EMPLOYMENT TRIBUNALS

Claimant: Miss S Daley

Respondent: Goldsmiths, University of London

Heard at: London South (by video)

On: 14 to 18 October 2024

Before: Employment Judge Evans
Ms E Whittam
Mr C Tansley

Representation
Claimant: in person
Respondent: Ms Veale of counsel

JUDGMENT

The Tribunal's unanimous judgment is that:

1. The complaint of unfair dismissal is not well-founded. The claimant was fairly dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

3. The complaint of breach of contract was not presented within the applicable time limit. It was reasonably practicable to do so. The complaint of breach of contract is therefore dismissed.

4. The complaint of unauthorised deductions from wages was not presented within the applicable time limit. It was reasonably practicable to do so. The complaint of unauthorised deductions from wages is therefore dismissed.

REASONS

Preamble

1. These are the Tribunal's reasons for its reserved judgment. Evidence and submissions concluded towards the end of 17 October 2024. The Tribunal then reserved its decision before deliberating for the remainder of 17 October 2024 and on 18 October 2024.

2. The claimant's employment with the respondent began on 30 January 2017 and ended on 5 January 2023. Early conciliation began and ended on 1 March 2023. The claimant presented their claim on 14 March 2023. It included complaints of unfair dismissal and disability discrimination. The claimant was given leave to amend on 15 August 2024 following an application made on 5 August 2024 to add complaints of breach of contract and unauthorised deductions from wages.

The Hearing

3. The claim came before Tribunal between 14 and 18 October 2024. The following witnesses had provided witness statements and were cross-examined:

   3.1. The claimant;

   3.2. Ms Sandra Marcantuono, the Respondent's Associate Director of Estates Business Operations (who investigated the disciplinary allegations against the claimant);

   3.3. Ms Helen Cocker, the respondent's Director of IT and Digital Services (who took the decision to dismiss the claimant);

   3.4. Mr Stephen Graham, the respondent's Executive Dean of Faculty (who heard the claimant's appeal against dismissal).

4. After the witnesses had given their evidence, the parties made their submissions. Both parties had prepared written submissions and also made oral submissions.

Adjustments

5. There was a discussion at the beginning of the Hearing of adjustments that the claimant might require in order to be able to participate fully. She said that she might require additional breaks and that it would be helpful to her if "legalese" could be avoided.

6. The Tribunal explained the breaks that would normally be taken in the Tribunal's working day (morning break, an afternoon break and an hour for lunch). The Tribunal indicated that it would offer further breaks if it appeared that the claimant needed them. Equally, if the claimant felt that she needed an additional break and the Tribunal had not noticed this, she should request a break and that will be possible. The claimant was given regular breaks during her evidence. The Tribunal took at least an hour for lunch each day. The claimant was given additional breaks when she requested them. At no point did she suggest that the breaks that were provided were inadequate.

7. So far as “legalese” was concerned, the Tribunal explained the procedure that was being followed at each stage of the Hearing and did its best to make sure that the claimant understood the legal issues.

Documentation

8. After considerable discussions on the first day of the Hearing, the Tribunal had the following documentation before it. Neither party objected to any of the documentation being admitted, despite some of it being produced on the first day of the Hearing:

    8.1. The parties had agreed a bundle whose pagination ran to 714 (but which included 836 pages) (“the Bundle”). All references to page numbers are to the hard copy pagination of the Bundle unless otherwise stated.

    8.2. The claimant’s witness statement had 91 pages of documentation exhibited to it (“the Claimant’s Exhibited Documents” or “CED”). References to these documents are to CED [x] where [x] is the page number of the exhibited documentation.

    8.3. An additional bundle produced by the claimant running to 47 paginated pages (although there were actually only 46 pages in the bundle because there was no page 23) (“the Claimant’s Supplementary Bundle” or “CSB”).

    8.4. Documents relating to county court proceedings brought by the claimant which the respondent believed should be before the Tribunal (“the County Court Documents” or “CCD”).

    8.5. An email dated 3 May 2022 from the claimant to the respondent, produced by the respondent on the first day of the Hearing.

9. In addition, the respondent produced a respondent’s chronology and a respondent’s opening skeleton argument.

10. The Tribunal spent some time at the beginning of the hearing making sure that the parties both had all of the documents referred to at [8] above. We did not proceed further until we were sure that that was the case.

11. During the course of the first and second days of the Hearing the claimant asserted on a number of occasions that documents were missing from the Bundle. We suggested that she should identify such documents. She sent four emails with documents attached to them on 16 October 2024. However, the documents attached to 3 of the 4 emails were already included in the Bundle. The fourth email had two screen shots attached to it. The screenshots were of emails from 2019. In one of them the claimant indicated that she would like to do “Risk Assessment Training”. In the other she stated that she would like to “request some H&S training”. The respondent objected to the documents being admitted on the basis that they were not relevant to the issues that the Tribunal would have to decide. The claimant was unable to explain clearly why they were

relevant to the issues that we had to decide. The Tribunal after deliberating very briefly refused to admit them on the basis that they were not relevant to the issues that we would need to decide.

The issues

12. The issues arising in this case were set out in the case management orders of 15 January 2024 (page 117) and of 23 July 2024 (page 151). The Tribunal spent some time at the beginning of the Hearing going through the issues with the claimant, because she was unrepresented. She and the respondent confirmed that those were indeed the issues that we should decide. The issues are set out in Appendix 1.

13. It was agreed at the beginning of the Hearing that the issue of time limits arose in respect of the unauthorised deductions and breach of contract claims and the discrimination claims. There is no time limit issue in respect of the unfair dismissal claim or the claim that the dismissal itself was an act of disability discrimination.

The Law

Unfair dismissal

14. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed.

15. Section 98(1) of the 1996 Act provides that, when a Tribunal has to determine whether a dismissal is fair or unfair, it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer. A reason for dismissal is a set of facts known to or beliefs held by the employer which cause it to dismiss the employee. Conduct (and so misconduct) is a potentially fair reason.

16. When the reason for the dismissal is misconduct, the Tribunal should have regard to the three-part test set out in British Home Stores Limited v Burchell [1980] ICR 303. First, the employer must show that it believed the employee was guilty of misconduct. This is relevant to the employer establishing a potentially fair reason for the dismissal under section 98(1) and the burden of proof is on the employer.

17. Secondly, the Tribunal must consider whether the employer had reasonable grounds upon which to sustain its belief in the employee's guilt. Thirdly, the Tribunal must consider whether at the stage at which that belief was formed on those grounds the employer had carried out as much investigation into the matter as was reasonable in the circumstances. The second and third parts of the test are relevant to the question of reasonableness under section 98(4) and the burden of proof in relation to them is neutral.

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18. Section 123(1) of the 1996 Act states:

> *Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

19. The Tribunal has therefore considered whether the compensation awarded should be reduced to reflect the chance that the claimant might been dismissed fairly at a later date or if a fair procedure had been used.

Disability discrimination

The question of disability

20. Section 6 of the Equality Act 2010 ("the Equality Act") provides that a person ("P") has a disability if:

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

21. An effect is "substantial" if it is "more than minor or trivial" (section 212 of the Equality Act).

22. There are supplementary provisions in part 1 of Schedule 1 to the Equality Act which deals with matters including the following:

> ***2 Long-term effects***
> *(1) The effect of an impairment is long-term if—*
> *(a) it has lasted for at least 12 months,*
> *(b) it is likely to last for at least 12 months, or*
> *(c) it is likely to last for the rest of the life of the person affected.*
> *(2) 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.*
> *(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*
> *(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.*
>
> ***5. Effect of medical treatment***
> *(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—*
> *(a) measures are being taken to treat or correct it, and*
> *(b) but for that, it would be likely to have that effect.*

23. The meaning of "likely to" in these circumstances is "could well happen" (SCA Packaging Ltd v Boyle [2009] UKHL 37.

24. "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)" ("the Guidance") was issued by the Secretary of State pursuant to section 6(5) of the Equality Act. The Guidance does not impose any legal obligations in itself and is not an authoritative statement of the law. However, the Tribunal must take into account any aspect of the Guidance which appears to it to be relevant.

25. It is thus the adverse effect of the relevant impairment that is to be the subject of the Tribunal's assessment, requiring it to focus not upon what the claimant can do but upon that which he cannot; Aderemi v London and South Eastern Railway Ltd [2013] ICR 591 EAT paragraph 15. As for the requirement that the adverse effect be "substantial", that means only that it is "more than minor or trivial"; section 212(1) Equality Act. Unless an effect can be classified as trivial or insubstantial, it will necessarily be "substantial"; Aderemi paragraph 14. Moreover, given that the protection is intended to enable employees to advance in their employment, in considering the effect on "normal day-to-day" activities, these are to be taken to encompass the activities that are relevant to participation in professional life; Paterson v Commissioner of the Police of the Metropolis [2007] ICR 1522 EAT paragraphs 66-67.

26. The burden is on the claimant to show that she had a disability at the material time(s). The material time(s) is the date of the alleged discriminatory act(s). (Cruickshank v VAW Motorcast Ltd [2002] ICR 729. Further, this is the material time for establishing whether the impairment had a long-term effect.

27. The question of whether the claimant had a disability at the material time is a matter for the Tribunal rather than for any medical expert.

28. In the case of Sullivan v Bury Street Capital Limited [2021] EWCA Civ 1694 the Court of Appeal approved the four-stage approach set out in Goodwin v Patent Office [1999] I.C.R. 302:

    28.1. **The impairment condition:** Does the claimant have an impairment which is either mental or physical?

    28.2. **The adverse effect condition**: Does the impairment affect the applicant's ability to carry out normal day-to- day activities …, and does it have an adverse effect?

    28.3. **The substantial condition**: Is the adverse effect (upon the claimant's ability) substantial?

    28.4. **The long-term condition:** Is the adverse effect (upon the claimant's ability) long-term?

Prohibited conduct

29. Section 39(2) of the Equality Act provides that an employer must not discriminate against an employee as to the terms of their employment; in the way it affords access to (or by not affording access to) opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; by dismissing the employee; or by subjecting the employee to any other detriment.

Discrimination arising from disability

30. Under section 15(1) of the Equality Act, 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".

Knowledge of disability

31. Section 15(2) provides that there will be no such discrimination if "A shows that A did not know, and could not reasonably have been expected to know, that B had the disability". In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial:

    31.1. There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.

    31.2. The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.

    31.3. The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

    31.4. When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at paragraph 31.

31.5. The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:

> *5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.*
>
> *5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.*

31.6. It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).

31.7. Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code.

Time limits (discrimination): (1) conducted over a period (2) J&E extension

32. Section 123 of the Equality Act provides where relevant as follows.

> *(1) Subject to sections 140B, proceedings on a complaint within section 120 may not be brought after the end of –*
>
> *(a) the period of 3 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…*
>
> *… (3) For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

33. Turning first to the question of whether there is a "continuing act" (i.e. conduct extending over a period of time), there is a continuing act when the employer is responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686). The focus of the Tribunal should be on the substance of the complaint not on whether there was a discriminatory policy, rule, practice, scheme or regime – these are just examples given in the authorities of when an act extends over a period of time.

34. Turning to the “just and equitable” extension, it is for the claimant to show that it would be just and equitable to extend time. However, the discretion given to the Tribunal to extend time is a wide discretion to do what it thinks is just and equitable in the circumstances. The Tribunal should assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. These will usually include:

34.1. The length of and reasons for the delay;
34.2. Whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigation the claims while matters were fresh;
34.3. The prejudice to the claimant in refusing to extend time;

35. Other factors which may be relevant include:

35.1. the extent to which the cogency of the evidence is likely to be affected by the delay;
35.2. the extent to which the party sued had co-operated with any requests for information;
35.3. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;
35.4. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action;
35.5. the merits of the claim

36. In Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576 the Court of Appeal noted that the Tribunal when considering the exercise of its discretion has a “wide ambit” within which to reach a decision. However, although the discretion is wide there is no presumption that it should be exercised so as to extend time. Indeed, the exercise of discretion is the exception rather than the rule. Further, the burden, which is one of persuasion, is on the claimant.

Unauthorised deductions from wages

37. Section 13 of the 1996 Act provides that an employer may not make a deduction from the "wages" of a worker unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing their agreement or consent to the making of the deduction.

38. Section 27 of the 1996 Act ("Meaning of 'wages' etc") provides where relevant as follows:

> *(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—*
>
> *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise, …*

Breach of contract

39. A breach of contract occurs when a party to a contract fails to fulfil an obligation imposed by the terms of a contract.

40. A breach of contract gives the innocent party the right to sue for damages, i.e. for financial compensation for losses flowing from the breach. The general principle which applies to all types of claim for breach of contract is that damages should return the innocent party to the position they would have been in if there had been no breach. A claim for damages for breach of contract may be pursued in the Employment Tribunal when it arises, or is outstanding, on the termination of employment, but not otherwise.

Time limits for claims for breach of contract or unauthorised deductions from wages

41. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that a complaint for breach of contract should be presented within three months of the effective date of termination. If it is not, the Tribunal will only have jurisdiction to consider it if it was not reasonably practicable for the complaint to have been presented within that three-month period and it was presented within such further period as the Tribunal considers reasonable.

42. Section 23 of the 1996 Act deals with complaints to a Tribunal. A complaint that an employer has made deductions in contravention of section 13 must be presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made. When a complaint is made in respect of a series of deductions, the claim must be presented before the end of the period of three months beginning with the date of the last payment of wages from which a deduction was made.

43. The Tribunal must therefore consider two things if a claim is presented outside the three-month time limit. First, whether it was not reasonably practicable for the claim to be presented within the (the burden of proof is on the Claimant).

Secondly, if it was not, the Tribunal must be satisfied that the further period within which the claim was presented was reasonable.

44. The Tribunal must determine as a matter of fact the substantial cause of the Claimant's failure to comply with the primary time limit. The whole of the limitation period should be considered but "attention will in the ordinary way focus upon the closing rather than the early stages" (Schultz v Esso Petroleum Ltd [1999] IRLR 488.

45. The leading case in relation to reasonable practicability remains Palmer and Saunders v. Southend-on-Sea Borough Council [1984] IRLR 119. In this case, May LJ stated that the test was one of reasonable feasibility: '

> *We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories: compare Marshall v Gotham Co Ltd [1954] AC 360, HL. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office [1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?" - is the best approach to the correct application of the relevant subsection.*

46. The question of what is or is not reasonably practicable is essentially one of fact for the Tribunal to decide.

Submissions

47. The parties both provided written submissions for which we are grateful. They also both made oral submissions. We do not set out their submissions in any detail here.

Respondent's submissions

48. Briefly, however, Ms Veale for the respondent emphasised that the claimant was not dismissed simply for failing to submit proper fit notes. Rather, she was dismissed after repeatedly refusing to submit proper fit notes and without providing a plausible explanation for her refusal. Further, she had taken an increasingly uncompromising tone in relation to the respondent's requests for proper fit notes: she had threatened legal action, made serious accusations, all whilst refusing to engage with the process. As such she was guilty of a wilful and ongoing refusal to provide proper fit notes which was not based on any reasonable ground. This had led to a breakdown in the relationship of trust and confidence.

49. Whilst it was true that the claimant was unwell at the time, she was able to send many emails and attend court in relation to her separate County Court claim against the respondent. Further, the psychologist's report did not identify any link between her health conditions and her failure to send appropriate fit notes. In the circumstances, the respondent would not have been able to trust her to follow its procedures going forward.

50. So far as the discrimination claim was concerned, much of it was out of time, much of the alleged unfavourable treatment had not been proved, and that which had been proved was unrelated to her disability. The claimant had not in any event adduced sufficient evidence to prove disability and the respondent did not have the necessary knowledge.

51. The breach of contract and wages claims were substantially out of time. Further, they had no merit: the claimant was seeking to rely opportunistically on a single error in an offer letter. Throughout the employment relationship neither she nor the respondent had at any point conducted themselves on the basis that she was a part-time employee.

Claimant's submissions

52. Turning to the submissions made by the claimant, she submitted in her written submissions that she should have been given a warning rather than being dismissed. She noted that she had a clean disciplinary record. Further, the allegations against her which had resulted in her dismissal were not in any event made out. She denied that she had not engaged with the respondent during the relevant processes. She said that the respondent's conduct towards her had disregarded her health and that of her daughter, who suffered from two autoimmune diseases. She identified what she regarded as management shortcomings in the way in which the risk presented by covid had been managed.

53. She explained in her written submissions that she had not provided full fit notes to the respondent because her "data had been breached" with the result that a false fit note had been uploaded to the DWP's systems. She said she was also concerned about a report being made to the DWP that she was a part-time employee (which had caused her problems in accessing "the work contribution payments") and about information regarding her health provided to the "Compensatory Recovery Unit" [sic]. She was also concerned about the respondent placing on the DWP system on 22 December 2021 that she had a "psychiatric injury" caused by stress at work. She complained that her friend, Sofia, should have been allowed to support her at the disciplinary hearing.

54. The claimant also referred in her written submissions to a number of historic complaints she had about her employment with the respondent which were not, strictly speaking, relevant to the issues that it had been agreed we would need to decide.

55. The claimant touched upon many of the same matters in her brief oral submissions. She made it clear that she was not accusing the respondent of having placed the false fit note on the DWP's systems.

56. The claimant said that she was being portrayed as a person who did not comply with policies and procedures and did not communicate. However, there were substantial documentary evidence which showed that this was not the case. She had communicated clearly to the respondent that she had a concern regarding her data and she had legitimate reasons for having worries about giving the respondent personal information. She emphasised and gave examples of how she had in various ways been a good employee. She noted that if she had not been a good employee the respondent would not have offered her a permanent role given that she had originally worked for the respondent via an agency.

Findings of fact

57. These findings of fact do not of necessity refer to all of the evidence that was before the Tribunal. As in many cases, the Bundle was of excessive length and contained many irrelevant documents. Further, there was much duplication between it, the Claimant's Exhibited Documents, and the Claimant's Supplementary Bundle. The Tribunal made plain at the outset that it would not necessarily read documents that were not referred to in the witness statements or during the course of the Hearing.

General background findings

58. The claimant was employed between 2017 and 5 January 2023, when she was dismissed for gross misconduct.

59. Prior to dismissal, she had been absent from work on sick leave for two years, the sick leave having begun on 3 January 2021.

Credibility of the witnesses

60. The Tribunal did not find the claimant a credible witness taking into account the following matters:

    60.1. She made assertions about documentary evidence that were demonstrably incorrect. For example, she asserted that the Occupational Health Report of 22 August 2018 ("the 2018 OH Report") recommended adjustments when it in fact did not.

    60.2. When it was put to her that a document did not say what she asserted it said, she suggested on more than one occasion that she was in fact referring to another document. We refer to our findings at [72] below as an example of this tendency.

    60.3. On more than one occasion she asserted that she had not seen a document before, when this was clearly not the case. For example, on day two of the Hearing, when taken to the particulars of employment included in the Bundle, she said that she had not seen the document before and would provide her particulars of employment overnight. She did indeed provide her

particulars of employment overnight, but they were identical to those included in the Bundle.

60.4. She made factual assertions which were inconsistent with the documentary evidence (or absence of documentary evidence) in the Bundle, the Claimant's Exhibited Documents and the Claimant's Supplementary Bundle. When this was pointed out to her, she said that she would find what she said were missing documents but then was unable to do so. For example, she asserted that by the time of the appeal hearing she had provided fit notes in the form required by the respondent for the whole of the period following 1 April 2022 but was then unable to produce such fit notes. We find that in fact such fit notes were not provided.

60.5. She had a tendency to say that she did not remember things which it was inconvenient for her to remember. For example, when questioned about the lack of medical records, she said that she did not remember EJ Byrne ordering their production when: (1) the case management orders in this respect were perfectly clear; and (2) the respondent had subsequently written to the claimant pointing out that the medical evidence had not been provided.

60.6. She had a tendency to give answers which on further examination turned out to be misleading. For example, she asserted that when absent from work she did not have access to her work email account. When further questioned, it became clear that she did have access but that she preferred not to use it.

61. By contrast, we found each of the respondent's witnesses to be credible. This was because their evidence was consistent with the documentary evidence; their oral evidence was consistent with their witness statements; and they were each prepared to make sensible concessions when responding to questions.

Terms of employment

62. The claimant's contract of employment comprised an offer letter dated 27 January 2017. This set out certain terms of her employment and cross referred to the respondent's standard written statement of particulars.

63. Under the heading "salary and hours of work" the offer letter stated:

> *Your part-time salary will be on Grade 3: Spine .14; £22,871 per annum all inclusive of London Weighting Allowance.*
>
> *The normal hours of work will be between 9 AM to 5 PM, Monday to Friday. Your actual hours of work will be decided in consultation with your line manager.*

64. Throughout the time the claimant attended work she worked full-time hours. She regarded herself (and was treated) as a full-time employee. This was reflected in the way her role was recorded in the respondent's HR system. It was also reflected in a document issued to her which was in effect her job description. We

find that the intention of both the respondent and the claimant from the outset of the employment relationship was that she would be a full-time employee.

65. As a result of her interactions with the DWP the claimant began to believe that she had in fact been given a part-time employee contract. The interaction with the DWP had caused her to believe this because they had contended that as a part-time employee she was only entitled to a certain level of benefits. She then contended that she should have been paid enhanced overtime rates for all the hours she had worked in excess of 16-hours per week.

66. We find that in fact, even if she had been a part-time employee, she would not have been entitled to any such enhancement. We find that enhanced overtime is only paid at increased rates to employees once they have worked more than 35 hours per week. We find that the claimant did not work more than 35 hours per week.

The question of disability including knowledge

Fit notes

67. The claimant's fit notes for all periods of absence prior to the termination of her employment had referred to the reason for absence being work-related stress with some references to hypertension. None of them referred to "anxiety" or "PTSD", the two impairments which she relies on for the purposes of her claim.

68. The claimant presented to the respondent as having had historically good health. This was reflected in what she wrote her manager around her return to work in July 2018 (page 288): "I have not been to the doctors for any health issues and well over eight years". Her return-to-work forms dated 9 July 2018 (page 289 E343) and 30 July 2018 (page 291) both say that she was unfit for work for "work stress". Each of these periods of absence lasted for around two weeks. In both return to work forms the claimant had indicated that she did not consider herself to be disabled.

69. The claimant had another period of absence in 2020 after she was refused permission to work from home whenever her daughter had a hospital appointment (page 325). The return-to-work form at page 432 gave the reason for absence as "work stress and extreme hypertension". The claimant again indicated that she did not consider herself to be disabled.

70. The claimant's next period of absence from work began in early 2021. She provided an unsigned sick note for the period 13 to 20 January 2021. The reason for absence was given as "stress at work". Whilst the sicknote was unsigned, it did identify the doctor's surgery and included a unique ID (page 394). Ms Marcantuono queried the lack of a signature. This was resolved when the claimant provided screenshots showing its provenance.

71. The claimant did not in fact return from this period of absence prior to her dismissal in January 2023. Throughout 2021 she provided fit notes to the respondent covering her absence in the normal manner. However, an issue

arose in relation to the fit notes that she provided on 13 March 2022 and 12 April 2022 (pages 438 and 439). The fit notes gave the reasons for absence as being "stress at work" but they did not identify the medical practitioner or their practice. They also did not include a unique ID or a QR code. Further sick notes provided to the end of the claimant's employment were in similar form, for example the sicknote for May at page 450. The exception to this was the fit note at page 538 for the period 4 October to 11 November. Again, the reason for absence was "work stress" but on this occasion the name of the practice of the GP was identified.

The 2018 OH Report

72. The claimant contended that the respondent was also been aware that she had a disability from 22 August 2018 when it had received the 2018 OH Report. The respondent contended that the report was the document at page 298. The claimant contained that in fact the report was the document at exhibit J33 of her supplementary documents. The documents at page 298 and exhibits J33 are in fact the same document.

73. The 2018 OH Report notes that the claimant "is fit for work and undertake her substantive role. She has made a full recovery following her last period of sickness absence". The report observes:

> *[the claimant] has no previous medical history of a psychological condition and no other medical history of any significance. She is not on any medication, prescribed or otherwise.*

74. The claimant accepted in cross examination that this was right, although she said that she had had a period of stress related to her home life around the year 2000. She accepted that she had not mentioned this to the person preparing the 2018 OH Report.

75. In response to the question "any work modification which would alleviate the condition or facilitate the employees [sic] rehabilitation?" the 2018 OH Report records:

> *Sharon returned to work on 30 July 2018 on a 2 week phased programme and as of 12 August 2018 she resumed to her full hours and role. No other work modifications are necessary.*

76. In answer to the question "What support would facilitate the employees return to work? A phased return to work is already in place." the 2018 OH Report records:

> *[The claimant] resumed work on 30 July 2018 and she is currently attending work and undertaking her substantive role. The work matters are in the process of being addressed which will allow Sharon to move forward.*
>
> *Sharon confirmed she would be happy to raise any work concerns with her manager should any arise.*

77. The 2018 0H Report does not therefore either suggest in any way that the writer considered the claimant to have a disability or recommend anything that might be sensibly described as a "reasonable adjustment". Indeed, the words "no other work modifications are necessary" suggest that the writer quite specifically did not believe that anything which might reasonably be described as a "reasonable adjustment" was necessary.

What the claimant told the respondent about her health

78. In 2020 the claimant raised concerns with the respondent about the risk of Covid infection. She was particularly anxious about this because her daughter suffered from autoimmune diseases which made her particularly vulnerable to infection. She also believed herself to be more vulnerable than average. There were a number of communications between the claimant and the respondent about this towards the end of 2020 and in early 2021. However, these communications did not relate to any significant extent to the anxiety which the claimant says that she was suffering from by then.

79. The claimant accepted that she had not told the respondent about the PTSD from which she suffered prior to the date of the psychologist's report dated 24 October 2022 ("the Psychologist's Report") because she did not herself know that she had PTSD before she received the report. We also find that prior to her dismissal her emphasis on communications with the respondent was on her suffering from stress rather than anything else.

Medical evidence

80. The claimant has not provided any medical evidence of significance beyond the Psychologist's Report. This was at page 56 of the Bundle. In her summary of conclusions, the author states that as at the date of the report the claimant suffered from:

    80.1. a moderate depressive episode;
    80.2. generalised anxiety, moderate to severe;
    80.3. panic disorder;
    80.4. Post-traumatic Stress Disorder.

81. The report was, perhaps surprisingly, prepared on the basis of a single 90-minute video consultation and *without* the author having access to any of the claimant's medical records. The report suggests that the conditions are due to the claimant's experiences in the workplace. The report is not in any way focused on matters relevant to the question of whether the claimant has a disability for the purposes of the Equality Act. In terms of timing, the report states that its author would "attribute the psychological difficulties of depression and anxiety directly to workplace stress sustained since 2017".

Findings about effect of any impairments on ability to carry out normal day-to-day activities

82. The disability impact statement which the claimant had provided during the course of the proceedings was a confused and lengthy document which did not in

the Tribunal's view adequately address the extent to which the impairments relied upon affected the claimant's ability to carry out normal day-to-day activities at the relevant time.

83. Having regard to the overriding objective, the Tribunal therefore asked the claimant a series of questions in relation to this. Notwithstanding its general credibility findings as set out above, the Tribunal did find the claimant's evidence in relation to the effects of the claimant mental health impairments to have the ring of truth, not least because during it the claimant made relatively nuanced distinctions about how the claimed impairments affected her at different points in time in a way that was not necessarily to her advantage.

84. In light of this, the disability impact statement, and the Psychologist's Report, we find that by late 2020 the claimant had a mental impairment of anxiety which adversely affected her ability to carry out the following day-to-day activities: shopping, cleaning and other domestic chores, socialising, and sleeping. We find that from late 2020 the effects were more than minor or trivial (and therefore were substantial). In particular, we find that from late 2020 the claimant suffered from regularly disturbed sleep, socialised very little, and found it impossible to carry out many domestic chores. We find that the claimant suffered such adverse effects of the impairment of anxiety until the termination of her employment.

85. We approach the question of whether the effects of the impairment were long term on the basis that that they did not have a substantial adverse effect prior to late 2020. We conclude that it was not "likely" at that point that they would last for 12 months because, in light of all the evidence before us, we find that a substantial cause of the increased anxiety felt by the claimant in late 2020 and early 2021 was the covid pandemic, her concerns about her and her daughter's vulnerability to covid, and the fact that the respondent told her in early 2021 that her role could not be conducted remotely. In late 2020/early 2021 it could not be said that such cause of the increased anxiety (and so the anxiety itself) was "likely" to last for at least 12 months. The effects of the impairment were not therefore long-term until late 2021.

86. Turning to the question of PTSD, in light of the same evidence we conclude that the claimant had a mental impairment of PTSD which either alone or combined with anxiety adversely affected her ability to carry out day-to-day activities from around June 2022 (the date given by the claimant in her oral evidence). We conclude that it was "likely" at that point that the effects of such impairment would last for 12 months given the nature of the mental impairment.

The 2020 request for an Occupational Health appointment

87. The letter at page 293 set out the process for an occupational health referral being made. One part of it was that the employee should consent as the claimant had done by signing the occupational health referral which began at page 293 on 31 July 2018.

88. On 10 November 2020 claimant requested information about how she could be referred to patient Health (page 356). She did this by sending an email from

s.daley@gold.ac.uk to Ms Marcantuono who replied to her seven minutes later stating:

> *You will need to complete the attached document and return to Charlene Richards.*
>
> *Right in the email the reason why the referral is being made to enable Charlene to notify OH.*

89. In cross-examination claimant said that she had not received Ms Marcantuono's reply because when off sick she did not use what she referred to as the "staff" email address regularly. As noted above, in other evidence the claimant indicated that she did in fact have access but generally referred not to use her work email account. However, the response of Ms Marcantuono was sent just seven minutes later to the email address that the claimant had used to send the original request for information. We therefore find that the claimant did receive the email

90. On 14 November 2020 the claimant emailed Ms Marcantuono again (page 362). The thrust of the email is that she would like a referral to be made to occupational health so that things could be put in place on account of what she believed to be her vulnerability to Covid. She also expresses concerns in the email for her daughter's health. Ms Marcantuono replied on 16 November 2020 (page 364) to the "Sharon Daley – staff" email address. She again attached the form that the claimant needed to complete for the OH referral to take place.

91. The claimant needed to complete the form (to give her permission for a OH referral to be made) and then return it to HR. We find that the claimant did not do this and that this was, as she suggested in cross examination, an oversight on her part. We find that Ms Marcantuono did not chase the claimant because (1) she did not know that the claimant had not completed and returned the form (it was to be sent straight to HR); (2) the impetus for the OH referral came entirely from the claimant.

92. We find that the factual reason for the OH referral not being made was the claimant's failure to complete and return the form. We find that since it was the claimant rather than any member of management who wished the referral to take place, the onus was very much on her to ensure the relevant form was completed. We further find that the reason that the claimant wished to be referred to Occupational Health was her concern about her and her daughter's vulnerability to Covid. Such concerns were unrelated to the impairments that she relies on in her disability discrimination claim.

Risk assessments

93. Although the claimant contended that the respondent had failed to carry out a risk assessment when it should have done, she struggled to identify exactly when or why she said such a risk assessment should have taken place. In cross examination, she accepted that she had not asked for a risk assessment in 2018 and said that "maybe" she had asked for one in 2020.

94. The Tribunal asked her to identify in the bundle any relevant request for a risk assessment and she identified the email at page 381. In that email dated 5 January 2021, the claimant raises concerns which, whilst not entirely clear, relate above all to risks posed to her and her daughter by Covid and states:

> *Can you send any information how you intend to make sure we are safe at work*
> *Maybe a risk assessment form*

95. The email does not suggest that a risk assessment should take place as a result of her suffering from anxiety and PTSD (or workplace stress).

96. The context for this email was in fact the claimant having raised concerns from November 2020 about the risks that Covid 19 posed to her and her daughter. Ms Marcantuono had previously explained the processes and guidance that she said the respondent was following. For example, in her email of 17 November 2020 at page 375 she stated:

> *The process that has been followed is in line with NHS guidance and the college's Outbreak Prevention and Control Plan which has been signed off by the Director of Public Health, Lewisham.*

97. Equally, on 5 January 2021 (page 449), she explained that the respondent remained open "in line with national guidance" and also stated:

> *As you are aware safety arrangements have been put in place to protect all members of staff and the risk assessment has been reviewed and approved by Health and Safety following recent changes in guidance.*

98. Returning to the claimant's email of 5 January 2021, Ms Marcantuono replied to this on 6 January 2021 (page 385). She did not deal expressly with the question of risk assessments but rather focused on what by then was the underlying issue: that the claimant wished to be allowed to work from home. Ms Marcantuono had previously dealt with this in her email of 5 January 2021 at page 382. In that email she had said:

> *In line with national guidance the university remains open and as your switchboard role is essential to support the services being provided and unfortunately cannot be conducted remotely, we reasonably requested both switchboard operators to attend campus today, similar to other members of staff providing critical services.*

99. In her email of 6 January 2021 (page 385) Ms Marcantuono stated:

> *… Unfortunately your role as switchboard operator cannot be carried out from home, your options are as follows;*
>
> *You can either attend work on campus, book annual leave or unpaid leave or we can put you on the furlough scheme.*

100. We find that the reason that Ms Marcantuono did not deal with the question of risk assessments in her email of 6 January 2021 was that she believed she had already provided the claimant with the necessary information in relation to steps being taken by the respondent to manage covid related risks. We further find that the risk assessment which the claimant wanted carried out was unrelated to either her anxiety or to her PTSD. Rather she hoped that a further risk assessment would assist her in pressing her case that she should not be required to attend work at what was the height of the Covid pandemic.

The claimant's absence from work from early 2021

101. The claimant provided the respondent with a letter from Bellingham Green Surgery dated 5 January 2021 (page 383). It stated:

> *[The claimant] has asked me to write to you to explain that her daughter has a medical condition which makes her clinically extremely vulnerable to complications of a Covid 19 infection. Her daughter received a shielding letter earlier in the year and therefore according to the latest government guidelines has been advised to resume shielding. As such [the claimant] would like to work from home. I'm sure you are aware that current government guidelines advised everyone who can work from home to do so, and I would be grateful if you could facilitate Miss Daly to do so if possible, especially as her daughter is at risk.*

102. The respondent would not in fact permit the claimant to work from home, as the correspondence considered above in the context of risk assessments makes clear.

103. Following the respondent refusing permission to work from home, the claimant commenced a period of absence due to sickness on 6 January 2021. She did not return to work prior to her dismissal on 3 January 2023.

The disciplinary process in 2022 and the claimant's dismissal

The March and April 2022 fit notes

104. The claimant provided the respondent with a note for the period 31 March to 15 April 2022 which was at page 438. It recorded the reason for absence as "stress at work". The fit note did not include: the name of the doctor; details of the doctors practice; a unique ID reference number.

105. Ms Marcantuono requested a full copy of the doctors note by email on 4 April 2022 (page 438A). The claimant then submitted a further fit note in the same form covering the period 15 April 2022 to 1 May 2022 (page 439).

106. On 19 April 2022 the claimant emailed Ms Marcantuono (page 442) stating:

> *I would like to keep some parts of my medical information private.*
> *I see from your last email you would like more information please specify exactly what information you need so I can see if I can provide it.*

107. On 20 April 2022 Ms Marcantuono told claimant that the fit note was not a "full GP note" (page 440). She said:

> *Can you please forward the full doctors note which includes the doctor's signature/stamp, date of statement, doctors address and the Unique ID?*

108. The claimant replied on the same date stating:

> *As now my fit notes is part if a criminal investigation and also a court case I will ask you to be patient. I have a legal fit note. [Errors reproduced from the original]*

109. On 28 April 2022 Ms Adams of the HR Department emailed the claimant (page 445) explaining that the fitness notes were unacceptable because they could not be validated. She spelt out what was required:

> *In line with Goldsmith Sickness Absence policy, you have been asked to submitted [sic] the full medical note which includes the doctors signature/stamp, date of statement, doctors address and the Unique ID.*

110. The claimant was asked to provide full notes by 5 PM on Tuesday, 3 May 2022. Claimant was warned that in the absence of such fit notes the absence from 15 April to 1 May 2022 would be considered as unauthorised. She warned the claimant:

> *At that point the University, at its discretion and as a last resort, will use the disciplinary procedure to resolve the matter.*

111. We find that in light of these various emails the claimant was completely clear about what the respondent required by 28 April 2022. The claimant's friend, Ms Theophilou replied on 28 April 2022 (page 444):

> *Sharon mentioned the reason previously why her doctor's details is not provided. On the 31st December 2021 a fit note was provided to Universal Credit in which Sharon did not provide it. There is now a criminal investigation into this and at this time no one including Universal Credit is allowed access to her doctor details. A previous doctor of Sharon mentioned he was contacted without Sharon's permission and therefore to actually state at this point you are going to put her on disciplinary for not providing the doctors' name is wrong. Sharon does not give Goldsmith University permission to contact her GP. Prior to the issue with the Fitnote of 31st December 2021, Sharon sent an email to Sandra stating she had privacy concerns in January 2021 and November 2021.*
>
> *The fitnote will be available in the court case and as there is a criminal investigation at this time her GP details must be remain off record. The fitnote she supplied you is legal and if you want a legal clarification, she can get a solicitor to affirm that the Fitnote is genuine. If this is needed, then Sharon will get a solicitor's notary confirmation. [Errors reproduced from the original]*

112. We have set out above some of the correspondence between the parties in relation to the fit notes in some detail above because it is illustrative of the nature of the correspondence in relation to that subject generally. However, to summarise, prior to the instigation of disciplinary proceedings the respondent made clear why the fit notes were not acceptable on a number of further occasions, and we find that the claimant understood why this was the case.

113. The respondent set various deadlines for compliant fit notes to be provided:

113.1. 3 May 2022 (page 445);
113.2. 6 May 2022 (referred to at page 447);
113.3. 11 May 2022 (page 456).

114. The claimant did not provide compliant fit notes. The claimant's final position prior to disciplinary proceedings being instigated appears to have been that set out in Ms Theophilou's email at page 455:

> *The Fitnote is not separate regarding a legal matter. The Fitnotes were referred to by your legal representative in Sharon legal case and for this reason as a Fitnote was falsely given and her GP contacted which is currently investigated. Until the criminal investigation concludes that Goldsmith have not seen or have any knowledge of a false fitnote or contacting her GP,no full details of her GP will be given to compromise an ongoing investigation and court proceedings.*
>
> *If you feel that you want to move to a disciplinary with the following information I have provided, this will be challenged in court. Sharon has legitimate reason why her GP name is not to be disclose with an ongoing investigation. [Errors reproduced from the original]*

115. We make two findings in relation to this email. First, we find in light of the claimant's oral evidence that it was sent with her knowledge and approval. Secondly, we find that at no point prior to (or after) her dismissal has the claimant ever provided any significant evidence of the "criminal investigation" to which the email refers or any coherent explanation of why providing the respondent with details of the claimant's GP would compromise any investigation or court proceedings.

The disciplinary investigation

116. On 13 June 2022 the claimant was invited to a disciplinary investigation meeting to take place on 23 June 2022 (page 461). The investigation was said to be to deal with these allegations:

> *The investigation is into the following allegation:*
>
> *• Failure to submit full and acceptable medical evidence of ongoing sickness absence despite being requested to so since 15 th April 2022*
> *• Fraudulent conduct; wrongful or criminal deception intended to result in financial*

or personal gain and intended to deceive others.
• Serious breach of confidence

117. Ms Theophilou replied on behalf of the claimant on the same date with a series of questions (page 581). The email asserted:

> *The issue of her Fitnote is within the court process and therefore only the Judge whilst the police undertakes the investigation is allowed to see the full name of her GP…*

118. Another email sent by Ms Theophilou on the same day stated:

> *Again, as the case in the court all communication will be sent to the court as these matters were addressed regarding her being of ill [sic].*

119. In subsequent correspondence Ms Theophilou makes multiple reference to the court proceedings. This was confusing and unnecessary as those proceedings were unrelated to the disciplinary allegations being considered by the respondent.

120. The claimant did not attend the investigative meeting on 23 June 2022. This reflected the approach taken in correspondence by both her and her representative that she was ill and that it was in some way inappropriate for such an investigation to take place in light of the county court proceedings. On 29 June 2022 the respondent wrote to the claimant (page 480) stating that the investigating officer had agreed to "undertake your part in the investigation as a paper exercise". Questions were included and a response requested by 29 June 2022. The questions are at page 481 and included further details of the allegations set out at [116] above.

121. In relation to the third allegation, the question document states:

> *Allegation 3: Serious breach of confidence: in that we have requested information, and this has not been provided, and that the information provided does not meet the required standard.*

122. In this respect, the questions included:

> *6. Can you respond to allegation that you have not responded to a reasonable management request to provide fit notes.*

123. We find that following receipt of this document the claimant understood at the very least that the allegations against her were (1) that she had not provided fit notes in the approved form; (2) that she had failed to respond in a satisfactory manner to repeated requests in relation to the fit notes.

124. Ms Theophilou responded almost immediately to the question document by an email dated 30 June (page 484). However, rather than engaging with the questions raised, she raised a series of questions of her own. The respondent subsequently extended the deadline for response to 15 July 2022 (page 485) and

then to 18 August 2022 (page 492). However, the claimant provided no substantive response. Instead, Ms Theophilou sent an email on her behalf on 11 August 2022 (page 494) stating:

> *I responded to you on behalf of Sharon regarding the extension requesting with also some questions you failed to answer, however, the information was addressed in the court of which Goldsmith has a copy and the Court. All issues regarding Goldsmith are now in the matter of the court. Further communication should now go through your legal representatives.*

125. We find that on any realistic assessment the claimant refused to cooperate with the disciplinary investigation. The disciplinary investigation resulted in a detailed report being provided (page 499) by Ms Marcantuono. Its conclusion was that there was a case to answer in relation to the first and third allegations but not the second. The respondent did not therefore consider the second allegation – that the claimant had acted fraudulently – further.

The disciplinary hearing

126. The claimant was informed of the outcome of the investigation by letter dated 29 September 2022 (page 497). It stated that the investigating officer had concluded that there was a case to answer in respect of the following allegations:

- *Failure to submit full and acceptable medical evidence of ongoing sickness absence despite being requested to so since 15th April 2022*
- *Serious breach of confidence*

127. By letter dated 10 October 2022 (page 542) claimant was invited to a disciplinary hearing to take place on 3 November 2022. That letter enclosed a copy of the investigation report and of the investigation outcome letter.

128. The claimant did not respond to that letter or to a link subsequently sent to a Teams meeting for the date of the disciplinary hearing and said the respondent wrote her again on 17 October 2022 inviting her to provide a statement presenting a case if she was unable to attend. She has warned that otherwise the hearing would go ahead in her absence (page 556).

129. The claimant told the respondent that she was too unwell to attend the hearing due to take place on 3 November 2022, so it was postponed to 14 December 2022. The claimant was asked to provide medical evidence if she was unable to attend the rescheduled meeting. She did not do this – although she did provide the Psychologist's Report. This did not address her fitness to attend a disciplinary meeting.

130. The claimant did not attend the disciplinary hearing on 14 December 2022. Nor did she write to the respondent saying that she was unwilling or unable to attend. Nor did she provide a written statement setting out her case despite having been invited to do so (p556).

131. The disciplinary hearing on 14 December 2022 went ahead in the absence of the claimant. We find that Ms Cocker carefully considered the evidence contained in the investigation report and questioned Ms Marcantuono in relation to it.

132. Having considered the evidence, we find that Ms Cocker concluded that the claimant was guilty of gross misconduct in that:

132.1. Despite repeated requests she had repeatedly failed to provide complete sick notes;

132.2. Her refusal which was repeated was unreasonable and amounted to a breach of confidence, particularly taking into account what Ms Cocker regarded as her failure to engage constructively with the disciplinary process.

133. We find that Ms Cocker considered alternatives to dismissal but concluded that a written warning would have had no effect because the claimant had said she would not comply with the respondent's instructions in relation to fit notes (albeit she had provided one compliant note for a period beginning in October 2022). This also raised a concern in her mind that the claimant might well not comply with other management instructions.

134. The claimant was dismissed by a letter dated 5 January 2023 which stated:

The purpose of the hearing was to consider the recommendations of the disciplinary investigation regarding alleged misconduct as follows:

• Failure to submit full and acceptable medical evidence of ongoing sickness absence despite being requested to do so since 15th April 2022
• Serious breach of confidence

Based on the information available, the conclusion reached is:

• The misconduct allegations were upheld because you consistently failed to provide valid medical certificates for your absence from work. Evidence was presented that you had been given multiple opportunities to do so.
• This resulted in a prolonged period of unauthorised absence.
• Therefore, the allegations constitute gross misconduct, and my decision is summary dismissal.

The appeal against dismissal

135. The claimant appealed her dismissal by an email dated 6 January 2023 (page 583). She set out grounds of appeal in a disciplinary witness statement (page 601), a Statement of Fact (page 603) and a document headed Concerns (page 606).

136. By a letter dated 20 January 2023 she was invited to attend a hearing on 2 February 2023 (page 609). In that letter her request to be accompanied by Ms Theophilou was refused on the basis that she was not a work colleague or trade union representative.

137. The appeal went ahead on 2 February 2023 and was heard by Mr Graham. The appeal lasted for around an hour (page 615). Following the appeal hearing, Mr Graham upheld the decision to dismiss. His letter to the claimant was dated 3 February 2023. He rejected the appeal and upheld the decision to dismiss. His reasons for concluding that the claimant should be dismissed were the same as those of Ms Cocker.

The delay in bringing claims

The breach of contract and unauthorised deduction claims

138. We make the following findings in relation to why the claims for breach of contract and unauthorised deductions from wages were not presented to the Tribunal prior to 5 August 2024 (the date of the ultimately successful application to amend).

139. In the particulars of claim attached to the claim form submitted to the tribunal on 14 March 2023 the claimant noted that such matters would be looked at "in the County Court as it is to look at whether I should have been paid overtime rate on 16 hours contract". In fact, by 14 March 2023 her County Court claim against the respondent had been struck out. However, her application for relief from sanctions made on 21 December 2022 was still outstanding. Taking these matters in the round, we find that the reason the complaints of breach of contract and unauthorised deductions from wages were not included in the original claim was that the claimant believed she would be able to pursue them in the County Court claim following a successful hearing of her application for relief from sanctions. The claim form included in the County Court Documents does not in fact refer to any breach of contract relating to wages. The application for relief from sanctions was refused in the presence of the claimant on 13 April 2024 (page 22 of the County Court Documents).

140. Turning to why the claimant waited for nearly another four months before making an application to amend, we find that this was simply because she did not consider that there was any great urgency about the matter.

The discrimination claims

141. So far as the complaint of unfavourable treatment relating to the 2018 OH Report, the risk assessment, and the failure to respond to the request for an Occupational Health Appointment, concerned the claimant suggested that the reason she had not pursued these matters sooner in the Employment Tribunal was a mixture of trying to pursue the matters internally, being unaware that she could bring Tribunal claims for discrimination, and advice received from her trade union about how the matter should best be dealt with.

142. We do not accept that the claimant was unaware of the possibility of bringing Tribunal claims in relation to these matters at the time she says they occurred. We find that in fact she did not at the time wish to pursue them as matters in the Employment Tribunal. It is of note that in fact none of them were pursued even

when she provided particulars of her disability discrimination claim following the commencement of her claim (the Further and Better Particulars of Claimant page 97 do not refer to any of them). They were added by amendment during the course of the preliminary hearing on 15 January 2024 (see paragraph 5 of the Orders at page 118).

143. We find overall, therefore that the reason for not pursuing the complaints of unfavourable treatment list of between 6.1.1 and 6.1.3 of the List of Issues was quite simply that the claimant had no intention of pursuing these in the Employment Tribunal prior to early 2024. We find that she had the necessary knowledge to pursue them at the time they occurred.

144. Turning to the complaints relating to 13 June 2022 (6.1.4 and 6.1.5 the List of Issues), we find that the reason they were not pursued earlier is that the claimant did not address her mind to the question of the deadline for their presentation.

Conclusions

Time limits – discrimination claim (unfavourable treatment at 6.1.1 to 6.1.5)

Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

145. The claim was presented on 14 March 2023 and Early Conciliation began and ended on 1 March 2023. Consequently, the earliest date and act could be in time was 2 December 2022.

146. So far as issue 6.1.1 was concerned, the claimant contended that the 2018 OH Report should have been complied with in the autumn of 2018. As such, the complaint was presented a little over 4 years out of time.

147. So far as issue 6.1.2 was concerned, the claimant contended that there should have been a risk assessment in early 2021 (see [94] above). As such, the complaint was presented just under two years out of time.

148. So far as issue 6.1.3 was concerned, the claimant contended that the failure to respond took place in around November 2020. As such, the complaint was presented just over two years out of time.

149. So far as issue 6.1.4 and 6.1.5 concerned, the act complained of took place on 13 June 2022. As such, the complaints were presented around six months out of time.

If not, was there conduct extending over a period?

150. In light of our conclusions below, there was no conduct extending over a period.

If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

151. Not applicable.

If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

Why were the complaints not made to the Tribunal in time?
In any event, is it just and equitable in all the circumstances to extend time?

152. We have found at [143] above that the reason for the complaints which appear in the List of Issues between 6.1.1 and 6.1.3 not being presented before they were was that the claimant had no intention of pursuing these in the Tribunal prior to early 2024. In light of this, and the fact that the extent of the delay clearly affected the quality of the evidence in relation to these matters, the claimant has failed to discharge the burden of persuasion upon her, and we have concluded that it would not be just and equitable to extend time. The complaints which appear in the List of Issues between 6.1.1 and 6.1.3 are therefore dismissed on the basis that the Tribunal has no jurisdiction to hear them.

153. We have found at [144] above that the reason for the complaints which appear in the list of issues between 6.1.4 and 6.1.5 not being presented earlier was that the claimant did not address her mind to the question of the deadline for their presentation. However, in light of the close relationship between these complaints and the one which the respondent accepts is in time (the complaint detailed in issue 6.1.6), and the fact that the delay is much more limited, we have concluded that it would be just and equitable to extend time in relation to them.

Time limits – the complaints for breach of contract claim and unauthorised deductions from wages

Were the complaints for breach of contract and unauthorised deductions made within the time limits in Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and section 23 etc of the 1996 Act respectively? The Tribunal will decide:

Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination (in respect of the breach of contract) / the date of payment of the wages from which the deduction was made (in respect of the unauthorised deduction complaint)?

154. No. The last day for a claim to be presented in respect of the breach of contract claim was 4 April 2023. It was not presented by amendment until 16 months later.

155. So far as the complaint of unauthorised deductions from wages is concerned, the claimant had exhausted her entitlement to sick pay around the end of 2021. Consequently, on her case, the last unauthorised deduction (whether or not it was one of a series) would have taken place more than 2.5 years prior to the complaint for unauthorised deductions being presented by amendment on 4 August 2024.

[In respect of the unauthorised deductions complaint] *If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?*

156. No. See [154] above.

If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

157. Yes. In light of our findings at [139] above, the reason that these claims were not presented within the primary time limit was the mistaken belief of the claimant that she would be able to pursue them in her county court claim. We conclude that that mistaken belief was not reasonable: first, because she drafted the claim form herself and it made no mention of a claim in respect of unpaid overtime; secondly, because it was not reasonable for her to believe that her relief from sanctions application would be successful.

If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

158. In case we are wrong in our conclusions about reasonable practicability, we have considered this point also. Neither claim was presented within a reasonable further period. The breach of contract claim was presented 16 months out of time and the unauthorised deduction claim was presented more than two years out of time. Further and separately, the claimant delayed for nearly a further four months after her relief from sanctions application was refused on 13 April 2024 (and so there could have been no doubt in her mind that she would be unable to pursue the question of overtime in the county court claim).

159. The complaints for breach of contract and unauthorised deductions from wages are therefore dismissed on the basis that they were presented out of time and the Tribunal has no jurisdiction to hear them.

Disability

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:

Did she have an impairment, namely: Anxiety; and PTSD?

160. Yes. See our findings between [82] and [86] above.

Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

161. Yes. In respect of the anxiety from late 2020 and in respect of PTSD from June 2022.

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

162. The claimant did not have medical treatment or take other measures.

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

163. This issue is not relevant in light of the conclusion at [162] above.

Were the effects of the impairment long-term? The Tribunal will decide did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur?

164. Yes, in respect of the anxiety from late 2021 (see our finding at [85] above). In respect of the PTSD from June 2022 (see our finding at [86] above).

Discrimination Arising from Disability (Equality Act 2010 section 15)

Did the Respondent treat the Claimant unfavourably by:

Failing to comply with a 2018 OH report that recommended that certain adjustments be made for the Claimant;

165. No. In light of our findings at [72] to [77] above, the respondent did not fail to comply with recommendations included in the 2018 OH Report.

Failing to take a risk assessment in relation to the Claimant;

166. Yes. In light of our findings at [93] to [100] above, we find that the respondent did not undertake the specific risk assessment which the claimant wanted it to undertake in relation to covid related risks to her and to her daughter. This was unfavourable treatment.

Failing to respond to the request made by the Claimant in late 2020 that an OH appointment be booked for her;

167. No. In light of our findings at [87] to [92] above, the respondent did not fail to respond to the request. The respondent did respond to the request, but the claimant then failed to fill in the form that was required for her to give her consent to the OH referral, despite being sent the form on at least two occasions.

Subjecting the Claimant to disciplinary proceedings on 13 June 2022;

168. Yes. Construing the allegation broadly, this is the date on which the investigation began. This was unfavourable treatment.

Failing to allow the Claimant to be accompanied by a friend at the disciplinary hearings on 13 June 2022;

169. There was no disciplinary hearing on that date. However, this issue was in practice approached during the Hearing on the basis that it related to the refusal of the respondent (which was admitted) to allow the claimant to be accompanied by Ms Theophilou at the *appeal* hearing on 2 February 2023. This was unfavourable treatment.

Dismissing the Claimant;

170. Yes. The respondent dismissed the claimant.

Did the following things arise in consequence of the Claimant's disability:

A need for certain adjustments, as set out in the 2018 OH report;

171. No. No such adjustments were set out.

A need for a risk assessment to evaluate what adjustments the Claimant might need;

172. No. The disability relied on is anxiety/PTSD. However, the risk assessment which the claimant said she requested, and which was not carried out, did not relate to either anxiety or PTSD but rather to the claimant's understandable concerns about the risk that covid posed to her and her daughter (who suffered from autoimmune diseases).

A need for an OH evaluation in early 2021;

173. No. First, we do not accept that there was a "need" for an OH evaluation in early 2021. Further and separately, if there was, in light of our findings at [92] above, this did not arise in consequence of the disability that the claimant relies on, but rather in consequence of her understandable concerns about the risk that covid posed to her and her daughter.

A fit note that the Claimant presented to the Respondent on 30 March 2022;

174. Yes. It arose in consequence of her absence which was because of her anxiety.

A fit note that the Claimant presented to the Respondent on 14 April 2022;

175. Yes. It arose in consequence of her absence which was because of her anxiety.

176. Some of the complaints of discrimination arising from disability fall to be dismissed on the basis that the Tribunal has no jurisdiction to hear them because

they were presented out of time. However, in light of the "continuing act" argument, we set out in full our conclusions on whether the claimant was treated unfavourably because of something arising in consequence of her disability.

Was the unfavourable treatment because of any of those things?

177. In light of our conclusions between [165] and [175] above, what we need to consider under this heading is whether the unfavourable treatment of (1) failing to take a risk assessment; (2) subjecting the claimant to disciplinary proceedings; (3) failing to allow her to be accompanied; or (4) dismissing her was because of the fit notes presented on 30 March 2022 and 14 April 2022.

178. In this context "because of" does not require the treatment to be solely or principally because of the "something" but only that the "something" is of sufficient causal significance that the unfavourable treatment can be said to be because of it.

179. So far as failing to take a risk assessment is concerned, it is self-evidently the case that this cannot be said to be because of the two fit notes because these postdated the failure.

180. So far as failing to allow the claimant to be accompanied at the appeal hearing, this was in no sense whatsoever because of the fit notes. Rather, in light of our findings above, it was because the respondent's policies did not permit the claimant to be accompanied by Ms Theophilou and the respondent chose not to make an exception to its normal policy (because at least in part of the manner in which Ms Theophilou had conducted correspondence on behalf of the claimant).

181. So far as subjecting the claimant to disciplinary proceedings and dismissing the claimant are concerned, there is in light of our findings of fact above self-evidently a factual connection between the fit notes and the respondent subjecting the claimant to disciplinary proceedings and subsequently dismissing her.

182. However, we have concluded that neither the disciplinary proceedings nor the dismissal can be said to be because of the two fit notes. The claimant was not subjected to disciplinary proceedings or dismissed because she had submitted the two fit notes. Simply submitting the two fit notes reflected her ongoing sickness absence which had begun 14 months earlier and in respect of which the respondent had taken no previous disciplinary action. She had submitted many previous fit notes without the respondent treating her unfavourably.

183. Rather, the claimant was subjected to disciplinary proceedings and dismissed because of her response to the respondent's reasonable requests for fit notes in a form that it found acceptable to be submitted. We have no doubt that if the claimant had responded to these requests by providing the respondent with fit notes in a form that it found acceptable, she would not have been subjected to disciplinary proceedings or dismissed when she was.

184. To put things in a slightly different manner, the two fit notes arose in consequence of the claimant's disability because she was absent from work as a result of it, which meant that she needed to provide fit notes. However, she was not dismissed as a result of her absence from work as reflected by the fit notes. Equally, the claimant has not put forward any case that the fact that the two fit notes were not in a form acceptable to the respondent was in any way related to her disability. Nor has she put forward any case that her response to the respondent's reasonable requests was in any way related to her disability.

185. The claimant's complaints of disability discrimination therefore fail and are dismissed in their entirety.

Was the treatment a proportionate means of achieving a legitimate aim?

186. In light of our conclusions above, this issue does not arise. However, if it had arisen in relation to the acts of unfavourable treatment which were factually proved, and which postdated the "something" arising, we would have concluded that subjecting the claimant to disciplinary proceedings and dismissing her was a proportionate means of achieving a legitimate aim. The claimant persistently and without good reason refused to comply with the respondent's policies relating to absence.

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

187. In light of our conclusions above, this issue does not arise. However, if it had arisen, we would have concluded that the respondent knew or ought to have known of the claimant's disability by the time the decision to dismiss was taken as a result of the length of her absence combined with the contents of the Psychologist's Report. We would not have concluded that the respondent knew or ought to have known of the claimant's disability prior to that point, given the absence of medical information provided to it and the consistency with which the sick notes refer above to all to stress at work. Prior to the receipt of the Psychologist's Report, the respondent could quite reasonably have assumed that the factual origin of the absence was its refusal to permit the claimant to work remotely in light of her covid concerns.

Unfair Dismissal

What was the reason for the Claimant's dismissal? The Respondent submits that the reason or principal reason for dismissal was the Claimant's misconduct or, in the alternative, some other substantial reason. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct or that there was some other substantial reason for dismissing her.

188. In light of our findings of fact above, we conclude that the reason for the claimant's dismissal was twofold:

188.1. The belief of Ms Cocker and Mr Graham that she had failed to submit full and acceptable fit notes despite being requested to do so from 15 April 2022;

188.2. The belief of Ms Cocker and Mr Graham that she had breached the term of trust and confidence because (1) by repeatedly refusing to submit the fit notes she had deliberately failed to comply with a reasonable management instruction over a prolonged period of time without good reason; (2) she had failed to engage constructively with the disciplinary process.

189. In light of our findings of fact above, we also conclude that both Ms Cocker and Mr Graham genuinely believed that the claimant had committed this misconduct.

190. We further conclude that because such beliefs related to the claimant's conduct, the respondent has proved that there was a potentially fair reason for the dismissal.

If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

There were reasonable grounds for that belief;

191. We conclude that there were clearly reasonable grounds for such belief. The claimant repeatedly failed to provide fit notes in the form required by the respondent from 1 April 2022. The correspondence makes clear that this failure was deliberate and, in light of the confused explanations, that there was no good reason for it. In light of our findings of fact above, it is also clear that the claimant failed to engage constructively with the disciplinary process. This was to some degree the fault of Ms Theophilou. The tone she adopted in her correspondence was confusing, confrontational and at times aggressive. However, the claimant did not attempt to distance herself from the actions of Ms Theophilou at the time (and, indeed, during the course of the Hearing, confirmed that she had approved them). The fact that the claimant produced one compliant fit note in October 2022 has no material effect on this conclusion.

At the time the belief was formed the Respondent had carried out a reasonable investigation;

192. In light of our findings of fact at [116] to [125] above, we conclude that the belief was formed after the respondent had carried out a reasonable investigation. The investigation of Ms Marcantuono was detailed. The claimant has not made any coherent criticism of it. Further, the nature of the investigation was inevitably affected by the claimant's failure to cooperate with it.

The Respondent otherwise acted in a procedurally fair manner;

193. We conclude that the respondent did act in a procedurally fair manner. On a general level, the process as set out in our findings of fact above was a detailed

one which resulted in the claimant being informed of the allegations against her, being given an opportunity to participate in the investigation meeting, being invited to a disciplinary meeting and being able to appeal (which she did). More specifically, we have considered the following issues:

194. **The fact that she was off work sick throughout the process:** it is obviously the case that an employer should take particular care in the way that it conducts a disciplinary process when the employee in question is off work sick. However, there is no general rule that a disciplinary process should not be followed simply because an employee is absent from work due to sickness. We conclude that the respondent acted in a procedurally fair manner when it pursued the disciplinary matters against the claimant taking account of the following points:

194.1. The disciplinary allegations were related to her absence in that they concerned the form of fit notes that she was providing. It was reasonable for the respondent to pursue this matter while she was off sick, particularly given that by April 2022 she had been off work sick for 14 months and there was no indication of the date by which she would return;

194.2. The respondent modified the process it followed to take account of her absence due to sickness by giving her the option of participating in the process by providing materials in writing. It also extended deadlines and re-arranged a meeting. It further held the appeal meeting by virtual means;

194.3. The claimant did not provide the respondent with medical evidence which stated that she was unable to participate in the disciplinary process as a result of being off work sick. In this regard, it is worth noting that during the course of the disciplinary process the claimant was conducting county court proceedings against the respondent and, indeed, did attend a county court hearing.

195. **Accompaniment**: the claimant requested that she be permitted to be accompanied by Ms Theophilou at the appeal meeting in February 2023. We conclude that the respondent acted reasonably in refusing that request in light of the following matters:

195.1. Under its own procedures, and indeed under the law more generally, the claimant had no right to be accompanied by Ms Theophilou because she was neither an employee of the respondent nor a trade union representative.

195.2. Notwithstanding this, we have considered whether the refusal was nevertheless unreasonable in light of the fact that the claimant was at the time absent from work due to illness and (we have found above) suffering from anxiety and PTSD. We have concluded that it was not in light of the way in which Ms Theophilou had conducted correspondence on behalf of the claimant with the respondent. Her approach was aggressive, confrontational, and tended to focus on matters which were irrelevant. Examples of this can be seen in her e-mails referred to at [114], [117] and [118] above. We conclude that her presence at the appeal hearing would have been unhelpful to both the claimant and the respondent.

196. Overall, therefore, taking matters in the round we conclude that the respondent acted in a procedurally fair manner.

Dismissal was within the range of reasonable responses.

197. We have considered whether dismissal for the reasons set out [188] above was within the range of reasonable responses.

198. In this respect we have considered the provisions of the respondent's disciplinary rules, to which the respondent made little reference in either the contemporaneous documentation or the written witness evidence. Appendix A (page 194) to the respondent's disciplinary procedure gives examples of gross misconduct. Ms Cocker identified "serious breach of confidence" and "where the employee has stopped attending work without authority and reasonable explanation" as being the ones which appeared to her to be most obviously relevant.

199. We note that "serious breach of confidence" is an unfortunate term because it is potentially confusing: does it refer to a breach of the duty of trust and confidence or to the misuse of confidential information? However, we have found at [123] above that the claimant understood the factual allegations against her. Further, the second provision identified in Appendix A by Ms Cocker as being relevant clearly was relevant. In addition, we note that the disciplinary policy indicates that:

> *The treatment of misconduct will reflect what is reasonable taking into account all the circumstances of the case, precedent, the staff member's record of employment, previous patterns of behaviour (including any current warnings on record) and whether the actions are considered to have been wilful of malicious.*

200. We therefore conclude that the misconduct of which the claimant was found guilty did in principle fit within the examples of gross misconduct contained in Appendix A. In light of this, and taking matters in the round, we conclude that the decision to dismiss fell within the band of reasonable responses taking into account the following matters:

200.1. The respondent had given the claimant repeated warnings that a failure to provide fit notes in the appropriate form could lead to disciplinary action up to and including dismissal;

200.2. Every employee knows that refusing to obey a reasonable instruction amounts to misconduct and, indeed, the claimant accepted during her oral evidence that her conduct had perhaps been insubordinate;

200.3. Reasonably viewed, the repeated refusal of the claimant to provide the fit notes in the correct form, and the lack of any reasonable explanation for this refusal, did make the misconduct particularly serious and so a

reasonable employer could regard it as gross misconduct justifying summary dismissal;

200.4. The respondent was entitled to reach this conclusion notwithstanding the fact that the claimant had a clean disciplinary record;

200.5. Further and separately, even if the claimant's repeated failure to provide the sick notes was not gross misconduct, it was open to the reasonable employer to dismiss the claimant in light of her failure to engage with the disciplinary process and the manner in which she (to some extent via her representative) conducted herself. This is because the failure to engage and the way in which she conducted herself, when combined with the misconduct, clearly destroyed the relationship of trust and confidence between the claimant and the respondent.

201. The claimant was therefore fairly dismissed, and her complaint of unfair dismissal fails and is dismissed.

Did the Respondent follow a fair procedure when dismissing the Claimant? If not, should there be any Polkey reductions to any compensation awarded?

202. In light of our conclusions above, this issue does not strictly speaking arise. However, if it had, we would have concluded that the claimant's employment with the respondent would have ended within three months in any event as a result of either her prolonged absence due to illness (which stretched to over two years by the time she was dismissed) or the breakdown in trust and confidence between her and the respondent. In this respect, by her own admission, she had lost trust and confidence in the respondent, just as it had lost trust and confidence in her.

Unauthorised deductions/breach of contract

203. We have dismissed these claims at [159] above on the grounds that they were presented out of time and therefore the Tribunal has no jurisdiction to hear them.

204. However, we set out here very briefly in the alternative what our conclusions would have been if the claims had not been dismissed on this basis.

205. We would have concluded that, read as a whole, the documentation shows that the claimant was employed on a full-time basis to work 35 hours a week. We would have concluded that this was reflected in the fact that both the claimant and the respondent had conducted themselves on the basis that this was their mutual understanding for the whole of the time that the claimant had attended work. We would have concluded that the obviously erroneous reference to a "part-time salary" in the offer letter was an insufficient basis for us to conclude that in fact the claimant had been employed on a part-time contract.

206. Further, we would have concluded that, even if we were wrong about that, the respondent had not made unauthorised deductions from wages or acted in breach of contract by paying her as it did. We would have so concluded because

we have found at [66] above that part-time employees are only entitled to overtime pay at enhanced rates when they work more than 35 hours per week which, we have found, the claimant did not.

207. The claimant's complaints of unauthorised deductions/breach of contract would therefore have failed and been dismissed even if we had had jurisdiction to hear them.

Employment Judge Evans

Date: 18 October 2024

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Appendix 1

Issues from case management orders of 15 January 2024

The Complaints

1 . In discussion with the Claimant during the hearing, it was confirmed that she was making the following complaints (there was discussion of the fact that some of the matters she was raising in her agenda as 'reasonable adjustments' claims might be framed more appropriately as S.15 claims):

1.1 Unfair dismissal;
1.2 Disability discrimination under s15 Equality Act 2010;

The Issues

2. The issues the Tribunal will decide are set out below.

3. Time limits

3.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

3.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
3.1.2 If not, was there conduct extending over a period?
3.1 .3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
3.1 .4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

3.1.4.1 Why were the complaints not made to the Tribunal in time?
3.1.4.2 In any event, is it just and equitable in all the circumstances to extend
time?

4. Unfair Dismissal

4.1 What was the reason for the Claimant's dismissal? The Respondent submits that the reason or principal reason for dismissal was the Claimant's misconduct or, in the alternative, some other substantial reason. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct or that there was some other substantial reason for dismissing her.

4.2 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

4.2.1 there were reasonable grounds for that belief;
4.2.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;

4.2.3 the Respondent otherwise acted in a procedurally fair manner;
4.2.4 dismissal was within the range of reasonable responses.

4.3 Did the Respondent follow a fair procedure when dismissing the Claimant? If not, should there be any Polkey reductions to any compensation awarded?

5. Disability

5.1 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:

5.1.1 Did s/he have an impairment, namely: Anxiety; and PTSD?
5.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
5.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
5.1.4 Would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?
5.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

5.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
5.1.5.2 if not, were they likely to recur?

6. Discrimination Arising from Disability (Equality Act 2010 section 15)

6.1 Did the Respondent treat the Claimant unfavourably by:

6.1.1 Failing to comply with a 2018 OH report that recommended that certain adjustments be made for the Claimant;
6.1.2 Failing to take a risk assessment in relation to the Claimant;
6.1.3 Failing to respond to the request made by the Claimant in late 2020 that an OH appointment be booked for her;
6.1 .4 Subjecting the Claimant to disciplinary proceedings on 13 June 2022;
6.1.5 Failing to allow the Claimant to be accompanied by a friend at the disciplinary hearings on 13 June 2022;
6.1 .6 Dismissing the Claimant;

6.2 Did the following things arise in consequence of the Claimant's disability:

6.2.1 A need for certain adjustments, as set out in the 2018 OH report;
6.2.2 A need for a risk assessment to evaluate what adjustments the Claimant might need;
6.2.3 A need for an OH evaluation in early 2021;
6.2.4 A fit note that the Claimant presented to the Respondent on 30 March 2022;
6.2.5 A fit note that the Claimant presented to the Respondent on 14 April 2022;

6.3 Was the unfavourable treatment because of any of those things?

6.4 Was the treatment a proportionate means of achieving a legitimate aim?

6.5 The Tribunal will decide in particular:

6.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims
6.5.2 could something less discriminatory have been done instead;
6.5.3 how should the needs of the claimant and the respondent be balanced?
6.6 Did the respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7. Remedy

7.1 If the dismissal was unfair:

7.1.1 is the Claimant seeking reinstatement or re-engagement?
7.1.2 Is the Claimant entitled to receive compensation?
7.1.3 If so, what sum?
7.1.4 What is the appropriate basic award?
7.1.5 What is the appropriate compensatory award?
7.1.6 Has the Claimant taken reasonable steps to mitigate their loss following dismissal?
7.1.7 Did the Claimant contribute to her dismissal and should any compensation be reduced accordingly?
7.1.8 Has there been a breach of the ACAS Code of Practice, and should any uplift or deduction be made?

7.2 If the discrimination complaints are upheld:

7.2.1 Is the Claimant entitled to receive compensation?
7.2.2 If so, what sum?
7.2.3 What is the appropriate award for injury to feelings?
7.2.4 What is the appropriate compensatory award?
7.2.5 Should a recommendation be made by the Tribunal?

Issues from case management orders of 23 July 2024 (page 151)

The claims and issues, as discussed at this preliminary hearing, are those listed in EJ Byrne's Orders of 22 January 2024, save that, if the Additional Complaint is added by way of amendment, the list of Complaints will include:

"7.3 Unauthorised deduction from wages, based on work done over-and-above her contractual hours of 16 hours a week, which the Claimant says should have been paid at time-and-a-half but was only paid at normal hourly rate; and

1.4 Breach of contract in relation to the above",

and the list of issues will include:

7. Unauthorised deductions

7. 1 Were the wages paid to the Claimant throughout her employment less than the wages they should have been paid? The Claimant says that where she worked 17 or more hours per week she was entitled to be paid at a rate of 1. 5 times her normal hourly rate for those excess hours. The Claimant says she was only paid the normal hourly rate for those excess hours.

7. 2 Was any deduction required or authorised by statute?

7. 3 Was any deduction required or authorised by a written term of the contract?

7. 4 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

7. 5 Did the Claimant agree in writing to the deduction before it was made?

7. 6 How much is the Claimant owed?

8 Breach of Contract

8. 1 Did this claim arise or was it outstanding when the Claimant's employment ended?

8. 2 Did the Respondent do the following

8.2. 1 The Claimant says that where she worked 17 or more hours person week, she was entitled to be paid at a rate of 1.5 times her normal hourly rate for those excess hours under the terms of her employment contract. The Claimant says she was only paid the normal hourly rate for those excess hours.

8. 3 Was that a breach of contract?

8.4 How much should the Claimant be awarded as damages?"

26. The issues concerning "Remedy" in EJ Byrne's Orders are re-titled "Remedy for unfair dismissal and discrimination", and are numbered 9, 9.1, etc.