EMPLOYMENT TRIBUNALS

Claimant: Ms N Gardner

Respondent: Melksham Town Council

Heard at: Bristol **On:** 9th, 10th, 11th & 12th December 2024

Before: Employment Judge David Hughes
Ms M Luscombe-Watts
Ms G Meehan

REPRESENTATION:

Claimant: In person
Respondent: Mr S Wyeth, counsel

JUDGMENT having been sent to the parties on 14.12.2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

<u>Who everyone is</u>

1. The Claimant was employed by the Respondent between 03.05.2021 and 13.04.2023, as a seasonal park ranger and subsequently as an amenities team assistant. She was dismissed on the latter date on the grounds of medical capacity.

2. At the hearing, we heard evidence from the following:

   (a) The Claimant;
   (b) David Elms, Amenities Team Manager at the Respondent;
   (c) Hugh Davies, head of Operations at the Respondent;
   (d) Simon Crundell, an elected councillor at the Respondent and mayor of Melksham between May 2022 and May 2024.

3. We have also considered a statement by Patricia Clover, prepared on behalf of the Claimant. Ms Clover, who was referred to as “Patsy” before us, did not give live evidence, which means that counsel for the Respondent did not have the chance to cross-examine her.

The Claim

4. By a claim form presented on 04.07.2023, the Claimant claims against the Respondent for discrimination on the grounds of disability, specifically discrimination arising from disability, and harassment related to disability.

5. The Claimant suffers from acute migraine disorder. Although the Respondent had earlier disputed that the Claimant suffered from a disability for the purposes of the Equality Act 2010, on 11.06.2024, it conceded that she did so suffer.

The issues

6. On 16.01.2024, a Case Management Hearing was held before Employment Judge Midgley. He prepared the following 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 any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction.

1.2 Were the discrimination and victimisation 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 or omission 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. Disability

2.1 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:

2.1.1 Whether the Claimant had a physical or mental impairment. The claimant asserts she had a mental impairment caused by Acute Migraine Disorder.

2.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

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

2.1.4 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?

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

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

2.1.5.2 if not, were they likely to recur?

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

3.1 Did the Respondent treat the Claimant unfavourably by:

3.1.1 Dismissing her on 13 April 2023

3.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that (1) the claimant suffered from acute migraines from time to time; (2) the claimant required periods of sickness absence to manage the symptoms associated with those migraines; (3) the claimant hit the trigger point identified in the sickness absence policy because of those periods of sickness absence, (4) the claimant was required to attend capability hearings as a result.

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

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

The Respondent says that its aims were:

3.4.1 TBC

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 Could something less discriminatory have been done instead;

3.5.3 How should the needs of the Claimant and the Respondent be balanced?

4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

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

4.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

4.2.1 A sickness absence policy with a trigger point at which absences were managed through a capability process;

4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the sickness absence policy was more likely to 'bite harder' on the claimant because she was more likely to require sickness absence because of her disability, more likely to hit the trigger points under the policy and therefore more likely to be subject to sanctions (including dismissal) under the policy ?

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

4.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

4.5.1 Discounting periods of disability related absence

4.5.2 Increasing the trigger point

4.6 Was it reasonable for the Respondent to have to take those steps and when?

6.7 Did the Respondent fail to take those steps?

5. Harassment related to disability (Equality Act 2010 s. 26)

5.1 Did the Respondent do the following things:

5.1.1 On 11 May 2022 Hugh Davies sent a private WhatsApp to Patsy Clover, stating, "Hi Patsy, really important that you do her return to work today and inform her that she has hit the trigger for an absence review that will be conducted on your return. (Not teaching you how to suck eggs or anything);" the claimant relies upon the use of a private WhatsApp, and the implicit suggestion that Mr Davies was keen to progress the sickness absence procedure to target the claimant;

5.1.2 On 5 June 2022 Hugh Davies sent a private WhatsApp Patsy Clover stating "I have applied elsewhere but I will finish the job of ridding the firm of malicious and vexatious claimants.' Patsy Clover replied 'that could take some time!' Hugh Davis replied 'there is only one, NG.'

5.1.3 On 12 August 2022 Hugh Davies sent an email to Patsy Clover stating, 'Hi Patsy, Here's the report. She is playing the minimal contact game again and has requested this ref Dave, her line manager. Also reference to DDA"

5.1.4 On 8 February 2023 Hugh Davies sent a private WhatsApp to Patsy Clover stating "We have been advised to go in hard and discipline every shortcoming. I've asked Linda to accompany me when I meet with them. I'm going to have to engage with that sack of shit gardner.

5.2 If so, was that unwanted conduct?

5.3 Did it relate to the Claimant's protected characteristic, namely disability?

5.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

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

6. Remedy

Discrimination

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

6.2 What financial losses has the discrimination caused the Claimant?

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

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

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

6.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

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

6.8 Should interest be awarded? How much?

7. EJ Midgley made a direction for the hearing of a preliminary issue on the question of disability. Following the Respondent's concession referred to above, that preliminary hearing was no longer necessary.

8. We discussed the list of issues with the parties at the start of the hearing, and there was some development.

9. The Claimant had subsequently sent in further information, which Employment Judge Midgley had ordered. She set out further instances of alleged harassment, on which she sought to rely. These were:

   (a) *Sent on the 12/10/22 by Hugh Davies via Watsapp Pw sickness n diarrhea NG. She saw dave in the car park and had a meltdown. Wallace told dave he'd broken the rules…*

   (b) *Sent on the 14/10/22 by Hugh Davies via Watsapp I think the cllrs have deferred the decision to Linda. I said to her today that there is only one acceptable outcome for me and she knows exactly what that is. She said the cllrs didn't want that but I will not accept anything else. I think its clear there is nothing new from the appeal. She knows Kev is weak and I described how I had to lower my standards to accept his poor performance. I left her in no doubt where I stand on this whole charade. I mentioned sex discrimination, the lack of process followed and "when it goes to court" I want resignations and I will carpet all who are guilty. I fear the delay may be because she could have got to close to gardener and is not looking forward to delivering the news*;

   (c) Sent on the 8/02/23 by Hugh Davies via Watsapp. (this is in the same watsapp messages as the 'sack of shit gardner)

Maybe my hatred came out….plus, the 2 items shouldn't have been in the same meeting
Recipient - Hmmmm. Did they agree to anything?
Not really. Spineless.

(d) *Sent on the 27/02/23 by Hugh Davies via Watsapp.*
A bit shitty, on the offensive, anti you (rolling eyes emoji), I asked her if she was mates with NG
(winky faced emoji)

(e) *Sent on 24/03/23 by Hugh Davies via Watsapp*
I know…..its so Gardner n Wallace can officially hold hands.

(f) *Sent on the 12/04/23 by Hugh Davies via Watsapp*
I think it went as well as could be expected. Dave was immense and I think he clinched it just as I was about to release all hell on Simon. (Laughing face emoji)
Recipient- So what is happening?
Simon said he'll let us know tomorrow
Recipient-What??!! I thought it was up to LR – NG isn't part of the SMT.
That's what I said! And Simon said, when lr was out of the room that they were going to have a "very difficult conversation with the clerk"
The conversation will be tonight
Joe mccann knows and if I don't get my way, I'll blow this circus wide open with a full on court case.
Nothing to lose
Recipient – What exactly does Joe know?
Linda's weakness

(g) *Sent on the 13/04 23 by Hugh Davies via Watsapp*
Yep, well from lr. She's toast.
NG
Linda emailed her at 4pm
I'll get a copy tomorrow, just leaving

(h) *Sent on the 14/04/23 by Hugh Davies via Watsapp*
Hell Yeah! Check your email (Curious emoji)
Nothing. Its over for those sacks of human waste

(i) *Sent on the 15/04/23 by Hugh Davies via Watsapp*
Thing is, she's moved and hasn't provided her new address (as per usual form), so it went to both n personal email
Left it too late. Time critical. Its OK but should have been done in October.

10. Although the Respondent takes time points regarding the above, Mr Wyeth sensibly did not object to us hearing evidence about these allegations.

11. The Claimant said in her further information was that there should be:

    … a policy outlining that where someone is absent for a something that arises as a consequence of their disability, this absence will be counted separately from sickness absence, and will not be used in any calculation of absence used to trigger, return to work interviews, absent review meetings or disciplinary procedures.

    My calculations of sickness in the time I was employed at Melksham Town Council, 44 days are migraine or migraine related sickness days.

    Covid should also be included in the reasonable adjustments as it was pandemic no one could of avoided and I followed the instructions that either the government or Melksham Town Council advised me to follow in covering myself with an isolation note each time, many staff were off for weeks at a time. 22 days are Covid sickness days.

12. Although the above represent an expansion of the list of issues, the issues did narrow to some extent. Disability was no longer in issue. Mr Wyeth said of the question of knowledge that it was "*probably not the key point in the case*".

13. The Respondent's aims – which it is surprising that it had not been able to state before Employment Judge Midgley – were maintaining an acceptable level of attendance at the workplace, encouraging satisfactory attendance, being able to provide services to the community which are reliable and safe, alleviating stress on colleagues, enabling workforce and resource planning, and ensuring a sufficient workforce. The Claimant sensibly had no issue with the Respondent being able to advance those issues.

14. Issue 4.2 from the list of issues was no longer a live issue. As to 4.3, Mr Wyeth conceded that it would "*bite harder*" on a person with a disability, although he also observed that it was not just absence that led to dismissal.

15. This last observation by Mr Wyeth is related to an issue that struck us as we read the statements. Much of the evidence in the statements of the

Respondent's witnesses appeared to go to the Claimant's conduct in the course of her employment.

16. The Respondent's decision to terminate the Claimant's employment was expressly said to be based on her level of absence. It does not mention conduct. Neither does the Respondent's amended Grounds of Resistance.

17. We were concerned that the evidence going to conduct may not be relevant to any issue before us. There having been no application to amend (or re-amend) the Grounds of Resistance to add conduct as a reason for dismissal, we had specifically in mind possible Polkey[1]/Chagger[2] arguments based on conduct. We were concerned that such had not been flagged up in the list of issues – we interpreted issue 6.7 as relating to Polkey/Chagger arguments on the question of attendance.

18. Mr Wyeth contended that the evidence of conduct was important, as it went to show the context of the alleged harassment. It seemed to us that this was a good point, and we heard the evidence going to conduct.

19. We heard it as going to the question of harassment. But it remained the case throughout that the Respondent has not sought to argue that the Claimant's dismissal was because of her conduct, notwithstanding the forceful criticism made in this hearing of her conduct whilst employed by the Respondent.

20. As we set out below, the Respondent's stance is at odds with at least some of its own evidence. In closing, Mr Wyeth submitted that we should find that the Claimant was dismissed solely for reasons of conduct. This submission was made despite the fact that the Respondent's case was that the dismissal was because of the Claimant's level of sick leave.

Hearing preparation

21. On 13.07.2024, the parties were sent notice of this final hearing. That notice included directions from Employment Judge Cadney for the preparation and

[1] Polkey -v- AE Dayton Services Ltd [1988] AC 344
[2] Abbey National PLC -v- Chagger [2009] EWCA Civ 1202 [2010] ICR 397

exchange of witness statements, and the preparation of a hearing bundle. Regrettably, neither witness statements nor the hearing bundle found their way to the members of the tribunal when we were told that we were hearing this case, the Friday before the hearing started. That has significantly impacted on our ability to prepare for it.

22. On 05.12.2024, Employment Judge Roper directed that specific disclosure that the Claimant had requested – of minutes of a staffing committee meeting, which determined the termination of her employment – appeared to be directly relevant to the issues, and ordered disclosure of the same. Later that day, the Respondent's representatives responded, saying as follows:

The Respondent has undertaken a reasonable search for the 'confidential papers' referred to in the application and the minutes but given the confidential nature of the Staffing Committee discussions it appears that no minutes exist or have been retained – only the formal minutes referring to the agenda item.

Those formal minutes have been disclosed hitherto as indeed has material prepared by Mr Elms the Claimant's line manager for the Staffing Committee.

23. Later the same day, the Claimant emailed:

The Staffing Committee are a formal committee of Melksham Town Council.
There should be non confidential minutes and confidential minutes on record, these were signed by Mr Crundell (see below & attached)
Their formal published minutes for that agenda specifically refer to:
4/22.1 Confidential papers dated 12.04.2023 refer.
I have attached the meeting minutes dated 10th May 2023 where section 8/22 states:
Minutes PDF 228 KB
To approve the Minutes of the Staffing Committee meetings held on 12 January 2023, 10 March 2023, 17 March 2023, 27 March 2023 & 12 April 2023 (see attached).
Additional documents:
Minutes , 10/03/2023 Staffing Committee , item 8/22 PDF 224 KB
Minutes , 17/03/2023 Staffing Committee , item 8/22 PDF 219 KB
Minutes , 27/03/2023 Staffing Committee , item 8/22 PDF 224 KB
Minutes , 12/04/2023 Staffing Committee , item 8/22 PDF 248 KB
Minutes:
The minutes of meetings held on 12 January 2023, 10 March 2023, 17 March 2023, 27 March 2023, and 12 April 2023 having previously been circulated, were approved as a correct record and signed by the Town Mayor, Councillor S Crundell.

Can I refer the respondent to the National Association of Local Councils Legal Topic Note, specifically Section 67 onwards….

24. Minutes were subsequently disclosed, which are unenlightening.

25. The Claimant raised disclosure again at the outset of the hearing. No further documents were disclosed.

26. Mr Crundell's evidence also went to the question of disclosure. We will deal with this when considering Mr Crundell's evidence below.

27. A hearing bundle, and witness statements had been prepared. Unfortunately, neither had found their way to the panel hearing this case before the start of the hearing.

28. Still more regrettably, the bundle, when it arrived, was of considerably less use than it should have been. Although we were eventually provided with a searchable bundle, it came in two parts – with obvious consequences for pagination. It was not appropriately bookmarked, or bookmarked at all. A significant number of documents were corrupted or otherwise illegible (in both the electronic and paper copies of the bundle), meaning that we could not read them properly. And many had unnecessary anonymisations of people important to this case.

29. We were told that the anonymisations were the result of the documents being supplied to the Claimant following a subject access request. The redactions may be understandable in that context, but given that the Respondent supplied them pursuant to a SAR, it is hard to see how the Respondent would not have had unredacted copies, which should have been included in the bundle.

30. As for the corruption, Mr Wyeth told us of formatting difficulties that had been experienced.

31. We understand that the preparation of bundles can be burdensome, and that the burden fell on the solicitors for the Respondent. We also understand that

those solicitors have not acted for the Respondent throughout these proceedings. But it is simply not acceptable for solicitors to prepare as unhelpful a bundle as we have had to endure. The Respondent could have supplied un-anonymised documents. It is not too much to ask that a bundle be appropriately bookmarked, and searchable to the extent possible, in a single PDF. The preparation of the bundle showed a lack of respect for those who need to work with it – for the Claimant, for the Respondent's own counsel, and for this Tribunal.

The hearing

32. Mr Wyeth of counsel appeared for the Respondent before us. The Claimant was unrepresented. The Claimant's questioning of the Respondent's witnesses – particularly on the first day on which she cross-examined - was done with a brevity and technical competence worthy of many a professional advocate. Mr Wyeth, for his part, argued a case that presented challenges, bringing a needed realism to the case.

What happened

33. In setting out our factual findings, we will attempt to resist the temptation to determine every matter of controversy between the parties. For all the politeness with which people have behaved in the hearing before us – and it is right to acknowledge that politeness- it is evident that there has been considerable ill-feeling between the individuals involved. Perhaps for that reason, the parties have, at times, struggled to focus on the issues that really matter.

34. It is important to consider individual instances relied upon by the Claimant, and the Respondent's responses. But it is also important not to lose sight of the wood for the trees.

35. In making factual findings, we do so on a balance of probabilities. If we consider that something is more probable than not, it is taken to have happened. If something is less probable than not, we treat it as having not happened.

<u>The Claimant joins the Respondent</u>

36. The Claimant started working for the Respondent on 03.05.2021. How she initially did so, and who exactly was involved in her recruitment, do not seem to us to be relevant to any issue.

37. Having started work as a Seasonal Park Ranger, she became an Amenities Team Assistant in July 2021.

38. Both Mr Elms and Mr Davies praised the Claimant's performance in the early months of her employment.

39. The amenities team was small – at most, 5 people working under Mr Elms. These were Rae Knight, Paul Wallace, Reece Coward, and Joe Reece. None of these people gave evidence in this hearing.

40. The amenities team's role involved supervising a splashpad and looking after parks, emptying bins, cutting grass and suchlike.

<u>The Claimant's sick leave</u>

41. The Claimant suffers from acute migraine disorder. In an email dated 11.06.2024, the Respondent admitted that she was disabled for the purposes of the Equality Act 2010 ("EA") at the material time.

42. It is not open to serious dispute that the Claimant took a significant amount of time off work sick.

43. In its amended Grounds of Response, the Respondent pleaded a series of dates on which the Claimant was off sick, with reasons given for each instance.

44. In the course of the hearing, we were taken to two other documents, which also contained lists of dates off sick. These were, respectively, an email from Mr Elms dated 01.04.2022, and a list apparently prepared for a meeting of the Respondent's staffing committee – a committee of elected councillors.

45. The two lists did not match

    (a) In the email, a period of sickness starting on 01.04.2022 is said to have lasted 29 days. On the list, the length is given as 30 days;
    (b) The list contains a day of sick leave on 24.06.2022, which does not feature in the email;
    (c) The email records a day of sick leave on 06.07.2022 – a day on which the Claimant says she was not off sick, a claim that finds some support in a note of a telephone conversation on that date;
    (d) The email has a period of sick leave starting on 27.07.2022 as lasting 10 days, the list has it lasting 8 days;
    (e) The email had the Claimant off work with a migraine on 13.02.2023. The same document has her starting 10 days' sick leave due to Covid-19 on 10.02.2023. Whilst she may have had a migraine whilst also having covid, it is misleading to say that she was off work that day twice;

46. The list in the Amended Grounds of Resistance is not wholly consistent with either document.

47. It is important not to lose the wood for the trees. It is clear that the Claimant was off work for a considerable number of days, for a variety of reasons. The total was somewhere between 92 days and 96 days.

48. It is equally clear that a significant number of absences were not recorded as being due to migraines. The parties were not in agreement as to the calculations, but it seems to us that at least 53 days were not recorded to have been due to migraines.

49. The inconsistencies in the different positions advanced by the Respondent indicate an unsatisfactory approach to record keeping. But even taking that into account, it seems that more than half of the Claimant's recorded sick leave was not attributed to migraines. That said, of the non-migraine days, 20 were attributable to covid.

50. The Respondent called no evidence at all about how it treated covid leave for absence policy trigger purposes.

51. The Respondent made a referral for an Occupational Health (OH) assessment. A referral form was in the bundle, signed by the Claimant and dated 01.04.2022. We were told, and we accept, that the form was given to her on 30.03.2022, but she was reluctant to sign it on the spot.

52. What happened to the form is something of a mystery. It was apparently found some time later by Mr Elms and Mr Davies, in the course of tidying up a room in the Pavillion[3].

53. As the form was found signed, it seems to us to be probable that the Claimant returned it to someone. The Respondent's protestations to the contrary are unpersuasive. Its record-keeping has not been robust, and that an important document such as this was apparently left lying around to be found whilst tidying up does not inspire confidence in the Respondent.

54. It is not in dispute that an Occupational Heath professional's report was obtained. In the unusual circumstances of this case, the content of the OH report is not particularly important, save that it did recommend minimal contact between the Claimant and Mr Elms and Mr Davies

Filling-in paperwork

55. In July 2021, the Claimant was asked to sign some paperwork relating to a training scheme. This related to an arrangement under which the cost of training schemes undertaken was repayable, if the employee left the Respondent's employment within a certain period. She had not signed it, nor had she signed her contract of employment. She also failed to return a medical questionnaire she was asked to complete on starting her employment.

56. Questioned about a failure to fill in a questionnaire, the Claimant was taken to an email she sent to her trade union rep. The exact text of this email has been corrupted, but the following emerged from the evidence. The Claimant had

[3] One of the Respondent's premises

become unwell when cutting grass. The Respondent had suggested she go home, and contact her GP. She refused, on the basis that the asthma from which she suffers was controlled with medication.

57. The Respondent subsequently procured face masks, which it distributed to the amenities team, with either advice or a direction that they be worn. The Claimant objected to this, on the basis that she and other staff had not been consulted.

58. Mr Wyeth suggested that she was trying to make an issue out of perfectly reasonable behaviour on the part of her employer, which went to show that the Respondent could do no right in the Claimant's eyes.

59. It seems to us to be improbable that the Respondent would require that masks be worn by outdoor staff, as opposed to making masks available for any who wished to wear one. The provision of masks, in case staff wished to wear one, is unobjectionable. Nor do we consider that it is objectionable to suggest that the Claimant go home and consult her GP after an asthma episode. Likewise, we think a health questionnaire following such an incident is unobjectionable.

60. We consider that the Claimant's reaction was wholly unreasonable.

<u>Claimant's grievance</u>

61. On 07.04.2022, the Claimant made a formal grievance to the Respondent. It was addressed to Ms Clover. The grievance itself was not material to the issues before us, although some of the ground it covered was.

<u>Request for leave</u>

62. In August 2021, the Claimant requested two-weeks leave in April 2022. The time off included a weekend that she was on rota to work. There was a lengthy gap of time before the Claimant was given a decision. The last week of the requested leave was refused only the week before she had hoped to go on leave, because of the rota for weekend work.

63. Mr Elms' explanation for this was that an earlier holiday request had left the Respondent with no-one to cover her work, and Mr Davies had given up his own weekend to work.

64. The Claimant had subsequently booked time off around each bank holiday, so Mr Elms said that he would not allow the Claimant to book up throughout the year in one go. He felt this was unfair on other employees, and said that the Respondent would not look at holiday bookings until the new holiday year.

65. The Claimant was greatly upset by this, and we find that this was a significant cause of the animosity the Claimant felt towards Mr Elms and Mr Davies.

66. We do not think that either party's stance on this does them much credit. The underlying rationale for the decision – the need for fairness to all staff – was not challenged, and it strikes us that the amenities team's jobs were such that particular care would be required to ensure fairness re who got to work Bank Holidays and school holidays. Although we were not told the exact dates of Easter in 2022, it is common knowledge that Easter often falls in April, with the consequent school holidays. If – as was not challenged – the Claimant had booked up holiday time around other Bank Holidays, it seems to us to be more than reasonable for the Respondent to seek to ensure that other staff had an adequate chance to book holiday time in the April.

67. That said, the amenities team was small, and some realism is required. We were not told details of any trip the Claimant may or may not have wished to take in that April, but it seems to us to be likely that some holidays might need to be booked some time in advance, not least for reasons of price. In so small a team, it seems to us that the Respondent might have adopted a flexible approach, perhaps canvassing with other staff members whether an early booking was likely to pose an issue for any of them.

68. The holiday issue was not something relied upon by the Claimant as an instance of discrimination. That was wise, because we see nothing to indicate that the Respondent's attitude was at all related to the Claimant's disability. This

issue perhaps took a greater part of the parties' attention than its importance – or lack thereof – warranted.

Training claw-back sheets

69. In her grievance, the Claimant said that she refused to sign the training sheets because she had not been made aware of the claw-back provisions in interview, and they were issued to her after the training in question had been received. She also said that she did not like to be in debt, and felt it would be detrimental to her mental health to feel she would owe money if her employment were terminated.

70. This is related to form-filling referred to above.

71. Insofar as it is relevant to the matters we have to determine, we are not confident that the Respondent did make the Claimant aware of the claw-back provisions when she was interviewed. She said that didn't happen, and that was not challenged in cross-examination. It was also not challenged that the Claimant had been asked to sign the forms after the training. The former at least strikes us as a significant managerial failing.

72. However, we also consider the Claimant's response to be confrontational and at least her degree of outrage somewhat contrived. Claw-back provisions are far from unknown, and it seems to us that, had the Respondent explained the matter sensitively and at the appropriate time, and the Claimant been willing to heed an explanation, this issue need have generated little heat.

Change in managerial attitude following the forms issue

73. The Claimant complained that the attitude of Mr Elms and Mr Davies towards her changed in October 2021. Until then, they had been supportive, thereafter, she said that they became critical of her and her colleagues.

74. It was acknowledged by the Claimant that the change in attitude that she alleged was not related to her disability.

75. Much time was spent discussing the wording of messages exchanged.

76. In a WhatsApp exchange with Rae Knight, the Claimant described Mr Ellis as a "*twat*". This was in a private message between two people who worked under Mr Ellis.

77. Although it is not very nice to be described as a twat, we do not think it particularly objectionable for two employees to describe their boss as a twat in a private conversation. Indeed, we suspect that many a manager will have been referred to as a twat by those who work under them. It is a relatively mild term of abuse, devoid of, for example, racial or homophobic prejudice that would cause genuine concern even in a private conversation. It is naïve and unrealistic to think that people will only speak of their managers in respectful terms when having private conversations amongst themselves. People simply do not have private conversations in the sort of language they use before a Tribunal.

78. In her grievance, the Claimant complained that Mr Elms and Mr Davies had criticised the Claimant and her team and made derogatory comments about them, causing them to feel demotivated, disrespected and working in fear.

79. We have seen communications from which it is clear that Mr Davies in particular felt considerable animosity towards the Claimant – animosity to which he frankly confessed in cross-examination.

80. There is ample evidence of a communication style that does Mr Davies no credit at all. Instances include:

    (a) In an email dated 06.05.2022, Mr Davies wrote:

    > *Without any management input, the lunatics are running the asylum.*
    > *They can do what they want completely without penalty as Natasha Gardner has created a situation whereby the company has agreed that management cannot have contact with the team. They are just laughing at us.*
    > *It's the beginning of the end I'm afraid*

Compared with what was used on other instances, this language was relatively mild. However, it shows Mr Davies to hold an attitude of hostility towards the Claimant, and indeed towards anyone who disagreed with him.

(b) In a whatsapp exchange dated 05.06.2022, Mr Davies and Patsy included the following:

I just hope that you decide that you are able to come back...

I have applied elsewhere but I will finish the significant job of ridding the firm of malicious and vexatious claimants

That could take some time!

There's only one NG

The Claimant put to Mr Davies that this showed that he had already made a decision that her employment should be ended. Mr Davies did not deny that, merely averring that it had nothing to do with her disability. The frankness of that answer is possibly the only creditable thing about it.

(c) On 23.08.2022, when forwarding the OH report obtained to Ms Clover, Mr Davies wrote:

She playing the minimal contact game again and has requested this ref Dave, her line manager.
Also reference to DDA…

Mr Davies said in evidence that "*game*" here was a turn of phrase. Invited to identify an appropriate alternative, he suggested "*tactic*". He said that "*ruse*" would not be an appropriate alternative. In any event, this was dismissive of a suggestion – included in the OH report – that contact between the Claimant and Mr Elms and Mr Davies be minimised.

(d) An email dated 24.08.2022 records that another complaint – meaning that there must have been at least one preceding complaint – about Mr Davies' conduct towards staff, and suggests that it may be prudent to have a

conversation with him to discuss how he speaks to staff. It is said that this need not be a formal meeting;

(e) In an exchange with Ms Clover on 08.02.2023, Mr Davies referred to the Claimant as a "*sack of shit*";

(f) A Whatsapp exchange with someone whose identity was unhelpfully redacted on 12.04.2023, went as follows:

I think it went as well as could be expected. Dave was immense and I think he clinched it just as I was about to release all hell on Simon.

So what is happening?

Simon said he'll let us know tomorrow

What??!!I thought it was up to LR- NG isn't part of the SMT.

That's what I said! And Simon said, when Ir was out of the room that they were going to have a "very difficult conversation with the clerk "
…

(g) Later in the same exchange, one of the participants refers to someone called Louisa, who is described as "*weak as shit*" and someone with the initials SM was said to be "*flying the flag for that sack of human waste*";

(h) Later still in the same exchange, the following is recorded:

Joe mccann knows and if I don't get my way, I'll blow this circus wide open with a full on court case. Nothing to lose

What exactly does Joe know?

Linda's weakness

The problem is that they are too scared to get rid of LR

This exchange we find relates to the meeting at which it was decided that the Claimant should be dismissed. It shows an inappropriate attitude on the part of Mr Davies. A meeting of the Respondent's staffing committee is viewed as an instrument to obtain – or potentially an obstacle to obtaining –

a result which he assumes to be right. Others are dismissed with an arrogance that is inappropriate;

(i) In a WhatsApp exchange with Patsy dated 14.04.2023, Mr Davies described the Claimant – and Mr Wallace – as "*sacks of human waste*", and appears to be engineering some sort of unpleasant experience for Mr Wallace, the exchange reading:

What is the plan re PW? I wouldn't mind betting that he'll suddenly return from siv ! leave[4]*.*
He won't… he'll be shitting himself as lr[5] *has written that it's her decision. He'll go sick again. I'll be ready at 7.30 on Monday. Gonna kill me but its worth it*

This was immediately after the Claimant was dismissed. Challenged that it represented pride in the Claimant's dismissal, Mr Davies responded that it was more relief. We consider that both words are inapt. We consider that the appropriate term to describe this as "gloating";

81. The content of the WhatsApp messages included in the list of issues, and the Claimant's further information, was not disputed.

82. In closing, Mr Wyeth observed that, just as some coarse language is to be expected in private communications between employees, so it can be expected between managers discussing employees whom they perceive to be recalcitrant. That is a fair observation.

83. It is also right to observe that coarseness of language is not necessarily indicative of coarseness of attitude.

84. All that said, the most objectionable with Mr Davies' communications is not the coarseness of language, although at times it resembles nothing so much as the sort of dialogue one might hear in a gangster film. More objectionable than that is the utter contempt he appears to have held for anyone who was not of his

[4] This appears to be a corruption of "sick leave".
[5] Linda Roberts

view, the apparent readiness to engineer consequences for those serving under him, and the gloating when the Claimant was dismissed.

85. The communications we have seen show – and we find – that the working atmosphere in the Amenities Team was thoroughly toxic.

86. Mr Wyeth, in closing, focussed on a submission that, because the Claimant was unaware of the whatsapp messages referred to in the list of issues, and those in her further information, the Claimant cannot claim that they constituted harassment of her. He relies on the case of Greasley-Adams -v- Royal Mail Group Ltd[6].

87. It is not disputed that the Claimant was not, in fact, aware of the messages at the time, or indeed until after she was dismissed.

88. It seems to us that Mr Wyeth's legal submission is correct. The EAT has held that the wording of EA s26 requires that a complainant's perception be taken into account, and that in turn requires that the complaint have perceived something. In this case, at the relevant time, the Claimant had not perceived the messages to which she takes objection in these proceedings.

89. Mr Wyeth did not dispute that the atmosphere was poor. He sought to put the blame for this squarely on the Claimant.

90. He referred to the Claimant's reaction to the holiday leave request. We have discussed that already.

91. He pointed out that, in her grievance, the Claimant had referred to comments about the Amenities Team being the worst team Mr Davies had ever worked with and being like a bunch of whinging children. The point that Mr Davies abuse was not directed exclusively at the Claimant is one with some forensic force in the circumstances of this case. But it is hardly an attractive one.

[6] [2023] EAT 86 [2023] ICR 1031

92. There was an incident in the Claimant's grievance involving a row over whether Mr Davies was willing to work a weekend for the Claimant. The Claimant's complaint was that Mr Davies' agreement was not in sufficiently polite terms. This sort of stance was unlikely to reduce the level of acrimony.

93. In the same exchange, the Claimant told Mr Davies that she could not trust him. Mr Wyeth made much of this. Mutual trust and confidence is important in an employment relationship. It was clearly lacking in this relationship. It isn't necessary to decide the precise allocation of blame for the lack of trust and confidence in this case, but if it were, we would consider that the Claimant must accept a share of the responsibility for it, but so too must Mr Davies.

94. An idea of the state of affairs can perhaps be gained from the attitude towards a grievance that the Claimant submitted about Mr Davies and Mr Elms. The substance and merits of the grievance do not need to be addressed. It is clear that the grievance caused a strong reaction in Mr Davies.

95. He sought to obtain statements from other members of the Amenities Team, to defend his position. That in itself may be understandable, but shows poor judgement on his part. It would have been better to leave that to the grievance investigation. That should have been self-evident to a manager.

96. Mr Elms likewise made attempts to gather evidence in his own favour. On 06.04.2022, Rae Knight and the Claimant had a WhatsApp exchange in which the following was said:

    Dave just told us he wants statements off of all of us regarding your meeting Hugh requested them
    I've asked if they're required and if not then I won't write one, if it is required then I'll write the most simple one

    Morning, that's most interesting! Do what you need to do, say what you need to say, I am a big girl & know what they are up too xx

    Dave said i can refuse it but itll "look bad on me" if i do

97. Mr Wyeth in cross-examining the Claimant suggested that this was nothing more than legitimate efforts on the part of Mr Elms to defend himself. We think

that is unrealistic. It should have been apparent to all that it was better to leave requests for accounts to whoever was investigating the grievance. And the suggestion that it would "*look bad*" if a statement was not provided, which was not disputed in cross-examination, was one that we think would carry some menace, especially in the toxic working environment that we find existed.

98. The Claimant complained that, one day when she was working at the splashpad, Mr Elms attended with his family. The Claimant said in her statement that she felt this was inconsistent with zero contact, and made her feel uncomfortable, intimidated and shocked. She reported this to Ms Clover, she said in her statement.

99. Mr Elms did not deal with this in his statement, and was not cross-examined about it.

100. As there was a minimal – as opposed to no – contact recommendation, it might have been wiser had Mr Elms and his family chosen to spend their leisure time elsewhere. But the Claimant did not challenge him about this. It seems to us that Mr Elms' attendance, when off duty and with members of his family, at the splashpad, would not reasonably have caused the Claimant to feel intimidated or shocked. It seems to us that the Claimant's reaction was extreme.

101. On 10.05.2022, there was an email explaining that the Claimant did not wish to attend group meetings, or to receive one-to-one contact. However, she was content to be updated by an (unnamed) colleague. It strikes us as self-evident that this would present significant managerial difficulties.

102. On 03.10.2022, the Claimant was in an Asda supermarket, and says that Mr Elms and what she describes as "*two females*" "*kept walking up and down the aisle clearly trying to intimidate me or get a reaction*".

103. This incident apparently so upset the Claimant's partner that he contacted the town clerk and asked for the matter to be reported to the police.

104. The Claimant did not cross-examine Mr Elms about this.

105. We are not satisfied that there is anything objectionable in this incident. It seems to us, and we find, that Mr Elms was probably doing nothing more than walking up and down the supermarket aisles, as one does when one is shopping. There are other supermarkets, we were told, in Melksham, but there has been no suggestion that Mr Elms or Mr Davies were given anything like a list of no-go locations.

106. We consider the reaction of the Claimant, and her partner (from whom we did not hear evidence) to be contrived. If either had felt this merited police involvement, they could have contacted the police.

107. On 10.10.2022, the Claimant says that she was subjected to intimidation when Mr Elms turned up near her workplace at the start of the day, having warned of his presence only one minute before. She panicked and went home

108. Mr Elms explained that he had parked in a nearby car park, didn't get out of his car, and had messaged, on arrival, that he would wait until the Claimant left before entering the premises. The Claimant did not dispute this, in particular she did not dispute that he remained in his car.

109. We find that Mr Elms' behaviour on this occasion was reasonable and considerate. The Claimant's reaction to it was disproportionate and, we find, contrived.

110. The picture that emerges is that the Claimant was extremely difficult to manage. She was intransigent. Her reactions to relatively minor incidents were extreme, and she appears to have thought that the Respondent and her colleagues should mould their behaviour entirely to suit her. When this didn't happen, she was confrontational.

<u>The Claimant's dismissal</u>

111. The exact circumstances of the Claimant's dismissal are somewhat opaque. It is clear that the question of whether she should be dismissed was

referred to the Respondent's staffing committee. The minutes of this are uninstructive. The apparently relevant section reads:

Confidential Session
It was proposed by the Town Mayor, Councillor S Crundell, seconded by the Deputy Town Mayor, Councillor Mortimer and
UNANIMOUSLY RESOLVED that in view of the sensitive nature of the business to be transacted that the press and public be instructed to withdraw.
4/22.1
Staffing Matters
The concerns from the officer were received and discussed and a way forward agreed. Confidential Papers dated 12.4.2023 refer.

112. We have already referred to papers supplied to the committee.

113. Mr Crundell gave evidence. He explained that the committee would not have the authority to dismiss the Claimant, that that decision would lie with the town clerk. This was not the understanding of the other witnesses from the Respondent who spoke to this matter, but we accept Mr Crundell's evidence on this point. The consequence of that is that the Respondent has not called evidence from the actual decision-maker, who took the decision to dismiss.

114. He was asked about records of the business conducted outwith the public's presence. How would he, as committee chair, be able to check what had happened at an earlier meeting? He explained that he would have to check with the clerk to the committee, who may have a manuscript note. No such manuscript notes have been disclosed in this case, it seems.

115. That strikes us as highly unsatisfactory, and it is to his credit that Mr Crundell did not suggest otherwise.

116. It was decided to dismiss the Claimant. The dismissal letter has already been referred to.

117. In closing for the Respondent, Mr Wyeth faced up to a fundamental tension in the Respondent's case. Notwithstanding the content of the dismissal letter, and the Amended Grounds of Resistance, the Respondent's witnesses had said:

(a) *I believe the real reason was Natasha's dismissal was not so much her sickness absences (for migraine or other health issues) bad though they certainly were, but due to the breakdown in working relations and her behaviour…* Mr Elms' statement, para 68;
(b) *I do believe that the Staffing Committee recognised that whilst her absences were poor in frequency and days, that was not decisive in the decision making, what was important was the ability of staff to work with each other and be managed without due conflict* Mr Davies' statement para 52
(c) …*the reasons for the dismissal were only partly related to her sickness absence but the predominant, indeed overwhelming issue, was the potential inability of her working with our existing experienced and respected management team should she remain in post* Mr Crundell's statement para 29.

118. Mr Crundell explained to us that the reason why the dismissal letter was framed as it was, was an attempt to be kind to the Claimant. He told us that there was at least one member of the committee who regarded themselves as a friend of the Claimant (who surprisingly, did not recuse themselves). The committee was advised by the town clerk on this matter.

119. We accept Mr Crundell's account on this point. He seemed to us to be a truthful witness.

120. He was, however, exceptionally poorly served by the professionals within the Respondent. However well-meaning, the town clerk – on whom Mr Crundell told us the ultimate responsibility lay – should have advised Mr Crundell and his committee that it was not proper to lie in the dismissal letter, notwithstanding that the lie may have been well meant. Mr Crundell himself would be entitled to rely on the advice he received from the professionals in the Respondent. He is not personally to blame for this. But the Respondent institutionally most certainly is.

121. Our finding is that the Claimant was dismissed largely because of the working relationship that existed in the Respondent's Amenities Team. We think the Claimant, Mr Elms and Mr Davies each carry a share of the blame for that state of affairs

122. The Claimant's sickness absences did play some part in the decision to dismiss her. They were an excuse used by the Respondent, a figurative fig-leaf for the more substantial reason. We deal with the law below, but applying the test in Nagarajan[7], the question for us is, whether the Claimant's absences had a significant influence on the decision to dismiss.

123. This is a finely balanced call, but, we find, on balance, that they did not. The Respondent's decision was to use the absences as a pretext or fig-leaf for the substantial reason to dismiss. The Respondent's own decision to use it as a pretext, does not mean that it made a significant part of the decision-making process. The simple fact is, we find, that the Respondent decided to dismiss the Claimant because it found her unmanageable due to her conduct. That it chose to lie about that, does not change that fact.

124. We are also mindful of the effect of EA s136. The Respondent wrote a letter saying that the reason for the dismissal was absence, in the case of a Claimant it now admits was disabled. That is a set of facts from which the Tribunal could, in the absence of any other explanation, that the Respondent dismissed the Claimant for that reason, and in doing so, discriminated on her for a reason arising from her disability.

125. The question then becomes, can the Respondent show that it did not contravene s15?

126. For the reasons set out above, we find that it can. Notwithstanding the untruthful position in the dismissal letter, maintained through these proceedings until very late, we are satisfied that the decision to dismiss was not, in fact, related to the Claimant's disability

127. Mr Wyeth contended that the Claimant's dismissal was objectively justified by the level of acrimony that existed. Given our findings, we do not need to decide this.

[7] Nagarajan -v- London Regional Transport [2000] 1 AC 501

Reasonable adjustments

128. Mr Wyeth submitted that a case such as this is not, properly understood, a reasonable adjustments case. He referred us to Carranza[8].

129. We do not think there is any difficulty in this case identifying the PCP. It has not seriously been disputed.

130. The second difficulty identified in Carranza is the identification of a practical step as opposed to a mental process. In that case, the majority in the ET had not identified the step which it was reasonable for the employer to take. In this case, the Claimant has advanced the steps that she says the Respondent should have taken.

131. We consider that the Claimant's real difficulty on this issue is that the adjustments she contends would be reasonable, are, we consider, not reasonable.

132. Simply discounting the periods of absence related to disability, or increasing the trigger point (to some unspecified degree) fail to pay sufficient regard to the legitimate need for the Respondent to ensure that it had sufficient staff to meet its needs.

133. The same problem arises with the suggestion that absence related to disability be counted differently to sickness absence, and not used to calculate things like absence review meetings.

134. As to the suggestion about covid absences, this was not developed in argument or evidence.

135. It may be that the s15 analysis is more apt for this sort of case. But even if one subjects this case to a reasonable adjustments analysis, we find that it fails.

[8] General Dynamics Information Technology Ltd -v- Carranza [2015] ICR 169

<u>Law</u>

<u>EA 2010</u>

136. EA s123 provides as follows:

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

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

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

137. EA s6 provides as follows:

6 Disability

(1) 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.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
(6) Schedule 1 (disability: supplementary provision) has effect.

138. EA s15 provides as follows:

15 Discrimination arising from disability
(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

139. EA ss20 & 21 provide as follows:

20 Duty to make adjustments
(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(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.
(4) The second requirement is a requirement, where a physical feature 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.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.
(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.
(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,
(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.
(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21 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.

140. EA s26 provides as follows:

26 Harassment
(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.
(5) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation*.

141. EA s136 provides as follows:

136 Burden of proof
(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.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
(5) This section does not apply to proceedings for an offence under this Act.
(6) A reference to the court includes a reference to—
(a) an employment tribunal;
(b) the Asylum and Immigration Tribunal;
(c) the Special Immigration Appeals Commission;
(d) the First-tier Tribunal;
(e) the Education Tribunal for Wales;
(f) the First-tier Tribunal for Scotland Health and Education Chamber

Polkey

142. In Polkey, it was considered whether the Tribunal should consider whether, if the employee had been consulted or warned before dismissal was decided upon, (s)he would nevertheless have been dismissed?

143. It was held that, If the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, it can reduce the compensation by a percentage representing the chance that the employee would still have lost his or her employment. This is sometimes framed in the terms of, what are the chances that, following a reasonable investigation and a fair disciplinary procedure, the employer would have fairly dismissed the Claimant?

Chagger

144. In Chagger, the Court of Appeal held that, in a discrimination case, the Tribunal has to determine what in fact were the chances that dismissal would have occurred had there been no unlawful discrimination.

Greasley-Adams

145. In Greasley-Adams, the EAT held that the language of EA s26 provides for a cumulative test. Lady Haldane said as follows:

> *it is stated that A harasses B if, firstly, they engage in unwanted conduct, secondly that the conduct has the effect of violating B's dignity (for present purposes) and that in deciding whether the conduct has that effect, "each of the following must [my emphasis] be taken into account— (a) the perception of B, (b) the other circumstances of the case, [and] (c) whether it is reasonable for the conduct to have that effect." In other words, the perception of the person claiming harassment is a key and indeed mandatory component in determining whether or not harassment has occurred. If there is no awareness, there can be no perception. I am fortified in that conclusion having regard to authorities cited to me such as Pemberton v Inwood [2018] ICR 1291 in particular the opinion of Underhill LJ at para 88 where he said, referencing his own earlier decision in the case of Dhaliwal :*
>
> > *"In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives*

> *themselves to have suffered*[9] *the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so." (Emphasis added.)*

I consider that this passage is an entirely clear and correct statement of the proper approach to the construction of this section, and I respectfully adopt it.

146. Greasley-Adams is binding authority in this Tribunal, that the Claimant cannot claim that matters of which she was unaware at the time, constituted harassment of her.

Nagarajan

147. This case is authority for the rule that a finding of direct discrimination requires no more than that the characteristic in question have been a significant cause of the decision to treat a person less favourably. In this case, that would mean the test is as stated above – whether the Claimant's absence had a significant influence on the decision to dismiss her.

Carranza

148. In Carranza, the EAT said the following:

> *31. I begin with the employment tribunal's reasoning on the question of reasonable adjustments. As I do so, there is one general preliminary point I should like to make. This general point arises out of Mr Cordrey's reliance on Royal Bank of Scotland v Ashton [2011] ICR 632 and Griffiths v Secretary of State for Work and Pensions [2014] EqLR 545 . Those cases show that it can be difficult to analyse a claim relating to dismissal for poor attendance as a claim of failure to make a reasonable adjustment. There are, I think, at least two reasons why it may be difficult to do so. The first relates to the selection of a provision, criterion or practice: I think this was the problem which caused difficulty in Ashton and Griffiths . The second relates to the identification of a*

[9] Italicised in the original decision as reported, underlined given the italicisation in these reasons.

practical "step" as opposed to a mental process—an issue which arises in this case. I shall return to these points later in this judgment.

32. The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20–21 of the Act. The focus of these provisions is different. Section 15 is focused on making allowances for disability: unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage.

33. Until the coming into force of the Equality Act 2010 the duty to make reasonable adjustments tended to bear disproportionate weight in discrimination law. There were, I think, two reasons for this. First, although there was provision for disability-related discrimination, the bar for justification was set quite low: see section 5(3) of the Disability Discrimination Act 1995 and Post Office v Jones [2001] ICR 805 . Secondly, the decision of the House of Lords in Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening) [2008] 1 AC 1399 greatly reduced the scope of disability-related discrimination. With the coming into force of the Equality Act 2010 these difficulties were swept away. Discrimination arising from disability is broadly defined and requires objective justification.

34. In many cases the two forms of prohibited conduct are closely related: an employer who is in breach of a duty to make reasonable adjustments and dismisses the employee in consequence is likely to have committed both forms of prohibited conduct. But not every case involves a breach of the duty to make reasonable adjustments, and dismissal for poor attendance can be quite difficult to analyse in that way. Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, section 15 .

35. Considering whether there really is an alleged "step", and what it is, will help to see whether the duty is in play. It is now well established that "steps" are not merely mental processes such as the making of an assessment; rather they are the practical actions which are to be taken to avoid the disadvantage. As Langstaff J put it in Royal Bank of Scotland v Ashton [2011] ICR 632 , para 24:

> *"The focus is on the practical result of the measures which can be taken. It is not—and it is an error—for the focus to be on the process of reasoning by which a possible adjustment was considered."*

36. Ashton was decided under the Disability Discrimination Act 1995 , in which section 18B contained a non-exhaustive list of reasonable adjustments which were "steps" leading to practical results. The Equality Act 2010 does not contain such a list: examples are now to be found in the statutory code: see Code of Practice on Employment (2011), para 6.32. But I have no doubt that the same approach applies to the Equality Act 2010 .

149. We have dealt with the substance of the Respondent's arguments on Carranza at paragraphs 128-135 above.

Conclusions on the issues

Time

150. Insofar as time is concerned, the EA provides for a wide discretion to allow claims brought outwith the primary limitation period to continue. Without waiving any time point, Mr Wyeth realistically recognised that we would have to reach determinations, to give us a basis on which to decide whether or not to exercise our discretion. Having reached determinations, it seems to us to be just and equitable to exercise any necessary discretion to allow us to determine the merits of the claim.

Disability

151. Disability is not in issue, as indicated above.

Discrimination arising from disability

152. It is not disputed that the Claimant was dismissed.

153. We find that the Claimant:

(a) Did suffer from acute migraines from time to time;
(b) Required periods of sickness absence to manage the symptoms associated with those migraines;
(c) Hit the trigger points identified in the sickness absence policy because of those periods of sickness absence – this was not disputed;
(d) Was required to attend capability hearings as a result – this again was not disputed.

154. We find that (c) and (d) above do constitute unfavourable treatment, as does her dismissal. However, we do not find that any of these were because of anything arising from her disability.

155. We accept that the reason advanced by the Respondent were a proportionate means of achieving a legitimate aim.

156. Requiring the Claimant to engage with a capability process was not unreasonable, and did not unfairly balance the Claimant's and the Respondent's needs.

Reasonable adjustments

157. The only live issue here – other than whether it is an appropriate way of considering the case at all – is whether the adjustments for which the Claimant contends are reasonable. We have found they are not.

Harassment

158. None of the alleged instances said to constitute harassment has been disputed, and we find that all did happen.

159. We are not persuaded that the harassment related to the Claimant's disability. They related to Mr Davies' (primarily) visceral dislike of the Claimant.

160. Had she known of them, at least some of the instances probably would have violated the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment. But she did not know of them, so they did not have that effect.

Preparation Time Order ("PTO")

161. The Employment Tribunal Rules of Procedure 2013 ("the Rules") – in force when we heard and determined this dispute – rule 76 provides as follows:

> ***76.— When a costs order or a preparation time order may or shall be made***
> *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*

(b) any claim or response had no reasonable prospect of success; or
(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.
(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.
(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

162. Rule 76 (1)(a) requires us to consider whether to make a PTO if we consider there was unreasonable acts in the way proceedings, or part, have been conducted. We find that the Respondent, in taking the position that the dismissal was because of the Claimant’s sickness absences, right through until closing, when its own witnesses said the dismissal was for conduct, was unreasonable.

163. That we must consider whether to make a PTO is not the same thing as deciding that we should make one. We remind ourselves that costs orders are the exception, rather than the rule, in this Tribunal – see, for example, Barnsley Metropolitan Borough Council -v- Yerrakalva[10].

164. We remind ourselves that a PTO does not depend on there being a causal link between the unreasonableness and time spent (see Yarrakalva),

[10] [2011] EWCA Civ 1255 [2012] ICR 420

and that it is intended to be compensatory, not punitive – see Lodwick -v- Southward LBC[11].

165. At the close of the hearing, we advised the parties of our view that it appeared to us that we were required to consider whether to make a PTO. We invited their representations on whether we should determine whether or not to make a PTO and, if necessary, assess the amount, at the end of the hearing, or adjourn for written submissions. The parties were content for us to determine the issue at the end of the hearing, and, if necessary, summarily assess the amount of any PTO we decided to make.

166. The Claimant contended that a PTO should be made. She argued that, if the Respondent had been truthful from the start, the whole process could have been avoided. She submitted that she had spent many hours preparing for the hearing spending 8 hours each day the week before the hearing.

167. Mr Wyeth argued that to find that there had been unreasonable conduct, and to exercise our discretion to make a PTO, would be to hold that the Respondent's problem was that it – eventually – told the truth. There is no merit whatsoever in that argument. The problem was not telling the truth from the start. The problem was that the Respondent instructed its lawyers to take a position, and to maintain a position, that the Respondent knew was not its true case.

168. Mr Wyeth also pointed out that, although the Claimant's case has not succeeded, the criticism of the Respondent that she has achieved, is of some value to her, and it would be unjust to exercise our discretion to make a PTO.

169. In this case, we are satisfied that we should make a modest PTO. We are not persuaded that, had the Respondent been truthful from the start about the reason for dismissal, the proceedings could have been avoided. On the

[11] [2004] EWCA Civ 306 [2004] ICR 884

contrary, the Claimant may well have persisted in a claim for s15 discrimination, but the case would have looked very different.

170. As to the amount of any PTO, the Respondent submitted that it should be limited to 10hrs, representing the time to prepare a witness statement.

171. The Claimant's submissions would, in effect, invite us to make a PTO representing a very significant part of the preparation for this hearing. As we do not accept that the hearing could have been avoided but for the Respondent's unreasonable behaviour, this would not be appropriate.

172. We think that the Respondent's suggestion of a PTO based on 10 hours, is too low.

173. Applying a necessarily broad-brush approach, we consider that it would be just to make a PTO representing 15 hours' preparation time.

174. Rule 79 of the Rules provides as follows:

79.— The amount of a preparation time order
(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—
(a) information provided by the receiving party on time spent falling within rule 75(2) above; and
(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.
(2) The hourly rate is £33 and increases on 6 April each year by £1.
(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

175. It was not disputed before us that the effect of this rule was the rate at which to allow a PTO was £49 per hour. 15 hours at £49 per hour comes to £660, and we made a PTO in that sum.

Employment Judge David Hughes

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Date 15.01.2025

REASONS SENT TO THE PARTIES ON
03 March 2025 By Mr J McCormick

FOR THE TRIBUNAL OFFICE