



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss I Butunoi

**Respondents:** (1) Turner Health Group Limited  
(2) Dr A K Turner

**Heard at:** East London Tribunal Centre

**On:** 17, 18, 19, 20 September 2024

**Before:** Employment Judge Volkmer  
**Members:** Mrs W Blake-Ranken  
Mr M Rowe

## Representation

**Claimant:** in person, supported by her sister Ms Butunoi  
**Respondents:** Ms Smith, HR Consultant

**JUDGMENT** having been sent to the parties on 2 October 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

### Introduction

1. The Claimant was employed by Nurture Chiropractic Clinic Limited (“Nuture”) between 13 November 2020 and 4 November 2022 when she was dismissed on ill-health grounds. ACAS conciliation was from 10 January 2023 to 30 January 2023, the Claimant presented her claim on 28 February 2023.
2. The Claimant brings the following claims:
  - a. direct disability discrimination;
  - b. discrimination arising from disability;
  - c. failure to make reasonable adjustments; and
  - d. unauthorised deduction from wages.

3. The Tribunal heard witness evidence from the Claimant, her sister, also Ms Butunoi (although there was no cross examination) and the Second Respondent. The Tribunal also considered a hearsay witness statement from Ms Katherine Creighton Crook, who did not attend to give evidence.
4. The Tribunal considered a Hearing Bundle of 446 pages as well as the additional documents provided by the Claimant which had not been included in the Hearing Bundle. The additional documents are referred to by electronic bundle number and page number e.g. page 1, New Bundle 1.

### Background

5. Prior to this Final Hearing, two Preliminary Hearings were held in relation to this claim as follows.
6. On 25 August 2023 a Preliminary Hearing for Case Management was held before Employment Judge Bedeau. The case management order (CMO) from that Preliminary Hearing is at page 47. Employment Judge Bedeau recorded in the case summary in relation to the Claimant "*the disabilities she is relying on are her painful left wrist, anxiety and depression. She is not relying on her endometriosis as a disability as she stated that her discriminatory treatment aggravated that condition.*" (page 52). The List of Issues was set out in that order (page 53 onwards). A further hearing was listed to determine whether the Claimant had been disabled at the relevant time by reason of her painful left wrist and/or anxiety and depression for the purposes of section 6 of the Equality Act 2010 ("EqA").
7. A further Public Preliminary Hearing was held on 15 May 2024 before Employment Judge Jones. At that hearing it was determined that the Claimant's painful left wrist was not disability, but the anxiety and depression was a disability for the purposes of section 6 of the EqA.

### Amendment Application

8. The Claimant had made an amendment application in writing on 22 June 2024 (page 429), the amendment application sought to amend the claim to include endometriosis as a pleaded disability. This was referred to Employment Judge Jones, who asked the Respondents to provide their comments, which the Respondents did on 15 July 2024, setting out the reasons for objecting to the application (page 435). No determination had been made, on the application, so this was to be dealt with at this hearing.
9. The application was discussed with the Claimant who stated that the amendment application affected the List of Issues (as set out in the Case Management Order dated 30 August 2023, page 53) as follows:
  - a. in relation to paragraph 2.4 to add the following "If so, was it because of the Claimant's anxiety and depressions and/or endometriosis";
  - b. in relation to paragraph 3.1.1 to amend it as follows "Dismissing her because she was unable to return to work ~~as the respondent had not implemented regular breaks to address her disability, namely her painful left wrist~~";

- c. in relation to 3.2.1 deleting the current wording and replacing it with “sick leave”
10. Under the general case management powers set out in Rule 29 of the Employment Tribunal Rules of Procedure (2013), Tribunals have a broad discretion to allow amendments to pleadings at any stage of the proceedings, either on the Tribunal’s own initiative or on application by a party.
  11. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it.
  12. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT that in determining whether to grant an application to amend, the Employment Tribunal should have regard to all of the circumstances of the case. In particular it must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. In Selkent His Honour Judge Mummery (as he then was) set some examples of factors which should be considered by the Tribunal: the nature of the amendment, the applicability of time limits and the timing and manner of the application.
  13. In Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07 Lord Justice Underhill made clear that the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.
  14. In Abercrombie v Aga Rangemaster Ltd [2014] ICR 209 Lord Justice Underhill emphasised that Selkent was not intended as prescribing a tick box exercise. It is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance of hardship and injustice. He added the following guidance: “*the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted*”.
  15. In Vaughan v Modality Partnership 2021 ICR 535, EAT, His Honour Judge Tayler gave detailed guidance on applications to amend tribunal pleadings. It confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. Factors in Cocking and Selkent are not a definitive checklist. The consideration of the real practical consequences of allowing or refusing an

amendment should underlie the entire balancing exercise undertaken by the Tribunal.

16. Pursuant to Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16, a tribunal can decide to allow an amendment, subject to limitation points (or, alternatively, it can postpone making a decision on the application to amend) in appropriate cases where determining the time points would require significant evidence.
17. In considering the balance of injustice and hardship in allowing or refusing the application, The Tribunal took into account the following factors in this case:
  - a. the nature of the amendments. Adding endometriosis was effectively adding a new factual background to the existing legal claims;
  - b. time limits. The date of the application was 22 June 2024, which meant that the claim was certainly outside of the primary three month time limit;
  - c. timing and manner of the application. The application was made on 22 June 2024 which was after the Preliminary Hearing on disability and only a short time before the final hearing. The application was not copied to the Respondents who received it on 2 July 2024 from the Tribunal;
  - d. the Claimant had a number of opportunities to clarify her claim, and had expressly stated in the Preliminary Hearing on 25 August 2023 that she was not relying on endometriosis as a disability, which the Respondents had relied on;
  - e. the Claimant was not represented and felt surprised and put on the spot by the question in the hearing on 25 August 2023. She found it difficult to focus during the hearing because of her anxiety medication;
  - f. the Claimant was not represented and did not realise that she had to make a formal application to amend her claim. She had referred to this in a witness statement submitted in October 2023 which she thought would be enough;
  - g. all of the documents relevant to the endometriosis claim were included in the documentation before the Tribunal already. The Respondent could not identify any other real practical consequences arising from the amendment;
  - h. in terms of the area of enquiry, the Tribunal would need to determine whether endometriosis constituted a disability, but otherwise the factual focus of the Tribunal's enquiry was not materially different;
  - i. in every amendment application allowing the amendment will require the Respondents to have to defend a complaint that they otherwise would not have had to, and refusing an amendment will prevent the Claimant from pursuing the complaint.

18. We took all of the factors set out above into consideration. We determined that the balance of injustice and hardship weighed in favour of allowing the amendment since although the application was made at a very late stage in terms of real practical consequences, the parties were already prepared to address the question of why the Claimant had been dismissed (which was also the key question following the amendment) and all the documents were in the hearing bundle. No other real practical consequences had been identified. The amendment was allowed. No determination was made in relation to time limits at this stage.

### **Other Preliminary Matters**

19. We discussed that the First Respondent had been added by consent at the Preliminary Hearing but the legal entity had only been incorporated on 10 January 2024. The Claimant had been dismissed on 4 November 2022 by the previous Respondent, Nurture. The parties explained that the current First Respondent had been substituted by consent because Nurture had been dissolved as a company and the Second Respondent was a director of both companies. The parties agreed that the current First Respondent had never been the Claimant's employer, and could not therefore have done the acts complained of.
20. The Claimant explained to the Tribunal that she had not received the Hearing Bundle or the Second Respondent's witness statement from the Respondents until the morning of the hearing and so had not had any time to familiarise herself with the documents. Further, the Respondents had not included the documents she had asked to be included in the bundle. The Respondents stated that they had not sent the hearing bundle or witness statement in advance was because they had been unsure about whether the hearing would go ahead after being copied to a notice of appeal in relation to the Preliminary Hearing on 15 May 2024. They had become aware on 9 September 2024 that the hearing would go ahead but had not sent the Hearing Bundle and witness statement on that date either. They had not included the Claimant's documents in the Hearing Bundle because the Hearing Bundle was already 500 pages.
21. The Claimant was given time to go away and consider with her sister whether she wanted to ask the Tribunal for a postponement or whether she wanted to continue. The Claimant decided that she did want to go forward. We discussed that since the Claimant was being cross examined first, she would have the Tribunal's reading time and overnight to read the documents. Her documents could also be submitted to the Tribunal. The Claimant submitted documents to the Tribunal these are referred to by page number and title "New Bundle". Although there were some documents which had been included in the Respondents' bundle, some documents referred to were omitted. The Respondents could also consider the documents from the Claimant overnight (which the parties agreed had been provided to the Respondent before) and then ask any additional cross examination questions which arose from the those documents on the second day of the hearing.
22. On the first morning, we discussed timetabling of the hearing, and how long each party would be permitted for cross examination. We discussed that

each witness would be asked at the end if they wish to clarify anything (i.e. there would be no formal re-examination). This was because neither party was legally represented. After the Second Respondent had been cross-examined, Ms Smith asked to re-examine the Second Respondent, but the Judge was not willing to permit this because this opportunity had not been given to the Claimant, and the approach had been agreed at the beginning of the hearing. Ms Smith agreed that all of her points could be raised in submissions. The Judge reminded the parties of this at the beginning of submissions and each party was given the chance to give a short reply after submissions.

## The Issues

23. The issues in the case are as follows. The List of Issues set out below reflects the outcome of the amendment application.

### Issues

1. *Disability [endometriosis only]*
  - 1.1. *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 the following:*
    - 1.1.1. *Whether the Claimant had a physical or mental impairment. She relies on endometriosis.*
    - 1.1.2. *Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?*
    - 1.1.3. *If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*
    - 1.1.4. *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?*
    - 1.1.5. *Were the effects of the impairment long-term? The Tribunal will decide:*
      - 1.1.5.1. *did they last at least 12 months, or were they likely to last at least 12 months?*
      - 1.1.5.2. *if not, were they likely to recur?*
2. *Direct disability discrimination (Equality Act 2010 section 13)*
  - 2.1. *the Claimant compares herself with people who either do not have her disabilities or are non-disabled*
  - 2.2. *Did the Respondent do the following things:*
    - 2.2.1. *Dismiss the Claimant?*

- 2.3. *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 she was and therefore relies upon a hypothetical comparator*
3. *Discrimination arising from disability (Equality Act 2010 section 15)*
  - 3.1. *Did the Respondent treat the Claimant unfavourably by:*
    - 3.1.1. *Dismissing her because she was unable to return to work;*
  - 3.2. *Did the following things arise in consequence of the Claimant's disability:*
    - 3.2.1. *The Claimant's sick leave?*
  - 3.3. *Did the Respondent dismiss the Claimant because of that sickness absence? The Claimant will say yes. The Respondent contends that breaks were offered to the Claimant, but she refused to return to work.*
  - 3.4. *Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:*
    - 3.4.1. *the Respondent will argue that it has to ensure a fair and consistent treatment of its staff on sick leave.*
  - 3.5. *The Tribunal will decide the following in particular.*
    - 3.5.1. *Was the treatment an appropriate and reasonably necessary way to achieve those aims?*
    - 3.5.2. *Could something less discriminatory have been done instead?*
    - 3.5.3. *How should the needs of the Claimant and the Respondent be balanced?*
  - 3.6. *Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?*
4. *Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)*
  - 4.1. *Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?*
  - 4.2. *A "PCP" is a provision, criterion or practice. Did the Respondent*

have the following PCPs:

- 4.2.1. *requiring staff to work without adequate breaks?*
- 4.3. *Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she was required to use her painful left wrist in the course of her work for long periods?*
- 4.4. *Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?*
- 4.5. *What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:*
  - 4.5.1. *the provision of 10 - 15 minute breaks every hour.*
- 4.6. *Was it reasonable for the Respondent to have to take those steps and when?*
- 4.7. *Did the Respondent fail to take those steps? The Respondent contends that regular breaks were offered to the Claimant, but she refused to return to work.*
5. *Unauthorised deductions (Part II of the Employment Rights Act 1996)*
  - 5.1. *Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted? The Claimant asserts that every morning there would be a 30 minutes' staff huddle prior to the start of their shifts to discuss work-related matters for which time they were not paid. The Respondent will say that staff were required to turn up for work 10 minutes early to change into their uniforms, discuss work related matters, to ensure that they started their shifts on time, and their clients were not waiting. They were not paid for that time.*
  - 5.2. *Was any deduction required or authorised by statute?*
  - 5.3. *Was any deduction required or authorised by a written term of the contract?*
  - 5.4. *Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?*
  - 5.5. *Did the Claimant agree in writing to the deduction before it was made?*
  - 5.6. *How much is the Claimant owed? From 13 November 2022 4 November 2022, she is claiming £2,300.*
6. *Time Limits*
  - 6.1. *Were the discrimination complaints made by way of made amendment application on 22 June 2024 within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide the following.*

- 6.1.1. *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?*
- 6.1.2. *If not, was there conduct extending over a period?*
- 6.1.3. *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*
- 6.1.4. *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*
- 6.1.5. *Why were the complaints not made to the Tribunal in time?*
- 6.1.6. *In any event, is it just and equitable in all the circumstances to extend time?*

### **Findings of Fact**

24. The Claimant was diagnosed with endometriosis in 2018. The symptoms include stomach cramps, irregular vaginal bleeding and pain, pain when passing stools, pain during sexual intercourse and lower back pain and exhaustion. This affected the Claimant's activities including sleeping, going to the toilet and having sex. For the first two to three days of the Claimant's period she would not be able get out of bed except for essential matters. These findings are based on the Claimant's witness statement and disability impact statement which are consistent with other documents such as the Universal Credit Medical Report Form (page 231) and reports of discussions with the Second Respondent (in oral evidence and documentation e.g. page 263).
25. The Claimant was appointed as a Soft Tissue Therapist by Nature, starting work on 13 November 2020. She was employed for 14 hours per week, Mondays 15.00 to 20.00, Wednesdays 9.00 to 13.00 and Fridays 15.00 to 20.00. The Second Respondent was an employee, statutory director and shareholder of Nurture and in practice managed the business.
26. The Claimant and the Second Respondent had a good working relationship. The Second Respondent considered the Claimant to be good at her job.
27. The Claimant and the Second Respondent would have personal discussions. The Second Respondent stated that she was aware of the Claimant's anxiety and depression and endometriosis. In relation to the endometriosis the Second Respondent was aware of its ongoing nature, that the Claimant was seeing a consultant taking medication and that there would be in operation at some point. They also discussed the history of, and effect of the Claimant's anxiety and depression. In witness evidence the Second Respondent stated that both of these conditions were discussed with the Claimant by WhatsApp or in person, and that she (the Second Respondent) had never denied being aware of them.

28. In early May 2021, the Claimant hurt her right wrist lifting a heavy bag of soil at home.
29. The Claimant had initially hoped to increase the hours she was working for Nurture to full-time. However since it appeared to her that this kept being delayed, the Claimant began to look for a second part-time job to supplement her role at Nurture. She took part in interviews with another company, LSM Clinic Ltd (“LSM”) on 3 May 2022 (by video) and 8 May 2022 (a practical interview). The Claimant was successful and her start date was 5 June 2022 and it was agreed she would work three shifts per week of 5 to 7 hours. Her role at LSM was agreed to be on a self-employed basis.
30. There is a significant volume of communication between the parties. This judgment does not refer to all of it, but refers to those documents to which the Tribunal were referred which are relevant to the issues to be determined by the Tribunal.
31. Shortly after the interviews with LSM, between 9 and 11 May 2022, the Claimant started experiencing pain in her left wrist. On 5 June 2022 the Claimant sent a WhatsApp message to Sue Wheawell (the Practice Manager for Nurture) saying *“Hi, Sue! Sorry to bother on the weekend, I wouldn’t if it weren’t a work emergency. I don’t want to panic Angel either... I had my MRI on my right wrist on Thursday morning and visited an urgent care centre in the evening for my left one as it got considerably worse (very painful). I was advised to stop working as carrying to do so wouldn’t allow my (left) wrist to heal I was also advised to contact the GP for a sick note (I only have a letter at the moment from seeing a GP through the out of hours service – through 111). Please let me know when you have a few moments, it may be easier to talk, but for the record I would also need a written reply I attach the scanned letter. Thank you. Xx”* (pages 103 to 106). The Claimant sent the “record of attendance” from the urgent care centre through by WhatsApp as well (page 199).
32. Following the messages above, the Claimant’s first day of sickness absence was on 6 June 2022. Ms Wheawell spoke to the Claimant on that morning regarding her absence. The Claimant was supposed to have a GP appointment on 14 June 2022, but this was cancelled at short notice, which led to a delay in her providing the doctor’s sick note.
33. An ill health review meeting took place on 24 June 2022 (page 137), the Claimant, Ms Wheawell and the Second Respondent were present. The meeting notes referred to Nurture having received a doctor’s certificate showing the Claimant to be unfit for work until 13 July 2022 with a diagnosis of Tendonitis of the wrists. During the meeting the Claimant stated that she was working for LSM and that she had massaged during her sickness period. The Claimant asked for 10 minute breaks between massage clients. The note states *“we explained that breaks will not be given during Massage [sic] hours as the shifts are usually 4/5 hours maximum. We asked Iunia how many hours of massage she could cope with back to back so that we could possibly offer compromise and working shifts/patterns and hours.”* (page 137).
34. The Second Respondent wrote a letter to the Claimant following up on the

meeting, dated 30 June 2022 (page 139). The letter stated *“Although it is not operationally practical to offer breaks within your working shift of 4 to 5 hours. However, I can reduce the number of shifts per week you are required to work and I believe this will help you. I confirm that with effect from 18<sup>th</sup> July you are required for two shifts per week rather than three. I understand that your sick note extends until 13<sup>th</sup> July so would not be attending work anyway until mid July at the earliest. Although we don’t know for certain that reducing the number of shifts you work per week will help your wrist recover, if we don’t try we won’t know.”*

35. The Claimant replied by email on 4 July 2022 (page 143) and explained that *“being unable to work at Nurture under these circumstances is due to the volume of work and continued sustained effort – 8-9 massages back-to-back per shift (the afternoon shift allowance two 10 minutes breaks - as the 10 minutes before ending the day cannot be taken into account as a break). Outside-the-clinic [sic] activities I have do not come even close to this kind of volume of work, as I mentioned in the meeting we had on Friday, 24<sup>th</sup> June (as confirmed in our conversation – 4 massages in 5 weeks’ time).”*
36. The Claimant’s Fit Note dated 6 July 2022 recorded the reason for absence as *“right hand - mild degenerative changes, left hand De Quervain’s tenosynovitis”* (page 203). This covered the period to 1 August 2022.
37. The Second Respondent replied on 13 July 2022 stated *“we are happy to make adjustments for you. However, it’s simply that we can’t operationally manage to provide breaks between clients, so we have done what we can to help you i.e., reduce the number of shifts you work. The contract regarding your hours and new holiday allowance will be provided.”* (page 149).
38. In the Claimant’s GP records, in relation to a consultation on 27 July 2022, the following was recorded: *“works as a massage therapist, h/o problem with wrist and been unable to work, this has caused tension at work with managers, not been to work since 6<sup>th</sup> June, manager has accused patient of lies, now stressed and not sleeping, tearful and upset, lives with sister who is supportive, has been in contact with acas, occ suicidal thoughts, has been online Romanian therapy privately, advised to attend a&e if suicidal - keen to try medication and not ready to go back to work, for trial of sertraline and review 2 weeks”* (page 297). Sertraline, an antidepressant, was prescribed. The Claimant’s Fit Note dated 27 July 2022 recorded stress at work and anxiety as the reason for the Claimant not being fit for work. This covered the period until 19 August 2022. The Claimant’s cover email stated *“I am attaching the sick note from the doctor, which has been extended due to mental health reasons. I have been prescribed antidepressants and I will start my treatment today.”* (page 179).
39. On 4 August 2022 the Claimant raised a grievance (page 155), stated to be raised against the Management Team (the Second Respondent and Susan Wheawell) which included complaining about Nurture not giving the Claimant the breaks she was requesting. A number of other matters were raised in the grievance which are not relevant to the issues in this claim. The grievance letter states *“Not making needed adjustments to my work conditions strongly impacted my life negatively in more ways that [sic] I can*

*emphasise through this letter. There are things that cannot be quantified, nor proven. I ask for acknowledgement of the suffering I have been put through from a mental health point of view emotionally physically and financially... The emotional distress I have gone through because of work-related issues that Nurture can be backed up by a report from my counsellor/psychotherapist” (page 171).*

40. An ill health review meeting was held on 8 August 2022. In a letter dated 11 August 2022 from the Second Respondent to the Claimant, the Second Respondent stated *“The following was discussed:... You confirmed that you are suffering from endometriosis, anxiety and depression and also the problem with your wrist.”* (page 173). The letter again recorded a discussion around the Claimant being able to work at LSM because of doing fewer massages per shift than at Nurture. The letter stated *“should you not be able to return to work during the week of 31<sup>st</sup> August, we will consider termination of contract at our next meeting.”* (page 173). The letter also referred to Nurture being limited in the adjustments it could make because of being a small company.
41. The Claimant’s Fit Note dated 25 August 2022 recorded that the Claimant *“may be fit for work”* with adjustments because of *“left wrist pain”*. The adjustments stated in the Fit Note were *“regular breaks”* (page 207). This Fit Note was in stated to run until 24 September 2022. The Claimant sent this to Nurture on 26 August 2022 (page 85, New Bundle 2).
42. Ms Wheawell sent the Claimant a letter dated 26 August 2022, which stated *“I regret to advise that we are unable to accommodate your G.P.’s recommendation for regular breaks whilst you are working here. Nurture is a small business and we have already reduced the number of shifts you work from three shifts per week to two shifts per week. Our business is dependant upon us being able to deliver a reliable efficient service to clients at times convenient to them. If we are not able to provide that level of service, our business will be put at risk. Following on from the Pandemic, this is not a risk we can take because the livelihood of all who work at Nurture has to be safeguarded as far as we are able to do so.”* (page 213).
43. The Claimant sent an email to Nurture on 30 August 2022 saying *“We have never actually talked about specifics when it comes to breaks. We are not talking about breaks after each massage session, what I had in mind was 10 mins each hour (which is two 30 mins sessions most times). On a morning shift that would translate into one 30 mins slot dispersed between massage sessions as 10 mins breaks, hence my initial proposals to either start 30 mins earlier in the morning (8:30 AM instead of 9:00 AM), or to go 30 mins after 1:00 PM”* (page 193).
44. Ms Wheawell wrote to the Claimant on 2 September 2022 (page 197) saying *“Integrated breaks are not an adjustment that Nurture can commit to – we have considered this, but a massage booked for 30 minutes includes the time it takes for clients to get undressed and then re-dressed therefore you are not performing massage treatment for 30 minutes. An afternoon shift already includes two 10-minute breaks. The breaks were introduced during the Covid 19 Pandemic as cleaning time and have been retained.”*

45. The Claimant emailed back the same day, 2 September 2022 saying “*It would have made more sense in my opinion for Nurture to allow me to work on Monday and Friday afternoons, as these shifts already had integrated breaks – as you mentioned yourself – as opposed to keeping the morning shift on Wednesdays – which is the one creating all these complications.*”. (page 97, New Bundle 2).
46. The Claimant’s Fit Note dated 29 September 2022 again stated that she may be fit for work with regular breaks, with the reason stated to be “*wrist pain and waiting for hospital follow-up*”. This Fit Note ran until 31 October 2022.
47. An ill health review meeting took place via zoom on 3 October 2022. This was attended by the Claimant, the Second Respondent, June Smith (HR Consultant) and the Claimant’s sister. At this meeting it was discussed that the Claimant’s absence had been caused by three different medical conditions: the Claimant’s painful left wrist, anxiety and depression and endometriosis (this finding is based on the content of the letter of 6 October 2022, page 363).
48. On reduction of the Claimant’s shifts from three shifts to two shifts, these shifts consisted of a morning shift on a Wednesday and an afternoon shift on a Friday. The afternoon shift already incorporated two ten minute breaks. The morning shift did not. In the meeting on 3 October 2022 it was discussed whether the Claimant could return to two afternoon shifts. This would allow the break she was requesting, without any operational changes for Nurture. This was proposed by the Claimant’s sister. In cross examination the Second Respondent’s position is that in the meeting the Claimant expressly refused to come back for two afternoon shifts. This is denied by the Claimant. The Tribunal preferred the Claimant’s account. This is because it is more consistent with the contemporaneous documentary evidence, such as the email referred to at paragraph 45 above, the dismissal letter (which did not record this arrangement being offered and/or refused) and her email the following day (page 367) which also referred to these afternoon shifts being an option which had not been offered to her.
49. Following the meeting, on 6 October 2022, the Second Respondent sent the Claimant a letter dismissing her. It stated the following:
- “As you know, the purpose of our meeting, as outlined in our letter to you dated 11th August, was to consider termination of your contract because Nurture cannot easily sustain long term absence either operationally or financially.*
- Since our meeting, we have reflected on the following:*
- *You confirmed at the meeting on 8th August that you hoped to return to work on 31st August but were not well enough to do so*
  - *You have now been absent from work since 6th June*
  - *Your absence has been caused by three different medical conditions,*

*painful left wrist, anxiety and depression and endometriosis*

- *Reasonable adjustments for your medical conditions have already been made for you; we have reduced your shifts from three to two per week. As a small business, we are limited to the adjustments we can make because we do not have a large workforce and must ensure that we meet our client's needs. If we fail to do this, our business will fail*
- *One of the reasons preventing you from returning to work has been that we have not been able to provide the regular breaks between massages that your G.P. has recommended. The above bullet point explains our inability to do this*
- *You confirmed during our meeting that you are still not pain-free – you suffer a lot of pain when twisting or trying to grip or grab something*
- *You still experience pain in your hand and wrist when carrying out daily activities and apply Ibuprofen and tape for strengthening your wrist*
- *You confirmed that the pain is very bad in the mornings*
- *Regarding your endometriosis, you still experience bleeding and cramps every day and are booked for a pre-operation assessment on 9th November*
- *In terms of your mental health, you still take antidepressants and Vitamin D for anxiety and depression*
- *You are to have a corticosteroid injection at the hospital on 16th November*
- *Although your sister expressed the wish for you to return to work next week, working Monday and Friday afternoons, those afternoons have always been part of your working week and even after reducing your working week to two shifts, you have not been able to return to work and the health problems you suffered from in June, you are still suffering from now in October*

*In summary, we simply have no confidence that even though you have been able to carry out massage work for another employer during your period of absence from Nurture, that you would be able to attend work here, regularly and reliably in the foreseeable future.*

*Bearing in mind all the above points, I confirm termination of your contract with effect from 4th November. I also confirm that during your notice period your accrued holiday [5 days] is to be taken. We understand that you will be on sick leave for the remainder of your notice period and will be paid SSP.*

*We have considered whether offering you a different job within Nurture would be an alternative to dismissal. However, there is no job to offer you and we have already reduced your shifts from three per week to two and that has not enabled you to return to work". (pages 363 and 364).*

50. The Claimant responded by email on 7 October 2022, saying:

*“My absence has only been caused by one of my health conditions – de Quervain’s tenosynovitis in my left wrist – starting around the 11th of May 2022.*

*I was able to function very well and to deliver on my responsibilities with no questions whatsoever around my reliability before my absence, even with my pre-existing chronic conditions. My other health issues have been accentuated by unnecessary stress added to what should have been a standard procedure around sick leave. Endometriosis – stress-based bleeding, depression and anxiety – well managed before without the need for medication (stress related to how my absence has been handled aggravated my pre-existing conditions).*

*- Re reasonable adjustments – I have mentioned repeatedly that adjusting my working schedule from three shifts per week to two shifts per week does not support my need for non-continuous effort on my wrist throughout the shift. However, you decided it is still best to go ahead with that change in the work schedule.*

*I did not have a real chance at even trying out this change (that did not occur in time to make any positive changes to my complaints).*

*I was found fit for work with adaptations since the 25<sup>th</sup> of August. The afternoon shifts have not been offered as an option for me to take over at any point (not even without any additional adaptations), even though they have two 10 min breaks incorporated. I was advised not to return to work from the 31st of August (when I was fit). Nurture’s inability to accommodate regular breaks does not make me unfit. That was the only reason I was not able to return to work from the 31st of August.” (page 367)*

51. The Claimant did not appeal the dismissal decision itself because she was not interested in going back since she felt Nurture did not want her to be there (this finding is based on the Claimant’s oral evidence).
52. A grievance meeting was held on 13 October 2022. Ms Whewell was the grievance manager and sent the Claimant and outcome letter dated 19 October 2022 (page 187). The grievance was not upheld. The Claimant appealed the outcome (page 371). An appeal meeting took place on 15 December 2022, the Second Respondent was the appeal manager, and she sent the outcome letter on 6 January 2023 (page 377). The grievance appeal was also not upheld.

## **Disability**

53. Section 6 and schedule 1 of the Equality Act 2010 (“the EqA”) provides that a person P has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. A substantial adverse effect is one that is “*more than minor or trivial*” (section 212 EqA), and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person (Schedule 1 paragraph 2(1) EqA).
54. Schedule 1 par 2(2) EqA provides that “if an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-

day activities, it is to be treated as continuing to have that effect if that effect is likely to recur”.

55. “Likely” should be interpreted as meaning “it could well happen” rather than it is more probable than not that it will happen (SCA Packaging Limited v Boyle (2009) ICR 1056).
56. The burden of proof is on the Claimant to show that she is a disabled person in accordance with that definition.
57. In Goodwin v The Patent Office [1999] IRLR 7, at paragraphs 26-29, it was held that there are four key questions that need to be asked:
- a. *“Does the applicant have an impairment which is either mental or physical?”*
  - b. *“If so, does the impairment affect the applicant’s ability to carry out normal day to day activities?”*
  - c. *“If so, is the effect on the same substantial?”*
  - d. *“If so, is the effect on the applicant’s ability to carry out normal day to day activities long term?”*
58. J v DLA Piper [2010] IRLR 936, at paragraph 40 it was held:
- “It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin. However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant’s ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.”*
59. The material time for considering whether the impairment had (or was likely to have) a long term effect is the date of the alleged discriminatory act (All Answers Ltd v W [2021] EWCA Civ 606, CA) and events occurring after the date of the alleged discriminatory act should not be taken into account in considering if the effect of the impairment was long term. Whether an impairment is ‘long term’ is directed to the effect of the impairment, rather than the underlying impairment itself: Seccombe v Reed in Partnership Ltd, EA-2019-000478-00, at paragraph 29.

### **Disability: Discussion and Conclusions**

60. Employment Judge Jones determined in the Preliminary Hearing on 15 May 2024 that the Claimant was disabled at the relevant time for the purposes of section 6 of the EqA by reason of depression and anxiety. The condition of the Claimant’s wrist was found not to constitute a disability for the purposes of section 6 of the EqA. As such, this Tribunal had only the task

of determining whether endometriosis was a disability.

61. The Respondent accepted that the Claimant had endometriosis. This is a physical impairment. The Tribunal determined that it had a substantial adverse effect on the Claimant's ability to carry out day-to-day activities, namely using the toilet, having sex and sleeping and likely others on days when the Claimant was unable to get out of bed on the first two or three days of her period. The Tribunal decided that the effects of the impairment were long-term. The Claimant's evidence was that she was diagnosed with endometriosis in 2018, and the Tribunal determined that the effects of the impairment had lasted at least since then until the events in issue in the case. These findings are based on the Claimant's witness statement and disability impact statement which are consistent with other documents such as the Universal Credit Medical Report Form (page 231) and reports of discussions with the Second Respondent (in oral evidence and documentation e.g. page 263).
62. For these reasons the Claimant's endometriosis was found to constitute a disability under section 6 EqA at the relevant time.

#### **Direct Discrimination: the Law**

63. As for the claim for direct discrimination, under section 13(1) of the EqA 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.
64. Employers are liable for the acts of their employees under section 109 EqA, which sets out that "*Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*". Individuals can also be personally liable for discrimination under section 110 EqA:
- "(1) A person (A) contravenes this section if—*  
*(a) A is an employee or agent,*  
*(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and*  
*(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be)."*
65. It is not necessary for the employer to be a respondent to the complaint, for individuals to be personally liable, provided that the Claimant can show that the act would be treated as "also done by the employer" under section 109 EqA - Barlow v Stone [2012] IRLR 898 (EAT). This case relates to the equivalent provision of the Disability Discrimination Act 1995, which has different statutory wording, but I consider that the same interpretation applies to section 110 EqA.
66. As set out in Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913, the following three issues may arise in respect of any specific complaint of discrimination:

*"(1) Did the alleged act occur at all?*

*(2) If it did occur, did it amount to less favourable treatment of the claimant when compared with others?*

*(3) If there was less favourable treatment, what was the reason for it? In particular, was that reason discriminatory?*

*Accordingly, there may be cases in which the tribunal never has to address question (3), because it is not satisfied that it has been proved on the evidence that the alleged act took place at all; or it may not be satisfied that there was less favourable treatment.”*

67. Direct discrimination is based on comparative treatment. It must be established that the Claimant was treated “less favourably” than someone else, who will be either an actual person or a hypothetical person. Either way, a comparator must be in materially the same circumstances (see section 23(1) EqA which provides: “*on a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case*”).
68. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides 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 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.
69. *Efobi v Royal Mail Group Ltd 2021 ICR 1263, SC*, the Claimant is required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the Tribunal could infer an unlawful act of discrimination.
70. *Igen v Wong [2005] EWCA Civ 142* remains the leading authority in relation to the application of the burden of proof set out in section 136 EqA in relation to discrimination cases. It was not sufficient for the Claimant simply to prove facts from which the tribunal could conclude that the Respondent “*could have*” committed an unlawful act of discrimination. It is clear that the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent *did* commit an unlawful act of discrimination it can.
71. It is not sufficient to shift the burden of proof for a Claimant to show only a difference in status and a difference in treatment. These are bare facts which only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. (*Madarassy v Nomura International Plc [2007] EWCA Civ 33*).
72. *Madrassy* further sets out that “could conclude” “*must mean that ‘a reasonable tribunal could properly conclude’ from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory ‘absence of an adequate*

*explanation' at this stage (which I shall discuss later) the tribunal would need to consider all the evidence relevant to the discrimination complaint".*

73. In Artem Limited v Edwins [2024] EAT 136 this was also emphasised by HHJ Tayler, who stated that in relation to considering whether there was sufficient evidence to shift the burden of proof *"an Employment Tribunal should not ignore evidence that suggests discrimination. However, I should also add that it is important that Employment Tribunals do not ignore evidence that suggests there has not been discrimination. What must be ignored at the first stage is any exculpatory explanation for the treatment."*

74. HHJ Tayler considered the interrelationship between the use of comparators and the shifting burden of proof in Virgin Active v Hughes [2023] EAT 130:

*"61. In many direct discrimination claims the claimant does not rely on a comparison between his treatment and that of another person. The claimant relies on other types of evidence from which it is contended that an inference of discrimination should be drawn, the comparison being with how the claimant would have been treated had he had some other protected characteristic.*

*62. In other cases, the claimant compares his treatment with that of one or more other people. There are two ways in which such a comparison may be relevant. If there are no material differences between the circumstances of the claimant and the person with whom the comparison is made (the person is usually referred to as an actual comparator), this provides significant evidence that there could have been discrimination. However, because there must be no material difference in circumstances between a claimant and a comparator for the purpose of section 23 EQA it is rare that a claimant can point to an actual comparator. The second situation in which a comparison with the treatment of another person may provide evidence of discrimination is where the circumstances are similar, but not sufficiently alike for the person to be an actual comparator. The treatment of such a person may provide evidence that supports the drawing of an inference of discrimination, sometimes by helping to consider how a hypothetical person whose circumstances did not materially differ to those of the claimant would have been treated (generally referred to as a hypothetical comparator). Evidence of the treatment of a person whose circumstances materially differ to those of the claimant is inherently less persuasive than that of a person whose circumstances do not materially differ to those of the claimant.*

...

*67. If anything more is required to shift the burden of proof when there is an actual comparator it will be less than would be the case if a claimant compares his treatment with a person whose circumstances are similar, but materially different, so that there is not an actual comparator."*

75. HHJ Tayler also summarised the law in Leicester City Council v Mrs B Parmar: [2024] EAT 85 and commented that *"comparing the treatment of a claimant with that of another person is a subtle business. The analysis is highly context specific."*

76. If the burden of proof has moved to the respondent, it is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.
77. Even if the Claimant is treated less favourably than an appropriate comparator, it must have been “because” of the protected characteristic. This requires the Tribunal to determine the reason why the Claimant was treated less favourably. This is not to say that the comparator issue is a threshold to be crossed before “the reason why” is addressed. This sequential analysis can give rise to problems because sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.
78. Discrimination is only made out if the protected characteristic had a “significant influence on the outcome”: Nagarajan v London Regional Transport [1999] 4 All E.R. 65. Nagarajan also set out that subconscious intention was sufficient in relation to direct discrimination, it did not need to be a conscious motivation. In a case related to the protected characteristic of disability, it was found that the disability itself must be the reason for the treatment, not something related to a disability (Cordell v Foreign and Commonwealth Office [2012] I.C.R. 280).
79. In every case the Tribunal has to determine the reason why the Claimant was treated as they were. The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).
80. The case of B v A UKEAT/0450/06/RN, made clear that in finding the “reason why” it was not a “but for” test. In that case, the breakdown of the relationship was the reason for the unfavourable treatment, this was inconsistent with a finding that the reason for the treatment was the Claimant’s sex.

### **Direct Discrimination: Discussion and Conclusions**

81. In relation to the First Respondent, this legal entity was never the Claimant’s employer, it was incorporated long after her dismissal. Therefore in relation to the First Respondent, this allegation must fail because the First Respondent never dismissed the Claimant.
82. The parties agree that the Claimant was dismissed by the Second Respondent in her role as an employee and director of Nurture.
83. The Tribunal must consider whether the burden of proof has shifted to the

Second Respondent. Taking into account all of the evidence before it, but ignoring any explanation by the Second Respondent, the Tribunal could not properly conclude that the dismissal was directly discriminatory.

84. The Tribunal considered that the following factors were relevant to its determination regarding the question of whether the burden of proof had shifted to the Second Respondent:
- a. another other employee referred to with a similar level of absence was not dismissed, despite also having a disability (indicating the burden should not shift);
  - b. the Claimant's evidence was that she was treated well prior to her absence. At this time she also had anxiety and depression and endometriosis, which she had discussed with the Second Respondent verbally on a number of occasions (indicating the burden should not shift);
  - c. the parties had agreed that Nurture could accommodate absence for an operation that the Claimant required for her endometriosis. The difference in relation to this absence appeared to be the certainty of the timing (indicating the burden should not shift); and
  - d. reference was made to another employee who had dyslexia and for whom alternative arrangements were made regarding note taking (indicating the burden should not shift);
  - e. the matters we will come onto refer to regarding adjustments to the Claimant's working hours (indicating the burden should shift).
85. The Tribunal considered that the Claimant's points regarding offensive language used by Ms Whewell (who had referred to mental "problems" in a letter to the Claimant), could not be taken into consideration in relation to the Second Respondent. These would have been relevant in relation to a claim against Nurture, however in this hearing the Tribunal were only considering those acts for which the Second Respondent could be held personally liable. There was no suggestion that she had any involvement in the use of the offensive language. The Tribunal also considered that the mere reference to the Claimant's endometriosis and anxiety and depression in the dismissal letter did not give rise to an inference of direct discrimination. However, this individual was an evidential comparator, whose treatment was taken into account.
86. The Tribunal must determine whether the dismissal was less favourable treatment. There was nobody in the same circumstances as the Claimant. Neither an actual comparator or an evidential comparator had been expressly identified by either party. However in oral evidence the Second Respondent referred to another employee who had a similarly long absence due to cancer. This employee was not dismissed. In relation to this individual, there was more certainty around the individual's return date, which the Tribunal considered was a determinative difference based on the evidence before it. This individual could not be treated as an actual comparator because they were also disabled (by reason of cancer) and the certainty about their return was a material circumstance which differed from

the Claimant.

87. The Tribunal must consider how a hypothetical comparator without a disability, but in relation to whom all of the material circumstances are the same, would have been treated. The Tribunal considers that the material circumstances relevant to the hypothetical comparator are an individual in the same role as the Claimant, with the same period of absence, and the same uncertainty as to return date.
88. The Tribunal considered, based on the Second Respondent's evidence, which was consistent with the correspondence at the time, as well as the factors set out above at paragraph 84 in relation to burden of proof, but which are also relevant here, that the hypothetical comparator would also have been dismissed, and therefore considers that the Claimant was not treated less favourably.
89. The Tribunal considered in relation to the "reason why" test that the Claimant was dismissed because of a combination of both the Claimant's absence and the lack of certainty regarding when she might return. This is based on the Second Respondent's evidence and the factors set out in the dismissal letter. The "reason why" was not that the Claimant was disabled.
90. For the reasons set out above, the complaint of direct disability discrimination is not well founded and does not succeed.

#### **Discrimination arising from disability: section 15 Equality Act**

91. The Claimant makes a complaint of discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2) EqA, this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
92. The same provisions apply in relation to the burden of proof and personal liability as set out above in relation to direct discrimination.
93. Pursuant to Trustees of Swansea University Pension and Assurance Scheme and anor v Williams 2019 ICR 230, SC, there is a relatively low threshold required to establish unfavourable treatment and engage section 15 EqA. It is an analogous to concepts of disadvantage and detriment.
94. Mr Justice Langstaff explained the approach Tribunals should take to establishing causation in Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT, as follows.

*"26. The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" — and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second*

*causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.*

*27. In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.*

*28. The words "arising in consequence of" may give some scope for a wider causal connection than the words "because of", though it is likely that the difference, if any, will in most cases be small; the statute seeks to know what the consequence, the result, the outcome is of the disability and what the disability has led to."*

95. Mrs Justice Simler also dealt with the question of causation in *Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT*, in which she said

*"this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."*

96. In the same case, Mrs Justice Simmler stated that in relation to determining whether the "something" arose in consequence of the disability, *"The critical question was whether on the objective facts, her refusal to return [the "something"] arose in 'consequence of' (rather than being caused by) her disability. This is a looser connection that might involve more than one link in the chain of consequences."*

97. Turning to objective justification, considering whether an action is objectively justified under section 15 involves *"weighing the employer's justification against the discriminatory impact. To do that, it must engage in what is called critical scrutiny, considering whether the means correspond to a real need of the undertaking, are appropriate with a view to achieving the aim in question, and are necessary to that end..... while the test is an objective one and not a band of reasonable responses test, the authorities also establish that the test as to whether the measure is "necessary" does not mean that the employer must show that it was the only course open to it in order to achieve its aim. It effectively means "reasonably necessary", as judged by the tribunal."* *Stott v Ralli Ltd 2022 IRLR 126, EAT*.

98. The Equality and Human Rights Commission Code sets out that, in order to be a “legitimate aim”, the aim should be “*legal, should not be discriminatory in itself, and must represent a real, objective consideration.*” (paragraph 4.28).

99. Seldon v Clarkson Wright and Jakes (A Partnership) 2012 ICR 716, SC noted that aims had to be relevant to the particular employment in question, see paragraph 61:

*“Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. For example, improving the recruitment of young people, in order to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned. Avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce.”*

100. The aim must be (i) appropriate to the employer’s objectives; and (ii) reasonably necessary to achieve the relevant objectives (Chief Constable of West Yorkshire Police and anor v Homer 2012 ICR 704, SC). “Reasonably necessary” is a stricter test than the “range of reasonable responses” test, the Tribunal must make its own judgement within the context of the relevant considerations involved.

101. In considering justification, what is required is “*an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition*” (Allonby v Accrington & Rossendale College [2001] EWCA Civ 529).

102. In NSL Ltd v Zaluski 2024 EAT 86, HHJ Auerbach summarises the authorities as follows:

*“76. However, the following particular points emerging repeatedly from the authorities (I cite only some examples) also need to be kept in mind. Firstly, the PCP must be “appropriate” to the aim or aims found to have been legitimately relied upon, which means that it must be rationally connected to that aim or aims, in the sense of being logically capable of furthering them (see, for example, Homer at [20] and [22]).*

*77. Secondly, the respondent does not have to show that the application of the PCP or PCPs was necessary to the achievement of the aim, in the sense of there being no alternative way to do so. Rather, the question is whether it is reasonably necessary: Hardys & Hansons plc v Lax at [28]. However, the balancing exercise may therefore include consideration of whether there were reasonable alternatives to the imposition of a discriminatory PCP: Homer at [24]. Further, in the proportionality or balancing exercise, the impact of the PCP on the affected group must be weighed against the importance of the employer's need. The more serious the disparate impact,*

*the more cogent the justification must be: Hardys & Hansons plc v Lax at [19]; Homer at [20] and [24].”*

103. An employer, in showing objective justification, does not have to demonstrate that there was no route other than the discriminatory practice by which the legitimate aim could have been achieved. However, the availability of a less discriminatory but equally effective measure will undermine the argument that a particular measure was proportionate (*Hardy and Hansons plc v Lax 2005 ICR 1565, CA*).

#### **Discrimination arising from disability: Discussion and Conclusions**

104. This complaint fails against the First Respondent for the same reasons as the direct discrimination complaint.
105. It is agreed between the parties that the Second Respondent dismissed the Claimant. The Second Respondent conceded knowledge of disability in oral evidence.
106. The Tribunal considers that dismissal is inherently unfavourable treatment of the Claimant.
107. The Tribunal must consider whether the Claimant's sick leave arose in consequence of the Claimant's disability. This is in fact conceded at paragraph 24 of the Grounds of Resistance, which states "*Taking information from sick notes from and or meetings with the claimant, the Respondent understands that her absence has been caused by three different medical conditions - painful left wrist..., anxiety and depression... and endometriosis*". No application was ever made to amend the Grounds of Resistance. However this appeared to be in dispute before the Tribunal.
108. The Tribunal finds that the sick leave was because of all three medical conditions: the Claimant's painful left wrist, her anxiety and depression and endometriosis. This finding is based on the Claimant's oral evidence, the GP record of 27 July 2022, the Claimant's Fit Note dated 27 July 2022, the Claimant's cover email of the same date which all referred in various terms to the Claimant being absent for that period due to anxiety and depression. The Claimant's witness evidence was that the endometriosis was also one of the reasons for the absence, this was consistent with what was discussed contemporaneously a number of times, including most notably being noted in the dismissal letter as having been discussed in the final ill-health review. The dismissal letter noted all three conditions were the reason for the Claimant's absence (page 363).
109. The Second Respondent pointed to the fact that only one Fit Note referred to anxiety and this was sandwiched between Fit Notes which were related to the wrist problem. The Tribunal also notes a statement by the Claimant in an email dated 7 October 2022 that the absence was caused only by her left wrist pain (page 367). Nevertheless taking into account the above evidence, even if the absence started for reasons solely related to the wrist, later it related to depression and anxiety and endometriosis. The Tribunal considers that overall, the sick leave was caused by all three conditions.

110. The Second Respondent stated in her witness statement that the Claimant's dismissal was not related to any factor "*other than that her long-term absence was not sustainable within our small business*" (page 421). The dismissal letter referred to Nurture not being able to "*easily sustain long-term absence either operationally or financially*" (page 363). The factors taken into account referred to the Claimant being absent from work since 6 June 2022 and various points regarding why she was not returning to work. The Tribunal has not factually upheld the Respondent's position that the Claimant was refusing to return to work. The Claimant had not been offered the opportunity to undertake two afternoon shifts which would incorporate the breaks she had requested without any operational changes for Nurture. The Tribunal's finding is that the dismissal was because of both the Claimant's absence and the lack of certainty regarding when she might return. The sick leave was a significant factor in the dismissal decision. As set out in *Sheikholeslami*, it need not be the sole reason.
111. The Second Respondent says that this was a proportional means of achieving a legitimate aim and relies on the aim of ensuring a fair and consistent treatment of its staff on sick leave. The Tribunal considers that this is a legitimate aim.
112. The Second Respondent struggled to explain how dismissing the Claimant's would achieve fair and consistent treatment of its staff on sick leave. When asked to explain the point in submissions, reference was made to the effect of absence on staff members who were still at work. However the aim relied on does not relate to staff members still at work, but instead refers to those on sick leave.
113. Nurture did not have any sickness absence policy in place. Decisions were made on a case-by-case basis by the Second Respondent and Ms Whewell, taking the advice of Ms Smith in her role as HR consultant to Nurture. It is difficult to see how dismissing the Claimant might achieve fair and consistent treatment of staff on sick leave when the Second Respondent did have in place a sickness absence policy or procedure which was applicable to all staff and did not seek objective advice on health and employment via a referral to Occupational Health.
114. The Tribunal considered a less discriminatory way of achieving consistency would have been to have a policy or procedure which could be applied to all staff.
115. Further, the Tribunal notes that the Claimant was not given the opportunity to return to two afternoon shifts per week. These shifts already had the two ten minute breaks requested by the Claimant, without Nurture making any operational changes. The only other staff member with a similar level of absence to the Claimant had not been dismissed and was said to have had a phased return, not returning to her full contractual hours until a year later. Therefore giving the Claimant the opportunity to attempt to return with these breaks as requested, and advised by her doctor, appears to be a more consistent approach to that applied to the other member of staff with a similar level of absence. This appears to be less discriminatory way of achieving the Second Respondent's stated aim of fair and consistent treatment of staff on sick leave.

116. The Tribunal considers that the dismissal was not a proportional means of achieving the aim identified by the Respondent.
117. The Tribunal considered that this complaint was established on the balance of probabilities. However, based on the evidence referred to in paragraphs 105 to 116 above, the evidence was also sufficient to transfer the burden of proof to the Second Respondent, who failed to discharge the burden to show that the treatment was not discriminatory.
118. The Tribunal upholds this complaint of discrimination arising from disability.

### **The Law: Reasonable Adjustments**

119. 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 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. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
120. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

### **Discussion and Conclusions**

121. The alleged PCP was requiring staff to work without adequate breaks. The Tribunal considers that Nuture had a practice of requiring staff to undertake back to back massages during their morning shifts without breaks. This is based on the evidence of both the Claimant and Second Respondent.
122. As to disadvantage, the Claimant alleges that she was put at a disadvantage in that she was required to use her painful left wrist in the course of her work for long periods. The Tribunal considers that this disadvantage is unrelated to those conditions which have been found to constitute a disability, namely anxiety and depression and endometriosis. The pleaded disadvantage relates to the Claimant's wrist condition only.
123. Based on the evidence referred to above at paragraphs 121 and 122, primarily that this complaint is based on the Claimant's wrist, which is not a disability, the Tribunal considered that the burden of proof had not shifted to the Respondents.
124. For that reason the complaint of a failure to make reasonable adjustments fails.

### Unauthorised Deduction from Wages: The Law

125. The Claimant also claims in respect of deductions from wages which she alleges were not authorised and were therefore unlawful deductions from her wages contrary to section 13 of the Employment Rights Act 1996 which sets out the following:

*(1) An employer shall not make a deduction from wages of a worker employed by him unless—*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

126. Section 27(1) of the Employment Rights Act 1996 defines “wages” as “any sums payable to the worker in connection with his employment”, including “*any fee, bonus, commission, holiday pay or other emolument referable to the employment*”. By virtue of S.27(5), payments or benefits in kind are not to be treated as wages.

### Unauthorised Deduction from Wages: Discussion and Conclusions

127. The Claimant was not in an employment relationship with either of the Respondents. She was employed by Nuture. A different legal person. Neither of the Respondents before us had an obligation to pay the Claimant’s wages. Therefore this complaint is not well founded and is dismissed.

### Time Limits in relation to discrimination complaints

128. In relation to time limits, section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.

129. Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan gave guidance at paragraphs 18 and 19:

*“[18] ... It is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list ...*

*[19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”*

130. He went on to say [25] *“As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it “thinks just and equitable” is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.”*
131. In every case the implication of refusing to extend time will be that the Claimant will not be able to have a claim decided on its merits. On the other side, granting an extension of time means that a Respondent will have to defend the claim and also then might lose, which would not happen unless time was extended. In all cases there is the inherent importance attached to compliance with time limits, and finality in litigation, even where, as in this statutory test, there is considerable flexibility when deciding whether or not to extend time. The onus is on a Claimant to persuade a Tribunal that there is some good reason why it would be just and equitable to extend time in the given case (*Wells Cathedral School Ltd v Souter (2021) EAT-2020-00801*).
132. The Claimant’s amendment application was made on 22 June 2024, the last act complained of was on 4 November 2022 (dismissal). This complaint is therefore significantly out of time. The Tribunal considered that the same factors were relevant in relation to this question as had been relevant to the question of the amendment, see paragraph 17 above. Taking all of those factors into account, the Tribunal determined that it would be just and equitable to extend time in relation to the disability claim regarding endometriosis.

**Employment Judge Volkmer  
Dated: 11 October 2024**