



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss Kelly Arnold

**Respondents:** (1) Select Enterprises (South East) Limited  
(2) Mrs Balvinder Kalsi

**Heard at:** East London Hearing Centre

**On:** 15, 16, 17, 18, 22 & 23 October 2024

**Before:** Employment Judge Barrett  
**Members:** Miss M Daniels  
Mr L O'Callaghan

## Representation

**Claimant:** Mr Stewart Arnold, her father  
**Respondent:** Mr Marc Ramsbottom, Peninsula UK

# JUDGMENT

The judgment of the Tribunal is that: -

1. The First Respondent constructively unfairly dismissed the Claimant. The Claimant's complaint of unfair dismissal brought against the First Respondent is well-founded and succeeds.
2. The Claimant's remaining claims of direct sexual orientation discrimination, harassment related to sexual orientation, harassment related to disability and discrimination arising from disability brought against the First and Second Respondents are not well-founded and are dismissed.
3. A hearing to determine remedy will be listed. Case management directions concerning the remedy hearing will be sent in a separate case management order.

# REASONS

*This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.*

## Introduction

1. The First Respondent is a company which operates a chain of nurseries known as Kids Inc Nurseries. At the time of the events giving rise to this claim it employed approximately 300 people. The Second Respondent is the joint owner and director of the First Respondent, together with her husband Mr Sav Kalsi. The Claimant worked for the First Respondent from 5 January 2015 to 10 April 2021. On 1 April 2019 her role changed from HR / Payroll Administrator to Executive Assistant to the Second Respondent.
2. The events giving rise to the Claimant's claim occurred between 8 November 2020 and 8 April 2021, when she tendered her resignation. They occurred in the context of the Covid-19 pandemic. The Tribunal was provided with and had regard to a timeline of lockdowns and a copy of the applicable Covid-19 Government guidance.
3. Following early conciliation between 12 and 14 April 2021, the Claimant presented her ET1 claim form to the Tribunal on 1 May 2021 containing complaints of constructive unfair dismissal and sexual orientation discrimination. Following case management at preliminary hearings, her amended claim comprises complaints of constructive unfair dismissal, direct sexual orientation discrimination, harassment related to sexual orientation, harassment related to disability and discrimination arising from disability. The Respondents resist her claims.

## The hearing

4. The hearing was conducted by Cloud Video Platform over five days and the Tribunal convened to deliberate on the sixth day. The Claimant was represented by her father Mr Stewart Arnold, who has a legal background albeit not in employment law. The Respondent was represented by Mr Marc Ramsbottom of Peninsula UK.
5. The Tribunal was provided with a bundle of documents numbering 481 pages, to which an additional 8 pages of Covid-19 guidance were added by agreement, a bundle of witness statements numbering 74 pages, a chronology drafted by the Respondents and amended by the Claimant, an agreed list of issues and an opening submission on behalf of the Respondents.
6. The first day was taken up with housekeeping matters and Tribunal reading time.
7. On the second and third days, the following witnesses gave evidence in support of the Claimant:
  - 7.1. The Claimant herself.

- 7.2. Her father, Mr Arnold, who gave evidence about contemporaneous conversations he had had with his daughter about events at and related to work.
- 7.3. Ms Nicola Campbell, the Claimant's partner, who gave evidence about circumstances leading to the Claimant self-isolating in November 2020, as well as contemporaneous conversations about work events and the Claimant's health.
- 7.4. The Claimant's brother, Mr Lee Arnold, gave evidence about the impact work events had on his sister's health including on 25 November 2020.
- 7.5. Mrs Lara Elder, a former employee of the First Respondent from 8 September to 30 October 2020, gave evidence about her experience working for the company and the extent of its compliance with Covid-19 guidance.
- 7.6. Mrs Brenda Martin and Mr James Martin, the Claimant's former primary school teacher and her husband who are long-standing friends of the Claimant's. They gave evidence about contemporaneous conversations they had with the Claimant about work events, and her health.
- 7.7. Mrs Gemma Peck, another friend, who gave evidence about contemporaneous conversations she had with the Claimant, the Claimant's compliance with Covid-19 guidance and the Claimant's health.
8. The Claimant additionally supplied written statements from Paola Wood, Karen Granby and Kayleigh Every, which the Tribunal read but has placed less weight upon as they were not tested in cross-examination.
9. On the fourth and fifth days, the Tribunal heard evidence from the following witnesses from the First Respondent:
  - 9.1. The Second Respondent, who gave evidence about a disciplinary investigation meeting conducted with the Claimant on 19 November 2020 and the circumstances in which the Claimant was paid £2,000 in April 2019; the Claimant says this was a gift or bonus whereas the Respondents contend it was merely a loan.
  - 9.2. Mrs Jessica May, former Operations Support Manager at the First Respondent, who took notes at the 19 November 2020 meeting and thereafter corresponded with the Claimant about suspension, grievance and sickness absence processes.
  - 9.3. Miss Stevie Deeble, former Senior Manager and current Operations Director at the First Respondent, who conducted the investigation into the Claimant's grievance.
  - 9.4. Mrs Sonia Sabharwal, the First Respondent's former Finance Manager, whose name appears as a witness on the document which the Respondents say was a Loan Agreement signed by the Claimant in April 2019.
10. Mrs Sabharwal was not on the original list of witnesses to be called by the Respondents. On the second day of the hearing, Mr Arnold made an application

on the Claimant's behalf for witness orders to compel two witnesses to attend the hearing and give evidence about the £2,000 gift / loan issue. The first proposed witness was Mrs Sabharwal and the second was Mrs Kirstie Albany, the First Respondent's former HR Manager, whom the Claimant alleged may have been involved in forging her signature on the said Loan Agreement. Prior to making the application, Mr Arnold asked the Respondents' legal representatives for contact details for the two proposed witnesses so he could ask if they were willing to give evidence voluntarily. The Respondents declined to provide contact details and (at that stage) decided not to call the two proposed witnesses themselves.

11. Mr Arnold submitted that the proposed witnesses could give evidence as to the Loan Agreement, which was a key issue in the case going to the credibility of the Claimant and the Respondents. He had had no way of contacting them and needed the Tribunal to issue an order. Mr Ramsbottom relied on *Noorani v Merseyside TEC Ltd* [1999] IRLR 184 as authority for the proposition that the evidence of a proposed witness must be of sufficient relevance to justify making a witness order. He submitted that Mrs Sabharwal's evidence was not of sufficient relevance given that she was merely a witness not a party to the disputed agreement and the key witnesses as to what was said about the terms of the £2,000 payment, namely the Claimant and the Second Respondent, were giving evidence. Mrs Albany was still less relevant as she had no connection with the issue other than the Claimant's bare allegation that she might have been involved.
12. The Tribunal considered the matter and gave its case management decision on the morning of the third day. Rule 32 of the Employment Tribunal Rules of Procedure provides that the Tribunal may order any person in Great Britain to attend a hearing to give evidence. In considering whether to grant an application for a witness order, the Tribunal is required to act in accordance with the overriding objective to deal with cases fairly and justly, and in particular to consider whether first, that the witness can give relevant evidence and, secondly, that it is necessary to issue the order: *Dada v Metal Box Co Ltd* [1974] ICR 559. The Tribunal considered that the genuineness or otherwise of the Loan Agreement was a crucial issue in the case; the Claimant's allegation that "*the respondents have forged her signature and that the attempt to invent the existence of a loan agreement is an act of fraud*", is an allegation of breach of trust and confidence contributing to constructive unfair dismissal, and an allegation of direct sexual orientation discrimination. However, the Tribunal took into account that the two key witnesses, the Claimant and the Second Respondent, would be cross-examined on their evidence on the issue, and the relevant documentation was available in the trial bundle. Further, that it was open to the Claimant to invite the Tribunal to draw an inference from the Respondents' decision not to call a witness to give evidence. In the circumstances, the Tribunal concluded that the proposed witnesses' evidence was not sufficiently relevant to justify making a witness order, bearing in mind the need to deal with the case fairly and justly, which includes dealing with cases in ways which are proportionate to the complexity and importance of the issues, and avoiding delay (rule 2 of the Employment Tribunal Rules of Procedure). Mr Arnold requested written reasons for the Tribunal's decision, which are hereby provided.
13. However, matters moved on as during the break between the fourth and fifth days of the hearing, the Respondents applied to call Mrs Sabharwal as a witness,

despite not having served a witness statement from her. The Claimant objected to the timing of the application, but given that she had previously wished to have the witness called, the Tribunal allowed it and Mrs Sabharwal gave her evidence on the afternoon of the fifth day, relying on the note of her answers in two internal grievance investigation interviews as her evidence-in-chief, expanded upon in answers to supplemental questions.

14. At the close of the evidence on the afternoon of the fifth day, both Mr Arnold and Mr Ramsbottom made helpful written and oral closing submissions.
15. The sixth day was taken up with the Tribunal's deliberations and the parties did not attend.

## Findings of fact

### Commencement of employment

16. The Claimant applied for a job with the First Respondent in November 2018. The parties agree that she mentioned during the interview process that she had a female partner, and therefore the Respondents were aware of her sexual orientation from the outset of the employment relationship.
17. It is also not disputed that the Claimant is a disabled person by reason of a back condition, and that the Respondents were aware of this throughout her employment.
18. The Claimant commenced employment on 5 January 2015.

### The £2,000 payment in April 2019

19. On 1 April 2019, the Claimant's job role changed from HR / Payroll Administrator to Executive Assistant to the Second Respondent. She signed a contract amendment form recording this change on 8 April 2019. Her salary increased from £26,000 to £30,000 per annum.
20. At around this time the Second Respondent handed the Claimant a company cheque for £2,000. As noted above there is a dispute between the parties as to whether this was expressed to be a gift or a loan. The Claimant says that it came as a surprise. She recalls that that Second Respondent said it was intended to cover moving expenses as the Claimant had been talking about finding a new place to rent, and that it was a "*welcome to the new role bonus*", but that if there were pay rises the following January, the £2,000 would be her pay rise in advance. The Second Respondent says that she offered to loan the Claimant the money as a deposit for a new flat, that she would never make such a gift to an employee, and that the Claimant signed a written contract ("the Loan Agreement") at the time undertaking to repay the sum.
21. The Tribunal unanimously concludes that the £2,000 was paid as a gift or bonus and was not at the time expressed to be a loan. Our reasons for preferring the Claimant's account of this matter are as follow:
  - 21.1. For reasons set out at paragraph 84 below, we find that the Claimant's signature on the purported Loan Agreement was copied from another document, and she did not sign the Loan Agreement. This strongly tends

to suggest that that Respondents' account of the way the Loan Agreement document was produced is not credible.

- 21.2. The Respondents' case was that the Claimant may have misunderstood the nature of the payment, and thought it was a gift when in fact it was a loan. It was also the Respondents' case – and the evidence of their witnesses – that the Claimant signed the Loan Agreement. However, it is very unlikely that the Claimant could have signed the Loan Agreement and still have mistaken the nature of the payment.
- 21.3. We accepted the Claimant's evidence about the £2,000 as straightforward and credible. Her credibility was bolstered by the fact that she disputed the contention that the £2,000 was a loan as soon as it was made to her, and took prompt steps to inform Action Fraud and the police, as detailed at paragraphs 90 and 97 below.
- 21.4. Mr Stewart Arnold, Mr Lee Arnold, Ms Campbell, Mr and Mrs Martin, and Mrs Peck all gave evidence about the Claimant telling them in 2019 that she had been given £2,000 by her employer. The Tribunal accepts their evidence and consider it shows the Claimant's natural reaction to a happy surprise was to tell her family and close friends about it.
- 21.5. Although the Claimant did want to move, she did not need to borrow money for a deposit in April 2019. WhatsApp messages in the bundle show that she moved to a new flat in or around January 2020. We also accept the Claimant's evidence that she already had the money for a deposit saved, and the higher salary in her new role allowed her to look for places with a higher monthly rent.
- 21.6. On the face of the Loan Agreement, the £2,000 was said to be repayable on or before two years elapsed, and repayable at any time on written demand. The Tribunal considers it unlikely that a company loan to an employee would not have a repayment schedule with, for example, tranches to be deducted from salary. In a grievance investigation interview, the Second Respondent said she *"thought that by 2 years' time if she was still in the role, I would use it as a salary increase instead of a pay rise and write it off"*. However, this would have given rise to complicated issues with tax, NI, pension contributions and so forth which do not appear to have been addressed.
- 21.7. It is not disputed that the Second Respondent was generous towards employees and the Tribunal considers that giving a bonus on the appointment of the Claimant to the role of Executive Assistant would not have been out of character for her.

#### The Claimant's Executive Assistant role

22. The Claimant's Executive Assistant role involved performing a variety of tasks, including running personal errands for the Second Respondent such as collecting dry cleaning and groceries for her and her family members. The parties agreed that she sometimes worked outside normal office hours and would reply to messages from the Second Respondent on evenings and weekends.

23. The parties agree that the Claimant and the Second Respondent had a close working relationship and got on well. The Claimant took pride in her role and would, for example, visit several shops to look for a particular branded item the Second Respondent wanted.

The Claimant's relationship with Ms Campbell

24. The Claimant spoke at work about her friendship with Ms Campbell, and her colleagues sometimes ordered goods from Ms Campbell's chutney and pickle business.
25. The Claimant and Ms Campbell formed a romantic relationship at some point prior to the beginning of 2020. At this time, Ms Campbell separated from her husband but they continued to live in the same house. The Claimant did not discuss this aspect of her private life at work.

Events during the Covid-19 pandemic from March 2020

26. In March 2020, the country went into lockdown in response to the Covid-19 pandemic. The First Respondent kept a limited number of nurseries open for the children of key-workers, and closed others. Some of the First Respondent's staff were furloughed, but the Claimant continued to attend work at Head Office and to carry out errands between the nurseries which were open and to shops to buy personal items for the Second Respondent and her family. On 30 March 2020, the Second Respondent sent her a message thanking her for *"the extra running around that you're doing at the moment"*.
27. During the summer of 2020, the Claimant spoke to the Second Respondent and others about helping Ms Campbell sell at food markets on the weekends. The Second Respondent and her other colleagues were also aware that she and Ms Campbell went on holiday together in early October 2020.
28. However, the Second Respondent did not know that the Claimant and Ms Campbell had formed a romantic relationship nor that Ms Campbell stayed with the Claimant at weekends. During the week, Ms Campbell lived in her own home, as did her then-husband whom she was separated from.

The Claimant's linked household contact with Covid-19

29. On 5 November 2020, the second national lockdown came into force. The applicable guidance at the time permitted 'support bubbles' defined as follows:

**'A support bubble is a support network that links 2 households.**

**You can only form a support bubble if you meet certain eligibility rules. Not everyone can form a support bubble.**

...

**Once you're in a support bubble, you can think of yourself as being in one 'household'. This means you can have close contact with the other household in your bubble as if they were members of your own household.**

...

**Not everybody can form a support bubble. It is against the law to form a support bubble if you are not eligible.**

**You can form a support bubble with another household of any size if:**

- **you live by yourself – even if carers visit you to provide support**

...

**All members of your household must be part of the same bubble. This means you and the people you live with cannot form separate bubbles, even if you meet more than one of the eligibility rules above.'**

30. Ms Campbell was permitted to visit the Claimant's home under the applicable rules because the Claimant lived alone. There is no suggestion that anyone in the Claimant or Ms Campbell's household formed a bubble with anyone else. The Tribunal has not heard evidence as to when Ms Campbell first started staying at the Claimant's flat at weekends and therefore makes no finding as to whether this pre-dated or post-dated the introduction of the support bubble rule.
31. On Sunday 8 November 2020, the Claimant learned that Ms Campbell's estranged husband had tested positive for Covid-19. Her evidence, which the Tribunal accepts, was that within 10 minutes of hearing this she sent the Second Respondent the following message:

**'Hi Balvinder, hope you're ok. I'm really sorry but I am going to have to stay off work until I've had a covid test and get the result. Nikki has been here all weekend and yesterday morning found out her soon to be ex husband Lee was an idiot and has been exposed. He shared a car with 2 friends no masks to go play golf. 1 friend tested positive. Lee managed to get a test late afternoon yesterday, his results just came back, he tested positive! Neither I or Nikki have any symptoms whatsoever and while I am now scared in general and about worried about rent etc., I know the right thing to do, is to tell you immediately and try to find a test somewhere as quickly as possible. Sorry [crying face emoji] xxx'.**

32. The Second Respondent replied:

**'Kelly**

**I think the word you're looking for is covidiot! [rolling eyes emoji] Some people just don't think about the knock on effect of their actions on others!**

**Please don't worry. If you can't get a test tomorrow, I'll ask Sonia to speak to the people that did the anti body testing - they should be able to organise something. In fact, to speed things up, call Sonia first thing (she's always in early on a Monday) and ask her to arrange this for you. Only if Nikki's test is positive, will you have to isolate for 14 days. If her (and yours) test is negative, then I don't think there's anything to worry about. If you do have to isolate, we can work something out salary wise.**

**So no need to worry.**

**Speak tomorrow. B xxx'.**

33. The Claimant replied to thank her, and messaged again the following day to confirm she had taken a test at a testing centre. She and Ms Campbell both subsequently received a negative result.

Absence from work for Covid-19 self-isolation 9-18 November 2020

34. The following day, on Monday 9 November 2019, the Claimant received a telephone call from Mrs May which lasted 25 minutes and also called Mrs May for a further conversation lasting 16 minutes. During one of these conversations (Mrs May's evidence was that she thought it was the second one) the Claimant told Mrs May that she and Ms Campbell were in a romantic relationship and that Ms Campbell had been staying with her at weekends.
35. The Claimant messaged the Second Respondent asking if she could work from home, with a list of various tasks she could perform remotely. On Wednesday 11 November 2020, the Claimant messaged Mrs May that she was feeling paranoid about the Second Respondent not replying to her messages. The Second Respondent had a migraine that week and therefore was not regularly in contact with anyone at work.
36. Mrs May spoke to the Second Respondent by telephone on Thursday 12 November 2020. During this call, Mrs May told the Second Respondent about the Claimant's relationship with Ms Campbell and that Ms Campbell had been staying with the Claimant at weekends. The Second Respondent expressed surprise and said that she thought this was not allowed. They also discussed the Claimant's request to work from home, which the Second Respondent declined.
37. Later that day, Mrs May wrote to ask the Claimant and Ms Campbell to take a further test the following week before returning to work. She also suggested the Claimant might use her two remaining annual leave days to make up her income. The Claimant replied:
- 'Of course we will get another test. Really wish I was allowed to work from home, as others have been allowed. I am truly hating this and I don't understand that changed since Monday, but it is what it is. I've obviously update Balvinder which makes me very sad to be honest. I know you said I didn't have anything to feel bad about but I clearly do. I'll let you know the result of the tests and I'll have a think about the annual leave, please thank Balvinder for me xx'.**
38. In a further message the following day, the Claimant told Mrs May that her loss of earnings would mean she could not buy Christmas presents that year. Not being able to work from home, the Claimant reported her linked household contact with Covid-19 to the Government's Track and Trace service in order to be eligible to receive SSP from her first day of absence (it would otherwise start on day 3). She received an 'isolation note' certifying that:
- 'The person named above has been told to self-isolate by an NHS service or a healthcare professional. This is because they are in a support bubble with someone who has symptoms of coronavirus'.**
39. One of the allegations made by the Claimant is that between 9 and 19 November 2020 Mrs May repeatedly called her asking her about her private relationship with her partner. The telephone records show that in addition to the two calls on 9 November 2020, the Claimant and Mrs May also spoke on 11 and 16 November. The Claimant gave evidence that during these conversations, Mrs May conducted a "polite interrogation" into her relationship with Ms Campbell. Mrs May does not dispute that they spoke about the relationship, saying she was pleased for the Claimant and told her so. The Tribunal finds that Mrs May did ask

the Claimant questions about her relationship during these calls and that she was seeking to find out information about it to convey to the Second Respondent.

40. The Claimant further alleges that during these conversations Mrs May misled her to believe that at most she would receive a minor telling off for missing work. Her evidence was that Mrs May told her that either nothing would be said or at worst she might get a *“slap on the wrist”*; she was unsure what she had done wrong but sensed that she had annoyed the Second Respondent. Mrs May, when giving evidence, accepted that she had sought to reassure the Claimant, who (as noted above) was expressing concern about the lack of contact from the Second Respondent. When asked in the internal grievance investigation interview, Mrs May said she had told the Claimant that she may expect a *“telling off”* for saying that she lived alone.
41. The Tribunal considers that in the early part of the Claimant’s absence, Mrs May did want to reassure her that the reason for the lack of contact was that the Second Respondent was suffering from a migraine. However, from 12 November 2020 onwards, Mrs May must have known that the Second Respondent believed the Claimant had done something wrong by having Ms Campbell stay over at her flat on weekends. Further, the Respondents’ case is that during the Claimant’s absence, other colleagues in the office (namely, Mrs Albany, Mrs Sabharwal, Claudia Swaep and ‘Antonia’) raised concerns about the Claimant’s conduct which the Second Respondent and Mrs May felt necessary to investigate.
42. On 17 November 2020, the Claimant wrote to Ms Campbell, *“thank you so much for our chat yesterday, last night was the 1<sup>st</sup> time I slept well”*. The Tribunal finds that Mrs May did reassure the Claimant in their telephone conversation on 16 November 2020. Doing so, when Mrs May knew that the Second Respondent believed the Claimant had breached lockdown rules and other concerns were being investigated, gave the Claimant a misleading impression about the situation she would come back to when she returned to work.
43. On 18 November 2020, the Claimant reported a second negative test result and Mrs May told her she could return to work the next day. The Claimant returned to work on Thursday 19 November 2020.

#### Meeting of 19 November 2020

44. On arrival, the Claimant was asked by a colleague to run an errand, which she did, and then to make a telephone call. The Claimant was on the phone when the Second Respondent, and then Mrs May, arrived at the office. Mrs May asked her to come into the meeting room when she finished on the phone. The Claimant did as she was asked, going into a small room used for meetings which was located close to her desk. When she entered the room, the Second Respondent and Mrs May were waiting for her. A meeting then took place lasting from 10.14 to 10.50.
45. There is a dispute between the parties as to whether the Claimant was told what the meeting was about. The Claimant alleges that she was not told, and it was not until she was suspended at the end of the meeting that she realised she had been in a disciplinary investigation meeting. The Respondents say that the Claimant was told at the beginning of the meeting that it was a disciplinary investigation meeting. Mrs May took a note of the minutes of the meeting which

record that at the beginning, the Second Respondent stated, "*On behalf of the Company I will chair this investigatory meeting and Angela [Mrs May] will take notes*". The Claimant's amended version of the minutes show that her recollection differed, and the Second Respondent had simply said, "*Angela will take the notes for this meeting*". Even on the original version, it was not made clear that the purpose of the meeting was to investigate a disciplinary allegation against the Claimant. The Tribunal prefers the Claimant's version as more accurate, because she disputed the minutes promptly and gave credible evidence on the matter. The Tribunal also considers that the Claimant's answers during the meeting (on either version of the minutes) show a tendency to compliance which was consistent with a belief that she would receive a minor telling off or 'slap on the wrist' if she simply apologised for any perceived wrongdoing, rather than realising that she was facing a serious disciplinary investigation and needed to defend herself. The Claimant has since referred to the 19 November 2020 meeting as the 'ambush' meeting, and the Tribunal accepts that to be a fair description.

46. The Claimant further alleges that the meeting was hostile and unfairly weighted against her. The Respondents deny this allegation. The Second Respondent said in her evidence that it was "*calm and measured*". Mrs May said it was tense at points but not to the extent that she thought it was unfair or the Claimant needed a break. The Tribunal unanimously prefers the Claimant's characterisation of the meeting. Looking at the minutes (both the original and the amended versions) it is apparent that the Second Respondent took a scattergun approach, bombarding the Claimant with a range of accusations which were in the main not properly disciplinary matters at all, and in some cases related to things which had happened months before. The accusations included:
- 46.1. That the Claimant had failed to delegate tasks during her self-isolation period such as collecting prescriptions for the Second Respondent's father-in-law and picking up the Second Respondent's dry cleaning. Given that the Claimant had asked for and been refused the opportunity to work from home, and was on leave, the Tribunal considers that the responsibility for delegating her tasks lay with her line manager, the Second Respondent. It was unfair to suggest that the Claimant had done something wrong by not undertaking to delegate the work herself. The Claimant nonetheless apologised for this. The Second Respondent told her she was disappointed and "*so upset by how much you have let me down*".
  - 46.2. That the Claimant had lied to the Second Respondent by saying she lived alone. Mrs May's minutes suggest that the Claimant simply accepted this allegation, saying "yes" when the Second Respondent put to her that "*You knew you had someone living with you and you lied to me and didn't tell me*". The Claimant's amended minutes show her recollection is that she replied, by way of defence, "*She visits at weekends...*". The Tribunal understands that in the context of the heightened anxiety that was prevalent during the Covid-19 pandemic, the Second Respondent was alarmed that she had not fully understood the risk the Claimant might have presented given that she spent time indoors with her partner. There was also a potential issue as to whether Ms Campbell might have begun visiting the Claimant at home in the earlier part of the first lockdown before the support bubble exception was introduced. However, there was

no proper or fair investigation into this potential issue (and it was not put to the Claimant or Ms Campbell during this hearing either). Instead, the Claimant was repeatedly accused of lying. The Tribunal finds that the Claimant did live alone and that Ms Campbell only visited. Even if it was understandable for the Second Respondent to be anxious, there was no proper basis to accuse the Claimant of lying about this.

- 46.3. That the Claimant had told two colleagues that she could not buy Christmas presents for family and friends because she did not receive full pay while she was off work. The Second Respondent interrogated the Claimant about her personal finances. The Claimant's ability or otherwise to buy Christmas presents could not possibly have amounted to a disciplinary issue, and her personal finances were not something the Respondents were entitled to investigate. This allegation also showed that Mrs May had relayed to the Second Respondent the content of the Claimant's message about Christmas presents.
- 46.4. That during the summer of 2020, the Second Respondent had telephoned the Claimant at 17.15 and asked her to buy her a home blender and bring it to the Second Respondent's house on the Claimant's way home, because the Second Respondent wanted to do home baking and her blender had broken. The the Claimant had called her back to say Argos was out of stock, whereas the Second Respondent alleged that in fact a colleague checked and Argos had blenders available. This is such a trivial matter to arise months later, that the Tribunal considers it showed that the Second Respondent and / or Mrs May must have invited the Claimant's colleagues to supply any concerns they had about her during the period she was absent from work.
- 46.5. That in October 2020, the Claimant had driven the Second Respondent home but then complained to a colleague the following day that she had not got home herself until 18.20. The Claimant's response was that she may have mentioned it but it was not said as a complaint. Even if the Claimant had complained about getting home late, this would not have constituted a disciplinary issue. The Tribunal again considers that this shows that there had been a fishing expedition to find out information to use against the Claimant in the meeting.
- 46.6. That during the first lockdown the Claimant had been slow in joining her colleagues to volunteer to prepare gift bags for NHS staff in the office. Mrs May intervened at this point in the meeting to support this allegation (*"Eventually you came down to the back after being asked by 3 different people to come and join us..."*). Mrs May's notes record the Claimant protesting that she did help but acknowledging that she ought to have gone to help sooner whereas the Claimant's amended minutes suggest that she explained she had been late to join because she had a work deadline. Even if the Claimant was late in joining a volunteering effort this could not reasonably be construed to be a proper matter for disciplinary investigation.
- 46.7. That at the same time the Claimant had been seen by colleagues playing games and messaging on her PC. Mrs May's notes show that the Claimant explained she had a legitimate reason to have Facebook open

on her PC as (which is not disputed) part of her duties involved selling personal items for the Second Respondent on Facebook marketplace. The Claimant's amended minutes have more detail, including that on a different date she once played a game with Mrs Albany when she had finished her tasks, to which the Second Respondent replied, "*We aren't here to talk about Kirstie*". This was at most a minor conduct issue, which ought to have been raised at the time and not brought up months later.

- 46.8. That the Claimant had not kept up to date with filing when covering a period of Mrs Albany's absence; the Claimant said she had done everything she was instructed to do but apologised when told she had missed something. At most this amounted to a minor competency issue and should not have been included in a disciplinary investigation.
47. Towards the end of the meeting, the Second Respondent returned to the topic of Covid-19 risk, saying, "*I'm so disappointed you deceived me Kelly*" and "*by behaving this way, you took the decision to protect my family away from me*". The Claimant apologised repeatedly. At the end of the meeting, the Second Respondent said,
- "I am suspending you for gross misconduct. Your behaviour and negligence is a fundamental breach of contractual terms and irrevocably destroys the trust and confidence necessary to continue the employment relationship. There was also a breach of health and safety rules that endangers the lives of or may cause injury to, employees or any other person. I am suspending you and would like you to go home, please leave your office keys here and we will be in touch with you".**
48. The Second Respondent's evidence was that she did not decide to suspend until the end of the meeting, and that while she may have had notes to refer to, she was not speaking from a script. The Tribunal finds that the language used in this final passage, which is more formal than that recorded in the rest of the minutes, shows that the Second Respondent had prepared what she was going to say to the Claimant in advance.
49. The Claimant was shocked and distressed to be suspended when she had thought she was at most going to face a minor telling off, and at the abrupt breakdown of her formerly close working relationship with the Second Respondent.
50. The Second Respondent and Mrs May gave evidence that after the Claimant went home, Mrs May conducted investigation interviews with the Claimant's colleagues Mrs Albany, Mrs Sabharwal, Ms Swaep and 'Antonia'. Mrs May says she took minutes of those interviews. No notes or record of these interviews were disclosed by the Respondents or produced before the Tribunal.

Suspension letter and other communications 19-24 November 2020

51. That afternoon, Mrs May sent the Claimant by email a letter confirming suspension and inviting her to a disciplinary hearing the following day. The letter read:

**'Dear Kelly**

Further to our meeting on 19 November 2020, I write to confirm that you have been suspended on contractual pay to allow an investigation to take place following the allegations below:

- **Alleged dishonesty which has resulted in a fundamental breach of trust that has irrevocably destroyed the trust and confidence necessary to continue the employment relationship in the position of trust you have.**

As your employer we have the duty to fully and properly investigate these matters. Suspension from duty on contractual pay is not regarded as disciplinary action. It is merely a holding measure pending further investigation where it is undesirable for an individual to remain on duty.

The duration of suspension will only be for as long as it takes to complete the investigation. During your suspension you remain our employee and continue to be bound by your terms and conditions of employment. It may be necessary for me to contact you and/or require you to attend a disciplinary hearing and you are required to make yourself available during your normal working hours.

During this suspension you must refrain from attending the workplace, whether during or outside of normal working hours, unless it has been specifically requested by the company or otherwise authorised in advance. You are also instructed not to contact or to attempt to contact or influence anyone connected with the investigation in any way or to discuss this matter with any other employee or client of ours. I am duty bound to inform you that a failure to abide by this instruction would be treated as an act of misconduct. However, if there is anyone whom you feel could provide a witness statement which would help in investigation the allegations against you, then please contact me and I will arrange for them to be interviewed.

You are required to attend a disciplinary hearing on Friday 20 November 2020 at Kids Inc, Head Office at 3.30pm.

Once our investigations have been completed, we will contact you again to inform you of what action, if any, we will be taking.

If you have any queries regarding the contents of this letter, please contact me.

Yours sincerely

Angela May

*Support Manager*

52. This letter put the disciplinary allegation in the strongest terms without explaining what the Claimant was said to have done wrong. When looking back at the letter in the course of giving her evidence, Mrs May said it looked “*rubbish*” and that as a result of merging two template letters she had accidentally omitted to tell the Claimant that she had a right to be accompanied to the scheduled disciplinary hearing. The Tribunal finds that coming after the shock of the meeting, this letter compounded the Claimant’s distress.
53. The Second Respondent’s evidence was that the investigation referred to in this letter which required to be undertaken was interviewing colleagues who had raised concerns about the Claimant’s conduct during the time she was self-isolating. As noted above, she and Mrs May gave evidence that those interviews were completed on that same day, 19 November 2020.

54. Later that afternoon, Mrs May sent the Claimant a copy of her notes of the meeting the Claimant had attended earlier that day. At 18.31 on the same day, the Claimant emailed her reply stating:

**'Thank you for sending them however I do not believe the minutes are accurate. There are things written I categorically did not say and there are things I said that aren't minuted'.**

55. The Tribunal has been told that the First Respondent's Mimecast email security software delayed receipt of emails from the Claimant's web-based email address. However, the Claimant's email disputing the minutes must have been received by 11.34 on 20 November 2020, when Mrs May replied:

**'If you would like to write your additions on to the minutes and highlight anything you don't think is accurate, and please bring them with you later to our meeting'.**

56. At 12.49 that day, the Claimant replied and requested that the disciplinary hearing be rescheduled until after she had received the corrected minutes and had a proper opportunity to consider the disciplinary process. She wrote again at 13.31 asking for confirmation that proper and reasonable time would be allowed.

57. Those two emails appear not to have been received by Mrs May until 18.36 that day, i.e. after the time of the scheduled disciplinary hearing had elapsed. She responded on Saturday 21 November 2020, saying:

**'Your email arrived at 6.36pm last night. I attach the photo proof.**

**However I repeat, we are holding the investigation meeting again on Monday as you are unhappy with the minutes and further information has come to light.**

**Please confirm you will be attending at 10.30am on Monday.'**

58. When asked during her evidence, the Second Respondent did not know what further information had come to light which was thought to justify re-running the investigation meeting. Mrs May said it was conducting the interviews with other members of the office staff which provided further details about their allegations on the Claimant's behaviour. However, the Tribunal has not been provided with any evidence as to the content of those interviews, or the notes of the interviews which Mrs May says she took.

59. At 08.16 on Monday 23 November 2020, the Claimant sent the following email in reply, appending a corrected version of the minutes:

**'I refer to your email of Saturday afternoon.**

**To expedite the process, I am pleased to tell you that I have just finished correcting the Minutes of 19.11.20. I attach the final version with a set showing corrections in red.**

**For the record, I repeat that I had absolutely no advance notice or indication that the meeting last Thursday was in any way to be a formal or investigatory meeting. Encouraged by your reassuring remarks to me (recorded in my email of 20.11.20), I genuinely thought I was attending a 'clear the air' meeting purely to address any concerns prior to my return to work.**

Please relay to Balvinder and Sav that the dramatic and seemingly hostile turn of events on Thursday left me devastated and shocked. I have had to take diazepam because of the stress and concern of the treatment I have been subjected to.

As the Covid exposure risk question seems to be the main concern of Balvinder, I respectfully point out that the Government guidelines only require an employee to declare if he/she has been in contact with someone who has tested positive. In this case, that person is Nikki's estranged husband and I have NEVER been in contact with him. Nonetheless, upon hearing that he had tested positive, I notified Balvinder immediately not because I had to but because I felt she should be aware as I did not want to risk the possibility of giving it to her, her family or my colleagues. So this demonstrates maximum transparency on my part and not a case of dishonesty.

As to the other matters in the meeting of 19.11.20, I realise this is not the time or place for me to debate every point but by way of one example only, regarding the allegation of me wanting to get out of work or away on time or early, you will remember in August when my car was rear-ended, while very shaken and upset I still continued and completed my errands rather than look for what could have been an easy excuse to go home.

In the spirit of goodwill, I sincerely invite Balvinder to reconsider the current process and my suspension which, with respect, I believe to be inappropriate. If she still wishes to pursue it, then on a constructive note may I suggest that she/you proceed with the corrected Minutes and if there are any additional matters that you email them to me to so as to adhere to the lockdown guidelines and I will do my very best to answer them as quickly as possible.

Given the intervening weekend, I have of course still had no real opportunity to seek advice elsewhere and which I will do if necessary.

Finally, for the avoidance of doubt regarding the email I sent to you Friday 20/11/20 at 12:49, I attach a screenshot showing the time I sent it.'

60. Due to the problem with the Respondent's email system, Mrs May did not receive that email until 14.08, i.e. after the 10.30 time scheduled by the Respondents for a further investigatory meeting. At 11.14, Mrs May had emailed the Claimant, saying:

**'As you have not attended our investigatory meeting that was due to be held today, I am inviting you to an investigatory meeting tomorrow at 3.30pm.**

**As I have said previously, we are holding a fresh investigatory meeting as you are unhappy with the minutes from the meeting held on Thursday 19 November, and further information has come to light which we would like to discuss with you.**

**I would like to remind you that you must be available to attend work whilst on suspension.**

**Please confirm your attendance tomorrow , by 5.30pm tonight.'**

61. The Claimant replied at 16.31 on 23 November 2020, saying:

**'I refer to your email this morning. I am disappointed to note that not only have you completely disregarded my email sent today at 08:16 (being a sincere attempt to resolve the current unfortunate situation), but as with my previous emails, you have not had the courtesy to even acknowledge it (them).**

I have taken the opportunity to fully discuss the matter with ACAS today (they were not there over the weekend) and my response reflects their advice.

As I have sent you corrected minutes of 19.11.20 while everything was still very fresh in my memory, I believe those minutes with 'warts and all', clearly do indeed represent a true and accurate record of that meeting.

The impact of Thursday's events which I believe to be a predetermined witch hunt, has had a significant detrimental effect on my health. I have struggled to remain calm, feeling in a persistent state of panic and have been forced to take medication to reduce my anxiety and heart rate levels, more so in the evening to allow me some sleep but low doses have been needed throughout the day as well, all against the background of your demanding emails each with a new deadline to be met.

With regard to your proposed 'redo investigation', I feel a) the corrected minutes cover all those issues and b) my current mental and emotional state make it impossible for me.

Additionally, just as everyone at the office has (but will be in fear of their job to agree), I have witnessed first-hand that Balvinder has predetermined outcomes of disciplinary hearings even before an investigation meeting has taken place; as I believe to be the case now. Finding myself now on the receiving end of that unfair inflexible view makes me feel very much that I am being bullied.

The errors in Thursday's hasty meeting demonstrates that this situation has been prejudged and the meeting was not carried out in a fair or reasonable way. My position and rights have been severely prejudged. This means I have a complete lack of confidence in your invitation for a 'redo'.

I am agreeable for you to email me with this the "further information that has come to light" and of course any questions arising from that, which I am ready and willing to answer.

For all of the above reasons, I feel unable to attend the meeting tomorrow but will instead prepare and send you my Statement of information in lieu of my attendance as advised by ACAS given the prevailing circumstances.'

62. That email appears to have been received by Mrs May at 17.13 that afternoon. Mrs May also sent a WhatsApp message to the Claimant on 23 November 2020 explaining that as a result of the problem with the email system, she had not received the Claimant's email of that morning until 14.08. She asked the Claimant to attend the rescheduled meeting on Tuesday 24 November 2020 at 3.30pm.

63. On 24 November 2020, the Claimant sent a statement in lieu of attendance to Mrs May, copied to the Second Respondent and others, which was received at 14.04. The statement contained an explanation of her reasons for non-attendance, including that:

'I have been advised by my GP today as follows. Prescribed anti-depressants to help me try to stay calmer. They will take 4 weeks to kick in and the first 2 weeks can make me feel worse. To have a blood pressure test and an ECG as the Doctor is extremely worried about my having constant palpitations. He was about to prescribe sleeping pills before realising the 3 serious medications I take which already have a sleepy effect but okay to continue with diazepam. He strongly advised me to seek counselling, which I will do.'

Events of 25 November 2020

64. The Claimant alleges that on 25 November 2020, the Respondents called her 13 times in 41 minutes. When giving evidence, Mrs May accepted that she did this, using various different phone numbers (including borrowing colleagues' work and personal phones). She said she called repeatedly because the Claimant had blocked her number and was not picking up. She wanted to warn the Claimant that she was sending her a proposed settlement agreement to exit the Claimant from the business, and she was worried that if the Claimant received this by post without Mrs May speaking to her about it, it would come as a shock. (The Tribunal has not been told about the content of any settlement discussions but all parties have referred to the fact that the Respondents were seeking to send a copy of a settlement proposal to the Claimant at this stage.)
65. Mrs May says she sent the Claimant a copy of the settlement agreement by recorded delivery and by post, and that both came back because the Claimant had not accepted delivery. Her evidence was that she threw the returned letters away. The Claimant gave evidence that she was suffering from poor mental health, and that there was one occasion when a delivery person called her doorbell and she did not feel well enough to get out of bed to accept the letter. The Tribunal accepts the Claimant's evidence that this only happened on one occasion.
66. The Tribunal finds that the Claimant had provided sufficient information by email that the Respondents ought to have been aware that her lack of telephone contact was because she was suffering from poor mental health. Mrs May in evidence said that she did not put as much weight as she could have done on what the Claimant was saying about her mental health during this period, because prior to 19 November 2020 the Claimant had been a happy, bubbly person.
67. The Claimant's next allegation is that on 25 November 2020, Mrs May and Mrs Albany visited her home unannounced. The Respondents do not dispute that on that date, Mrs May and Mrs Albany drove to the Claimant's home to hand-deliver a copy of the proposed settlement agreement. There was a letterbox at the entrance door to the building the Claimant lived in, and another letterbox in the front door to the Claimant's flat, which was located on the ground floor corridor inside the building. Mrs May says that she and Mrs Albany did not buzz the Claimant's doorbell or knock on her door, but that someone else let them into the building and they took a picture of the envelope containing the proposed settlement agreement being inserted into the letterbox in the Claimant's flat door. The Claimant says she was alarmed to see them arrive by car, and then further distressed by them buzzing her doorbell. The Claimant messaged her father, and he called her immediately. Mr Arnold gave evidence that during that phone call he could hear the Claimant's doorbell buzz multiple times, and that the Claimant was *"absolutely losing it having a meltdown"* in panic. He was abroad and so contacted his son, the Claimant's brother, to alert him to the situation. Mr Lee Arnold confirmed in his witness statement that his father told him *"they were buzzing Kelly's bell"* and that when he called his sister, *"she was sobbing and hyperventilating and could barely speak"*. The Tribunal accepts the Claimant's evidence given that she recalls reacting strongly to her doorbell buzzing, and her account is supported by the evidence of her father and brother.

The Claimant's grievance

68. There was then a period of time during which the parties conducted without prejudice discussions, which are not relevant to this claim. It is unclear to the Tribunal whether the Claimant's disciplinary suspension was formally lifted or whether matters simply moved on. When these discussions ended, Mrs May wrote to the Claimant on 22 January 2021 asking her to return to work on 25 January 2021.

69. On 25 January 2021, the Claimant submitted a grievance. The grievance included the following relevant passages:

**'When Balvinder asked me to change my role in the company from HR/Payroll Administrator to her Executive Assistant, it was because of my hard work and loyalty. As a welcome to my new role Balvinder very generously gave me a gift of £2,000 to enable me to move home, as she knew how much relocating meant to me.**

...

**'I have not done anything wrong, yet the treatment I have been subjected to is more extreme than anything I witnessed Balvinder do to anyone else before. I believe I have been singled out for this special extreme level of victimisation because our relationship was so close and Balvinder felt incredibly aggrieved when she discovered information about my private life as she would have felt she was entitled to know everything about me.**

**a) On 08 November 2020 at 16:51, I sent a WhatsApp message to Balvinder informing her immediately of a Covid situation. Balvinder's response at 16:52 assured me there was "no need to worry". There was no outrage on her part.**

**b) Between 09/11/2020 and 19/11/2020, Angela May ["Angela"] called me several times asking about my private relationship with my partner. I only realised later that under the pretence of friendly concern, Angela was probing me for information to feed back to Balvinder.**

**c) On 19 November 2020, I was ushered into an unscheduled meeting which I was previously tricked by Angela to believe would 'worst case scenario be a minor telling-off'. On the contrary, it was a hostile and unfairly-weighted meeting which I learned only later was an Investigatory Meeting. On the same day I received a Suspension letter.**

**It was during the time between 09/11/2020 and 19/11/2020 that Balvinder's attitude towards me totally changed. I have always known that working at Kids Inc involved a controlling micro management style but it is clear to me that my choosing to keep my private life as private and the subsequent discovery I had a partner, is what angered Balvinder and is the reason behind her decision to get rid of me.**

**I did not have to tell anyone at work anything about my private life. Nor did I have to tell anyone at work about a possible Covid risk unless my partner had herself tested positive, which was not the case. As a person with a disability who lives alone, I am entitled to a support bubble of which my partner, Nikki, was the only person in it. Everyone at work was fully aware that throughout the pandemic I saw Nikki at weekends; the only new information was that she is my partner. I have been punished for being more honest than I had to be and having a girlfriend. I have never before in my life had any issues requiring mental health assistance until as a direct result of this situation and how badly I have been treated. I was so**

devasted, shocked, upset and broken by it all that I have had to take antidepressants, beta blockers, undergone tests, mental health assessments and subsequent mental health coaching appointments all to help me try to get back to myself.' [251-252]

70. In the grievance, the Claimant alleged that the 19 November 2020 investigation meeting, suspension, short notice of disciplinary hearing, allegation of dishonesty, number of calls on 25 November 2020, and home visit on the same day amounted to discriminatory and bullying treatment.
71. Mrs May acknowledged receipt of the grievance on the same day. In the acknowledgement letter, she asked the Claimant to return to work or comply with the absence reporting policy. She added, "*We will be in contact with you soon, once somebody independent has been appointed to review all points within your letter and all other contents relating to your grievance*".
72. The Claimant did not return to work, and subsequently submitted GP fit notes certifying that she was not able to work due to work related stress and depression.
73. The next day, 26 January 2021, Miss Deeble emailed the Claimant saying she had been appointed to hear the grievance, attaching a letter inviting her to a grievance meeting. Miss Deeble's job title at that time was Senior Manager, and she was responsible for nurseries in one geographical area of the First Respondent's business. Miss Deeble's line manager was the Second Respondent. The Tribunal finds that given this organisational structure, Miss Deeble was not in a position to freely and independently investigate a grievance brought against the Second Respondent.
74. The Claimant said she could not attend the meeting because "*Kids Inc have caused the mental and physical health problems I am currently suffering and this is considered a temporary disability which makes personally attending the hearing process impossible for me*" but submitted a written statement in lieu of attendance. Miss Deeble sent her a list of written questions on 3 February 2021. The tone and content of these questions are discussed further at paragraph 79 below.
75. The Claimant responded to Miss Deeble's questions on 7 February 2021. In her response, the Claimant questioned the necessity and relevance of some of the questions, and Miss Deeble replied on this point the following day, saying:  
**'These questions were asked to help in my understanding of your grievance and to obtain all of the facts in relation to it prior to conducting my investigation. You are not under an obligation to answer the questions however I do believe that it would be of assistance'**.
76. On 9 February 2021, the Claimant sent Miss Deeble an audio recording of a voicemail Mrs May had left her.
77. On 10 February 2021, Miss Deeble conducted interviews with the Second Respondent, Mrs May, Mrs Albany, Ms Claudia Swaep, and Mrs Sabharwal. The tone and content of these interviews are discussed further at paragraph 79 below.
78. Miss Deeble wrote to the Claimant with the grievance outcome on 12 February 2021. Her findings were that:

- 78.1. The 19 November 2020 meeting was not an ambush or heavy-handed;
  - 78.2. The disciplinary hearing was originally scheduled with less than 24 hours' notice, but it was rescheduled;
  - 78.3. The Claimant's recorded statement in the 19 November 2020 meeting, "*I haven't lied about anything else*" could allude to an admission of dishonesty (and by implication, the Respondents were not wrong to allege this);
  - 78.4. The calls and voicemail were due to a concern about the Claimant's lack of engagement;
  - 78.5. The home visit was due to communication issues and was not heavy-handed;
  - 78.6. There was no evidence of bullying, discrimination or harassment.
79. The Claimant alleges that Miss Deeble responded to her grievance in a one-sided, flawed and unfair manner, and that the decision to reject the grievance had already been taken at the outset. The Respondents, and Miss Deeble herself, refute that allegation and contend that she followed a thorough and fair process to reach an outcome which was not predetermined. The Tribunal unanimously concludes that the Claimant's factual allegations about the way her grievance was handled are well-founded. We reach this conclusion for the following reasons:
- 79.1. The questions Miss Deeble sent to the Claimant on 3 February 2021 were more appropriate to a disciplinary investigation than a grievance process, for example, asking the Claimant questions such as "*Please could you explain, in your own words, why you believe you were invited to the investigation in November 2020?*", "*Prior to November 2020, were your colleagues unaware of the circumstances surrounding your private life?*", "*Did you ever inform your colleagues that you were living alone during the pandemic and as such presented a low risk of contracting covid-19?*", "*When your partner started staying with you, did you inform anybody at work? If so, who?*" [264]. There were also questions which struck the Tribunal as unnecessary such as "*Could you confirm the date on which you were placed on paid suspension?*" [264].
  - 79.2. By contrast, the questions Miss Deeble asked when conducting the grievance interviews were open and non-challenging. For example, the way the 19 November 2020 meeting had been conducted was central to the Claimant's complaint. The minutes of that meeting, either using Mrs May's original notes or the Claimant's amended version, contained sufficient material to give cause for concern, as discussed at paragraph 46 above. One obvious step for a grievance investigator to take would have been to ask the Second Respondent and Mrs May questions based on the content of the minutes. However, Miss Deeble did not refer to the minutes in her grievance interviews and simply asked "*How would you described the tone of the meeting?*", "*do you recall the meeting being hostile?*", and "*would you describe the meeting as hostile or unfairly weighted?*". She accepted the answers given without further probing.

- 79.3. Also obviously relevant to fairness was whether there was a sound basis for suspecting that the Claimant had broken lockdown rules. Miss Deeble did not look at the relevant support bubble rules and appears to have accepted the Second Respondent's assertion in her grievance interview that *"it came to light that she had broken lockdown rules and put people's lives at risk during the first lockdown"*.
- 79.4. Miss Deeble did not ask the Claimant what she was looking for as an outcome to her grievance, which would be a usual question to ask a complainant at the outset of the process of investigating a grievance that might be upheld.
- 79.5. The grievance outcome letter stated, *"In light of you choosing not to attend a grievance hearing either via zoom, telephone or in person, I submitted a number of questions to you"*. This overlooked the Claimant's health reasons for non-attendance, which she had explained to Miss Deeble in writing.
- 79.6. Overall, the Tribunal finds that the questions asked by Miss Deeble of the Claimant in writing and of others in witness interviews were designed to elicit information to exculpate the Second Respondent rather than to even-handedly investigate the concerns raised. The outcome letter reflected the same one-sided approach.

### The Loan Agreement

80. As noted above, the Claimant referred to the £2,000 payment in her grievance letter. The Second Respondent is recorded as saying in her grievance interview on 10 February 2021 that she *"gave [the Claimant] a loan of £2,000 to pay towards her deposit for her new flat"* [279]. Also on 10 February 2020, Miss Deeble interviewed Mrs Sabharwal, asking her *"Do you have any recollection of a loan from the company to Kelly Arnold at any point?"* In the grievance outcome letter, Miss Deeble wrote:

**'Upon review of your personnel file and speaking with Balvinder and Sonia, the Accounts Manager, it has transpired that this was not a gift and was in fact a loan over a 2-year period. There is a loan agreement and copy of the cheque on your file, which stipulates that the loan is due to be repaid by 07 April 2021. This was signed by yourself and countersigned by the accounts manager.'**

81. It has not been explained to the Tribunal what prompted Miss Deeble to review the Claimant's personnel file for paperwork relating to the £2,000 payment; it was not part of the complaints the Claimant had raised which Miss Deeble was tasked with investigating. It is possible that Miss Deeble herself decided to investigate the nature of the £2,000 payment because of the discrepancy between the Claimant's description of it as a gift and the Second Respondent calling it a loan in her grievance interview. However, the questions Miss Deeble asked Mrs Sabharwal suggest that she was seeking evidence to confirm that it was a loan not a gift.
82. On receipt of the grievance outcome, the Claimant promptly replied, disputing that there had been a loan agreement and stating that the £2,000 had been given to her as a gift. Miss Deeble acknowledged receipt of this email, and then followed up on 16 February 2021 with a reply stating:

**'Apologies for the slight delay in responding to you. I am on annual leave from this afternoon and will only be checking my emails periodically.**

**Please find attached a copy of the loan agreement held on your personnel file. You will note that this has been signed by Balvinder and yourself and was witnessed by Sonia. I am informed that the original copy of the document was provided to you at the point of signing and as such I am unable to provide this to you.**

**I am concerned that there appears to be a dispute over the £2,000 being a gift rather than a loan. As such, I will be conducting further internal investigations into this matter upon my return from annual leave. In the interim, please could you provide me with any evidence to support your claim that this was a gift?**

**I am due back from annual leave on 18 February 2021 and will conduct further investigations upon my return.'**

83. Miss Deeble enclosed the Loan Agreement document which appeared to be signed by the Second Respondent and the Claimant, and witnessed by Mrs Sabharwal.
84. One of the allegations in the Claimant's claim is that Miss Deeble's 16 February 2021 email alleged she had signed a loan agreement; this is indisputably correct. The Claimant further alleges that the Respondents had invented the agreement and forged her signature. This is an extremely serious allegation and the Tribunal has approached it with commensurate care. We unanimously conclude that the image of the Claimant's signature on the purported Loan Agreement was copied (or 'clipped') from a different document. This is because the signature on the Loan Agreement is identical to that on the contract amendment form which the Claimant signed (as all accept, genuinely) on 8 April 2019. On the contract amendment form, the Claimant signed on a line. The Loan Agreement does not have lines on the signature page. Nonetheless, part of the straight line under the signature on the contract amendment form has been carried across and appears under the signature on the Loan Agreement. When asked how this could have come about, both the Second Respondent and Mrs Sabharwal said they could not explain it. The Tribunal cannot conceive of an innocent explanation. The Tribunal finds that the image of the Claimant's signature taken from the contract amendment form must have been inserted into the Loan Agreement by some person or persons at the First Respondent with the intention of making it appear that the Claimant had signed the Loan Agreement, when in fact she had not done so. It was not done with the Claimant's knowledge or authority.
85. On 18 February 2021, Miss Deeble conducted further interviews with the Second Respondent, Mrs Sabharwal, Mrs May and Mrs Albany. All stated that the £2,000 was a loan not a gift. The Second Respondent is noted as saying that Mrs Sabharwal was witness to the agreement and that when the Claimant signed the agreement she (the Second Respondent herself) had given the Claimant the original and a copy and told her to put 'it' (presumably the original) in her file and keep the copy. Mrs Sabharwal said that she, the Second Respondent and the Claimant had all signed the agreement at the same time, and that the normal procedure was to keep a copy in the file and give a copy to the person (i.e., the person in receipt of the loan).
86. In her witness statement, the Second Respondent said that Mrs Sabharwal drew up the Loan Agreement based on a standard document used previously, and that

*“I was not involved in the administrative arrangements of when Kelly signed the agreement, that was done by Sonia”*. When asked about this in evidence, she said that she signed the agreement first and then Mrs Sabharwal separately witnessed the Claimant sign it. When she was taken to the note of Mrs Sabharwal’s 18 February 2021 interview, the Second Respondent changed her evidence, saying, *“if we were all there I don’t recall [but] if Sonia says we were all there that’s probably what happened”*. The Tribunal finds that whether or not she was involved in the production of the Loan Agreement document, the Second Respondent knew that the Claimant had not entered into any such agreement in 2019 and therefore her evidence on this issue was not truthful.

87. When Mrs Sabharwal gave evidence, she said she could not specifically remember drawing up the Loan Agreement but that she could have done so. She said she remembered the Second Respondent, the Claimant and herself all being present together in the small meeting room for the time it took all three of them to sign the Loan Agreement. She said that after the Loan Agreement had been signed, she gave it to Mrs Albany in her role as HR Director, and did not know what happened to it after that. The Tribunal finds that Mrs Sabharwal’s evidence is irreconcilable with the copied signature on the Loan Agreement and was not truthful.
88. On 19 February 2021, Miss Deeble wrote to the Claimant stating that a copy of the Loan Agreement was held in her personnel file and asking her for any evidence to substantiate her allegation that it was not genuine. The Respondents have not produced the original and contend it was given to the Claimant in 2019.

#### The grievance appeal

89. Also on 19 February 2021, the Claimant submitted an appeal against the grievance outcome.
90. On 22 February 2021, the Claimant, assisted by her father, made a report to Action Fraud that her signature on the Loan Agreement had been forged. She was advised to report the matter to the police.
91. The Claimant’s grievance appeal was heard by Senior Manager, Jeni Sutton. Ms Sutton held the same position in the company as Miss Deeble, and also reported to the Second Respondent. The Tribunal finds that, as with Miss Deeble, the company structure meant that she was not in a position to freely and independently investigate a grievance against the Second Respondent.
92. On 26 February 2021, Ms Sutton invited the Claimant to an appeal hearing. The Claimant submitted a further written statement in lieu of attendance dated 3 March 2021, in which she explained that she was unable to attend in person and was not well enough to attend virtually, that she was still taking prescribed medication and receiving counselling. At this time the Claimant was certified by her GP as not fit for work due to depression.
93. Ms Sutton sent her appeal outcome on 5 March 2021, in which she did not uphold the appeal. The outcome letter alleged that the Claimant *“failed to attend the appeal hearing”*, without acknowledging the medical explanation provided by the Claimant. The outcome letter stated that Ms Sutton had read both sets of minutes of the 19 November 2020 meeting but saw *“no evidence of an ambush”*. In the

Tribunal's view, these minutes are so obviously concerning (for the reasons outlined at paragraph 46 above) that this tends to suggest that Ms Sutton, like Miss Deeble, took a one-sided approach with a view to exculpating the Second Respondent.

Welfare meeting invitation and follow-up questions

94. The Claimant's last fit note dated 11 March 2021 certified her as unfit to work until 10 April 2021. On 15 March 2015, Mrs May wrote to the Claimant inviting her to a welfare meeting. The Claimant replied on 17 March 2021, saying:

**'Quite frankly, the sudden pretence of concern for my well-being at this late stage is a case of 'far too little, far too late' and feels completely disingenuous and self-serving.**

**You quite rightly refer to my absence because of stress at work. To be accurate it is stress, anxiety, low mood and palpitations. As this is still the case, I cannot entertain any direct contact with you at this time. The very thought fills me with anxiety and is clearly not good for my well-being. I am still on medication and receiving counselling. Please keep to email contact only.'**

95. Mrs May replied on 23 March 2023, asking the Claimant a number of questions:

**'Thank you for your email, the content of which is noted. Please be assured it is normal practice for an organisation to seek to make enquiries regarding an employee's absence especially if long term and ongoing and therefore seek to reassure you this would be a natural and normal next step in your case. With regards to the phrase "appropriate alternative arrangements" this related to if you were unable to attend so they we could discuss an alternative way of making our enquiries.**

**I note you have requested we continue any correspondence by way of email and therefore as requested I look to make written enquiries as to your ongoing health and wellbeing. We will use the information obtained to make an informed decisions about any actions we may need take in light of your current health/wellbeing status. I will however still be sending a copy via post to ensure you receive it.**

**These submissions once received are likely to contain information about you which is classed as 'special categories of data' (i.e. information about your health) and data protection laws will apply. We will ensure this data is processed in line with our data protection policy regarding lawful processing.**

**I would be grateful if you could provide as much detail as possible for each question where applicable and include information for all of your health and welfare conditions. The below are standard questions but you can provide more detail if required.**

- How are you currently feeling?**
- Are you feeling better or worse than when you first went absent?**
- How long have you had this condition? And or is it a condition you have had before?**
- How does it impact you on a day to day basis?**
- Is there a pattern with any flare ups or is constant , if yes how often? Why?**

- Is there anything else that may be impacting your absence from work that we are not already aware of?
- What has your GP said about your return to work?
- What date do you feel you will be returning?
- What medication/treatment are you receiving?
- How are you responding to this?
- Would your medication affect your ability to do your job e.g. make you drowsy, dizzy?
- Have you been referred to a specialist or anyone other than your GP?
- If so, who and when and what treatment have they suggested.
- Have you received any treatment? If you are scheduled treatment when will it be? Hypothetically speaking if you had x treatment what is the percentage chance of a recovery and how long would the recovery take?
- Are there any aspects of your job that you will be able / unable to do e.g. lifting, standing for long periods of time?
- Are there any reasonable adjustments we can make to aid your return? For example, lighter duties/phased return?
- Is there any other support that we could consider to aid your return to work?
- Would you be happy to consent for us to get an occupational health report?

I would be grateful if you could return the answers by Wednesday 31 March.' [332].

96. The Claimant alleges that this email contained 18 questions including questions about the Claimant's back condition and the impact of that problem. It does contain 18 questions. There is a dispute between the parties as to whether any of the questions related to the Claimant's back condition. The Claimant felt that she was being "set up to fail", by being asked questions about her back condition which the Respondent had not thought necessary to ask at any time when she had previously been suffering from the effects of it in the workplace. Mrs May's evidence was that the Claimant's back condition had not caused any problems while she was at work and there was no reason to think that it had changed during the Claimant's period of absence. She knew the Claimant was absent due to stress and depression. She had been provided with a standard set of questions by the company's HR provider which she put into the email. She acknowledged in evidence that it would have been better to edit the list to ask only questions which were applicable to the Claimant's situation. The Tribunal finds that on an objective reading, the question "Are there any aspects of your job that you will be able / unable to do e.g. lifting, standing for long periods of time" had nothing to do with the Claimant's depression, and it was reasonable for the Claimant to understand it related to her back condition.
97. On 27 March 2021, the Claimant and her father attended Romford Police Station to report the Loan Agreement as a forgery.

Resignation

98. On 8 April 2023, the Claimant submitted a notice of resignation to take effect on 10 April 2021. In her email she wrote:

**'I have been forced into giving my notice because of the combination of actions against me:**

**a) serious breach of contract by Kids Inc,**

**b) breach of trust and total breakdown of trust,**

**c) breach of duty of care,**

**d) hostile actions taken by Kids Inc, specifically by Balvinder Kalsi aided by Angela May, Kirstie Albany, Sonia Sabharwal and other employees,**

**e) fraudulent loan agreement and forgery of my signature.'**

99. She listed the events which she said had pushed her to resign, which included the "*hostile 'ambush' meeting on 19 November 2020*", which was "*made worse by Angela's assurances that I need not worry about returning*", her suspension, the "*[h]arassment calls on 25 November 2020*", and the visit to her home that day, the grievance process conducted by Miss Deeble and Ms Sutton, the "*fraudulent*" Loan Agreement, and the impact of the foregoing matters on her health. She alleged that it was the discovery of her relationship with Ms Campbell which had caused the breakdown of the employment relationship, saying:

**'I believe I have been singled out for such extreme victimisation because our relationship was so close and Balvinder felt incredibly aggrieved when she discovered information about my private life as she would have felt she was entitled to know everything about me'.**

100. In evidence, the Claimant stated that she resigned due to the "*culmination*" of all these events, and in particular that receiving the list of questions about her health conditions on 23 March 2023 was the catalyst for her decision. The Respondents point out that the Claimant did not list the 23 March 2021 email in her resignation letter. The Tribunal nonetheless accepts that the 23 March 2021 email was the catalyst prompting the Claimant to resign. The resignation letter was written at a time when the Claimant was ill with depression, as certified by her GP. The letter did not say that the list of reasons it gave was exhaustive. It was natural for the Claimant to focus on the most significant reasons rather than the final email that tipped the balance.

101. Mrs May replied asking the Claimant to reconsider but on 14 April 2021, the Claimant confirmed that her resignation stood.

102. On 21 April 2021, Mrs May wrote to the Claimant in the following terms:

**'Following on from your resignation we will shortly be looking to process any appropriate termination payments for payroll.**

**Although I am aware you have disputed the validity of the loan agreement in your name, we believe it to be legally binding and have evidence of the payment made to you, which naturally, given its large sum, would be due repayment. The terms of the agreement were that you should have repaid the amounts in full no later**

than 7 April 2021 . You have not done so and therefore as such are in default of this agreement.

To this end I would bring to your attention that within the agreement it allows for the recouping of monies outstanding from any final payments. As you have now resigned we are considering whether to exercise this clause and/or to pursue the matter in the civil courts for any parts or whole amounts outstanding.

To date you have made no payments to use under the agreement here in mentioned. Copy attached. We therefore request full payment is made by Friday 30 April 2021. If we do not hear back from you within 7 days we will be in touch with regards to the monetary amounts we believe are outstanding and how we propose the matter is addressed.'

## The law

### Constructive unfair dismissal

103. Section 94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer. Section 95(1) ERA provides that she is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct ('a constructive dismissal').
104. If there is a constructive dismissal, s.98(1) ERA provides that it is for the employer to show that it was for one of the permissible reasons in s.98(2) ERA, or some other substantial reason. If it was, s.98(4) ERA requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.
105. The employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that she was entitled to regard herself as discharged from his obligations under the contract. The Claimant relies on a cumulative breach of the implied term of trust and confidence. The applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at [14] onwards):

**14. 'The following basic propositions of law can be derived from the authorities:**

**1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**

**2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd*. [1981] ICR 666.) This is the "last straw" situation."

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.'

106. The Court of Appeal gave further guidance in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 (at [55]):

**‘(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?’**

**(2) Has he or she affirmed the contract since that act?**

**(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**

**(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)**

**(5) Did the employee resign in response (or partly in response) to that breach?’**

107. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at [29]).

108. It is important to apply both limbs of the test. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract if there is ‘reasonable and proper cause’ for it: *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727 (at [22- 23]).

109. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 (at 828-829).

110. A constructive dismissal can still be a fair dismissal for s.98(4) ERA purposes: *Savoia v Chiltern Herb Farms Ltd* [1982] IRLR 166. The Tribunal must establish the principal reason for the fundamental breach of contract that led to the constructive dismissal - *Genower v Ealing, Hammersmith & Hounslow AHA* [1980] IRLR 297. If there is a potentially fair reason within the categories at s.98(1), the question for the tribunal to determine is whether the employer complied with s.98(4) by acting reasonably in the circumstances.

#### Burden of proof in discrimination cases

111. The burden of proof provisions are contained in s.136(1)-(3) Equality Act 2010 (‘EqA’):

**(1) This section applies to any proceedings relating to a contravention of this Act.**

**(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

**(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

112. The effect of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

**‘It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.<sup>1</sup> He explained the two stages of the process required by the statute as follows:**

**(1) At the first stage the Claimant must prove “a *prima facie* case”. That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving “facts from which the Tribunal could conclude that the Respondent ‘could have’ committed an unlawful act of discrimination”. As he continued (pp. 878-9):**

**“56. ... The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**

**57. ‘Could conclude’ in section 63A(2) [of the Sex Discrimination Act 1975] must mean that ‘a reasonable Tribunal could properly conclude’ from all the evidence before it. ...”**

**(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**

**“He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim.”**

**He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.’**

113. In *Royal Mail Group v Efofi* [2021] ICR 1263, the Supreme Court confirmed that a claimant is required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.
114. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9, 11] held that the Tribunal should avoid adopting a ‘fragmentary approach’ and should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.
115. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

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<sup>1</sup> *Madarassy v Nomura International plc* [2007] ICR 867, CA

116. A mere difference of treatment is not enough to shift the burden of proof, something more is required: *Madarassy* per Mummery LJ at [56]:

**‘The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.’**

117. However, as Sedley LJ observed in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279 at [19]:

**‘the “more” which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.’**

118. It is well-established that unfair treatment is not to be equated, as such, with discriminatory treatment (*Glasgow City Council v Zafar* [1998] ICR 12). Discrimination may, however, be inferred if there is no explanation for unreasonable behaviour (see the discussion in *The Law Society v Bahl* [2003] IRLR 640 (EAT) at [93] – [98], upheld by the Court of Appeal [2004] IRLR 799 at [100] – [101]).

#### Direct discrimination

119. Section 13(1) EqA provides:

**A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

120. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here sexual orientation.

121. The appellate courts have made clear that it is open to Tribunals to address both stages by considering a single question: the ‘reason why’ the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

122. It is sufficient that the protected characteristic had a ‘significant influence’ on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan v London Regional Transport* [1999] ICR 877 at 886).

123. The question whether the alleged discriminator acted ‘because of’ a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] ICR 501, per Lord Nicholls at 511). Lord Nicholls considered the distinction between the ‘reason why’ question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

**‘Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the “operative” cause, or the “effective” cause. Sometimes it may apply a “but for” approach...The phrases “on racial grounds” and “by reason that” denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.’**

124. The Court of Appeal in *Coyne v Home Office* [2000] ICR 1443 makes clear that the employer will not be guilty of discrimination if an inadequate response to a grievance was demonstrably unrelated to the relevant protected characteristic of the Claimant. In a case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled, the mishandling is not discriminatory simply because the grievance concerned discrimination. It is not a ‘but for’ test; the Tribunal must scrutinise the motivation of the alleged discriminator (*Dunn v Secretary of State for Justice* [2019] IRLR 298 CA, per Underhill LJ at [44]).

### Harassment

125. Harassment is defined by s.26 EqA, which provides, so far as relevant:

**(1) A person (A) harasses another (B) if-**

**(a) A engages in unwanted conduct related to a relevant protected characteristic, and**

**(b) the conduct has the purpose or effect of—**

**(i) violating B's dignity, or**

**(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**

...

**(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**

**(a) the perception of B;**

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

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

126. Guidance as to the construction of the wording ‘related to a relevant protected characteristic’ was given by the Court of Appeal in *UNITE the Union v Nailard* [2018] IRLR 730. It imports a broader test than that which applies in a claim of direct discrimination. It was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. However, there are limits. The Tribunal in that case had allowed that a failure to address a sexual harassment complaint, made against elected officials of the union, could itself amount to harassment related to sex ‘because of the background of harassment related to sex’. That, the Court of Appeal held, went too far. The Tribunal had not made any findings as to whether the claimant’s sex formed part of the motivation of the alleged discriminator.

127. Whether conduct is related to a protected characteristic is a question to be judged by the Tribunal by reference to all of the evidence, not simply the perception of the claimant; the knowledge or perception of the claimant's protected characteristic by the person making the comment is also relevant (*Hartley v FCO Services* [2016] UKEAT/0033/15/LA [23-25]).
128. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 at [22]:
- 'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'**
129. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.
- 'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**
130. He further held (at [13]):
- 'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'**
131. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ at [12], referring to Elias LJ's observations in *Grant*, stated:
- 'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**
132. Section 212(1) EqA provides that the concept of 'detriment' does not include conduct that amounts to harassment. Thus, a claimant cannot succeed in a claim of both harassment and direct discrimination, in respect of the same conduct, since a finding of direct discrimination necessarily involves findings of detriment. However, there is nothing in the statutory language to prevent a claimant from advancing claims in the alternative by reference to these causes of action in respect of the same conduct.

Discrimination arising from disability

133. Section 15 EqA provides that:

**(1) A person (A) discriminates against a disabled person (B) if—**

**(a) A treats B unfavourably because of something arising in consequence of B's disability, and**

**(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**

**(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

134. In *Praiser v NHS England* [2016] IRLR 170 at [31], Simler P summarised the proper approach to a s.15 EqA claim as follows:

**‘(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**

**(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required... The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**

**(c) Motives are irrelevant...**

**(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is “something arising in consequence of B's disability”. That expression ‘arising in consequence of’ could describe a range of causal links... the causal link between the something that causes unfavourable treatment and the disability may include more than one link...**

**(e) ... However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.**

**(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.**

**(g) ...Weerasinghe ... highlights the difference between the two stages — the ‘because of’ stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the ‘something arising in consequence’ stage involving consideration of whether (as a matter of fact rather than belief) the ‘something’ was a consequence of the disability.**

**... (i) ... it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to ‘something’ that caused the unfavourable treatment.’**

135. If the two-stage test is satisfied by the Claimant, the burden moves to the Respondents to show that the treatment is a proportionate means of achieving a legitimate aim. Determining whether the treatment is a proportionate means of achieving a given aim “*requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition*”: *per* Balcombe LJ in *Hampson v Department of Education and Science* [1989] ICR 179.

## Conclusions

### Constructive unfair dismissal

136. The Claimant says the following matters cumulatively amounted to a breach of the implied term of trust and confidence. In relation to the factual allegations we have found proven on the balance of probabilities, we ask ourselves did the First Respondent have reasonable and proper cause for doing them? In relation to those matters which are proven and for which the First Respondent had no reasonable and proper cause to act as it did, we next ask whether taken singly or together they were calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and her employer?
- 136.1. The Claimant alleges that between 9 November 2020 and 19 November 2020, Mrs May repeatedly phoned her asking about her private relationship with her partner. The Tribunal has found that this did occur. While the Tribunal considers it understandable that the Respondents wanted to understand the Claimant’s risk levels in the context of the Covid-19 pandemic, there was no reasonable or proper cause for the Claimant’s employer to ask about the nature of her relationship with Ms Campbell. In the context of a previously close-knit workplace, Mrs May asking the questions was not in itself calculated or likely to destroy or seriously damage the relationship of trust and confidence. However, this was capable of contributing to a cumulative breach together with the matters set out below, given that the information Mrs May elicited was used to instigate a disciplinary investigation into the Claimant’s conduct.
- 136.2. The Claimant alleges Mrs May misled her to understand that at most she would receive a minor telling off for missing work. The Tribunal has found this allegation to be proven. There was no reasonable or proper cause for Mrs May to continue to reassure the Claimant towards the latter part of her self-isolation period, once Mrs May knew that the Second Respondent believed the Claimant had breached lockdown rules, and other allegations about the Claimant’s conduct were being investigated. While Mrs May may have not intended to damage the employment relationship, misleading the Claimant as to the situation she would face on return to work was conduct likely to destroy or seriously damage the Claimant’s trust and confidence in her employer. The result of Mrs May’s misleading reassurance was that the Claimant was acutely shocked by the 19 November 2020 meeting and unprepared to defend herself.
- 136.3. The Tribunal has also found that Mrs May and the Second Respondent did conduct a hostile and unfairly-weighted meeting with the Claimant on 19 November 2020 without telling her at the outset that this was an

investigatory meeting. There was no reasonable or proper cause for failing to explain to the Claimant the nature of the meeting in advance, or for taking the one-sided approach outlined in paragraph 46 above. The Tribunal unanimously concludes that the way the meeting was conducted in itself was calculated or likely to destroy or seriously damage the relationship between the Claimant and her employer.

- 136.4. There is no dispute that the Respondents suspended the Claimant on 19 November 2020. The Tribunal concludes that there was no reasonable or proper cause for doing so. In evidence, the Second Respondent and Mrs May said suspension was necessary because it would have been awkward to interview the Claimant's colleagues about her conduct if she was in the workplace, especially given that her desk was next to the meeting room. However, those interviews (the notes of which have not been disclosed) were said to have been concluded on 19 November 2020. The Respondents could have simply have let the Claimant go home for the afternoon to conduct interviews in her absence. None of the matters she was being investigated for appear to the Tribunal to have justified disciplinary suspension. Suspending her without good cause, and formalising it in the severe yet unparticularised letter set out at paragraph 51 above, was calculated or likely to destroy or seriously damage trust and confidence.
- 136.5. The Claimant alleges that the First Respondent responded to her grievance in a one-sided, flawed and unfair manner in which the decision to reject the grievance had already been taken at the outset. The Tribunal accepts this allegation is well-founded given the findings at paragraphs 79 and 93 above. There was no reasonable or proper cause for Miss Deeble and Ms Sutton to take a one-sided, flawed and unfair approach which sought to exculpate the Second Respondent instead of genuinely investigating the Claimant's concerns. The Tribunal concludes that their handling of the grievance process was calculated or likely to destroy or seriously damage trust and confidence.
- 136.6. There is no dispute that Miss Deeble said in her email of 16 February 2021 that the Claimant had signed a loan agreement in which she agreed to repay a loan of £2000. The Tribunal upholds the Claimant's serious allegation that the signature on the Loan Agreement was forged, to the extent that we have found the image of the Claimant's signature was copied from another document and inserted into the Loan Agreement without the Claimant's knowledge or authorisation. There could be no reasonable or proper cause for taking such action. Fabricating the Claimant's signature on a document which appeared to create a £2,000 liability to the First Respondent was a matter so serious that it amply crosses the threshold to amount to a breach of the implied term of trust and confidence.
- 136.7. The Claimant alleges that the Respondents demanded that she repay the sum of £2000 when neither this amount nor any sum was owed. On the evidence before the Tribunal, the Respondents did not demand repayment until the letter of 21 April 2021 which is set out at paragraph 102 above. As this post-dated, and therefore could not have causally

contributed to, her resignation, the Tribunal does not need to consider whether this letter breached the implied term.

137. Overall, the Tribunal concludes that the second to sixth matters alleged amount to breaches of trust and confidence in themselves and the first to sixth matters collectively constitute a cumulative breach of trust and confidence.
138. The Tribunal additionally considered whether the list of 'welfare' questions sent by Mrs May in her email of 23 March 2021 was capable of forming part of a cumulative breach of trust and confidence, given that the Claimant's evidence was this this was the final matter which prompted her to resign. We consider that the email was clumsy and poorly worded. Mrs May gave evidence that this was because she had neglected to edit a standard list of questions provided by the First Respondent's HR advisors. However, the impression reasonably given to the Claimant was that the First Respondent was expressing doubt about her physical capability to undertake a role she had already been doing for the past two years. The Claimant was upset to receive it. While the email would not amount to a breach of trust and confidence taken alone, it was sufficiently adverse to the Claimant to amount to the 'last straw' in a cumulative breach (*Lewis v Motorworld Garages Ltd* [1986] ICR 157).
139. The list of issues invites the Tribunal to determine whether, if there was a breach, it was a fundamental one. However, a breach of the implied term of trust and confidence is necessarily a fundamental breach of contract entitling the Claimant to treat the contract as being at an end (*Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A).
140. The next issue for determination is whether the Claimant resigned in response to the matters found to have amounted to a breach of trust and confidence. The Tribunal's findings of fact regarding the Claimant's reasons for resignation are at paragraphs 99-100 above. They included the first to sixth matters at paragraph 136 above, as well as the 23 March 2021 email which amounted to the 'last straw'.
141. Next, did the Claimant affirm the contract by delay or other conduct which showed she chose to keep the contract alive even after the breach? The time period which elapsed between the 'last straw' on 23 March 2021 and the resignation on 8 April 2021 was 16 days. During this time, the Claimant was signed off work sick with depression. She had not attended work since the 19 November 2020 meeting. She had repeatedly protested against the Respondents' treatment of her in correspondence, including by submitting her grievance, grievance appeal, and various statements in lieu of attendance at meetings. The Tribunal unanimously concludes that the Claimant had not affirmed her contract of employment when she resigned in response to the breach of trust and confidence. She was therefore constructively dismissed by the First Respondent.
142. The Tribunal further concludes that the First Respondent's reasons for doing the conduct found to amount to a breach of trust and confidence were not capable of amounting to a potentially fair reason for dismissal within s.98 ERA. The principal reason for the course of conduct was that the Second Respondent no longer wished to retain the Claimant as her Executive Assistant. Even if there were to have been a fair reason, the First Respondent's actions reviewed at paragraph

136 above were not reasonable in all the circumstances. The Claimant was unfairly dismissed.

Direct sexual orientation discrimination

143. The Tribunal has considered whether in relation to each of the allegations of direct discrimination, there is evidence from which it could conclude on the balance of probabilities that the Claimant was treated less favourably than a hypothetical straight comparator in materially similar circumstances because of her sexual orientation. A comparator in materially similar circumstances in this case would be a straight employee who formed a support bubble with a male partner.
144. The Claimant was asked in evidence about what she thought would have happened if she had a male partner, and whether the fact she had a female rather than male partner made any difference. Her answer was equivocal. She said she thought possibly it was both the fact she was in a romantic relationship without the Second Respondent knowing, and the fact Ms Campbell was her girlfriend (not a boyfriend) which caused the Second Respondent to be angry, but she did not know and she could not answer for the Second Respondent. In the Claimant's resignation letter she attributed the Second Respondent's sense of grievance on discovering her relationship with Ms Campbell to the Second Respondent feeling entitled to know everything about her private life given their close working relationship, rather than the fact she was in a relationship with a woman.
145. The Second Respondent evidently felt betrayed on discovering that the Claimant was in a romantic relationship which she had not disclosed. However, she strongly disputed that she was upset by it being a gay relationship. She had known the Claimant was gay from the outset of her employment and had known about a previous serious relationship the Claimant had had with a woman.
146. Taking each of the factual allegations in turn:
  - 146.1. As above, the Tribunal has found that between 9 November 2020 and 19 November 2020, Mrs May repeatedly phoned the Claimant asking about her private relationship with her partner. However, the Tribunal cannot identify evidence that could support a conclusion that Mrs May treated the Claimant less favourably because of her sexual orientation. Her interest was in the fact of the romantic relationship, and not specifically that it was between two women. The reason for the treatment was that Mrs May was seeking to find out information about it to convey to the Second Respondent.
  - 146.2. It is accepted that on 25 November 2020 Mrs May called the Claimant by telephone 13 times over the course of 41 minutes. The Tribunal cannot identify evidence to support a conclusion that Mrs May would have acted differently if the Claimant was straight or in a straight relationship. Mrs May's reason for ringing repeatedly was that she wanted to alert the Claimant to a proposed settlement agreement, and not the Claimant's sexual orientation.
  - 146.3. It is also accepted that on 25 November 2020, Mrs May and Mrs Albany visited the Claimant's home unannounced. The Tribunal has not seen or

heard any evidence to suggest that they would have acted differently if the Claimant was straight or in a straight relationship. The reason for the visit was to deliver a settlement proposal and not the Claimant's sexual orientation.

- 146.4. The Tribunal has found that Mrs May did mislead the Claimant that at most she would receive a minor telling off for missing work. Again, the Tribunal has not been able to identify any evidence to suggest that Mrs May treated the Claimant less favourably in this regard because of her sexual orientation, or that she would have been more forthcoming about what the Claimant faced on return to work if the Claimant had been in a relationship with a man. The reason for the treatment was that Mrs May wanted to reassure the Claimant (although she should not have provided false reassurance).
- 146.5. The Tribunal has also upheld the Claimant's allegation that the 19 November 2020 meeting was hostile and unfairly weighted and she was not told the purpose of the meeting at the outset. However, there was nothing in the minutes of the meeting or the evidence reviewed as a whole which indicated that the reason for the hostility and unfairness was the Claimant's sexual orientation, or that she would have been treated better if she had been in a relationship with a man. The reason for the treatment was that the Second Respondent was upset to discover the Claimant had been in a relationship and had her partner staying at her house without the Second Respondent's knowledge, but not because her partner was female.
- 146.6. It is not disputed that the Claimant was suspended on 19 November 2020. Again, there is no evidence to support a conclusion that this would have been different if the Claimant was straight or in a relationship with a man. The reason for the suspension was that the Second Respondent was upset to discover the Claimant had been in a relationship and had her partner staying at her house without the Second Respondent's knowledge, and therefore no longer wanted the Claimant to be working in a position of trust as her Executive Assistant. However, it was not the fact that the Claimant was in a relationship with a woman that upset her.
- 146.7. The Tribunal has found proven the Claimant's allegation that her grievance was dealt with in a one-sided, flawed and unfair manner in which the decision to reject the grievance had already been taken at the outset. However, there is no evidence to support a conclusion that Miss Deeble and Ms Sutton approached the grievance and grievance appeal as they did because of the Claimant's sexual orientation. The Tribunal has found that due to their roles in the company they were not in a position to independently investigate the Second Respondent, and took an approach designed to exculpate her.
- 146.8. Miss Deeble did state in an email on 16 February 2021 that the Claimant had signed a loan agreement in which she agreed to repay a loan £2000. The Tribunal has found that the image of the Claimant's signature on the Loan Agreement was copied from another document and the Claimant did not sign it. It has not heard evidence as to the reasons why someone (or some persons) at the First Respondent inserted the Claimant's

signature onto the Loan Agreement. However, there is no evidence to suggest that it was done because of the Claimant's sexual orientation. By the time the dispute over the Loan Agreement arose, the relationship between the parties had already broken down. The Tribunal infers that the Second Respondent regretted giving the Claimant £2,000. We make no further findings about how or why the Loan Agreement came to be produced.

- 146.9. The Claimant alleges that the Respondents demanded that she repay the sum of £2000 when neither this amount nor any sum was owed. The Tribunal agrees that this demand was made in the letter of 21 April 2021. The fact that this letter post-dated the Claimant's resignation does not prevent us from considering it as a potential act of discrimination against a former employee. However, again there is no evidence that the treatment would have been different if the Claimant was straight or in a relationship with a man.
147. Overall, in relation to those factual allegations which we have found to have occurred, the Tribunal has not identified material from which we could conclude that the Claimant was treated less favourably than a straight employee in materially similar circumstances would have been treated or that the reason for the treatment was the Claimant's sexual orientation. The burden of proof has not shifted to the Respondents to show a non-discriminatory explanation for the conduct. Nonetheless, where the Tribunal has been able to make a positive finding as to the reason for the treatment we have done so at each subparagraph of 146 above.

Harassment related to sexual orientation

148. The factual allegations of harassment relation to sexual orientation are:
- 148.1. Between 9 November 2020 and 19 November 2020, Mrs May repeatedly phoned the Claimant asking about her private relationship with her partner.
- 148.2. Mrs May misleading the Claimant that at most she would receive a minor telling off for missing work.
- 148.3. Conducting a hostile and unfairly-weighted meeting with the Claimant on 19 November 2020 without telling her at the outset that this was an investigatory meeting.
- 148.4. On 25 November 2020 calling the Claimant by telephone 13 times over the course of 41 minutes.
- 148.5. Mrs May and Mrs Albany visited the claimant's home unannounced.
149. All of these matters have been found to have occurred. Were they related to the Claimant's sexual orientation? We have considered that the causal link required for something to be 'related to' sexual orientation is looser than that required for direct discrimination (*UNITE the Union v Nailard* [2018] IRLR 730). However, even on that broader test, there is nothing to suggest that the Claimant's sexual orientation formed any part of the Respondents' motivation or reasoning. We particularly considered in relation to the first allegation whether the fact that Mrs

May asked questions about the Claimant's private relationship, and that relationship happened to be with a woman, provided a sufficient link to sexual orientation to satisfy the 'related to' test. The Claimant did not suggest that Mrs May's questions related to the same-sex nature of the relationship as opposed to the fact there was a relationship which involved Ms Campbell staying at the Claimant's flat. Mrs May strongly refuted having any concerns about the Claimant's sexual orientation. Overall, we conclude that none of the matters listed at paragraph 148 were related to sexual orientation.

150. There is therefore no need to go on to consider whether the conduct was unwanted or whether it had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Harassment related to disability

151. There is one factual allegation said to amount to harassment relating to disability: did the Respondents on 23 March 2023, send the Claimant 18 questions which included questions about her back condition and impact of that problem? The Tribunal has found that Mrs May did send 18 questions, of which one question (about lifting and standing) would reasonably have been read as referring to the Claimant's back condition. Other questions on the list were ambiguous in that they could have referred to stress and depression, the conditions for which the Claimant had been signed off work, but might also relate to the back condition.
152. The conduct was unwanted by the Claimant. She did not want Mrs May to invite her to a welfare meeting or ask her questions about her health.
153. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? The Tribunal considers that in the context of a long-term absence during which the Respondents had not previously expressed an interest in the Claimant's health, sending such a detailed list of questions to elicit personal medical information was intrusive. A more sensitive approach would have been to ask the Claimant's permission to refer her for an Occupational Health assessment, and leave it to a medical professional to ask appropriate questions. The inclusion of the question on lifting and standing gave the Claimant the impression that her physical capability to undertake her role was to be subject to scrutiny.
154. We do not conclude that it was Mrs May's purpose to cause distress and accept that she had copied and pasted a standard list of questions without editing it. Subjectively, the Claimant found the email upsetting to receive. However, we bear in mind that the test is objective as well as subjective and note the guidance in *Land Registry v Grant* [2011] ICR 1390 that we should not "*cheapen the significance*" of the words of the statutory test. Overall, we conclude that the 23 March 2021 would not reasonably have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Discrimination arising from disability

155. Under this head of claim, the Claimant contends that she was treated unfavourably by the 23 March 2021 email including questions about her back condition, and that said unfavourable treatment was done because of something arising in consequence of her disability, namely the symptoms of her back condition and medication.
156. The questions in the 23 March 2021 email did amount to unfavourable treatment, for the reasons given in the paragraph above.
157. It is not disputed that the Claimant's back condition gave rise to symptoms and she took medication for it.
158. The next question is, did the Respondents ask the Claimant questions which included questions about her back condition and impact of that problem, because of the symptoms of the Claimant's back condition and medication? We answer that question in the negative. There was no causal link between the symptoms of and medication for the Claimant's back condition, and Mrs May sending the email of 23 March 2021. Mrs May sent the email because the Claimant had been on long-term sick for stress and depression, her grievance and grievance appeal processes had come to an end, and Mrs May wished to commence an absence management process. The Claimant's back condition had been successfully managed when she was at work and was not the cause of her absence.
159. The discrimination arising from disability claim therefore fails on causation and there is no need for the Tribunal to go on to consider whether the treatment was a proportionate means of achieving a legitimate aim.

Time limits

160. The Claimant's EqA claims are dismissed on their merits and therefore the Tribunal does not need to determine whether or not the allegations in those claims were presented to the Tribunal in time.

**Employment Judge Barrett  
27 October 2024**