EMPLOYMENT TRIBUNALS

Claimant: Miss Tehmina Akhtar

Respondent: Calrom Limited

Heard at: Manchester (partly on a hybrid basis by CVP)

On: 17, 18, 19, 20 June 2024, 10 11 October 2024 and 17 and 18 October 2024 (panel only)

Before: Employment Judge Cookson
Ms Crane
Ms Doyle

REPRESENTATION:

Claimant: In person (and by Ms Trayers of Counsel for the final two days) 10 and 11 October 2024 claimant and her representative attended by CVP.

Respondent: Ms Niaz-Dickinson of Counsel

JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The complaint of unfair dismissal is well founded. The claimant was unfairly dismissed.

2. The complaints of direct disability discrimination are not well-founded and are dismissed.

3. The complaints of unfavourable treatment because of something arising in consequence of disability are not well founded and are dismissed.

4. The complaint of a failure to make reasonable adjustments for disability is not well-founded and is dismissed.

REASONS

5. The claimant was employed as a "Dot Net Developer" or ".Net Developer" by the respondent, a company that provides software and development services to the travel sector, between 5 July 2007 and 31 August 2022. Early conciliation started on 23 November 2022 and ended on 4 January 2023. The claim form was presented on 6 January 2023. The claimant brought complaints of unfair dismissal and disability discrimination.

6. There was a Preliminary Hearing for case management purposes before Employment Judge Callan on 27 April 2023 and as a result of that a list of issues was identified. There was a further case management preliminary hearing on 22 February 2024 before Employment Judge Ross which led to a further preliminary hearing to consider an amendment application by the claimant on 9 April 2024. The amendment application was determined by Employment Judge McDonald and the application to amend was refused. The claimant had sought to add a number of additional complaints of direct disability discrimination, failure to make reasonable adjustments, a claim of race discrimination which included a complaint of race related harassment, and a claim of victimisation under Section 27 of the Equality Act 2010.

7. At the outset of this hearing it was confirmed to the Tribunal that the issues to be determined by this Tribunal were as set out in the List of Issues attached to the Case Management Orders of Employment Judge Callan but updated as noted by Employment Judge McDonald. The updating reflected the fact that the respondent had conceded that the claimant was a disabled person between July 2022 and 31 August 2022 by reason of anxiety disorder. It was also noted that there is an incorrect reference in the Callan Case Management Orders to direct race discrimination when reference should have been to direct disability discrimination.

8. In reaching our judgment the Employment Tribunal considered: -

    a. A joint bundle of documents prepared by the respondent which runs to 615 pages and a second bundle of documents, described as a remedy bundle, which contains various documents including those relating to disability, which runs to some 444 pages.

    b. An agreed cast list and chronology prepared by the respondent.

    c. The evidence in a witness statement and given orally by the claimant.

    d. The evidence in a witness statement and given orally for the respondent by

        i. Mr Simon Wilkins, Chief Technical Officer

        ii. Ms Lorraine Astbury, Chief HR Officer and

        iii. Mrs Julie Griffiths HR Business Partner.

e. Written and oral submissions from both counsel.

Adjustments for the claimant and timetabling

9. It had been recognised by the Employment Tribunal that the claimant is a disabled person. She had identified the need for various adjustments which were discussed with the claimant at the outset of the hearing and accommodated as far as possible. Unfortunately, one adjustment, that the hearings should be conducted in ground floor hearing room, proved impossible to accommodate due to the hearing of a long case which due to its size required the only ground floor hearing room in Manchester Employment Tribunal. The claimant had also requested that she be allowed frequent breaks as required which we were able to accommodate, and she was provided with a dedicated waiting room.

10. Regrettably, it proved impossible to complete the case within the allocated time, in part for reasons which are discussed below. In the intervening period the claimant instructed counsel who attended for the final two days of the hearing before us. The claimant requested that she and her counsel be allowed to attend the final two days of the hearing with parties by video, with the claimant attending from Pakistan, and that request was accommodated.

The claimant's amendment application

11. It had been recorded in the list of issues that the claimant brought a claim of direct disability discrimination in relation to the termination of her employment, together with a number of claims of unfavourable treatment discrimination because of something arising in consequence of her disability in related to other alleged detriments. As noted above at the outset of the hearing the claimant had agreed that list of issues was correct. However at times when she was answering questions during cross-examination and then more particularly in her cross examination of Mr Wilkins, the claimant repeatedly put her case in relation to the reason for her dismissal on the basis that she had been discriminated against in the decision to dismiss her was because she was in Pakistan and unable to travel back to the UK for reason caused by her disability.

12. In light of the fact that the claimant is a litigant in person who appeared to be putting a different case to the one that had been identified in the list of issues, the Employment Judge raised this with the parties. It was acknowledged by the respondent's counsel that it now appeared that the claimant was putting her case on the basis that she had been dismissed for a reason which was because of something arising in consequence of disability. Ms Niaz-Dickinson told us that the respondent did not accept that this was a situation where the claimant's claim could simply be relabelled, and it would not consent to an amendment. The claimant was asked if she wished to make an application to amend her claim and was given time to consider this. She decided not to make that application and to proceed with her claim as originally identified by employment judges in the past and identified in the list of issues and confirmed with the Tribunal at the outset of the hearing.

13. However, in the break between the first part of the hearing and the reconvened part hearing dates in October, the claimant wrote to the Tribunal to indicate that she wished to make an application to amend to change the basis of her discrimination complaint about the termination of her employment to one of a complaint under section 15 Equality Act 2010 as set out above.

14. That amendment application was considered by the Tribunal at the outset of the reconvened hearing. Having heard submissions from both counsel, the application was refused. Oral reasons to explain that the decision were given at the time and written reasons were not requested, but in brief summary the Tribunal concluded that the balance of prejudice fell in favour of the respondent. The application to amend was made at a very late stage and in particular had been made after both the claimant and, significantly, Mr Wilkins had given evidence and been released by the tribunal. The claimant was in Pakistan and could not be recalled to give further evidence or be cross-examined. It was acknowledged by the Tribunal that the respondent was prejudiced by the fact at this late stage the respondent would be unable to offer evidence relevant to the question of whether it had a legitimate purpose. In the circumstances the tribunal concluded that it was not in accordance with the overriding objective to allow the application to amend.

The relevant law

Unfair dismissal

15. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95, but in this case the respondent admitted that it dismissed the claimant on 31 August 2022 despite initially informing the claimant that she had resigned.

16. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First the employer must show that it had a potentially fair reason for dismissal within sections 98(1) and (2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider whether the respondent acted fairly or unfairly in dismissing for that reason.

17. The respondent initially relied on two potentially fair reasons for dismissal:

    a. Section 98 (2) (b) .. the conduct of the employee, and

    b. S98(1)(b) which provides that if a reason is not one which falls within s98(2), the reason for dismissal may be fair if it is “some other substantial reason of a kind such as to justify the dismissal of an employee holding the position”.

18. However before us the respondent has relied only on s98(1)(b).

"***SOSR dismissals"***

19. Perhaps self-evidently, to be a "SOSR" the reasons do not have to be of the same type as those stipulated in s 98(2). The reason must not be whimsical or capricious and must be capable of being substantial. The key question is whether the reason could justify dismissal, if so, it will pass as a substantial reason (*Kent County Council v Gilham* [1985] IRLR 18, CA).

20. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, (having regard to the reason shown by the employer) shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

Disability Claims under the Equality Act

Meaning of Disability

21. Section 4 EqA identifies "disability" as a protected characteristic. Section 6(1) defines disability as follows:

"A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

22. In the list of issues the disability is noted as stress, anxiety, and trauma. The respondent conceded that the claimant was disabled by reason of anxiety disorder from July 2022. This concession means that the claimant was accepted to be disabled for most of the complaints, but it was necessary for the tribunal to determine if the claimant was disabled when it is alleged the respondent refused to extend furlough leave.

23. In determining the issue of disability the tribunal must have regard to Secretary of State's Guidance on the meaning of disability.

The burden of proof in discrimination cases

24. s136 Equality Act states that

"(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."

25. This section reflects what is often called "the shifting burden of proof." The law recognises that direct evidence of discrimination is rare and employment tribunals frequently have to infer discrimination from their findings of material facts. The law requires the claimant to show facts which could suggest that there was discriminatory reason for the treatment, but the claimant does not have to prove discrimination.

26. It is only if the claimant shows facts which would, if unexplained, justify a conclusion that discrimination had occurred, that the burden shifts to the employer to explain why it acted as it did. The explanation must satisfy the Tribunal that the reason had nothing to do with the protected characteristic.

Direct Discrimination

27. s13 Equality Act 2010 states that

"(1)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."

28. In assessing whether treatment in less favourable, the test is an objective one — the fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment. However the claimant's perception is still relevant. The approach we must adopt is helpfully explained in the EHRC Code of Practice as follows 'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated — or would have treated — another person.'

29. Whether less favourable treatment has occurred is assessed by comparing what has happened to the claimant with how a real or hypothetical comparator was treated. The legislation requires that must be no material differences between the circumstances relating to the claimant and their comparator.

30. In *Gould v St John's Downshire Hill* 2021 ICR 1, EAT, Mr Justice Linden, helpfully explained what the tribunal must decide: 'The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, 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… [and] the influence of the protected characteristic may be conscious or subconscious.'

31. As noted above, this is decided bearing in mind the burden of proof in s.136 of the EqA. This entails a two-stage test. At the first stage the claimant must prove facts from which the tribunal could decide that discrimination has taken place, which is commonly described as a 'prima facie case of discrimination.'

At the second stage — which is only engaged if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) — the burden 'shifts' to the respondent, which must prove (on the balance of probabilities) a non-discriminatory reason for the treatment in question. Tribunals will only need to apply the provisions of S.136 if they are not in a position to make clear positive findings based on the evidence presented as to whether there has been discriminatory treatment and about the putative discriminator's motives for subjecting the claimant to that treatment.

32. The Court of Appeal's judgment in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and others* 2005 ICR 931, CA makes clear that the outcome at the first stage will usually depend upon what inferences it is proper to draw from the primary facts found by the tribunal.

Discrimination because of something arising in consequence of disability – s 15 Equality Act

33. Section 15 EqA defines discrimination arising from a disability (as it is described in the heading in the Act) as follows

"(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 a disability."

34. Section 15 EqA is particular to people with disabilities. It recognises that the reason for discriminatory treatment might not be the disability itself (that would be direct discrimination) but because of the way the disability impacts on the disabled person, for example because they had to take a lot of time off due to sickness absence caused or related to their disability.

35. The treatment is unlawful if it is "unfavourable" rather than "less favourable" which means that no comparator is required for this form of alleged discrimination.

36. s15 EqA requires the unfavourable treatment to be because of something arising in consequence of the disabled person's disability. If the something is an effective cause – an influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously), the causal test will be satisfied. The employer's motivation is irrelevant. It is sufficient for a claimant to show facts from which the tribunal could reasonably conclude that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. If the claimant does that, the burden shifts to the respondent to show that there was a non-discriminatory reason for the treatment.

37. Even if a claimant succeeds in establishing unfavourable treatment arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

38. There is guidance for tribunals about how to approach s15 claims in the case of *Pnaiser v NHS England and anor* 2016 IRLR 170, EAT. Mrs Justice Simler summarised the proper approach to establishing causation under S.15 is as follows:

    a. First, we must identify whether the claimant was treated unfavourably and by whom.

    b. Next, we 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.

    c. We 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.

Failure to make reasonable adjustments

39. The EqA imposes a duty on employers to make reasonable adjustments for disabled people. The duty can arise in three circumstances. In this case we were concerned with the first of those. This is set out in sub-section 20(3). References to "A" are to an employer.

    "(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

40. Paragraph 20(1)(b) of Part 3 of Schedule 8 of the Equality Act says that the duty to make reasonable adjustments does not arise if the employer: *"does not know and could not reasonably be expected to know – "(b) …that an interested person has a disability and is likely to be placed at the disadvantage referred to…"*

41. S21 of the Equality Act provides

    "Failure to comply with duty

    (1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

    (2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

42. It is for the claimant to show what "provision, criterion or practice" it is alleged they have been subject to. The term is not defined in the EqA. However, the EHRC's Employment Code, explains how we should approach this as follows the term *'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications, or provisions. A [PCP] may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision'* (para 4.5).

43. Where a disabled person claims that a practice (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the alleged practice must have an element of repetition about it and be applicable to both the disabled person and his or her non-disabled comparators.

44. However, para 20(1) of Schedule 8 to the EqA provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know:

"….[not relevant]

in any other case, that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid" – para 20(1)(b)."

45. The requirements set out in para 20(1)(b) – which apply in relation to employees in employment – are cumulative. In other words, an employer has a defence to a claim for breach of the statutory duty if it does not know and could not reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP, physical feature or lack of auxiliary aid. Importantly, the words 'could not reasonably be expected to know' in para 20 give scope for an employment tribunal to find on the evidence that the employer had what if often called constructive (as opposed to actual) knowledge by lawyers, both of the disability and of the likelihood that the disabled employee would be placed at a disadvantage. Accordingly, the question is objectively what the employer could reasonably have known following reasonable enquiry. Employers do not have to make every possible enquiry in circumstances where there is little or no reasonable basis for doing so.

46. In determining a reasonable adjustments claim, a tribunal will therefore have to consider the nature and extent of the substantial disadvantage relied on by the employee, make positive findings as to the state of the employer's knowledge of the nature and extent of that disadvantage, and assess the reasonableness of the adjustment (i.e. 'step') that it is asserted could and should have been taken in that context. In practice, these three aspects of the

duty necessarily run together. It is often the case that an employer cannot make an objective assessment of the reasonableness of proposed adjustments/steps unless it appreciates the nature and extent of the substantial disadvantage imposed on the employee by the PCP, physical feature or lack of access to an auxiliary aid, and an adjustment to a work practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage.

47. In terms of how we should assess whether an adjustment is reasonable or not the Code of Practice says this,

"What is meant by 'reasonable steps'?

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable."

Our findings in this case

48. We have made our findings of fact in this case on the basis of the material before us, taking into account the contemporaneous documents where they existed and the conduct of those concerned. We have resolved the conflicts of evidence which arose on the balance of probabilities taking into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

49. Not all of the evidence which we received in this case appeared to be relevant to the legal issues. We have not made findings of fact about every contested matter of evidence before us. In particular we have received extensive evidence from the claimant about things which happened before the start of her career break but, as the relevance of much of this was not made clear, we considered only evidence which appeared to be relevant and necessary for us to determine the legal claims.

50. The respondent is part of a group of companies, Travel Innovation Group, which has two other UK companies and a sister company based in Pakistan, Calrom Pakistan (Private) Limited. The respondent employed 75 employees in the UK at the time of the hearing before us.

51. The claimant began employment on 2 July 2017. She was employed as a ". Net Developer," also referred to in documents as a "Dot.Net Developer." We had a statement of terms and conditions of employment signed on 5 July 2017 but in the bundle of documents before us. The claimant was based in open plan offices in Wilmslow, Cheshire.

52. Initially it seems the claimant's employment went well. She had been employed on a fixed term basis at first and was then made a permanent member of staff. At the outset of her employment the claimant had declared "blurred vision" as an underlying health condition, but nothing else. In 2018 the claimant had informed the respondent that she was experiencing some dizzy spells which were being investigated by her GP and that she had some other medical conditions which did not feature in the evidence before us. In the usual kind of way, the claimant had intermittent days off for ill health, but there appeared to be no significant reasons for any concern.

53. In around September 2019 something of a dispute arose between the claimant and her colleagues about the position of her desk. There had been various office seat moves and in particular there were discussions about the claimant's desire to work next to an open window. This as a source of tension in the office between the claimant, her managers, and her colleagues. It seems the claimant's colleagues objected to the window being open. Her manager made various unsuccessful attempts to resolve this. The claimant's reasons for wanting to sit next to the window were that she was suffering from anaemia and was experiencing dizzy spells.

54. On 31 January 2020, the claimant experienced what was described at the time as a near faint or dizzy spell in the office. The account given by the claimant in contemporaneous records from around the time to her GP and that in witness statement were not wholly consistent. We did not consider the claimant's evidence to be very reliable about this, but what is clear is that the claimant had felt unwell at work and thought she would faint. There was sufficient concern about the claimant that an ambulance was called, and the paramedic crew spent some time with the claimant, but she was not taken to hospital and was advised to visit her GP.

55. When the claimant submitted a statement of fitness to work shortly after this the reason given was "*near faint episode at work*", although the claimant's own GP records recorded that what happened was a likely to have been a panic attack, and in her evidence to us Ms Griffiths, who was also present in the office at the time, also referred to this as a panic attack.

56. The claimant had attended her GP and they provided a statement for fitness to work, which perhaps rather unusually, rather than signing the claimant as off work, suggested that the claimant would be fit for work if a number of adjustments were made, in particular being allowed to open a window if needed. It seems the respondent, and Ms Griffiths in particular, rather misread the note and understood it be the more common sort of fit note which records that someone is unfit for a period of time. Ms Griffiths did not think she needed to do anything until the claimant came back to work, and the claimant did not chase it up but waited for the respondent to get in touch with her. The result was a period of sick leave. On 11 February 2020, the claimant met with her line manager, Mr Adeel, and Ms Griffiths in a return-to-work meeting. The typed summary of the meeting recorded that the claimant had suffered a panic attack at the office and that there was a discussion about adjustments. The Tribunal finds that the claimant gave the temperature in the office as the main issue which was causing her difficulties and she had reported that when she

felt too warm, she began to feel claustrophobic and needed to have the window open.

57. The notes record that the claimant told the managers that she had not been clinically diagnosed with anxiety, but in the course of the meeting there had been discussions about the claimant feeling anxious and more generally about her mental health and what steps she could take to help "mitigate" that. The claimant was also encouraged to see the company's Personal Development Coach. It is clear that the respondent had knowledge at this time that the claimant was experiencing some symptoms of anxiety and stress, but the tribunal accepted that the respondent was not aware this was possibility a long-term issue or that it was more than an adverse reaction to day-to-day life.

58. This was significant in that the claimant says she was disabled at this time, but other than a description of the events of 31 January and the following meetings, the claimant offered us extremely limited evidence about the impact of any impairment on her day-to-day activities. Our conclusions about that are discussed further below.

59. The claimant returned to work on 20 February 2020 and on her return was provided with a Dyson fan and there was an agreed approach in relation to her taking staggered breaks. In the background to this, the UK was, of course, starting to experience the effects of the Covid 19 pandemic. As a company servicing the travel industry, the respondent was significantly impacted both by the situation in the UK and by the impact of the pandemic on global travel. On 1 April 2020 most of the company's staff, including the claimant, were furloughed.

60. The claimant was one of those staff selected to return to work on 1 July 2020, but she told us that she found it difficult. On 6 July 2020, the claimant spoke to Mr Wilkins to request that she stay on the furlough scheme until the end of October when the furlough scheme was due to end. The claimant referred to "weak health," but the Tribunal accepts the respondent's evidence that she was not more specific in the information she provided to the respondent about what she meant, and we also accepted that this was a time when many staff were expressing anxiety and concern about the return to work.

61. Mr Wilkins explained that he did not consider that it was practical for the period of furlough to be extended. The business had gone through a period of very significant challenge, but the travel industry was beginning to open up again and the respondent needed to rebuild its business which it did by gradually bringing staff back. We accepted that the respondent had genuine reasons for seeking to bring the claimant back and moving forwards rather than keeping staff on furlough which would begin to generate a cost for the business as the furlough scheme was wound back by the Government.

62. At the outset of the Covid pandemic staff had been offered the possibility of an unpaid career break under the terms of a scheme the company already had in place. The claimant asked to take a career break if she could not be placed on furlough and Mr Wilkins and Ms Astbury decided that could be approved. The travel industry was still fragile. We accepted the respondent's evidence that it

made financial sense at that time to allow career breaks if employees did not want to return, without the additional cost of furlough.

63. In light of this it was agreed that the claimant was to be placed back on furlough until 31 July 2020 then the claimant would be allowed to take annual leave during August, and then a career break from September 2020 to 31 January 2021. That was a month longer than the period usually allowed for a career break under the career break policy, but the terms were otherwise as set out in the career break policy and subject to the same conditions.

64. Eventually the claimant formally commenced her career break on 21 August 2020. To record what had been agreed, the claimant signed a copy of a career break procedure on 7 July 2020. The document signed records that career breaks will not be for longer for four months except in exceptional circumstances, that the employee must keep in touch with the company at regular intervals and that requests for career breaks can only be made once every three years. The document includes the following wording:

"*If the company agrees to grant you a career break (whether this is for the dates and duration that you have requested or whether it is for alternatively agreed dates and duration), this will be on the basis that you agree to return to work on the specified date at the end of the break. This will be a return to the same job on the same terms and conditions as you occupied before the career break unless a redundancy situation has arisen…. On your return to work, the company may, at its absolute discretion, require you to undertake a period of induction and/or retraining, as necessary.*

Except where you are ill and have followed the company's normal procedures in relation to sickness absence, if you fail to return to work on the agreed return date at the end of a career break, it will be treated as gross misconduct. There will be an investigation into why the return was delayed and it will be decided whether the circumstance justify your dismissal."

65. It was agreed as part of the career break that the claimant would have bi-monthly meetings with Mr Wilkins. It seems these meetings did take place, at least during the first period of the career break, although, as time passed, they seemed to have rather fallen by the wayside.

66. On 5 October 2020, the claimant wrote to Mr Wilkins to request an extension of her career break until 31 May 2021. The reason given for the extension was that the claimant had signed up to an online language course which concluded at the end of May. The claimant describes this as being *"very productive so far and beneficial to my well-being*."

67. The tribunal considered whether this reference to her well-being suggested that the respondent should have been on notice of underlying health issues, but we concluded that in the absence of other information this was too vague to suggest anything other than a desire to continue a sabbatical.

68. Mr Wilkins told the HR team that he had no issue with extending the career break as requested and a letter was sent confirming the extension on 7 October 2020. That is a short letter which says this:-

"Following your request to Simon Wilkins to formally extend your career break, please take this letter as confirmation we are happy to accept this request.

Your current break started on 21 August and was due to finish on 31 January 2021, however this will now be extended to 31 May 2021".

69. In May 2021, the claimant asked to extend her career break again. Her request said this:-

"I have suffered anxiety in the last few months that has weakened my general health. I would say it is most likely triggered due to the exceptional circumstances of the extended lockdown. I believe dedicating a little more time to my wellbeing would be beneficial in the longer run and secondly, my language course is extended beyond May. This course has only brought positivity so far." The request goes on to express appreciation for support the respondent had offered the claimant.

70. The claimant clearly referred to anxiety at this stage, but the Tribunal considered that it was significant that the claimant herself attributed her recent symptoms to the extended covid lockdown which suggested to the tribunal that the claimant herself thought she was experiencing a reaction to life events.

71. Mr Wilkins replied on 28 May 2021. He said this to the claimant:-

"*It was good to catch up with you on teams last week and I am sorry to hear you need to extend your career break for health reasons. I am pleased to be able to agree to your request to extend your career break until 31 January 2022, however I do not belief a further extension beyond that point would be possible. Technology moves at pace and we always endeavour to ensure our products are kept in line with such developments."*

72. In the background, correspondence between Mr Wilkins and Mrs Astbury shows that there were some concerns with the extension to the career break. Mrs Astbury pointed out to Mr Wilkins that the respondent was entitled to say that the position could not be held open any longer as workloads were increasing, and she made the point to him that while the role was held open it could not be filled.

73. In his reply, Mr Wilkins said *"I am struggling to see what the end point is here. There was no indication of improvement of her mental wellbeing, I understand she has fairly recently stopped recently to Saba and Hena who are in contact with her. The language course whilst apparently bringing positivity is now open ended as came up in my conversation with her on Friday*." He went on to express the concern that the longer the claimant was not engaged with the business, the further behind she would be when she eventually rejoined, increasing re-training needs.

74. We concluded that the internal correspondence indicated a willingness to maintain the claimant's employment, but there is a hint that Mr Wilkins had concerns about the future. He said this to Ms Astbury, *"as you say keeping the position open isn't costing the business anything, I do not wish to make the*

position redundant either. So it seems to be a question of how and when we bring the situation to a head. Waiting until January 2022 is fine with me, just getting a feeling of kicking the can down the road but there is time for that too".

75. Both Mrs Astbury and Mr Wilkins wrote to the claimant to confirm the career break extension, but both her warned that future extensions would be unlikely. In her letter Mrs Astbury said the respondent had been pleased to be able to support her request for a further extension of career break with the hope that the additional time would be beneficial from a personal and health point of view. The letter dated 28 May 2021 says this:-

"Your career break started on 21 August and was due to finish on 31 May 2021 following an extension, we now agree to this being extended further to 31 January 2022.

As explained by Simon, we cannot extend your career break beyond the end of January 2022 due to the pace of technology change within the business and the anticipated requirement for the additional resource by that point".

76. The letter goes on to note that on the claimant's return to work she would be required to undergo a period of re-training. The policy had suggested this might be required. We accepted that at this punt and in light of the length of the career break the respondent now considered this essential in light of infrastructure developments within the business.

77. In January 2022, the claimant wrote to Mrs Astbury copied to Mr Wilkins to express concerns about her ability to return to work as planned. She reported that she had suffered another panic attack the previous October "which resulted in the severe detriment of my health." She reported that she had gone to live with her sister in London and then towards the end of December she had travelled to back to Pakistan to be with her family. At the time of writing, which was shortly before her career break was due to end, the claimant was in Pakistan. She reported that before getting to Pakistan she had contacted her GP who had put her on a waiting list for Cognitive Behavioural Therapy for which there was a waiting time of around three to four months and that the therapy would be expected to last between six to twelve weeks depending on the frequency of sessions, with sessions to be held online.

78. The claimant said this:

"Due to my poor health I cannot live independently and require family support. In the light of my current health condition I can see two potential options concerning work life as described below, but I am open to any suggestions that you have.

Work from home (Pakistan) until I have completed my CBT course and my health is restored to the extent that I can return to the UK.

However I would like to bring to your attention that working from Pakistan would bring some challenges since I live in a small town with limited

infrastructure. There may be some unexpected internet connection issues, internet speed issues or electricity downtime during the day. The time difference will be a factor also being in Lahore is unfortunately not an option for me since I have no relatives here, and the whole purpose of being in Pakistan is to have the support of my family."

79. By this point we concluded the respondent knew the claimant had been experiencing anxiety issues for some time. This suggested something more and that the claimant has started to struggle significantly with day-to-day life which her doctor clearly considered was likely to last for some time given the waiting list period for the CBT.

80. Mrs Astbury's reply acknowledged that working from home from Pakistan did not appear to be an option and she reported that she had discussed the matter with Mr Wilkins and that a further extension to the career break "for a final time" had been agreed until 31 August 2022. Her letter said this:

"*This will mean the duration of your break will have been two years. If at that point you are not able to return then we will have to review your capability to carry out the role in line with our capability policy".*

81. This reply suggested an understanding on Ms Astbury's part that the claimant may have an underlying health condition and that her future return to work may be impacted by her health.

82. Internal correspondence at the time shows that Ms Griffiths was informed of the extension and drew Mrs Astbury's attention to various guidance about managing mental health issues, supporting mental health in the workplace including guidance from ACAS about absence from work where time off is due to a mental health issue.

83. In March 2022, the respondent closed its Wilmslow office, relocating the respondent to the site at Cheshire Oaks Business Park.

84. In July 2022, the claimant wrote to Mr Wilkins, copied to Ms Astbury asking for catch up. She said *"My CBT sessions are going well, and the programme is approaching towards its end soon. At which point my instructor will decide if I need few more extra sessions or not*." We accepted that in light of that and after discussion in the catch up that Mr Wilkins understood the claimant would be returning to work as planned. He reported to Ms Astbury that the claimant "*seems in a better place and from what she was saying far more self-aware and understanding of action she needs to take. She is planning on returning to the UK soon and wants to resume her employment with Calrom. She will advise us when arrangements to return to the UK have been made, expect this to be mid-August at the latest. I explained that once we knew this Julie and her line manager (Rehman) would work with her to plan her return to work.*"

85. The claimant told us however that as the time to return to the UK approached, she became more unwell. We were told that she felt unable to fly back on her own and began to make plans to travel back with her parents. We were told that she had begun to make some preliminary arrangements with an agent,

although we had no evidence of that, and no visa application was made. The claimant told us that it would typically takes around 6 weeks to obtain the necessary visas for her parents. There was still time to obtain a visa at that time, but the claimant would have needed to act. She did not do so, nor did she make any alternative plans were made.

86. On 12 August 2022 Ms Griffiths and a colleague had an online meeting with the claimant. The claimant would later suggest that Mr Wilkins had been present on that call but that is inconsistent with an email Ms Griffiths sent to Mr Wilkins and the tribunal prefers the evidence of the respondent's witnesses that the claimant is mistaken about that. If Mr Wilkins had been present Ms Griffiths would not have had to report to him what had been said. This was the first time the respondent learnt the claimant felt she could not travel back to the UK on her own. The possibility of travelling with her parents was reported as a "plan B." The claimant told Ms Griffiths a visa application had been made but that it could take 6 to 8 weeks. That was not true. No visa application had been made, only preliminary enquiries of an agent. The claimant knew that by this time this meant if she was to travel with her parents, she could not return to the UK to return to work in line with the respondent's expectations, but she did not reveal that to the respondent.

87. The claimant also told Ms Griffiths that when she would be able to return would depend on when how she was feeling. Ms Griffiths reported to Mrs Astbury and Mr Wilkins that *"we are very doubtful she will be back in readiness for the 1st September which is when her sabbatical ends*" and also that "*she needs more time*" and that *"putting her under pressure to return… makes her poorly*".

88. It seems likely to the Tribunal that this discussion had led the claimant to expect that she would be granted a further extension to her career break and Ms Griffiths did not give the claimant any warning that her employment would be terminated if she did not return.

89. There were subsequent discussions about what the respondent should do between Ms Griffiths, Mrs Astbury and Mr Wilkins, confirmed by internal emails. It was agreed that Ms Griffith would inform the claimant that her career break would not be extended again, but very significantly, it was also agreed that once agreed and approved the email would not be sent to the claimant until the end of the following week because Mr Wilkins *"did not want to get into big debate with her"*. It was noted that if the claimant had not indicated that she had returned to the UK by that time *"it's very unlikely she will be here by 1st September".*

90. An email was drafted and approved informing the claimant that if she was not back in the UK and ready to return to work by 1st September the company would take the view that she was not capable of carrying out her role and was resigning. Mr Wilkins added a paragraph expressing a willingness to consider employing the claimant in the future. The Tribunal concluded that the delay was imposed knowing that by the time she found out, if there had previously been a slim chance any arrangements being put in place for travel even if the claimant changed her mind given the ultimatum in the email, the delay would

mean that chance would be lost. It would be impossible for the claimant to comply, so the termination of the claimant's employment effectively became inevitable.

91. The email was approved by Mr Wilkins late on 19 August but not sent to the claimant until Thursday 25 August at 13.39 UK time, (and of course in light of the time difference that meant the email was sent outside business hours in Pakistan) with only one day until the UK's weekend and late summer bank holiday. The claimant was due to return to work the following Thursday, 1st September.

92. The relevant section of the email to the claimant said this

"*You mentioned that you still hadn't booked a ticket because you were anxious of traveling alone back to the UK which, is understandable, and you didn't give any indication of when you are likely to travel ,but you did mention that you were hoping that your parents could travel with you and stay in the UK for some time but this was all dependant on a visa allowing them entry in to the UK, which could take up to 8 weeks, which obviously takes us past the 31st August 2022, the end of your sabbatical.*

As you know the Company have gone 'above and beyond' in allowing you the opportunity to take an extended Career break lasting 2 years of which we know you have been very grateful of.

Our normal sabbatical policy is 6 months, but we felt we had to give you more time to complete your CBT treatment, which we believe has been very successful, as well as spending much needed quality time with your family out in Pakistan in order to restore your health however, as the email sent from Lorraine dated 25/01/22 clearly outlined that your sabbatical will end on the 31st August 2022 and it is a business decision that no further extension will be authorised.

So having said that, unless you are back in the UK and ready to return to work by the 1st September 2022, we are saddened to say that we have to take a view that you are not capable of carrying out your role at this current point in time, and are therefore resigning from your position. We have already collectively agreed that it is not an option to work from Pakistan from the 1st September, as you outlined in your email to Lorraine and Simon on the 20th Jan 2022, due to the limited infrastructure of the town that you currently reside in and unexpected interruptions to the internet connection."

93. We concluded that final paragraph was disingenuous. It suggests the claimant could perhaps return to the UK whilst acknowledging it was unlikely. The respondent must have known it was effectively impossible.

94. On the bank holiday Monday, 29 August 2022 the claimant emailed Mr Wilkins and asked to discuss the email. She said she had received "*the impression that you are being understanding of my situation and my efforts to try get back to the UK as soon as possible*." As noted above we concluded that Mr Wilkins had not spoken to the claimant on 12 September, but the email sent by Ms Griffiths to Mr Wilkins about that call suggests that during their conversation

Ms Griffith may well have given the claimant the impression that the respondent was going to respond sympathetically if she said she was not well enough to return to the UK. This email from the claimant is consistent with that.

95. Mr Wilkins replied saying the need to return on 1st September has been made clear from a considerable period of time. The claimant replied to inform Mr Wilkins that the factors which she had previously referred to explaining why she could not work from home in Pakistan no longer applied because there would not electricity outages now summer was over and the internet in the area had improved. In light of that the claimant suggested she could temporarily work from home in Pakistan.

96. Mr Wilkin's reply to that, sent on 30 August was rather odd. He made no attempt to reply to the suggestion of working from home or engage with what the claimant said about extending her career and instead said *"it seems we are of the same understanding; once you have managed your transition back to the UK we can discuss opportunities. Please let us know as and when your plans progress."*

97. On 31 August 2022, the day before the claimant was due to return to work, Ms Griffiths wrote to the claimant to confirm the termination of her employment as follows

"I am writing to confirm the termination of your employment as you have not returned at the end of your extended sabbatical leave,31st August 2022. As outlined in our email's dated 25th January 2022 and 25th August 2022 the company cannot provide any further extension as workloads have increased and we need the resources.

You are currently residing in Pakistan and as you are not in the UK you are not available to continue in your employment and therefore in effect you have resigned from your position."

98. The letter goes on to note administrative arrangements, including the payment of 61 days in owed holiday pay.

Submissions

99. We received helpful submissions from both counsel. Rather than seeking to summarise their respective positions here, we have explained how the tribunal took into account those arguments we heard and what conclusions we reached as result, in relation to each legal issue.

Further discussion, findings, and conclusions

100. It is worth clarifying our reasoning process. Having made our findings of fact the tribunal panel considered whether we should draw an inference of discrimination from any of those findings. There were some very curious

features to how the respondent had handled the termination of the claimant's employment and in particular its insistence at the time that she had resigned when that was clearly not the case. Our findings are set out below in the order of the list of issues, but as explained when we considered the question of unfair dismissal, we considered whether we should draw inference of discrimination from our findings of fact perhaps despite evidence from the respondent about its reasons. There was some significant overlap in our conclusions about the reason for dismissal in terms of unfair dismissal and direct discrimination.

Issue 1: time limits

101. In the circumstances, given our findings below it was not necessary for us to make findings on time.

Issue 2: unfair dismissal

What was the reason or principal reason for dismissal?

102. This question overlapped significantly with the complaint of direct disability discrimination. Our conclusions on that are explained below.

103. The respondent bore the burden of proof to show that it had a potentially fair reason for dismissal, which it said was the claimant's failure to return to work following her extended career break, which was a reason related to conduct, alternatively, some other substantial reason justifying dismissal.

104. For the respondent, Ms Niaz-Dickinson drew our attention to the test outlined by Lord Macdonald in the case of ***Harper v National Coal Board*** [1980] IRLR 260 in relation to the correct approach to be adopted where an employer relies on some other substantial reason as the reason for dismissal *"Obviously, an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no person of ordinary sense would entertain. But if the employer can show that he had a fair reason in his mind at the time when he decided on dismissal and that he genuinely believed it to be fair this would bring the case within the category of another substantial reason. Where the belief is one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific foundation (Saunders v Scottish National Camps Association Ltd [1980] IRLR 174)*."

105. The respondent had told the claimant that the reason her employment was coming to end was because she had resigned when she did not return from the career break. We received little explanation from the respondent about why it believed these circumstances could be said to be a resignation. Clearly it was no such thing and the claimant's request to be allowed to work from home from Pakistan showed that she did not want to end her employment. However, what the tribunal did accept was the reason why the claimant's employment ended was that it had become clear that the claimant would not

be physically returning to work at the time that had been agreed. The description of that as termination by the claimant was misconceived, but the reason for the claimant's employment ending was the failure to return to work in the UK.

106. We accepted that by August 2022 the claimant had been either on a career break or on furlough and so out of the business for around 29 months, that is from the onset of the covid pandemic and being placed on furlough in April 2020. The respondent is a technology business and the tribunal accepted that in that period much had changed in terms of the respondent's systems. The respondent had told the claimant that it had determined that she needed to physically return to the office in the UK for a period of retraining and renewed induction, which was consistent with what was said in its career break policy and explicitly to the claimant when the further extensions were granted. The tribunal did not accept that the claimant could reasonably have any doubt what the respondent's position was on that need to return to the UK, and we accepted that the respondent had a reasonable belief based on its experiences of remote training during the pandemic that this would be an essential element of the claimant's return to work.

107. Our conclusions about how the respondent responded to these circumstances is explained below, but we accept that this was a potentially fair reason. We considered whether it could properly be described as "some other substantial reason." The reason could have been expressed in terms of conduct or capability, but we accept that some other substantial reason (SOSR) can include elements of conduct and capability and indeed often does. Ultimately the respondent had concluded they needed the claimant to return from the career break to her UK role at that time and needed her to return to the office in the UK to enable that. That was not intrinsically discriminatory nor was it trivial. We accept that the claimant's failure to return could properly be categorised as SOSR which could potentially justify dismissal. Accordingly the respondent therefore had a potentially fair reason for dismissal under s98(1) of the Employment Rights Act.

108. We then had to consider fairness under section 98(4). We had to decide whether the respondent acted reasonably or unreasonably in treating this failure to return as a sufficient reason for dismissing the claimant, taking into account all of the circumstances including the size and resources of the respondent, and equity and the merits of the case. We reminded ourselves that that there may be a range of reasonable responses to those circumstances by a fair employer.

109. Ms Niaz-Dickson argued that the respondent had established all it needed to know about the fact the claimant would not be returning to the UK before the email of 25 August was sent to the claimant. The claimant had clearly been warned that she needed to return to the UK and in those circumstances the decision to dismiss was a reasonable one. Ms Niaz-Dickinson argued that the claimant could not argue she fell within the exception to a failure to return being gross misconduct because she was not saying she was unfit for work, or even unable to travel. Her reason for not returning was that she did not want to travel alone but, despite knowing that was the case, she had not taken steps to either secure a visa for her parents

or make other arrangements. The claimant herself had previously been clear that she could not work from home in Pakistan and the respondent's managers had agreed with that based on their personal experiences.

110. Ms Trayers reminded us that in terms of fairness, reasonableness is to be determined from the start of the process to its conclusion (*Taylor v OCS* [2006] IRLR 613) and she argued that the cumulative effects of the respondent's procedural failings render the dismissal unfair. She identified a number of failings including, significantly, that the respondent's own career break policy provided for circumstances in which someone does not return from a career break. The career break policy gave sickness as an exception to the standard policy that a failure to return after career break could be regarded as gross misconduct. The claimant had notified the respondent that she was not returning on health grounds, and therefore the respondent should have regarded her as falling within this exception and her potential non-return should have been treated as a capability issue. The claimant had made the respondent aware that she had not made firm arrangements to return to work from the career break was due to her anxiety and the respondent had failed to make adequate investigations into the claimant's health. Ms Trayers submitted that when the claimant notified the respondent about the increased feasibility of working from home in Pakistan on 29 August, that change of circumstances ought to have taken into consideration and investigated by the respondent.

111. Ms Trayers also argued that the claimant had been given insufficient notice given of her dismissal as a potential outcome of a failure to return, the claimant was not told that she would be notified of the potential for her to be treated as having resigned if she did not return until 3 working days before she was actually dismissed, and the respondent unfairly or unreasonably delayed sending the claimant notification that her employment would be terminated if she did not return on 1 September 2022.

112. The Tribunal accepted the claimant's submissions about fairness. The root of the unfairness seemed to be the respondent's misconceived conclusion that the claimant making clear that she would be unable to return to the UK could be properly deemed to be a resignation. The respondent had a policy which expressly dealt with the approach that would be adopted that if the claimant failed to return to work at the end of the career break period. It would treat that as potential gross misconduct. Having heard the respondent's evidence the Tribunal could not understand why it had not done precisely that, except perhaps that Mr Wilkins had lost patience after understanding in July the claimant was planning to return.

113. If there was a capability issue, the career policy gave a route for exploring that, if that was not the case the respondent could treat the claimant's absence from work on 1 September as gross misconduct as its policy had outlined, as the correct approach. The tribunal concluded that given how clear the respondent's career break policy was about what should happen, no reasonable employer would have decided to disregard that policy without at least explaining to the employee why it was doing that and giving her the chance to make representations before making a final decision. Delaying sending the letter warning of termination seemed to the Tribunal to

be an attempt to take away the chance to make representations, or in Mr Wilkins words, to get into a debate.

114. It seemed to be argued that the dismissal was fair because the claimant's dismissal had been become inevitable when she failed to return as agreed and it was said that can be seen from the evidence before the tribunal there was nothing further for the respondent to consider. However the respondent did not, and could not, know that when it made the decision was made to dismiss the claimant. This was an argument made with the benefit of hindsight.

115. The claimant's employment was terminated the day before she was actually due back in work. By then there was no question of the claimant being able to get to the UK in time, but the respondent knew the claimant had referred to her health and it knew that the career break policy provided for the claimant was saying "I am not well enough to come back to back to work on the first day back" and providing a sick note. This had been anticipated by Ms Astbury's earlier letter which had referred to the capability procedure. Ms Niaz-Dickinson argued this was irrelevant because the claimant said she was well enough to work, but Ms Astbury and Mr Wilkins did not and could not know that a doctor would not sign the claimant off on her first day back when the decision to terminate her employment was taken.

116. In addition the claimant was not warned during the conversations in July and earlier in August that if she did not return to the UK, she would be dismissed without any due process despite the terms of the career policy. The head of HR had told the claimant in January 2022 that if she could not return for health reasons this would be dealt with as a capability issue. No attempt was made to explain to the claimant why that had changed. The respondent did not know if, when presented with the blunt reality of the risk of termination in mid-August, the claimant might have been able to make other plans to return when there was perhaps time. Further it was not suggested there was any external time factor dictating the claimant's return date, except that was what had been agreed – there was not a project deadline which would have been impacted for example, which might justify the apparent urgency of the decision. We accepted that the respondent had good reason to doubt the feasibility of the claimant's proposal for working from home from Pakistan, but given that this suggestion had been raised we considered that a reasonable employer would at least have explained its concerns to the claimant to give her the chance to explain what she said had had changed or to put forward other mitigating factors or even to put forward other obvious suggestions, such as being allowed to take some of her accumulated holiday at the start of her official return to work, to facilitate a physical return to the UK.

117. The tribunal panel concluded that the approach adopted by the respondent was fundamentally unfair and that the respondent's arguments offended the fairness test as set out in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8.

118. The circumstances we found that the claimant's claim of unfair dismissal was well founded, and this claim succeeds.

Issue 3 remedy for unfair dismissal

119. We also concluded that the tribunal will have to consider how likely the claimant's dismissal was even if a fair procedure had been followed and whether also whether there is any factor which means it would be just and equitable to adjust the compensation payable to the claimant.

120. During the preliminary discussions at the beginning of the hearing, Ms Niaz-Dickinson had raised the issue of the tribunal making findings on a "Polkey reduction" at the liability stage, that is a possible reduction to compensation if the dismissal was found to be unfair based on the likelihood that the claimant would have been dismissed if a fair procedure had been followed. The claimant told us she was not aware of the *Polkey* case and was not prepared to deal with that as a litigant in person. We accepted that and it was determined that we would give the parties the opportunity to make further representations about a reduction to compensation if we found the dismissal was unfair. That will now be done at the remedy hearing in this case. At tis stage we will also hear further submissions about other reasons why compensation may be adjusted, such as whether the ACAS Code of Practice should have been followed. Case management orders will follow about this.

Issue 4: Disability

121. As noted in the section on the law, the respondent had made a partial concession in relation to disability, namely that the claimant was disabled by anxiety disorder in July 2022, but the respondent denied she was disabled at an earlier time. Ms Niaz Dickson reminded us of the significance of the guidance in *J v DLP Piper LLP* about when the question of when anxiety, stress and depression become disabilities.

122. However the first problem which faced this tribunal was identifying when the claimant became disabled in light of the somewhat limited evidence available to us.

123. A mental impairment does not need to have a specific medical diagnosis to amount to a disability. The claimant has pleaded her disability as anxiety stress and trauma. In her witness statement she also frequently refers to feelings of panic during her employment. However the claimant received no formal mental diagnosis until December 2021 when she was diagnosed with generalised anxiety disorder just before she returned to Pakistan.

124. Before then the claimant had attended her GP only infrequently and her medical notes show that she had not been prescribed any medication for any mental health condition. This meant we had little in the way of medical evidence.

125. The medical notes do suggest that, despite what was recorded in the fit note, the GP thought the claimant had had a panic attack at work in January 2020, but the notes do not suggest a concern about an underlying mental impairment or anything which might be expected to have a long term effect on the claimant's ability to undertake day to day activities.

126. The claimant's statement about the impact on day-to-day activities was also sparse in terms of evidence. In the disability statement, the claimant refers to feelings of anxiety, panic, stress, and depression. These can all be indications of a mental impairment, but they can also be ordinary reactions to the difficulties of every day as observed in *J v DLA Piper* case. Significantly the witness evidence of the claimant about the impact of her symptoms on her day-to-day life before she went to live with her sister in London. In the disability statement there is particular focus in the evidence on the claimant describing reactions to work and colleagues, suggesting to this panel, in the absence of any other evidence from the claimant, that these were adverse reactions to the pressures of work and the tensions between the claimant and some of her colleagues, rather than an underlying impairment.

127. Ms Trayers argued that we should conclude that the claimant was disabled based on what the claimant said about her mental health in June 2020 when she asked for the furlough extension and then a career break. However we considered that the context of the wider world that time was significant. The claimant herself reflected in correspondence to the respondent that she thought she had a reaction to the covid lockdown. The covid pandemic had a significant impact on the UK (and indeed wider world) population. There will be few people who did not experience stress, anxiety, and other symptoms of mental health difficulties, perhaps particularly during the first "UK lockdown" which started on 23 March 2020. We do not doubt the claimant felt extremely anxious in June 2020, but we do not conclude that we had evidence that at the time the claimant had a mental impairment which had or was likely at that time to have, a substantial and long term impact on her ability to carry out normal day to day activities.

128. Based on the claimant's evidence we concluded that that the claimant became disabled on or around October 2021 when her health deteriorated at the time of a further panic attack and she went to live with her sister in London. It was at that time that the claimant appears to have moved from experiencing adverse reactions to day-to-day life, and indeed to the extended impact of covid and the lockdowns, to developing an impairment which could be said to have a long-term adverse impact on day-to-day life. The anxiety had already lasted many months and we are satisfied that this was no longer something which was likely to resolve within 12 months. This impacted on her ability to look after herself, to cook and to interact with her family. We accept that by this stage day to day activities were being impacted so significantly the claimant was not able to live on her own. We accepted that the claimant was disabled from around the time of her panic attack In October 2021 and certainly by the time her diagnosis of GAD in December 2021.

129. In terms of the legal issues in the case we concluded that the claimant had not shown that she was disabled at the time the extension of furlough was refused. The respondent accepted that the claimant was disabled by time it was alleged she had been subject to other prohibited conduct in July 2022.

130. Perhaps more significant was the issue of what the respondent knew or reasonably ought to have known that the claimant was disabled. That is because the respondent denied that it ever knew the claimant was disabled.

131. Ms Trayers argued that the respondent had actual knowledge of the claimant's disability throughout the relevant period or ought reasonably to have known about the claimant's disability. Ms Trayers submitted that the claimant had informed the respondent about her anxiety from February 2020 onwards and the effects of that substantial and long terms effects of that condition on her day-to-day activities when she had requested the furlough extension, when she applied for extensions to the career breaks and when she told the respondent that she was waiting to hear about the cognitive behaviour therapy. This continued in subsequent correspondence and in her meetings with Mr Wilkins and Mrs Griffiths. This ought to have put the respondent on notice that there was a potential disability, and reasonable steps ought to have been taken to establish that. The claimant had not sought to conceal her condition, she had volunteered information about it and requested adjustments.

132. Our attention was drawn to the EHRC Code of Employment at 6.19: 'The employer must, however, do all they can reasonably be expected to do to find out whether this [i.e. the existence of a disability] is the case. What is reasonable will depend on the circumstances. This is an objective assessment', and to *Gallop v Newport City Council* [2016] IRLR 395 which found that it was necessary for a respondent to have knowledge that the claimant may fall within the legal s.6 definition as opposed to them simply being aware of the conditions and its effects for them to be deemed to have actual/constructive knowledge sufficient to meet the legal tests for the discrimination pleaded. In *A Ltd v Z* UKEAT/0273/18/BA: The question was what would the respondent have known had they carried out reasonable investigations?

133. We do not accept that if further enquiries had been made in February 2020 following the first panic attack that the GP would have provided information suggesting to the respondent that the claimant had a mental impairment having a significant impact on day-to-day activities which would be expected to last more than 12 months at that time. We do not accept that there is anything in the medical notes which suggest the GP would have reported more than a short term stress reaction.

134. The claimant made no more passing references to well-being over the summer of 2020 and although she referred to feeling anxious, given that she linked that to the lockdowns, we concluded that the respondent did not have information which should have suggested an underlying impairment which might have a long-term affect until January 2022 when the claimant requested a further career break extension. The claimant told the respondent she had a further panic attack and had been forced by her health to go to live with her sister in London and then to return to family in Pakistan in December. She told the respondent that she was now on the waiting list for CBT treatment.

135. We consider this was information which should have alerted the respondent to the need for more information. The internal correspondence between respondent managers and the email Ms Astbury sent to the claimant in January 2022 strongly suggests an understanding on the part of the respondent's managers that the claimant had a mental impairment and a strong suspicion on the part of the Respondent team that the claimant might be disabled is demonstrated in the correspondence between Ms Griffiths and Ms Astbury at that time.

136. The tribunal concluded that if the respondent had sought medical advice and further information from the claimant at that time it would have been told that the claimant had a mental impairment which was having a substantial impact on her day-to-day activities and that this could be expected to last more than 12 months.

137. We concluded that the respondent knew, or ought to have known that the claimant was disabled from January 2022.

138. Having reached conclusions about the we turned to the discrimination claims.

Direct discrimination

139. It seemed to the panel to make more sense to deal with the direct discrimination complaints chronologically then in the order set out in the list of issues.

Direct discrimination: issues 5.1.3 did the respondent refuse to retain the claimant on furlough and was that less favourable treatment because of disability (5.2. and 5.3)?

140. This complaint can be dealt in brief terms because we concluded that claimant was not a disabled person in June 2020 and the respondent did not perceive her to be disabled. Whatever happened this could not be direct disability discrimination.

141. In any event we concluded that the respondent had shown us it had good operational reasons for wanting the claimant to return to work in June 2020, as it began to take steps to seek to rebuild its business after the first lockdown. It clearly needed some staff to return to work from furlough and the claimant was an experienced member of staff. The respondent was entitled to require her to return to her contractual duties and although the claimant argued that some .net developers had been retained on furlough, but we did not accept that was in any way evidence of a decision tainted by discrimination. Rather it simply suggested the respondent wanted a long standing and experienced member of its team to return to work even if she was reluctant to do so.

142. This complaint was not well founded and is dismissed.

Issue 5.1.2 did the respondent refuse to consider the claimant's request to work from home in Pakistan and was that less favourable treatment because of disability (5.2. and 5.3)?

143. We concluded that the respondent did not refuse to consider the request, but rather Mr Wilkins rejected it as workable solution and he was not prepared to discuss that.

144. The respondent's conduct was not strictly as described by the allegation in the list of issues, but we did accept that the claimant could reasonably perceived that as a detriment.

145. We therefore considered whether it was less favourable treatment because of disability. In other words what was the reason for Mr Wilkins's conduct?

146. In terms of whether that was because of disability, the tribunal concluded that the actions of the employer in deliberately delaying informing the claimant that if she failed to return to work in the UK she would be deemed to have resigned, was significant in the terms of the question of the burden of proof under s136 of the Equality Act. By this time, the respondent knew the claimant was disabled. Deliberately delaying warning the client that if she did not return the respondent was going to deem her to have resigned rather than applying the terms of the policy suggested a possible hostility towards the claimant which in our view could have been tainted consciously or subconsciously by her disability.

147. We therefore considered whether the respondent had shown a non-discriminatory reason for the refusal.

148. In terms of the claimant's case, we were invited to draw an adverse inference from the fact that it is said by the claimant that there was no real consideration of the "work from home" request in August 2022 *"in light of the change in circumstances and the failure of the respondent to make any further inquiries into when the claimant might reasonably return, suggesting that the respondent knew and understood that there was some underlying reason for her non-compliance and that that reason could reasonably have been her disability*." The claimant relied on the fact that she had been allowed to work from home on short term basis in Pakistan "before disability," after a holiday to Pakistan. It was also argued that training and communication can, and are, routinely carried out remotely throughout the company and the claimant was put in a similar position to others who were allowed to work from home on a short-term basis in Pakistan, such as the claimant had previously, and the only difference of consequence here was the claimant's disability of which Mr Wilkins was aware. It was argued that this shows that disability must therefore have been part of the reason for this decision.

149. For the respondent, our attention was drawn to what the claimant has said in January 2022 about why working from home in Pakistan was not a viable option, not only in terms of the infrastructure issues which she said had

improved, but also the significant time difference when the claimant needed to be retrained and integrated back into the UK team.

150. The tribunal panel preferred Ms Niaz Dickson's submissions about the reason for the refusal. We accepted that the respondent had shown us that it had cogent reasons for not allowing the claimant to work from home in Pakistan. We accepted the evidence of Mr Wilkins that in terms of home working from Pakistan, based on his experience of the infrastructure in Pakistan, especially away from Lahore, he had genuine reasons to doubt the claimant's reassurances about connectivity and in event to still have significant concerns about the time difference in light of the need to re-integrate the claimant into the team. It had been unfair of Mr Wilkins not to explain this to the claimant and consult with her about his decision. However, we accepted his evidence about why he concluded it was essential that the claimant returned to the office for face-to-face training and for increased contact with her manager and team after her return to work.

151. We also accepted that the situation at the end of the claimant's career break was fundamentally different from that when the respondent had allowed the claimant to work from home after a period of holiday in Pakistan. At that time she was working on systems she was very familiar with and was simply returning to work after holiday in the usual way. No period of retraining, induction or reintegration into her team had been required.

152. By September 2022, the claimant had not undertaken any meaningful work for the respondent since the March 2020 lockdown and in the intervening period the respondent's infrastructure had changed significantly. The claimant's time out of the business meant that the respondent had previously concluded the claimant would have to undergo a period of induction and retraining in the UK offices and notified her about that long before it knew she had concerns about travelling alone and experience from other induction sessions had led Mr Wilkins to conclude that sessions needed to be conducted in the UK in the respondent's offices. We found no reason to doubt his evidence about that. In the circumstances we accepted that Mr Wilkins had a genuine reason to believe that a period of temporary working from Pakistan was not appropriate and his reasons for concluding that were not tainted by the claimant's disability. We concluded that he would have made the same decision about a non-disabled UK based employee wishing to work from home from rural Pakistan or indeed any other country with a significant time difference and/or historical infrastructure issues, after a significant amount of time out of the business for a career break.

153. This complaint was not well founded and is dismissed.

Issue 5.1.1 did the respondent dismiss the claimant and was that less favourable treatment because of disability (5.2. and 5.3)?

154. There was no dispute that the claimant had been dismissed and that was less favourable treatment. The significant issue was the reason for dismissal.

155. This was pleaded as a separate claim from those above, but the reality was there was a very significant overall and much of our reasoning above as applied here. We accepted the burden of proof had shifted to the respondent to show a non-discriminatory reason for dismissal but our findings on the reason for dismissal are relevant here.

156. Ms Trayers argued that the respondent had made an unreasonable assumption that the claimant was not going to return to work within a reasonable time frame, it was aware that the reason for the claimant was disabled and what her reasons were for not returning which should have triggered an investigation and the absence of investigation suggests the respondent already believed it knew what the reason for the claimant's potential non-return was, i.e. her disability and no non-disability reason was given for her inability to return. Accordingly it was argued that it cannot be said that the claimant's disability played no part whatsoever in the respondent's decision to dismiss and that had it not been for the claimant's disability she would still have been dismissed.

157. Ms Niaz-Dickinson argued that the respondent had shown that the claimant was dismissed because she failed to return to work after a lengthy career break and that she had not established facts from which the tribunal could conclude that the claimant was dismissed because of disability. It was emphasised that the claimant had not given any indication of when she would be able to return to work and that her absence from the workplace and the lack of assurance of when she would be returning within a reasonable timescale were capable of justifying dismissal. Our attention was drawn to what the claimant has said in January 2022 about why working from home in Pakistan was not a viable option, both because of infrastructure issues and the time difference and the evidence of Mr Wilkins about why he concluded it was essential that the claimant returned to the office for face-to-face training and for increased contact with her manager and team after her return to work.

158. The tribunal panel reflected carefully on the evidence before us. As noted there was significant overlap in terms of our conclusions about this with those set out above in relation to the request to work from home from Pakistan, which the claimant had sought as an alternative for a temporary but entirely undefined period of time which the panel accepted the respondent had non-discriminatory reasons for not allowing.

159. We concluded the context of the decision taken by the respondent was significant. Although the respondent had managed the termination process unfairly (and significantly so), we concluded that the respondent had not taken the decision to end employment *because* the claimant was disability but because it had determined that the continuation of the career break was not sustainable after it had been extended so significantly already, in the context of a technology based business which had been significantly impacted by the covid pandemic when the career break began but was rebuilding in the meantime had made significant infrastructural changes and wanted to move forwards.

160. This was a case where we concluded that it was important to consider what would have happened to a non-disabled comparator to determine if there had been less favourable treatment because of disability. We were satisfied that if a non-disabled employee had taken a career break which had been extended several times and during which time they had decided to travel to and stay in another country, and at the end of the career break had not returned to the UK or put in place arrangements to return to the UK, they too would have been dismissed. We are also satisfied that if the claimant had returned to the UK but had informed the respondent that she was unfit to return to work, she would not have been dismissed. Mr Wilkins had told us that if the claimant had returned for retraining but had requested a phased return to work and/or some home working from the UK given there would have been no connection issues and importantly no time difference issues, that would have been agreed. We accepted his evidence about that. Indeed we accepted that he was genuine when he indicated a willingness to reemploy the claimant in the future. The decision to dismiss was simply about the claimant not returning to the UK at the time agreed.

161. This complaint was not well founded and is dismissed.

Issue 6: Discrimination arising from disability (Equality Act 2010 section 15)

Issue 6.1.1 Did the respondent treat the claimant unfavourably by failing to investigate in accordance with the respondent's career break policy and was that unfavourable treatment because of something arising in consequence of disability (that the claimant could not travel back to the UK by 31 August 2022 and thereby return to work by that date)?

Issue 6.1.2 Did the respondent treat the claimant unfavourably by failing to conduct a capability review because of something arising in consequence of disability (that the claimant could not travel back to the UK by 31 August 2022 and thereby return to work by that date)?

162. There was a very significant overlap between these complaints with both counsel's submissions about these complaints being made in similar grounds and such significant overlap in our conclusions it makes sense to explain the tribunal's reasoning on both complaints together.

163. Ms Trayers reminded us that the respondent need only have knowledge of the claimant's disability, not the "something arising" (*City of York Council v Grosset* [2018] EWCA Civ 1105) and that the "something arising" can be anything that is the result, effect or outcome of a disabled person's disability or, to put it another way, conduct that arises in consequence of the disability or of which the disability was one cause if there are many causes of the conduct (*Risby v Waltham Forest* UKEAT/0318/15/DM). The causal link between the disability and the something arising is relatively loose and is to be determined objectively (*Sheikholeslami v University of Edinburgh* [2018] UKEAT 014_17_0510).

164. We are also reminded that motive is irrelevant (*Pnaiser v NHS England* [2016] IRLR 170) and there can be a series of links between the something arising and the treatment so long as there is some connection (*iForce v Wood*

UKEAT/0167/18). There is also a low threshold in terms of unfavourable treatment which is similar as a concept to disadvantage or detriment in other types of discrimination (*Williams v Swansea University* 2019 IRLR 306).

165. Ms Trayers argued that there is clear documentary evidence of the claimant making reference to her health when requesting extensions to her career break and that Mrs Griffith had acknowledged that she was aware that the claimant's health was the reason for her inability to return to the UK and therefore the causal link between the claimant's anxiety and her inability to return as the "something arising" was established. The alleged unfavourable treatment alleged concerned two major decisions: a failure to investigate in line with the respondent's career break policy and a failure to carry out a capability review. Both clearly impacted upon the process of and decision to dismiss and for this reason meet threshold for unfavourable treatment.

166. For the respondent, Ms Niaz-Dickinson emphasised that the reason why the investigation and capability meetings were not held was because, in the reasonable view of Mr Wilkins, there was no reason to hold those meetings. She argued that at no time has the claimant suggested that she was unable to work in late August/early September, indeed it was her case that she was fit to work (from home in Pakistan). It was clear that the claimant would not returning to the UK in circumstances where it had been made clear that the career break would not be extended again and there was no reason to look at this further.

167. In terms of whether the claimant's inability to travel back to UK and return to work arose in consequence of her disability, Ms Niaz-Dickinson argued that the claimant had not put forward sufficient evidence to establish that the 'something' was causally related to her disability. The claimant <u>was</u> able to travel back to the UK. The claimant had not presented any evidence to establish that there was a barrier in relation to her mental health condition that prevented her from travelling alone and in any event, what was stopping her from travelling back was that her parents did not have visas to travel to the UK.

168. In terms of the essential elements of s15, we accepted that at the time relevant time the respondent had knowledge of the claimant's disability. It was not disputed that no capability or investigatory meeting had been held and we accepted that the claimant reasonably perceived not being given the opportunity to put forward her arguments or have her situation considered as provided in the career break policy was unfavourable treatment.

169. In terms of the argument that no investigatory or capability hearing ere required because the respondent already had all of the relevant information, and for the same reasons explained in relation to the unfair dismissal complaint, we did not find that a convincing argument. The respondent can only argue that with the benefit of hindsight, and the claimant had been deprived of the opportunity of changing the respondent's mind.

170. The important question was therefore whether there was sufficient causal connection between the unfavourable treatment and the pleaded

"something arising," recognising that we were not interested in the respondent's reason but not their motive.

171. We concluded that if the claimant had returned to the UK the respondent would have applied its career break policy and would not have decided that the claimant had resigned. In other words it would have held an investigatory meeting to consider gross misconduct or held a capability review hearing if the claimant had returned to the UK. We have already explained why we were satisfied that the respondent's reasons were not the claimant's disability. We were satisfied that that this was not about the claimant being unwell. Mr Wilkins had responded positively when he thought the claimant was going to return in July. We had not reason to conclude the reasons were connected with the claimant having travelled to Pakistan because she was ill or that being why she had asked for the last extension to the career break. The reason was that the claimant had not returned to the UK. The question for us was had the claimant shown there was sufficient connection between the reason for her not returning to the UK and her disability?

172. The tribunal was troubled by the lack of evidence from the claimant about this. We had little more than an assertion by her that her unwillingness to fly alone was related to her disability. We are surprised there was not more medical evidence about that. We could accept that some people with generalised anxiety disorder might finding flying difficult, but then so do many people without the disability. Equally many people with GAD are happy to fly and to fly alone. Indeed although the claimant's evidence had not been entirely clear, it seemed she had done precisely that when she was very unwell in December 2022. However although we were not convinced there is an obvious connection, on balance, we accepted there may be a sufficient causal connection.

173. More significantly however the claimant's evidence was not simply that she could not travel back to the UK by 31 August 2022 because of her GAD and thereby return to work by that date as she had agreed was her case in the list of issues. The reason the claimant had been unable to travel back to the UK before the end of her career break was that she felt unable to travel back alone and had decided to fly with her parents and had failed to take any steps to secure the necessary visas for them. If the claimant had done what she told the respondents she had done, and applied for visas for her parents, it seems more likely than not that she could have returned to work in the UK. The claimant told us that she had made enquiries of an agent, but no application had been made. We had no evidence before us of any steps the claimant had taken in this regard. If she had taken any substantial steps presumably, she would have disclosed evidence of that, so in terms of seeking to secure visas we concluded she had done no more than make cursory enquiries at best. The claimant had also failed to explore any other alternatives. No satisfactory explanation was offered for that.

174. These failures in relation to the visas were not something arising from disability. It seemed likely to the tribunal that the claimant had simply assumed that the respondent would extend her career break if she asked again, but the respondent had previously said the career break would not be extended again and then extended it, and the claimant cannot reasonably have believed that

because this had happened before she could insist on the extension being granted again. Nor could she reasonably assume that she would allow to work from Pakistan despite her previously saying that would not be suitable, and the respondent having told her that a physical return to the UK was required for training.

175. We recognised that, as explained in *Sheikholeslami v University of Edinburgh* (above) the question is whether the claimant's failure to return arose in 'consequence of' (rather than being caused by) her disability which is a looser connection that might involve more than one link in the chain of consequences. We did not find this an easy question to resolve. We recognised there can be more than one and indeed a series of links in the chain and the treatment still be in consequence of disability. However we also considered that there must be a point where the link because too weak. After careful consideration we concluded that this was a case which involved too many "links in the chain" for the treatment to be properly found to be consequence of disability for the claim to succeed and, on balance, we accepted the respondent's submissions about this.

176. These complaints were not well founded and are dismissed.

Issue 7 Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

Did the respondent fail to make a reasonable adjustment for the claimant? It is alleged that the respondent had requirement to work in the UK which put the claimant at a substantial disadvantage in that she was unable to travel to return to work in the UK?

177. The first question was whether the respondent knew or could reasonably have been expected to know that the claimant had the disability?

178. For the reasons explained above, we concluded that the respondent was aware or ought to have been aware that the claimant was disabled from the exchange of emails in January 2022 when the claimant explained why she had returned to Pakistan.

179. It was not disputed that the respondent had a PCP that its employees work in the UK. The respondent has a sister company which has employees in Pakistan, but all of the respondent's workforce work in the UK and in particular that the requirement placed on the claimant on her return to work from the career break was that she would return to her UK based role in the UK.

180. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was unable to travel to return to work in the UK?

181. Ms Trayers argued that the claimant was put at a substantial disadvantage by the PCP: the claimant was living in Pakistan and on her account unable to return to UK because of her disability and therefore unable to comply with the PCP.

182. The claimant had been employed in the UK and worked for the respondent in the UK, the disadvantage created for the claimant was a consequence her return to Pakistan during her career break. The respondent had not in fact imposed any requirement on most of its employees generally or on the claimant specifically to fly or to fly alone or indeed to travel outside the UK. This case arose from the fact the claimant she had left the UK and now found it difficult to fly back. This was therefore a situation unique to the claimant arising out of her personal circumstances.

183. As already noted, the tribunal received extremely limited evidence that the claimant's inability to return to the UK was related to her generalised anxiety disorder, but we had we accepted on balance that the claimant's inability to fly alone was related to her disability.

184. However this alone would not trigger the duty to make an adjustment. The claimant had to prove that the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability.

185. In terms of the comparative exercise identified by the Court of Appeal in *Smith v Churchills Stairlifts Plc* [2005] EWCA 1220, the comparators for the comparative exercise in s20(5) are not drawn from the population in general. In the usual way when we look at substantial disadvantage and the need to make adjustments that applies to things which are done within the workplace and so the comparative exercise will usually be of some class of non-disabled employees (or perhaps applicants).

186. The claimant's case appears to rely on a comparative exercise which relies on a comparative exercise with the wider population and based on what seemed to us to be a very generalised assumption that someone with GAD will find it hard to fly alone then those without the condition, without any evidence about that.

187. We concluded on balance that the claimant had not established that she had been placed at a substantial disadvantage by the respondent's PCP compared to someone without the claimant's disability.

188. However in case we are wrong about that we went on to consider the pleaded reasonable adjustments. The respondent did know that the claimant said she could not fly alone because of her anxiety. If we are wrong on the question of substantial disadvantage, we concluded that the respondent was aware of that disadvantage. We considered whether it would have been reasonable for the respondent to have made any of the pleaded adjustments.

189. Mr Wilkins told us that if the claimant had returned to the UK the respondent would have been prepared to consider a phased return and some element of home working after the retraining had been completed. These were both pleaded adjustments, but they would not have removed the alleged disadvantage which was about not being to travel back to the UK. As Ms Niaz-Dickinson pointed out in fact despite the pleaded case as identified in the list of issues, the claimant was only seeking one adjustment. She was also not suggesting that the reasonable adjustment should have been that she work

remotely from Lahore. The claimant made clear to us she would not have done that. The only adjustment which the claimant regarded as being reasonable was being allowed to work for the respondent from her home in Pakistan.

190. The Tribunal accepted that this was not reasonable for the reasons already discussed. We accepted that the respondent reasonably concluded that the proposed adjustment was not reasonable because the claimant needed to attend face to face training in the UK, that her working in Pakistan was not workable because she needed contact with her manager and that the infrastructure outside Lahore meant that home working in Pakistan was not appropriate given the nature of the claimant's duties.

191. This complaint was not well founded and is dismissed.

Approved by Employment Judge Cookson

21 January 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON
21 January 2025

FOR THE TRIBUNAL OFFICE

Annex: List of Issues

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 24 August 2022 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. What was the reason or principal reason for dismissal? The respondent says it dismissed the claimant because she failed to return to work following her extended career break, which was a reason related to conduct, alternatively, some other substantial reason justifying dismissal.

2.2. Was it a potentially fair reason?

2.3. If the reason or principal reason was misconduct, did the respondent genuinely believe the claimant had committed misconduct?

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

2.4.1. there were reasonable grounds for that belief;

2.4.2. at the time the belief was formed the respondent had carried out a reasonable investigation;

2.4.3. the respondent otherwise acted in a procedurally fair manner;

2.4.4. dismissal was within the range of reasonable responses.

2.5. If the reason or principal reason was some other substantial reason (see paragraph 2.1 above) was it a substantial reason capable of justifying dismissal?

2.6. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

3. Remedy for unfair dismissal

3.1. ***After discussion with the parties, not considered at this hearing***

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 she have a mental impairment: the claimant relies upon anxiety, stress, and "trauma"?
   - 4.1.2. Did it have a substantial adverse effect on her 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 her 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. Direct disability discrimination (Equality Act 2010 section 13)

5.1. Did the respondent do the following things:
   - 5.1.1. Dismissal on 31 August 2022
   - 5.1.2. Refusal to consider her request to work from home in Pakistan
   - 5.1.3. Refusal to retain her on furlough in 2020

5.2. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who she says was treated better than she was.

5.3. If so, was it because of her disability?

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

6.1. Did the respondent treat the claimant unfavourably by:

   - 6.1.1. Failing to investigate in accordance with the respondent's career break policy;

6.1.2. Failure to conduct a capability review

6.2. Did the following arise in consequence of the claimant's disability:

6.2.1. The claimant could not travel back to the UK by 31 August 2022 and thereby return to work by that date?

6.3. Was the unfavourable treatment because of any of that matter?

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

6.5. The Tribunal will decide in particular:

6.5.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;
6.5.2. could something less discriminatory have been done instead;
6.5.3. how should the needs of the claimant and the respondent be balanced?

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

7. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

7.2. A "PCP" is a provision, criterion, or practice. Did the respondent have the following PCP

7.2.1. The requirement to work in the UK?

7.3. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was unable to travel to return to work in the UK?

7.4. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

7.5. What steps could have been taken to avoid the disadvantage? The claimant suggests:

7.5.1. Measures to assist her to adjust to normal work life;
7.5.2. A phased return to work;
7.5.3. Working from home

7.5.4. Working remotely from Pakistan

7.6. Was it reasonable for the respondent to have to take those steps?

7.7. Did the respondent fail to take those steps?