



EMPLOYMENT TRIBUNALS

Claimant: Miss Rhiannon Morris

Respondent: Pobl Group Limited

Heard at: Cardiff **On:** 21, 22, 23 (in Chambers) and
24 October 2024

Before: Employment Judge S Jenkins
Prof J Ukemenam
Mr M Vine

Representation:
Claimant: In person, assisted by her father, Mr A Morris
Respondent: Ms E Cunningham (Counsel)

JUDGMENT having been sent to the parties on 28 October 2024 and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to consider the Claimant's complaints of; unfair dismissal, discrimination arising from disability, and harassment related to disability; brought by way of a Claim Form issued on 9 February 2024, following a period of Early Conciliation with ACAS between 5 February and 9 February 2024.
2. We heard evidence from three witnesses on behalf of the Respondent: Michael Green, Project Manager and the person who carried out an investigation into allegations of misconduct on the part of the Claimant; Hayley Williams, Area Manager and the Disciplinary Officer in this case; and Natalie Hayes, Assistant Director of Support and the Appeal Officer in this case.

3. We heard evidence from the Claimant on her own behalf. We also read witness statements from the following other witnesses on behalf of the Claimant: from her parents, Tony and Donna Morris; a friend, Victoria Tuck; and a former colleague, Hayley Parsons; although none attended to be cross-examined.
4. The evidence of the Claimant's parents and friend was focused on the issue of disability, which was conceded by the Respondent shortly before the hearing and therefore did not need to be considered. The evidence of the Claimant's former colleague focused on her own experiences whilst working for the Respondent. In the circumstances, the evidence had little bearing on the Claimant's case, and as the witness was not present to be cross-examined, we could give very little weight to it.
5. We considered the documents within a hearing bundle spanning 780 pages to which our attention was drawn. We were also provided with transcripts of recordings of an investigation meeting between the Claimant and Mr Green, and of an appeal meeting between the Claimant and Ms Hayes, covertly recorded by the Claimant. The Claimant disputed the accuracy of the transcripts, but did not indicate what she contended to be the correct wording. In the event any disputed areas appear to us to be very limited in terms of their impact on the issues we had to determine.

Issues

6. The issues we had to determine, had been discussed and finalised following a Preliminary Hearing, held by the Judge in this case, on 15 May 2024 and were as follows:
 1. **Time limits**
 - 1.1 *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 6 November 2023 may not have been brought in time.*
 - 1.2 *Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*
 - 1.2.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*
 - 1.2.2 *If not, was there conduct extending over a period?*

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

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

1.2.4.1 *Why were the complaints not made to the Tribunal in time?*

1.2.4.2 *In any event, is it just and equitable in all the circumstances to extend time?*

2. **Unfair dismissal**

2.1 *Was the Claimant dismissed?*

2.2 *What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.*

2.3 *If the reason was misconduct, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:*

2.3.1 *there were reasonable grounds for that belief;*

2.3.2 *at the time the belief was formed the Respondent had carried out a reasonable investigation;*

2.3.3 *the Respondent otherwise acted in a procedurally fair manner;*

2.3.4 *dismissal was within the range of reasonable responses.*

3. **Remedy for unfair dismissal**

3.1 *Does the Claimant wish to be reinstated to their previous employment?*

- 3.2 *Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?*
- 3.3 *Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.*
- 3.4 *Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.*
- 3.5 *What should the terms of the re-engagement order be?*
- 3.6 *If there is a compensatory award, how much should it be? The Tribunal will decide:*
 - 3.6.1 *What financial losses has the dismissal caused the Claimant?*
 - 3.6.2 *Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*
 - 3.6.3 *If not, for what period of loss should the Claimant be compensated?*
 - 3.6.4 *Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*
 - 3.6.5 *If so, should the Claimant's compensation be reduced? By how much?*
 - 3.6.6 *If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?*
 - 3.6.7 *If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?*
- 3.7 *What basic award is payable to the Claimant, if any?*
- 3.8 *Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?*

4. **Disability**

4.1 *Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:*

4.1.1 *Did they have a physical or mental impairment: Borderline Personality Disorder?*

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

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

4.1.4 *Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?*

4.1.5 *Were the effects of the impairment long-term? The Tribunal will decide:*

4.1.5.1 *did they last at least 12 months, or were they likely to last at least 12 months?*

4.1.5.2 *if not, were they likely to recur?*

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 *Did the Respondent treat the Claimant unfavourably by dismissing her?*

5.2 *Did the Claimant's sickness absence in the last quarter of 2023 arise in consequence of her disability?*

5.3 *Was the unfavourable treatment because of that? Did the Respondent dismiss the Claimant because of that sickness absence?*

5.4 *If so, was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:*

5.4.1 **[TBC]**

5.5 *The Tribunal will decide in particular:*

5.5.1 *was the treatment an appropriate and reasonably necessary way to achieve those aims;*

5.5.2 *could something less discriminatory have been done instead;*

5.5.3 *how should the needs of the Claimant and the Respondent be balanced?*

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

6. **Harassment related to disability (Equality Act 2010 section 26)**

6.1 *Did the Respondent do the following things:*

6.1.1 *Caleb Heymans say, in an email to an area manager, about the Claimant that “because she has BPD I don’t think HR will do anything about her”?*

6.1.2 *Mike Green say, in an investigatory meeting on 7 December 2023, that he Claimant was “overreacting/overemotional”?*

6.2 *If so, was that unwanted conduct?*

6.3 *Did it relate to disability?*

6.4 *Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

6.5 *If not, did it have that effect? The Tribunal will take into account the Claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

7. **Remedy for discrimination**

7.1 *Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?*

7.2 *What financial losses has the discrimination caused the Claimant?*

7.3 *Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*

7.4 *If not, for what period of loss should the Claimant be compensated?*

7.5 *What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?*

7.6 *Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?*

7.7 *Should interest be awarded? How much?*

7. As we have noted, the Respondent, shortly before this hearing, conceded that the Claimant was disabled at the relevant times and therefore we did not need to consider that as an issue to be determined. The Respondent also conceded that the only aspect of the Claimant's complaints that could be considered to be out of time was the first allegation of harassment, and that, whilst the email referred to in that allegation was sent in October 2023 and was therefore potentially out of time, the Claimant only became aware of it during the disciplinary investigation in November or December 2023. We did not therefore need to consider time limits as an issue to be determined.
8. Finally the Respondent had, subsequent to the Preliminary Hearing, clarified its legitimate aim in relation to the Claimant's complaints of discrimination arising from disability in relation to paragraph 5.4 of the List of Issues. That aim was to ensure that the Respondent's services in relation to the children and young persons with whom the Claimant worked were appropriately resourced by a team of staff known to them.
9. At the outset of the hearing, in view of the paucity of evidence relating to remedy, we indicated that we would focus initially on liability, i.e. on whether or not the complaints succeeded, and would return to the issue of remedy if the complaints succeeded, at the end of the hearing if time allowed, or at a later date if it did not. In the event in view of our conclusions that the complaints failed, further consideration of remedy did not arise.

Law

10. In terms of the legal principles we had to consider when dealing with the Claimant's complaints, much of those were encapsulated in the summary in the List of Issues. We did however bear the following particular legal issues in mind.

Unfair dismissal

11. The first matter for us to consider was whether the Respondent, the burden

being on it, could satisfy us that it had dismissed the Claimant for a potentially fair reason, i.e. a reason falling within sections 98(1) or (2) of the Employment Rights Act 1996 ("ERA"). In this case, the Respondent contended that the dismissal was by reason of the Claimant's conduct, which falls under section 98(2)(b) ERA.

12. In relation to the reason for dismissal, the Court of Appeal made clear, in Abernethy v Mott, Hay and Anderson [1974] ICR 323, that the reason for dismissal is "*... a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.*"
13. If we were not satisfied that the reason for the dismissals was the Claimant's conduct, her claim would succeed. If we were so satisfied, we would then need to go on to consider whether dismissal for that reason was fair in all the circumstances, within the meaning of section 98(4) ERA. That provides that whether a dismissal is fair or unfair. "*... depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating [the reason] as a sufficient reason for dismissing the employee*".
14. In relation to dismissals by reason of conduct, the approach to be taken by an employment tribunal is underpinned by two touchstone Employment Appeal Tribunal ("EAT") decisions of over forty years' vintage; British Home Stores v Burchell [1978] IRLR 379, and Iceland Frozen Foods v Jones [1982] IRLR 439. The guidance provided by those two authorities was combined by the EAT in JJ Food Service Limited v Kefil [2013] IRLR 850, at paragraph 8, as follows:

"8. In approaching what was a dismissal purportedly for misconduct, the Tribunal took the familiar four stage analysis. Thus it asked whether the employer had a genuine belief in the misconduct, secondly whether it had reached that belief on reasonable grounds, thirdly whether that was following a reasonable investigation and, fourthly whether the dismissal of the Claimant fell within the range of reasonable responses in the light of that misconduct."
15. That range of reasonable responses test was also directed to apply in relation to the consideration of the reasonableness of an investigation by the EAT, in Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23.
16. The appellate courts have also made clear, in many cases over many years, that an employment tribunal should take care not to substitute its decision for that of the employer, or to "step into the employer's shoes".
17. Finally, with regard to assessing the fairness of the dismissal, we would also need to be satisfied that appropriate procedural steps had been followed, in particular the relevant provisions of the ACAS Code of Practice on

Disciplinary and Grievance Procedures.

Discrimination arising from disability

18. Section 15(1) of the Equality Act 2010 (“EqA”), which is headed ‘*Discrimination arising from disability*’, provides that, “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.”*
19. In Pnaiser v NHS England and anor [2016] IRLR 170, the EAT summarised the proper approach to establishing causation under section 15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then establish whether the reason was ‘something arising in consequence of the claimant’s disability’, which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

Harassment

20. Section 26 EqA notes that:
- “(1) A person (A) harasses another person (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.”*
21. In assessing whether that had taken place in this case, we would first have to assess whether the matters asserted had taken place, and whether they amounted to “unwanted conduct”, which the EAT, in Thomas Sanderson Blinds Ltd v English (UKEAT/0316/10), confirmed should largely be assessed subjectively, i.e. from the employee's point of view.
22. If we were satisfied that there had been unwanted conduct, we would then

need to consider whether it had related to the Claimant's disability, "related to" having a broad meaning, certainly wider than "because of" or "on the ground of".

23. Finally, if we were satisfied that there had been unwanted conduct which related to the Claimant's disability, we would need to consider whether it had had the purpose or effect of violating the Claimant's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.
24. In deciding whether the Respondent's conduct, if it took place, had the effect of violating the Claimant's dignity or of creating an intimidating etc. environment for her, section 26(4) EqA notes that three matters are to be taken into account; the Claimant's perception, the other circumstances of the case, and whether it was reasonable for the conduct to have had that effect, a test which therefore has both subjective and objective elements.
25. In relation to violating dignity, the EAT, in Richmond Pharmacology v Dhaliwal [2009] ICR 724, noted that 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.
26. In a similar vein, the Court of Appeal noted, in Land Registry v Grant [2011] ICR 1390 at paragraph 47, that, "*Tribunals must not cheapen the significance of these words* [i.e. the words of section 26(1)(b) – "violating dignity" or "creating an intimidating, hostile, degrading, humiliating or offensive environment"]. *They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.*"

Findings

27. Our findings of fact in relation to the issues we had to determine, reached on the balance of probability whether there was any dispute, are as follows.

Introduction

28. In assessing the balance of probability we took into account the guidance of Leggatt J, as he then was, in the commercial case of Gestmin SGPSSA -v- Credit Suisse UK [2013] EWHC 3560, where he warned that memory is especially unreliable when it comes to recalling past beliefs, as memories of past beliefs are revised to make them consistent with present beliefs. The Judge noted that the process of litigation itself subjects the memories of witnesses to powerful biases where the nature of litigation is such that witnesses often have a powerful stake in their particular version of events.
29. The outcome of the Judge's observations was that he felt that the best approach to adopt was to place little, if any, reliance on witnesses'

recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and from known or probable facts.

30. We therefore looked for support for our findings from documented contemporaneous accounts. We particularly noted that the Claimant, during this hearing, advanced several potentially cogent explanations to her conduct which she had not mentioned during any of the internal investigative and disciplinary processes. We felt that her advancement of those matters now, for the first time, undermined, to a degree, the credibility of her contentions regarding the events under consideration.

Background

The Respondent

31. The Respondent is a large charitable organisation which provides housing support and care services throughout Wales. Relevantly, for this case, it operates Clarewood Young Persons Service, based in Neath. Clarewood provides 24-hour temporary supported accommodation for 8 to 10 young people between the ages of 16 and 25 at any one time. Many of the clients have challenging and traumatic backgrounds involving neglect, abuse and drug or alcohol issues. Clients generally stay at the scheme for between 18 months and 3 years during which they are supported to develop life skills and gain independence.
32. Clarewood is, and was at all relevant times, managed by Mr Green, and two support workers and four scheme support officers are employed there. The staff generally work alone, including through the night on sleep-in shifts, but there are cross-over periods of up to half an hour or so between shifts. Staff are kept up to date about clients by emails, and by notes placed on a central system with staff team meetings taking place every six weeks.

The Claimant

33. The Claimant was appointed as one of the scheme support officers at Clarewood in November 2022. She typically worked Mondays and Wednesdays, including overnight stays, averaging some 32 hours per week.
34. The Claimant had herself been a client of a similar service in Swansea between 2005 and 2008, and she had subsequently achieved a degree in health and social care. The Claimant had, for many years, suffered with mental health issues, and was diagnosed with borderline personality disorder in February 2023. In July of that year the Respondent obtained an Occupational Health Report on the Claimant's ability to undertake her role and any adjustments that might be required, and it was confirmed that the

Claimant was fit to undertake her role and that no specific adjustments were identified beyond coping mechanisms undertaken by the Claimant herself.

Contracts and policies

35. The Claimant's Conditions of Service, her contract, noted at paragraph 4.3.1, that, at all times during her employment, she was expected to comply with all of the Respondent's rules, policies and procedures, and, at paragraph 4.4.1, that her employment was subject to compliance with all policies relating to safeguarding and any professional conduct obligations.
36. The Conditions of Service document further noted, at paragraph 18.1, that the Claimant agreed to maintain the highest professional standards in the performance of her duties, that she would strive to enhance the image, reputation and business standing of the Respondent, and would not engage in any activity or conduct that would, in the Respondent's reasonable opinion, compromise that standing.
37. With regard to applicable rules, policies and procedures, the Respondent operated several which were relevant to the Claimant and the way in which she conducted her duties.
38. These included: a Professional Boundaries Policy, in which the legislative and policy framework within which the Respondent operated was set out, specific references being made to the Social Services and Wellbeing (Wales) Act 2014; the Regulation and Inspection of Social Care (Wales) Act 2016; and the Social Care Wales Code of Professional Practice 2017.
39. The separate Professional Boundaries Procedure noted, at paragraph 2.7, that one of its objectives was, "*To promote the professionalisation of the workforce by trusting our colleagues to make appropriate and informed judgements about professional boundaries with the people they work closely with and know well.*". The Procedure further noted, at paragraph 4.7, that the Respondent expects its employees to use their professional judgement and to follow the principles of the Procedure and Policy.
40. The Respondent also operates separate Safeguarding Policies for Adults and for Children and Young People. At paragraph 4.6 of each Policy, it is noted that it is the responsibility and duty of every Pobl colleague to inform a manager or on-call manager if they have any suspicions, no matter how small.
41. The Respondent also operates a Social Media and Networking Policy, which includes, at paragraph 7.5, a requirement that employees should not post anything publicly or privately that others would find offensive.

42. The Respondent also operates a Disciplinary Policy which, at paragraph 11.3, set out a list of examples of matters normally regarded as gross misconduct. These included, “*serious breach of professional boundaries*”, “*repeated or serious failure to obey instructions*”, and “*bringing the organisation into serious disrepute*”.

Events leading to dismissal

43. The Claimant appears to have been a generally well-liked and effective scheme support officer. There was however evidence, in the form of notes of one-to-one meetings between the Claimant and Mr Green in 2021 and 2022, regarding concerns over the Claimant’s maintenance of appropriate boundaries with clients. Issues were also often raised with the Claimant about her smoking at the front of the building, when smoking was expected to be done at the back, and about the Claimant being up in the lounge until 3am to 4am when working overnight, when clients would sometimes be with her, when the expectation was that they would generally go to bed at around 11pm.
44. The Claimant did not get on with one of her colleagues whose working methods contrasted with those of the Claimant. Matters reached such a level that Mr Green held a mediation between the two employees in April 2023 to try to agree a way forward. The hoped-for improvements did not arise, and Mr Green proposed a further mediation meeting in June 2023, which the Claimant refused to attend. Ultimately, Mr Green issued both the Claimant and the other employee with file notes, as a form of informal verbal warning, in August 2023, in which, in the Claimant’s case, Mr Green highlighted several areas of concern regarding her conduct and performance.
45. Issues between the Claimant and the other employee did not however resolve themselves, and further concerns were raised about emails the Claimant circulated in early October 2023. That led to Mr Green raising further concerns with the Claimant on 12 October 2023, and to him suggesting that they meet the following Monday, 16 October 2023 to discuss things. However, the Claimant replied, later in the evening of 12 October 2023, attaching a Fit Note, and noting that she would be looking to get a further one to take her until January 2024, noting that she had been expecting the development from her colleague, and was therefore doing what her psychiatrist had recommended and was going on long-term sickness absence.
46. Mr Green then held a well-being meeting with the Claimant on 23 October 2023. Caleb Heymans, one of the Clarewood support workers, and another member of the Respondent’s HR team were also present. It was agreed that a further meeting would take place on 13 November 2023, with the possibility of the Claimant returning on 20 November 2023. The Claimant had, by then,

submitted a Fit Note for one month from 20 October 2023. The Claimant then emailed Mr Green on 6 November 2023, noting that she intended to return on 20 November 2023.

47. However, just prior to that, further and more serious concerns were raised about the Claimant's conduct. They originally arose from one of the clients speaking to Mr Heymans, which he then escalated to Ms Williams, the Area Manager, in Mr Green's absence, and copied to Mr Green in an email of 23 October 2023. In this email, Mr Heymans noted his concerns in six bullet points, but concluded by saying that he did not feel that the Respondent's HR department would do anything because of the Claimant's borderline personality diagnosis.
48. Of particular concern to the Respondent were allegations of serious breaches by the Claimant of her professional boundaries obligations, including allegations of discussions with clients about selling photos of her feet online, discussions of intimate details of her sex life, and watching inappropriate TV programmes with clients, including one under the age of 18, such as "*Naked Attraction*".

Investigation

49. Mr Green was asked to undertake a fact-finding investigation into the allegations, and he met with the Claimant on 13 November 2023 as scheduled, accompanied by an HR Officer. In that meeting he outlined to the Claimant the various concerns that had been raised. He also raised the issue of clients watching TV with the client in the lounge, sometimes until 4am, and comments that the Claimant had posted on Facebook, including one in which she had posted a mocked-up image of Mary Poppins with the words "*No fuck this I'm done*" and "*I am so done*", under her words of "*Me for the next 3 months*", which had been seen by clients.
50. After discussing the concerns that had arisen, the Claimant decided that it would be better if she remained on sick leave and not return on 20 November 2023 as had been planned. The Claimant was then suspended, on 21 November 2023, pending an investigation into allegations of a serious breach of professional boundaries and of bringing the Respondent into disrepute.
51. Mr Green undertook his investigation between 13 November 2023 and the end of December 2023. In addition to meeting the Claimant again on 7 December 2023, he met four employees on 29 November 2023, who attended at ten-minute intervals, and the fifth employee on 11 December 2023. He also met four clients, three on 13 November 2023 and a fourth on 16 November 2023, and again on 20 December. Witness statements were drawn up from the notes of the meetings.

52. In relation to the further meeting with the Claimant on 7 December 2023, as an agreed adjustment, the Claimant was provided with Mr Green's questions the day before the meeting. At one point in those questions, Mr Green noted that the Occupational Health report had confirmed that the Claimant was hyper-sensitive and could get offended by a certain type of communication style, a comment the Claimant subsequently raised as one of her complaints of harassment.

53. Mr Green then produced his investigation report. He noted the allegations he had investigated under four headings:

"1. Potential Serious Breach of Professional Boundaries", which included:

- *"Engaging in conversations with clients about personal matters, including explicit details about [the Claimant's] sex life.*
- *Watching inappropriate TV programs in the presence of minors.*
- *Discussing and encouraging clients to generate income by selling photos of their feet online.*
- *Staying awake until 3am or 4am during shifts with clients."*

54. *"2. Possible Bringing of Organisation into Disrepute", under which it was noted:*

- *"Posting derogatory comments about work on social media (Facebook)."*

55. *"3. Alleged Breach of Pobl Conditions of Service (Code of Conduct)", in which it was noted:*

- *"Persisting of oppositional behaviour towards a specific staff member, despite being instructed to cease such actions.*
- *Sending negative emails to the team, targeting an individual, and failing to adhere to the Pobl values of being positive, connected and considerate.*
- *Continuing to smoke cigarettes outside the building despite multiple agreements with management to cease this activity."*

56. *"4. Potential negligence in Duties", under which it was noted:*

- *"Failure to adhere to team working values, specifically regarding shared responsibility for cleaning duties in void flats.*
- *Spending working hours watching TV/Netflix in the office."*

57. Mr Green noted the witnesses he had spoken to and the statements that had been produced, and the documentation reviewed. He then set out a summary of his findings, setting out the evidence he considered relevant to

each of the four allegations in turn. He concluded by noting that he felt that there was a case to answer which should proceed to a disciplinary hearing.

Disciplinary hearing

58. Ms Williams was then asked to chair the disciplinary hearing, and she wrote to the Claimant on 17 January 2024, noting that there would be a disciplinary hearing to consider the allegations which were those set out by Mr Green in his investigation report. The meeting was scheduled for 25 January via Teams, and was to be chaired by Ms Williams, supported by Julie Cook, HR Business Partner. The Claimant was reminded of her right to be accompanied by a work colleague or trade union representative, and was made aware that an outcome of the hearing could be her dismissal.
59. The hearing was due to commence at 9.30am on 25 January 2024, but, shortly after that, Ms Cook received an email from the Claimant's trade union representative, noting that the Claimant felt unable to attend due to a developing episode of BPD. It was instead proposed by the representative that the panel would consider a written statement that had been produced by the Claimant, and representations made by the representative.
60. The Claimant's written statement largely involved a denial of wrongdoing. It did not involve any material acceptance of improper conduct on her part, nor did it indicate an appreciation of the seriousness of the issues in the context of the safeguarding and wellbeing obligations owed to the clients.
61. The trade union representative's comments focused more on mitigation. He recognised that the Claimant "*may have crossed boundaries*", and stated that, "*whilst [the Claimant] may not have performed fully as expected this was down to being far too close to the young people*". The representative concluded by noting that if the panel found the Claimant "*accountable on the allegations, some of which she acknowledged*", he asked the panel to consider that matters may be gross misconduct, but that that did not necessarily mean that dismissal would be the only option, a lower sanction could be considered.
62. Ms Williams and Ms Cook considered matters, and concluded that the Claimant should be dismissed for gross misconduct. Ms Williams confirmed that outcome in a letter to the Claimant attached to an email sent late in the afternoon of 25 January 2024. In that, she went through each of the four groups of allegations, noting her conclusions. She noted, with regard to the allegation of serious breach of professional boundaries, that the Claimant's actions did amount to a serious breach, and had led to a loss of trust and confidence in her as an employee and in her ability to continue supporting and safeguarding the Claimant's vulnerable clients.

63. Ms Williams also noted, with regard to all allegations, that the Claimant's actions were considered to be in breach of her Conditions of Service, and to amount to gross misconduct under the Respondent's Disciplinary Procedure. She noted that she and Ms Cook were not assured that similar incidents would not happen in the future, and had concluded that the Claimant's return could place the individuals supported at risk. She confirmed therefore that they had made the difficult decision to end the Claimant's employment with immediate effect.
64. Ms Williams concluded her letter by noting that the Claimant had the right to appeal the decision, and that any appeal should be submitted in writing to Natalie Hayes within seven calendar days.

Appeal

65. The Claimant did not directly raise an appeal against her dismissal. Instead she sent emails addressed to all of the directors of Gwalia, a subsidiary of the Respondent, and to the Respondent's then Chief Executive, on 29 January 2024, both referring to making a complaint against the Respondent.
66. The Chief Executive replied the following day, noting that she had brought the Claimant's complaint to the attention of the Respondent's Director of HR, who had advised on the Claimant's appeal options. One of the Respondent's senior HR Manager's, Lloyd Woodcock-Jones, then emailed the Claimant on the same day, noting that he recommended addressing the concerns the Claimant had raised through an appeal.
67. Mr Woodcock-Jones then wrote to the Claimant again on 15 February 2024, noting that the Respondent was uncertain if the Claimant was appealing against her dismissal as no formal appeal had been received. He noted that the Respondent had decided to interpret the Claimant's emails as an appeal, and he attached a letter inviting the Claimant to an appeal hearing on 28 February 2024, to be held via Teams. The letter noted that the appeal would be considered by Ms Hayes, who would be supported by the Respondent's HR Director. The Claimant was reminded of her right to be accompanied by a trade union representative or a work colleague. It was noted that the Claimant's two emails would be treated as her grounds of appeal, but that the Claimant could submit additional grounds if she wished.
68. Further email correspondence ensued between the Claimant and Mr Woodcock-Jones regarding the appeal. Mr Woodcock-Jones noted, in an email on 15 February 2024, that adjustments could be explored of the Claimant submitting a written statement, conducting the appeal via correspondence, or of the Claimant's trade union representative attending on her behalf. The Claimant replied noting that she would attend in person.

69. In advance of the appeal hearing, Ms Hayes reviewed the disciplinary pack, the dismissal letter, and the Claimant's emails being treated as her appeal. The appeal hearing then took place as scheduled. Ms Hayes was accompanied by the Respondent's HR Director, and an HR Assistant was present to take notes. The Claimant was not accompanied, but confirmed that she was comfortable to proceed.
70. The appeal commenced with a discussion of the Claimant's BPD condition and its impact on her, and the Claimant's concerns which form her harassment complaint, i.e. Mr Green's reference, in his written questions to the Claimant in advance of the meeting on 7 December 2023, to her being hyper-sensitive; and Mr Hayman's indication, in his email of 23 October 2023, that he doubted that HR would do anything about the Claimant's conduct because of her BPD diagnosis.
71. Ms Hayes then discussed the disciplinary allegations that led to the Claimant's dismissal, effectively it seemed to us, as a re-hearing of the disciplinary case. Following the appeal hearing, the Claimant sent a number of documents to Ms Hayes for her to consider, and Ms Hayes herself considered other documents, such as notes of the Claimant's one-to-one meetings with Mr Green and staff rotas, which she felt may have had some bearing on her decision. Those documents were sent to the Claimant on 21 March 2024, by the Respondent's HR Director, in advance of the reconvened appeal hearing, which was scheduled for 25 March 2024. The Claimant did not attend on that day, and the meeting ultimately took place on 11 April 2024 with the same people in attendance.
72. That meeting again explored Mr Green's reference in his written questions to the Claimant being "*hypersensitive*", which had been discussed in the subsequent meeting as a reference to the Claimant being "*overemotional*" or "*oversensitive*". The meeting also discussed the Claimant's contention that clients would lie, and therefore that their complaints were unreliable. The details of some of the disciplinary allegations were also discussed again.
73. Following the meeting, Ms Hayes reviewed the evidence she had considered and heard, and she set out her decision on the Claimant's appeal in a letter dated 1 May 2024. The letter was ten pages long, and methodically and comprehensively went through the allegations against the Claimant, and the issues she had raised in relation to them by way of appeal.
74. Specifically with regard to the first allegation of serious breaches of professional boundaries, Ms Hayes noted that three of the four clients interviewed had raised concerns, and they had been supported by the Claimant's five colleagues. She concluded therefore, that although sometimes clients may not be reliable, there was a substantial body of

evidence to suggest that the concerns about the Claimant's conduct were well founded.

75. Ms Hayes also noted that she was deeply concerned at the Claimant's failure to recognise why her conduct had been inappropriate, and that the Claimant's explanation for her conduct had changed from one appeal meeting to the other.
76. Ms Hayes also noted her conclusions in relation to the Claimant's contention that Mr Green and Mr Heymans had discriminated against her in relation to their written comments about her, and noted that she did not consider that the comments had been discriminatory, also noting that they did not have a bearing on the disciplinary process or decision. Ms Hayes concluded her letter by noting that she upheld the original decision of the disciplinary panel to summarily dismiss the Claimant on grounds of gross misconduct.

Conclusions

77. Taking our findings of fact and the applicable legal principles into account, our conclusion on the complaints that had been brought that we had to determine were as follows.

Unfair dismissal

78. The first issue for us to address was issue 2.2, the reason for dismissal. The Respondent contending that the reason was the Claimant's conduct, whereas the Claimant contended that the reason had been her sickness absence in the fourth quarter of 2023, which had arisen from her disability, and which therefore gave rise to her complaint of discrimination arising from disability.
79. We noted that the burden of establishing the reason for dismissal, and that it was a potentially fair reason for the purposes of Section 98 of the Employment Rights Act 1996, lay on the Respondent.
80. We noted that, whilst the Claimant had been absent due to sickness arising from her disability for about a month when the disciplinary concerns were brought to her attention on 13 November 2023, she had, at that stage, been due to return on 20 November 2023. It did not seem to us therefore that the Respondent's commencement of the disciplinary investigation had been motivated by the Claimant's absence.
81. We also noted that the Claimant's diagnosis of BPD had happened in February 2023, and that she had informed the Respondent of that shortly afterwards. Notwithstanding that diagnosis, the Respondent, principally in the form of Mr Green, had continued to manage the Claimant, in our view

sensitively and sympathetically, such that we did not consider that he would have had any motivation to pursue the disciplinary matters as a way to remove a potentially problematic employee.

82. We also noted that the concerns raised went to the core of the services being provided by the Respondent to its clients, and the professional boundaries that were needed to be maintained to ensure those services were provided appropriately and effectively. We did not therefore consider that the Respondent had any realistic alternative other than to investigate them.
83. Finally, we were satisfied that both Ms Williams and Ms Hayes had only the conduct concerns in mind when reaching their decisions. Ms Hayes, in particular, took care to explore any extent to which the Claimant's condition and absence may have been a factor in her conduct or in the disciplinary action taken.
84. Overall, we saw nothing to suggest that the Claimant's condition, or her absence, had any bearing on disciplinary action taken or on the decision that she be dismissed. We were satisfied that the allegations of misconduct was "*the set of facts known to the employer*", applying the Abernethey test, which caused the Respondent to dismiss the Claimant. The Respondent had therefore established conduct as the reason for dismissal.
85. We then moved to consider issue 2.3, whether dismissal for that reason was fair or unfair in all the circumstances, applying the British Home Stores -v- Birchell test.
86. We were satisfied that the Respondent did genuinely believe that the Claimant had committed misconduct. We have already noted, in our conclusions on the reason for dismissal, some matters which have a bearing on this issue. In addition to that however, we saw nothing to suggest that the disciplinary decision makers, Ms Williams and Ms Hayes, had anything other than their belief of the Claimant's misconduct in mind. There was no hint of any ulterior motive behind their decisions, and they took care to explore the allegations, and any explanations for them, with the Claimant before reaching their decisions.
87. We then considered whether that belief had been formed from reasonable grounds. In that regard, we noted the evidence available to the decision-makers contained in Mr Green's report, in the form of statements from clients and, importantly, from colleagues. It seemed to us that both Ms Williams and Ms Hayes were alive to the prospect of clients, due to their particular circumstances, not being entirely reliable, and therefore looked for, and found, corroboration for their conclusions from the Claimant's colleagues.

88. We also noted that the Claimant herself had accepted that some of the allegations had been made out, e.g. smoking at the front of the building, staying up until 3am and 4am, watching "*Naked Attraction*" in the presence of a client who was under 18, and the Facebook posts. We further noted that the Claimant, in advance of the disciplinary hearing had stated "*Can't you just give me a warning?*", and, in advance of the appeal hearing, had stated "*Can't you just give me a final warning?*". Whilst we appreciated the Claimant's comments, in her oral evidence, that her focus in making those suggestions was in getting back to work in order to provide for herself and her daughter, we nevertheless considered that those comments were suggestive of a degree of acceptance of culpability on the part of the Claimant. Overall therefore, we were satisfied that the Respondent's belief in the Claimant's guilt had been based on reasonable grounds.
89. We then moved to assess whether those grounds had been derived from a sufficient investigation, noting, as required by Sainsburys Stores -v- Hitt, that our focus was on whether the investigation fell within the range of reasonable responses open to an employer acting reasonably in the circumstances.
90. We noted the extent of the investigations undertaken by Mr Green. He spoke to four clients and five colleagues, and considered all relevant documents and policies. He also spoke to the Claimant to obtain her perspective on the allegations, initially on 13 November 2023, and more comprehensively on 7 December 2023, when he had provided his questions to the Claimant in advance in order to give her time to prepare.
91. We also noted that Ms Hayes, at the appeal stage, considered additional documents that the Claimant had provided, and gave the Claimant a further opportunity to explain herself. The investigations undertaken by the Respondent seemed to us to be comprehensive, certainly to be within the scope of the range of reasonable responses.
92. We then considered the Iceland Frozen Foods -v- Jones test, i.e. whether the decision to dismiss was in the range of reasonable responses. We noted the particular circumstances of the Clarewood operation, the particular vulnerability of the clients, and the regulatory framework within which the services to those clients had to be provided, in which the safeguarding of the clients and the maintenance of their wellbeing was paramount.
93. We also noted the Claimant's lack of acceptance of the seriousness of her actions, and her lack of insight into the need for the maintenance of appropriate professional boundaries.
94. We felt that the Respondent, or any reasonable employer faced with these circumstances, might possibly have concluded that a sanction short of dismissal could be appropriate. However, we could not say that the decision

to dismiss was outside the range of reasonable responses. In our view it fell squarely within it. We noted, in that regard, the words used by Ms Williams in her dismissal letter, that the Respondent could not be assured that similar incidents could not be repeated in the future, and that the Claimant's return to the service could place the individuals being supported at risk.

95. With regard to procedural matters, we noted that no material concerns were raised about the procedural steps that had been taken in relation to the disciplinary process, and we were satisfied that all terms of the Respondent's own policy and of the ACAS Code had been complied with at all relevant times.
96. Our conclusion therefore was that the unfair dismissal complaint failed and fell to be dismissed.

Discrimination arising from disability

97. Our conclusions in relation to the reason for dismissal in relation to the unfair dismissal complaint were also relevant here. We concluded there that the reason for the Claimant's dismissal was her conduct, and was not her condition or her sickness absence arising from that condition.
98. As noted in the Pnaiser case, we first of all had to consider whether the Claimant had been treated unfavourably, and in this case the Respondent accepted the dismissal could be considered to be an act of unfavourable treatment. We then had to determine what caused that treatment, focusing on the mind of the decision-maker.
99. In that regard, applying our conclusions in relation to the unfair dismissal complaint, we considered that the cause of the dismissal was the Claimant's conduct, and was not the Claimant's condition, or any sickness absence which may have arisen from it. In those circumstances the Claimant's complaint of discrimination arising from disability also failed and fell to be dismissed.

Harassment related to disability

100. We noted the alleged acts of harassment; the reference by Mr Heymans, in his email of 23 October 2023, to feeling that the Respondent's HR department would not do anything about the concerns raised about the Claimant's conduct because of her BPD diagnosis; and Mr Green's comment, in his advance questions to the Claimant, that the Occupational Health report had confirmed that she was "*hypersensitive*".
101. In terms of our analysis of the complaint in relation to the issues, we were satisfied that the two comments could be said to have been unwanted

conduct, noting the direction, from the Thomas Sanderson Blinds -v- English case, that that should largely be addressed subjectively from the Claimant's point of view.

102. We were also satisfied that the unwanted conduct could be said to relate to the Claimant's disability. We noted that the focus of Mr Heymans' comment about the claimant's BPD condition was the Respondent's HR team, and not the claimant directly, but we felt that the reference to the Claimant's condition as a reason why the Respondent's HR team would not do anything about her conduct was sufficient to establish the required degree of connection, noting that "*related to*" has a broad meaning.
103. We then moved to consider whether the conduct had the purpose or effect of violating the Claimant's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her.
104. We saw nothing to suggest that either Mr Heymans or Mr Green had had the purpose of violating the Claimant's dignity or of creating the required negative environment for her by making the comments. The evidence generally indicated that both of them had a good relationship with the Claimant, and had tried their best to support her, such that it would be unlikely that they would wish to cause that effect for the her.
105. Furthermore, we noted that Mr Heymans' comments were not directed to the Claimant, and only came to her attention indirectly during the disciplinary investigation. We also noted that Mr Green was simply quoting, he thought, it was later established that he was mistaken, from the Occupational Health report.
106. with regard to the effect of the comments on the Claimant, we noted that she had raised concerns about the comments in her appeal meeting with Ms Hayes, commenting that she felt that they had been discriminatory. We also noted however, that the Claimant had accepted Mr Green's apology for using the term in his written questions, when his incorrect description of the word used in the Occupational Health report had been brought to his attention by the claimant in the meeting on 7 December 2023.
107. Whilst the claimant, in her oral evidence, indicated that that had been done on the advice of her trade union representative, we noted that her acceptance of the apology was not referred to as having arisen following a discussion with the trade union representative, whereas her reply to another element of Mr Green's apology, that the words be removed from the notes, was referenced as having arisen from a discussion with the representative.
108. We also noted that the Claimant had herself noted, in an email to Mr Green, in which she described the impact of BPD, that it made people

"overemotional". Whilst the word used by Mr Green, "*hypersensitive*" was not precisely the same as that used by the Claimant herself, it was close in its meaning, and it was therefore difficult to see why the Claimant should be particularly affected by that term when she herself had used a similar one.

109. In addition to the Claimant's own perception, section 26(4) of the Equality Act 2010 requires us to consider the other circumstances, and whether it is reasonable to consider that the words used had the required effect.
110. In that regard, we noted the guidance from the Dhaliwal case, that 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.
111. We also noted the guidance from the Grant case, that the words used in section 26(1)(b), "*violating dignity*" and "*creating an intimidating, hostile, degrading, humiliating or offensive environment*", should not be underestimated.
112. In the circumstances, for the reasons we have outlined, we did not consider that it could reasonably be said that the words used by Mr Heymans and Mr Green had the effect of violating the Claimant's dignity or of creating the required negative environment. The words were used matter-of-factly in both cases, and, in Mr Heymans's case, indirectly. In our view, they were trivial and transitory, and said in circumstances where it should have been clear that no offence was intended.
113. We also therefore considered that the Claimant's complaint of harassment related to disability failed and fell to be dismissed.

Employment Judge S Jenkins
Dated: 3 December 2024

REASONS SENT TO THE PARTIES ON

13 December 2024

Katie Dickson
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS