EMPLOYMENT TRIBUNALS

Claimant | **Respondent**

Ms Bindhu Viswambaran **v** **John Lewis plc**

Heard at: London Central
On: 5 – 14 February 2025

Before: Employment Judge Hodgson

Representation

For the claimant: Mr T Kariyawasam, lay representative
For the respondent: Mr S Wyeth, counsel

Claim one - 2201726/2022

1. The claim of failure to make reasonable adjustments fails and is dismissed.

2. The claim of detriment contrary to section 47B Employment Rights Act 1996 and is dismissed.

3. The claim of discrimination arising from disability pursuant to section 15 Equality Act 2010 fails and is dismissed.

Claim two - 2203246/2023

4. The claim of unfair dismissal is not well founded and is dismissed.

5. The claim of automatic unfair dismissal pursuant to section 103A Employment Rights Act 1996 is not well founded and is dismissed.

Claim three - 2210051/2023

6. The claim of failure to make reasonable adjustments fails and is dismissed.

7. The claim of detriment contrary to section 47B Employment Rights Act 1996 fails and is dismissed.

8. The claim of discrimination arising from disability pursuant to section 15 Equality Act 2010 fails and is dismissed.

9. The claim of wrongful dismissal fails is dismissed.

10. The claim of unlawful deduction from wages fails and is dismissed.

REASONS

Introduction

1.1 There are three claims before the tribunal. They have previously been ordered to be heard together. I will refer to them as claim one, claim two, and claim three.

1.2 Claim one, 2201726/2022, was issued on 7 April 2022. Claim two, 2203246/2023, was issued on 21 March 2023; and claim three, 2210051/2023 was issued on 8 June 2023.

The Issues

2.1 As noted below, there was difficulty identifying the issues. Various judges had been involved in seeking to draft the issues in relation to three separate claims. Following my order on day one, the respondent filed separate lists of issues for each claim. I have had regard to the totality of the previous drafted issues. I do not consider it necessary to set out the respondent's draft verbatim. It is sufficient to identify the key claims and the key issues, which I do below.

Detriment for making protected disclosures - claim one (issued 7 April 2022)

2.2 The claimant alleges that she suffered detrimental treatment on the ground that she made protected disclosures. The respondent identified, having regard to the issues as drafted by previous churches, the pleaded detrimental treatment as follows:

2.2.1 detriment one: by the respondent paying the claimant at £9.63 per hour from about 2019 until the claim was submitted on 7 April 2022 (and ongoing) (which the claimant says is less than the respondent says it pays to underperforming employees);

2.2.2 detriment two: by sending the claimant a letter dated 14 January 2022 stating that she was being investigated for "Potential serious misconduct, namely unauthorised absence and unacceptable behaviour";

2.2.3 detriment three: by suggesting the claimant be redeployed or take an ill health pension (around January 2022);

2.2.4 detriment four; by inviting the claimant to a 'Fitness to Work Meeting' (around January 2022);

2.2.5 detriment five: by grading the claimant as underperforming (February/March 2022);

2.2.6 detriment six: since 13 November 2021 until the claim was submitted on 7 April 2022 (and ongoing) recording her as being on sick leave;

2.3 The following are alleged to be disclosures of information said to be protected:

2.3.1 disclosure one: by a verbal complaint to line manager Richard Wade on 22 May 2018 about an "ongoing bullying issue" and "potential environmental hazard that was causing her and some of her colleagues to get skin rashes and to feel unwell";

2.3.2 disclosure two: on 15 June 2018 by making a formal complaint by email to Mr Wade and Helen Labanya concerning the same issues (as disclosure one);

2.3.3 disclosure three: on 1 March 2020 email to Gregg Ward (new line manager) by raising the ongoing health hazard;

2.3.4 disclosure four: on 10 June 2021 by email to Mr Ward about bullying by Angela Andreas (manager of the shoes sales partners);

2.3.5 disclosure five: on 27 June 2020 by email to Nick Higgins, Michele Solieri, and the shop redeployment team alleging that return to work would break the government's furlough scheme rules and that the respondent had been negligent in relation to Covid safety measures;

2.3.6 disclosure six: on 20 June 2021 by email to Sarah Allen (relation manager of PhysioMed) about 'dishonest' ticking of boxes on occupational health forms indicating that the claimant had given consent to them being shared with her managers, when she had not;

2.3.7 disclosure seven: on 1 October 2021 email to Angela Andreas (line manager) disclosing persistent safety issues with the mobile aisle shelving.

2.4 The previous agreed issues failed to set out what was said to be the relevant failure in relation to any alleged disclosure. This uncertainty was not clarified by the claimant at any point.

<u>Discrimination arising from disability - claim one</u>

2.5 The previous issues record the unfavourable treatment was by grading the claimant as underperforming in her February/March 2020 appraisal.

2.6 The matter arising in consequence of disability is said to be "the claimant's underperformance (or part of it).[1]

2.7 The respondent states the treatment was a proportionate means of achieving a legitimate aim. The aims being to properly manage the performance of its workforce, ensure efficient operations, including customer service, to secure attendance, and to secure staffing levels.

Failure to make reasonable adjustments - claim one

2.8 The provisions, criteria or practices (PCPs) relied on had previously been identified as follows:

2.8.1 PCP one – the application of the absence management policy;
2.8.2 PCP two – requiring the claimant to use a standard trolley;
2.8.3 PCP three – requiring the claimant to work on a Saturday for 10 or 12 hours.

2.9 The substantial disadvantage for each PCP was previously recorded as follows:

2.9.1 PCP one – the claimant because of her disabilities had to take more time off (both because, on her case, she was too ill to attend and/or because she was unable to attend because adjustments had not been made);
2.9.2 PCP two – the standard trolleys increased the pressure on the claimant's joints and were difficult for her to handle (disability B);
2.9.3 PCP three – the claimant was fatigued by the longer days; the claimant had to travel during busy times which made it harder for her to find a seat on the train, which exacerbated her dizziness.

2.10 The previous issues identified the following as the alleged potential reasonable adjustments:

2.10.1 Adjustment one -the reasonable adjustment would have been to 'not count' the disability-related absence that occurred.
2.10.2 Adjustment two - the reasonable adjustment would have been to allow her always to use a smaller trolley.
2.10.3 Adjustment three - the reasonable adjustment would have been to allow the claimant to work on Sundays instead of Saturdays.

Time points – claim one

2.11 The respondent does not concede that all or any of the claims have been brought in time. The respondent does not accept it would be just and equitable to extend time for any claim or that it was not practicable to bring any claim in time, or that any claim was brought in such further time as was reasonable..

[1] Whilst this was recorded on previous lists of issues, it is unclear to me that the prior formulation accurately reflected the claimant's case. It was neither her evidence, nor consistent with the way she put her case, that she accepted there was underperformance.

Claim two (issued 21 March 2023)

2.12 The claimant alleges unfair dismissal (section 94 Employment Rights Act 1996) and automatic unfair dismissal for making a protected disclosure (section 103A Employment Rights Act 1996).

2.13 The respondent states it has a potentially fair reason for dismissal, being misconduct. The respondent alleges the claimant was dismissed for misconduct following unauthorised absence.

2.14 The claimant alleges she made protected disclosures. She relies on the same protected disclosures as identified in claim one.

2.15 It is the claimant's case the sole or principal reason for her dismissal was the alleged protected disclosures.

2.16 Did the claimant contribute to her dismissal?

2.17 If the dismissal is unfair, would the claimant have been dismissed in any event and if so by when?

Claim three (issued 8 June 2023)

2.18 The third claim covers a period from the issue of the second claim on 21 March 2023 until issue of the third claim on 8 June 2023.

2.19 I set out below the issues as identified in claim three which have been set out by EJ Brown.

2.20 The third claim has, at no time, been treated as an application to amend. Nor has any amendment been sought or been granted to a previous claim.

2.21 I raised with the parties the principal established in Henderson v Henderson. To the extent that claims brought in the third claim could have been brought in either claim one or claim two, there is a question as to whether they are an abuse of process, and whether they should be struck out.

2.22 The following claims were been recorded in the case management order of 4 December 2023 of EJ Brown

Detrimental treatment for making a protected disclosure (section 47B/48 Employment Rights Act 1996) – claim 3

2.23 Did the Respondent do the following things:

2.24 detriment seven: marking the claimant down as having taken unauthorised absence (11 to 13 April 2022);

2.25 detriment eight: reducing the claimant's sick pay to SSP (25 April 2022);

2.26 detriment nine: causing the claimant's Universal Credit payments to be reduced (August, September and November 2022);
2.27 detriment ten: cost of living payment?
2.28 detriment eleven: isolating the claimant by putting her in the jewellery stockroom on her return to work (8 February 2023);
2.29 detriment twelve: threatened the claimant by email with dismissal for unauthorised absence (March 2023);
2.30 detriment thirteen: purposefully depleting the claimant's 2022 annual leave, preventing the claimant from using her annual leave beyond March 2023 and underpaying her in Feb 2023;
2.31 detriment fourteen: by dismissing the claimant;
2.32 detriment fifteen: not acknowledging or dealing with the claimant's grievances at any point;
2.33 detriment 16: summarily dismissing the claimant and not paying her notice pay; and
2.34 detriment 17: dismissing the claimant's appeal.

2.35 The previous issues identified further protected disclosures as follows:

2.35.1 disclosure eight - 23 May 2021 the claimant's email to Gregg Ward about dishonest ticking of boxes;
2.35.2 disclosure nine- 2 August 2021 the claimant's email to Michael Edwards about dishonest ticking of boxes when the claimant says she had not;
2.35.3 disclosure ten – the claimant's email to John Lewis personnel about dishonest ticking of boxes on occupational health forms indicating that the claimant had given consent to them being shared with her managers, when the claimant says she had not;
2.35.4 disclosure eleven- the claimant's email of 25 April 2022 to people service centre ("PSC") and Ms Sarah Rowland (section manager of PSC) concerning errors regarding pay;
2.35.5 disclosure 12 – the claimant's email of 19 May 2022 –to Gill Manton concerning the protocol on reasonable adjustments said to breach the Equality Act 2010 and H&S legal obligations to employees;
2.35.6 disclosure 13 – the claimant's complaint of August 2022 to PSC concerning ongoing issues about Universal Credit payments being reduced;
2.35.7 disclosure fourteen – the claimant's email of 27 December 2022 (recipient unidentified) being a further email about universal credit reduction;
2.35.8 disclosure fifteen – the claimant's email of 17 December 2022 to Sarah Rowland (of PSC) being a further email about Universal Credit reduction;
2.35.9 disclosure sixteen – the claimant's email of 21 December 2022 – to Sarah Rowland (of PSC) being a further email about Universal Credit reduction;
2.35.10 disclosure seventeen – the claimant's email of 5 February 2023 – to Ms Melissa Lidder, the claimant's line manager, about failure to make reasonable adjustments;

2.35.11 disclosure eighteen – the claimant's email of 14 February 2023 to Mr Paul Marsden (branch manager) concerning disability discrimination and fraudulent pay deductions;

2.35.12 disclosure nineteen – the claimant's email of formal complaint to Paul Marsden, Melissa Lidder and Clare Ireland on 10th March 2023;

2.35.13 disclosure twenty – the claimant's further email of formal complaint to Paul Marsden & Melissa Lidder (at 8.52am on 15th March 2023);

2.35.14 disclosure twenty one - the claimant's email to Alison Smith (at 13.53 on 15th March 2023).

Discrimination arising disability section 15 EQA – claim three

2.36 The unfavourable treatment is identified as follows:

2.36.1 By Clare Ireland threatening the claimant with dismissal for unauthorised absence; and

2.36.2 subsequently dismissing her.

2.37 The matter arising in consequence of disability is said to be the claimant's absence.

2.38 The respondent alleges that the treatment was a proportionate means of achieving a legitimate aim for the same reasons as set out above

Harassment - claim three

2.39 There are allegations of harassment identified as follows:

2.39.1 Harassment one - on 8 February 2023 – by Clare Ireland pressuring the claimant not to have a paid lunch break or paid fifteen minute breaks per hour para 48 of C's FBPs dated 22.10.23.

2.39.2 Harassment two - on 8 February Clare Ireland suggesting to the claimant that it would not be worthwhile for the claimant to return to work.

2.39.3 Harassment three - on 8 February Clare Ireland refusing to implement all of the reasonable adjustments on her doctor's certificates (the respondent contends that these were not reasonable adjustments).

2.39.4 Harassment four - Clare Ireland threatening dismissal and dismissing the claimant.

2.40 The claimant relies on the protected characteristic of disability.

Victimisation – claim three

2.41 There are allegations of victimisation. The protected disclosures identified in claim three are said to be protected acts. The allegations of victimisation were recorded in the previous issues as follows:

2.42 Victimisation one - by paying the claimant £664 on 23 February 2023.

Wrongful dismissal – claim three

2.43 Wrongful dismissal - It is alleged the respondent failed to pay the contractual notice period of 26 weeks

Unlawful deduction from wages

2.44 It is the claimant's case that on 23 February 2023 she should have been paid £1,700 not £664.

Other matter arising in claim three

2.45 In claim three the rule in Henderson v Henderson may be engaged and I will need to consider if all or any of the claims could have been brought as part of the previous claims, and if so, whether all or any of the claim should been dismissed as an abuse of process.

2.46 Are all or any of the claims in claim three brought out of time and if so, should time be extended?

Evidence

3.1 The claimant served two statements. The first was a general statement. The second concerned a disability which she wished to be treated as private.

3.2 The respondent filed a bundle of documents. It filed a cast list and a chronology.

3.3 The respondent relied on evidence from the following: Ms Clare Ireland; Ms Emily Jane McGrath; Mr Nigel Towes; and Ms Angela Andreas.

3.4 For the respondent, Ms Ireland and Ms McGrath gave evidence. Mr Towes was not available. Mr Wyeth stated that Mr Towes was in Morocco, it was unclear why. He had been available the previous week, when the claimant was giving evidence. Ms Andreas was in Cyprus. She had recently given birth. Mr Wyeth stated he understood she was unwilling to attend, and in any event, permission would have been needed from Cyprus for her to attend by video. As she was in Cyprus, it was not possible to consider a witness order.

3.5 Both parties relied on written submissions in addition to their oral submissions.

Concessions/Applications

4.1 On day one, I noted there were three claims. The procedural history was complicated. In the first claim, some claims had been struck out,. The second claimant concerned dismissal, and only the allegation of dismissal was allowed to proceed. The third claim postdated termination of employment.

4.2 Several judges had drafted various list of issues. The final list of issues failed to differentiate between the three claims, but recorded that there were time issues. The parties agreed that the issues to be decided under each claim needed to be set out. It follows I did not agree the previously drafted final list of issues.

4.3 In compliance with my order, on day two the respondent filed three lists of issues, one for each claim.

4.4 In addition on day two., the respondent, pursuant to my order of day one, filed a position statement on disability.

4.5 On day one, I noted there had been a temporary rule 50 Employment Tribunal Rules of Procedure 2013 order which provided for the nature of the impairment alleged to constitute disability A to be kept private. The claimant, in particular, was concerned not to disclose the nature of the alleged disability generally, as she believed it would cause her harm. It was agreed that the matter need not be considered further until the conclusion of the hearing.

4.6 On day one, the outline timetable was agreed.

4.7 Day two was used as a reading day.

4.8 On day three of the hearing, the respondent filed a position statement on the alleged disabilities. It remained the respondent's case that the claimant had failed to identify her disabilities adequately or at all. I ordered the claimant to clarify her disability, and in particular to set out the impairments, the effect on day-to-day activity with and without medication, and information as to when each impairment had affected her.

4.9 On day four of the hearing, the claimant served a further document which gave further information on the disabilities. The claimant filed two documents. The first from her representative. The second from her personally. Her personal document contained further information which could reasonably be seen both as a clarification of her claim and evidence. I asked the respondent whether it wished to the claimant recalled to cross-examine further. Mr Wyeth declined the opportunity. The respondent indicated it would set out its position in submissions.

4.10 Both parties agreed to serve written submissions.

4.11 There were sensitivities concerning disability A. We have agreed to refer to it the mental health issue. The claimant's disability claims are not

based on disability A. Further, she does not allege disability A caused any behaviour which was relevant to any issue. It follows that disability A is largely coincidental and irrelevant. In those circumstances I do not need to give details. To the extent that it may be considered relevant, I have considered rule 49 Employment Tribunal Procedure Rules 2024. I should summarise my reasons for accepting that it is appropriate to make an order pursuant to rule 49. I am satisfied that public disclosure may cause the claimant serious harm. Given there is no relevance, or limited relevance, the interference with open justice is small. I have considered the competing interests of the claimant's privacy and the wider public interest of freedom of expression and concluded that nature of the mental health issue may be omitted.

The Facts

5.1 The claimant's first claim was issued on 7 April 2022 following a conciliation period from 30 March 2022. A strike out application was heard by EJ Stout (as she was) starting on 5 January 2023. All claims prior to September 2021 were struck out. EJ Stout allowed claims to proceed "in relation to her rate of pay" and other claims, as identified in her accompanying case management order. That case management order of 12 January 2023 set out a list of those claims which could proceed under claim one. It identified alleged protected disclosures and alleged detrimental treatment because of protected disclosures. It identified the alleged disabilities. It identified discrimination arising from disability. It identified alleged failure to make reasonable adjustments. It did not identify any claim of unlawful deduction from wages. There was reference to the claimant being paid £9.63 per hour from 2019 and continuing. This was said to be an act of detrimental treatment.

5.2 The claimant's second claim concerned dismissal and was issued on 7 April 2022. The claimant sought interim relief.

5.3 The second claim was issued on 21 March 2023. It alleged unfair dismissal, including automatic unfair dismissal for making a protected disclosure. It sought interim relief. The claim of interim relief was heard by EJ Grewal on 12 April 2023. The application for interim relief was rejected. All claims brought, other than unfair dismissal, were rejected. EJ Grewal ordered the first two claims be heard together.

5.4 The third claim was issued on 8 June 2023. A new ACAS certificate was obtained for a conciliation period from 5 May 2023 to 5 June 2023.

5.5 A case management hearing was held on 25 September 2023 before EJ Khan.

5.6 It is clear he intended that all three claim should be heard together, but it is unclear whether a specific order was made. He ordered a further

preliminary hearing to consider finalising the issues. He ordered further particulars.

5.7 On 4 December 2023, EJ Brown gave further directions. She set out what was said to be a final list of issues. She noted there were time issues. The list of issues, as recorded, did not differentiate between the three claims. It is apparent claims are included which were derived from various sets of "further particulars." No amendment was sought or granted.

5.8 The respondent's organisation, the John Lewis partnership, refers to its employees as partners.

5.9 At the material time, the claimant's contracted hours were 4.75 days per week, being 36.04 weekly hours. Her rate of pay was £9.63 per hour until October 2022, when it increased to £11.50 per hour. For the two years prior to the first claim, the claimant had been rated as underperforming. As an underperforming employee, her rate of pay was not increased from £9.63.

5.10 The claimant had significant periods of absence. In 2021, the claimant was absent from 25 January to 17 April, 25 July to 13 August, and 13 November to 31 December. Her absence then continued throughout 2022. She eventually returned to work for one day on 8 February 2023, but failed to return to work thereafter.

5.11 The respondent employed the claimant from 1 May 2017 as an operations partner based at the respondent's department store in Oxford Street, London. She was dismissed on 15 March 2023 for alleged serious misconduct.

5.12 I do not need to set out the full history of all interactions between the claimant and the respondent. I will, where necessary, set out further detail when considering the individual allegations. I will give a summary of the important interactions.

5.13 On 7 April 2021, the claimant had an OH assessment with Ms Anne Bounik who recommended a phased return. She stated "this partner is able to potter around the house not able to cook – as gets dizzy when standing for too long." She recorded the claimant had been housebound for ten weeks. It was recommended that she was fit for work in a reduced capacity, if able to travel on public transport outside rush hour. Workplace adjustments were recommended which included no travel outside work hours, opportunities to regularly change posture, and mainly sedentary work to build resilience. There was to be a buildup to 100% hours over a period of five weeks.

5.14 The claimant raised various concerns. She complained about her manager, Ms Angela Andreas at various times, including her email of 10 June 2021 which concerned an alleged incident on 9 June 2021. The claimant had been late and she objected to being questioned about her

lateness. The email is detailed and lengthy. The complaints were not limited to Miss Andreas.

5.15 In July 2021, Mr Michael Edwards became the claimant's line manager. The claimant was absent from 25 July 2021. On 2 August 2021, he explained that previous outcome reports were unavailable and he requested the claimant's permission to re-refer her to occupational health.

5.16 The claimant's response of 2 August 2021 refused his invitation to be referred to occupational health and stated "I am already dealing with that matter directly, so you should not be involved in the process until it has been properly concluded." It is clear she objected to his seeing any relevant medical evidence, including anything from occupational health. It follows that the claimant did not cooperate with the request to refer her to occupational health. This remained her position throughout the remainder of employment, and the managers were not able to secure any further occupational health report in relation to the claimant or view the previous documents.

5.17 On 14 August 2021, the claimant sent a GP note which suggested adjustments. The claimant returned to work on 16 August 2021 to attend a return to work meeting. She did not attend on 17 August 2021.

5.18 On 18 August 2021, Ms Edwards wrote to the claimant concerning her refusal to attend work.

5.19 On 20 August 2021, the claimant alleges she emailed John Lewis personnel to allege there had been "dishonest ticking boxes on OH forms." That email has not been produced to the tribunal.

5.20 On 22 August 2021, Ms Angela Andreas became the claimant's line manager. On 27 August 2021, the claimant submitted a nineteen page grievance. The grievance was extensive and include complaints about being marked as underperforming. She referred to failure to a make reasonable adjustments. She referred to having "suffered with pain in my joints and feet, ever since I develop shingles. This has meant I have had issues with walking, standing, pushing and pulling items within my normal duties."

5.21 On 13 September 2021, the claimant agreed to return to normal hours as from 2 November 2021.

5.22 The claimant continue to raise issues by email. Some of those issues included access to a trolley. The claimant had been using a trolley which had come from Waitrose. This remained a source of concern to the claimant.

5.23 The claimant commenced further absence on 13 November 2021. On 15 November 2021 Ms Andreas sent an email to the claimant reminding of

the need to report her absence. Her email records she had attempted to contact the claimant on at least three occasions.

5.24 The claimant responded on 15 November 2021. The email made a number of general allegations and raise as an issue that she had been marked as underperforming. She referred to her fit note from 12 November 2021 and its reference to reasonable adjustments. She stated "…… Or you are purposefully pretending not to understand." She referred to "puppet masters at JLP." It is unclear from the claimant's email what position she is adopting relation to return to her work.

5.25 There was then a series of attempted meetings and further emails. The claimant was seeking specific adjustments. The respondent was attempting to contact the claimant and progress matters, including the claimant's grievance which had not progressed because the claimant had failed to attend meetings.

5.26 On 11 January 2022, the claimant sent a further fit note which indicated she may be fit for work with some adjustments. The claimant's email gave an ultimatum. She stated, "Therefore I am giving you the same two choices as last time – either you accept the GPs reasonable adjustments or the permanent reasonable adjustment that I suggested several weeks ago." It continued by saying she would not attend until "these reasonable adjustments are implemented."

5.27 The adjustments suggested on the fit notes included the following: four shifts per week on Monday, Wednesday, Friday and Sunday; early shift avoid rush hour; rest for 15 minutes per hour; no increase in length of shift; not to work on Saturday; not to lift anything heavier than 3 kg; no climbing ladders; to be able to use a light trolley to help transport any load she is dealing with.

5.28 The claimant issued her first claim on 7 April 2022.

5.29 In August 2022 there was an issue relating to the claimant's universal credit.

5.30 In October 2022, Ms Clare Ireland became the claimant's line manager and she contacted the claimant on 10 October 2022. The claimant raised issues about adjustments. On 13 October 2022, Ms Ireland asked if the claimant would consent to an occupational health review. The claimant refused by email of 14 October 2021.

5.31 Ms Ireland then continued to engage with the claimant to offer adjustments and to find a way to enable the claimant to return.

5.32 Ms Ireland considered what adjustments could be made. On 9 November 2022, she advised the claimant the respondent could accommodate the following:

(a) To do 4 shifts per week on alternate days (Mondays, Wednesdays, Fridays and Sundays);
(b) All early start shifts to avoid rush hour;
(c) To be able to rest for 15 minutes every hour;
(d) No increase in the length of shift until her joint and arm pains have healed;
(e) Not to work on a Saturday as the commute is too busy;
(f) Not to lift anything heavier than 3kg;
(g) No climbing ladders and not to work in the shoes stockroom due to the work involved; and
(h) To be able to use a light trolley to help transport any load she is dealing with.

5.33 Ms Ireland requested the claimant discuss this with her. She found the claimant's response unclear. On 17 November 2022, Ms Ireland sent an email confirming that all the adjustments had been accommodated, except Sunday working, which would be kept under review. The claimant's latest fit note was to expire on 13 January 2023.

5.34 On 12 January 2023, the claimant sent a further email asking for confirmation that all adjustments suggested by her GP would be accommodated. She sent a further fit note for the period from 12 January 2023 to 12 April 2023, which stated she may be fit to return if reasonable adjustments were made. These were the same as previously recorded.

5.35 On 20 January 2023, Ms Ireland invited the claimant to a fitness to work meeting which was initially scheduled for 26 January 2023. It was postponed and rescheduled for 1 February 2023.

5.36 On 31 January 2023, the claimant requested confirmation that the adjustments could be agreed. She advised she would not be able to attend on 1 February because of difficulties with Thames Water and her water supply. The meeting was rescheduled to 3 February 2023.

5.37 On 1 February 2023, Ms Ireland reiterated the adjustments which could be made. Ms Ireland was able to offer most of the adjustments requested by the claimant. A key exception was the claimant's request to work on Sundays not Saturdays. Albeit Ms Ireland confirmed that she would seek to accommodate the claimant when an opportunity arose, having regard to the business need. She agreed to the claimant having a fifteen minute break every hour, but would not agree to this being paid. Ms Ireland had made arrangements for the claimant to work in the jewellery stockroom where she would not be required to lift any item above 3 kg. She recorded that a trolley would be unnecessary to assist the to transport any load. Before this tribunal, the claimant has indicated that the trolley was used, at least in part, as a walking frame. However, its use as a walking aid was never made clear to the respondent at the time. It was not set out in the GP fit note. Ms Ireland did not know, and could not reasonably be expected to know, that the claimant wished to use the trolley some form of walking frame.

5.38 On 2 February 2023, the claimant confirmed by email that she would return on 8 February 2023, but would cover the days leading up to 8 February 2023 with annual leave.

5.39 On 7 February 2023, Ms Ireland sent a further email which gave the claimant further options. However, the claimant could, if she wished, cease Saturday working. In the alternative, she could be offered alternate Sunday work, with her first Sunday being 18 February 2023.

5.40 The claimant responded on 8 February 2023 to say that she would work Mondays, Wednesdays, Fridays and alternative Sundays. Each day she would work 07:00 to 16:00.

5.41 She returned on 8 February 2023. Ms Ireland met with the claimant and welcomed her. During that day, Ms Ireland agreed with the claimant the reasonable adjustments as proposed. She agreed that the reasonable adjustments would be kept under review. On 11 February, the claimant made further proposals by email. She wanted to use all remaining annual leave to cover all days, apart from Wednesdays. The effect would be she would work Wednesdays (with one exception) up until April, but no other day.

5.42 Ms Ireland took advice and there was a review of the respondent's business needs, and in particular the holiday booked by other members of staff.

5.43 On 22 February 2023, Ms Ireland confirmed the claimant could have annual leave, as requested, until 1 March 2023, but thereafter, the rota demonstrated that others had annual leave booked and her request could not be accommodated. She would be able to use the days later in the year. The decision concerning annual leave was not Ms Ireland's. There is a process by which partners request holiday through the respondent's system known as "Workday." It is then authorised by a scheduler, having regard to the business needs and requests already made.

5.44 The claimant failed to attend work on 6, 8, 10, 13, and 15 March. She failed to inform her line manager that she was not coming to work, or give her reasons. The claimant submitted no new fit note.

5.45 On 7 March 2023, Ms Ireland sent an email to the claimant enquiring whether she was okay and second to confirm her absence was unauthorised. She sought an explanation.

5.46 On 8 March 2023, Ms Ireland invited the claimant to a disciplinary meeting to be held on 10 March 2023. The claimant failed to attend that disciplinary meeting.

5.47 On 10 March 2023, the claimant sent an email alleging the respondent had failed to implement her reasonable adjustments. She also alleged

she had been defrauded of pay having only received £664.23 in February 2023.

5.48 Ms Ireland, by email on 10 March 2023, rescheduled the disciplinary meeting for 15 March 2023.

5.49 The claimant failed to attend the disciplinary meeting. The disciplinary meeting went ahead without the claimant being present. Ms Ireland considered the relevant circumstances. She found the claimant's absence was unauthorised and amounted to serious misconduct. She dismissed the claimant. She considered this to be in compliance with the respondents disciplinary procedures. The claimant was advised of the reasons by letter of 15 March 2023.

5.50 On 21 March 2023, the claimant appealed the decision. He email alleged there had been a repeated failure to implement "all of my doctor's reasonable adjustments." It alleged that the failure contravened the Equality Act 2010. It alleged there had been a failure to distribute her annual leave correctly. It alleged she had been victimised by being underpaid.

5.51 With regard to the failure to make reasonable adjustments, the claimant alleged the following

> **Therefore when you refused to implement all of my Doctor's Reasonable Adjustments, JLP were committing an Unlawful Act and as such I had no legal responsibility to return to work until all the Reasonable Adjustments had been implemented correctly. EQUALITY ACT 2010 - Employment Statutory Code of Practice that has been attached above by me in PDF format, should have been what you referred to for guidance or you could have consulted the Partnership Policy Department. Instead of making the matter worse for JLP by making such an Unlawful and reckless decision. Since I have repeatedly been marked down unfairly as Underperforming, it would not be right for me to explain any further where my department went so wrong. So I shall leave that to the Appeals Manager who is chosen to work that out for Operations.**

5.52 On 30 March 2023, the claimant was invited, by email, to attend an appeal hearing scheduled for 18 April 2023. A reminder was sent on 12 April 2023. Mr Nigel Towes, a manager in the appeals office, was delegated to deal with the appeal. The claimant failed to correspond and confirm whether she would or would not attend.

5.53 On 20 April 2023, Mr Towes emailed the claimant and confirmed that as she had not responded, he would proceed to deal with her appeal in writing, and she should make representations by 24 April 2023.

5.54 On 23 April 2023, the claimant confirmed that she wanted the appeal to take place by email and she provided documents previously submitted as part of her appeal.

5.55 Mr Towes reviewed relevant documents, including those from the claimant, the disciplinary meeting notes, and the disciplinary outcome letter, and the claimant's extensive email 23 April 2023. He interviewed Ms Ireland.

5.56 Mr Towes sent his findings in an outcome letter sent on 9 May 2023. He made a number of findings which I can summarise.

5.57 He considered whether there had been a failure to implement all of the doctor's suggested reasonable adjustments. He identified that the claimant's request to work on Sundays and not Saturdays could not be fully accommodated. He noted there was a business reason for this. He considered the circumstances in relation to the annual leave, and the claimant's request to continue working on Wednesdays only until her annual leave had expired.

5.58 He concluded there had not been a failure to make reasonable adjustments.

5.59 He considered the allegation that the claimant had been underpaid, and rejected that allegation.

5.60 He concluded the claimant had been dismissed for unauthorised absences which amounted to serious misconduct pursuant to the partnership handbook. The absences were not authorised. He considered the absence to be serious misconduct which justified dismissal. He declined to interfere with the decision.

The law

Unfair dismissal

6.1 For claims of unfair dismissal, under section 98(1)(a) of the Employment Rights Act 1996, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden for showing the reason is on the respondent.

6.2 In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 the Court of Appeal held –

> **A reason for the dismissal of an employee is a ser of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.**

6.3 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.

6.4 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision, for that of the respondent, as to what was the fair course to adopt. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.5 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23.)

6.6 In considering the question of contribution, the tribunal must make findings of fact as to the claimant's conduct. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the award by such proportion as it considers just and equitable having regard to that finding.

6.7 Pursuant to section 207 Trade Union and Labour Relations (Consolidation) Act 1992 the ACAS Code on Disciplinary and Grievance Procedures 2015 ('the Code') is admissible in any employment tribunal proceedings, and the tribunal is obliged to take into account any relevant provisions of the Code. A failure to observe any provision of the Code shall not in itself render that respondent liable to any proceedings.

Time for bringing discrimination claims

6.8 Section 123 Equality Act 2010 sets out the time limits for bringing a claim.

(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.

…
(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.

6.9 It is possible to extend time for a discrimination claim. The test is whether the tribunal considers in all the circumstances of the case that it is just and equitable to extend time.

6.10 It is for the claimant to convince the tribunal that it is just and equitable to extend the time limit. The tribunal has wide discretion but there is no presumption that the tribunal should exercise its discretion to extend time (see **Robertson v Bexley Community Centre TA Leisure Link** 2003 IRLR 434 CA).

6.11 It is necessary to identify when the act complained of was done. Continuing acts are deemed done at the end of the act. Single acts are done on the date of the act. Specific consideration may need to be given to the timing of omissions. In any event, the relevant date must be identified.

6.12 The tribunal can take into account a wide range of factors when considering whether it is just and equitable to extend time.

6.13 The tribunal notes the case of **Chohan v Derby Law Centre** 2004 IRLR 685 in which it was held that the tribunal in exercising its discretion should have regard to the checklist under the Limitation Act 1980 as modified by the Employment Appeal Tribunal in **British Coal Corporation V Keeble and others** 1997 IRLR 336. A tribunal should

consider the prejudice which each party would suffer as a result of the decision reached and should have regard to all the circumstances in the case particular: the reason for the delay; the length of the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to a cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

6.14 This list is not exhaustive and is for guidance. The list need not be adhered to slavishly. In exercising discretion the tribunal may consider whether the claimant was professionally advised and whether there was a genuine mistake based on erroneous advice or information. We should have regard to what prejudice if any would be caused by allowing a claim to proceed.

6.15 Section 23 refers to comparators in the case of direct discrimination.

Section 23 Equality Act 2010 - Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

6.16 Section 136 Equality Act 2010 refers to the reverse burden of proof.

Section 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) …

6.17 **In considering t**he burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The

approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Whistleblowing claims

6.18 Under section 43A Employment Rights Act 1996, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B Employment Rights Act 1996.

> **(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**
>
> **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
> **(e) that the environment has been, is being or is likely to be damaged, or**
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.**
>
> **(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.**
>
> **(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.**
>
> **(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.**
>
> **(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).**

6.19 The following questions must be addressed: first, is there a disclosure of information; second, did the claimant believe the information tended to show one of the relevant failures identified in section 43B(1)(a)-(e); third, was the belief of the employer that the disclosure tended to show a relevant failure reasonably held; and forth, was the belief that there was a public interest reasonably held. In deciding the latter point it is important to recognise that there are two key questions: first, whether the worker believed, at the time he made the disclosure it was in the public interest; and second whether that belief was reasonable. All of these elements must be satisfied if the claim is to succeed.

6.20 Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. Mere allegations may not be a 'disclosure' for these purposes (see **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38. It should be recognised that the distinction between allegation and information may not be clear-cut. Any argument based on this alleged distinction should be viewed with caution. It is possible an allegation may contain information, whether expressly or impliedly. (see **Kilraine v Wandsworth LBC** [2018] EWCA Civ1 1436). Each case will turn on its own facts. It will be necessary to consider the full context.

6.21 It may be possible to aggregate disclosures, but the scope is not unlimited and is a question of fact for the tribunal.

6.22 It may be necessary to indicate the legal obligation on which the claimant is relying, but there may be cases when the legal obligation is obvious to all and need not be spelled-out (see **Bolton School v Evans** [2006] IRLR 500 EAT). However, where the breach is not obvious, the claimant may be called upon to identify the breach of obligation that was contemplated when the disclosure was made. It may be necessary to identify a legal obligation (even if mistaken), as opposed to a moral or lesser obligation (see **Eiger Securities LLP v Korshunova** [2017] IRLR 115, EAT.)

6.23 The reasonable belief of the worker must be considered. The test is whether the claimant reasonably believed that the information 'tended to show' that one of (a) to (f) existed; the truth of disclosure may reflect on the reasonableness of the belief.

6.24 'Reasonable belief' is to be considered by reference to the personal circumstances of the individual. It may be that an individual with specialist or professional knowledge of the matters being disclosed may not have a reasonable to belief whereas a less informed but mistaken individual might. Each case must be considered on its facts.

6.25 The public interest element was added in 2013 in order to reverse the decision in **Parkins v Sodexho Ltd** [2002] IRLR 109, EAT. This has been considered by the CA in **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ979.

6.26 Underhill LJ gave the lead judgment in the Court of Appeal and addressed whether a disclosure made in the private interest of the worker may also be in the public interest, because it serves the interests of other workers as well (see Underhill LJ, paragraph 32). Underhill LJ declined to interfere with the tribunal's decision and set out his reasons at paragraph 37.

> **.. the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest**

> **as well as in the personal interest of the worker… The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool… but that is subject to the strong note of caution which I have sounded in the previous paragraph.**

6.27 In paragraph 34, Underhill. LJ accepted, subject to his note of caution as set out above, the following may be relevant: the numbers in the group who share the interests; the nature of the interest affected – how important is the interest; the nature of the wrongdoing (intention may be important); and the identity of the wrongdoer and its position in the community. Whilst he identified that these matters may be among those to be considered, he made it plain that it is for the tribunal to consider all the facts.

6.28 Underhill LJ expressly refused to rule out the possibility that a disclosure of a breach of a particular worker's contract will not be in the public interest. At paragraph 36 he stated:

> **…I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B (1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never…**

6.29 As regards the content of a disclosure, Sales LJ in **Kilraine v LB Wandsworth** [2018] EWCA Civ 1436 held that "Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other...." Further, he stated at para 35 -

> **"35… In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) …**
> **36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case…"**

6.30 Sales LJ observed in **Kilrain**e at paragraph 33 that statements which were "devoid of any or any sufficiently specific factual content" would not qualify for protection.

6.31 In **Jesudason v Alder Hey Children's NHS Foundation Trust** [2020] ICR 1226, the Court of Appeal provided guidance on the concept of a 'detriment' in whistleblowing cases. At paragraph, the Court stated, "There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment" and approved the statement that an "unjustified sense of grievance cannot amount to a 'detriment.'"

6.32 Section 103A Employment Rights Act 1996 provides for automatic unfair dismissal if the sole or principal reason for a dismissal is the protected disclosure:

> **103A. An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.**

Reasonable adjustments

6.33 The law relating to reasonable adjustments is set out at section 20 of the Equality Act 2010.

Section 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) …**
>
> **(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) …**

6.34 In considering the reverse burden of proof, as it relates to duty to make reasonable adjustments, we have specific regard to **Project Management Institute v Latif 2007 IRLR 579** we note the following:

> **… the Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be evidence of some apparently reasonable adjustments which could be made.**

Discrimination arising from disability

6.35 Section 15 Equality Act 2010 provides –

> **(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.**

6.36 In **Pnaiser v NHS England** [2016] IRLR 170, EAT, Simler P at [31] gives extensive guidance on the general approach to be taken by a tribunal under s 15 in order to maintain its wide reach and not to confuse it with direct discrimination, which it is meant to supplement, not repeat. This could well be used as a template in this area. The whole paragraph merits reading. A very short précis might be as follows:

> (1) Was there unfavourable treatment and by whom?
> (2)What caused the impugned treatment, or what was the reason for it?
> (3) Motive is irrelevant.
> (4) Was the cause/reason 'something' arising in consequence of the claimant's disability?
> (5)The more links in the chain of causation, the harder it will be to establish the necessary connection.
> (6) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
> (7) The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.
> (8) It does not matter in which order these matters are considered by the tribunal.

6.37 Causation must not be too loose. Section 15 requires the tribunal to isolate the 'something' in question and to establish whether the ‘something’ was caused by the disability and if that ‘something’ caused the unfavourable

treatment[2] (a two-stage test): In **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305, Langstaff, P said this at paragraph 26.

> **26 The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus on the words "because of something", and therefore has to identify "something"—and second on the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B.**

Wrongful dismissal

6.38 If the employee is in repudiatory breach of contract, the employer may affirm the contract or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory and it is accepted by the respondent the employee will have no right to payment for his or her notice period.

6.39 In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicated Newspapers) Ltd 1959 1WLR 698, CA.**

6.40 The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal to decide. In **Briscoe v Lubrizol Ltd 2002 IRLR 607** the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster 1999 IRLR 288, ECJ** where the special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." There are no hard and fast rules as to what can be taken into account. Many factors may be relevant. It may be appropriate to consider the nature of employment and the employee's past conduct. It may be relevant to consider the terms of the employee's contract and whether certain matters are set out as warranting summary dismissal. General circumstances including provocation may be relevant. It may be appropriate to consider whether there has been a deliberate refusal to obey a lawful and reasonable instruction. Clearly dishonesty serious negligence and wilful disobedience may justify summary dismissal but these are examples of the potential circumstances and each case must be considered on its facts.

Unlawful deduction from wages

[2] It must be a material cause.

6.41 Section 13 Employment Rights Act 1996 provides:

> **(1) An employer shall not make a deduction from wages of a worker employed by him unless -**
>
> **(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract or,**
> **(b) the worker has previously signified in writing his agreement or consent to the making of the deduction**
>
> **(2) in this section "relevant provision", in relation to a workers contract, means any provision of the contract comprised -**
>
> **(a) in one or more written terms of the contract of which the employer has given the work of a copy on an occasion prior to the employer making the deduction in question, or**
> **(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.**

Conclusions

Claim one

7.1 Whilst it has been ordered that these claim should be heard together, they are, and remain, three separate claims. I will first decide those matters which are raised in claim one.

7.2 The claimant alleges that she suffered detrimental treatment on the ground that she had made protected disclosures (section 47B Employment Rights Act 1996).

7.3 To succeed in such a claim, it is necessary for there to be protected disclosures. The claimant must establish that she suffered the treatment she describes as detrimental. If she did suffer that treatment then it is necessary to consider whether there is a causational link between the detriment and any protected disclosure, such that the detriment was on the ground of the protected disclosure.

7.4 If there was detrimental treatment on the ground of the protected disclosure, it is necessary to consider whether the claim had been brought in time and I have regard to section 48 Employment Rights Act 1996. The test is whether it was reasonably practicable to bring the claim in time, and if not whether it was brought in such further time as was reasonable. It may be necessary to consider whether there is an act extending over a period, as the relevant date of the act will be the last date of that period.

7.5 I now consider the treatment said to be detrimental.

Detriment one: by the respondent paying the claimant at £9.63 per hour from about 2019 until the claim was submitted on 7 April 2022 (and ongoing) (which

the claimant says is less than the respondent says it pays to underperforming employees);

7.6 The claimant was paid £9.63 per hour until she received a pay rise in October 2022. I accept that her pay had not been increased for a number of years because her managers had rated her as underperforming. As the claimant would have preferred to be paid more, the failure to increase her pay could be seen as detrimental treatment as it was unwelcome. I find it cannot be seen as an act extending over a period. Where there is a deliberate failure to act it is treated as done when the act was decided on. It follows that the detrimental treatment occurred on each occasion the claimant was given a rating of underperformance, and ran and from that point. The claimant has failed to identify when those acts occurred, and so it is difficult to identify whether the claim are out of time. I don't have to finally resolve this.

7.7 In any event, it is necessary for there to be some evidence that the treatment was on the ground of a protected disclosure. There is no evidence that any of the protected acts had any material influence on the thought processes of any individual who marked the claimant as underperforming. The claimant asserts that she made contributions to the respondent, and she may be right. However, the fact that the claimant may have contributed in many ways, does not mean that the claimant was not underperforming.

7.8 I have limited evidence. It would have been open to the claimant to file a grievance in relation to being marked as underperforming. She failed to pursue such grievance at the time they arose. I have to make a finding on the balance of probability. On the balance of probability I find that the reason she was marked as underperforming was because she was underperforming. In no sense whatsoever was the ground for the decision any of the alleged protected acts. This claim fails.

Detriment two: by sending the claimant a letter dated 14 January 2022 stating that she was being investigated for "Potential serious misconduct, namely unauthorised absence and unacceptable behaviour";

7.9 Neither the evidence of the claimant, nor the evidence of Ms Andreas directly addresses any letter of 14 January 2022. The letter is not readily identified by either party. It does not appear in the bundle index.

7.10 There is an email of 12 January 2022 from Jo Moses, team manager, which refers to "Potential serious misconduct, namely unauthorised absence and unacceptable behaviour." This invited the claimant to a meeting on 17 February 2022. What is said to be the unacceptable behaviour is not spelt out. It is clear that there was potential unauthorised absence, as discussed in the finding of fact above. There is no evidence on which I could find that any of the alleged protected acts had any material influence on the decision to invite the claimant to a disciplinary hearing.

7.11 Given the almost total lack of evidence, I cannot find the treatment was either detrimental, or that it was on the ground of any alleged protected act.

Detriment three: by suggesting the claimant be redeployed or take an ill health pension (around January 2022).

7.12 The claimant gives limited evidence. At paragraph 97 of her statement, she alleges that Ms Andreas had a "new set of excuses" in her email of 25 January 2022. It was that email which referred to the possibility of an application for ill-health pension. The email covered a number of points. It reviewed the offer to make reasonable adjustments. The email states the following:

> **Regarding your questions relating to Jo Moses, I can confirm that I am aware of an investigation into allegations pertaining to your conduct. However these are not being managed by me so I would recommend you take these up with Jo. I will continue to support you with your sickness absence and performance cases at this time.**
>
> **Regarding your ongoing absence from work, we have now reached a point where this is not something the business can sustain going forward. So we shall be proceeding to the next stage of our ill health process.**
>
> **The next step is to offer you two alternative routes to follow, should your current role with the presently available adjustments prove too challenging to return to. The Partnership offers redeployment support to Partners whose health means their current role cannot be fulfilled however could work in a different location/role. If you'd like to be considered for this please let me know if you'd be willing to take part in a management referral to establish your suitability for this support and whether it's something which could be applicable in your case.**
>
> **The second option available for Partners is to make an application for the ill health pension, if this is something you'd be interested in considering at this point please do let me know and we can support you through the process. The pensions team can be contacted for further information here:**

7.13 Ms Andreas deals with the matter at paragraph 35 of her statement. She offered to support the claimant with various options, including ill-health retirement, should the claimant wish to pursue it. I accept her evidence that she was not seeking to force the claimant in any manner.

7.14 I accept that the two possibilities, being redeployment or ill-health retirement, were raised. I accept the respondent's evidence that this was standard practice, and was an option put to the claimant which she was free to pursue or reject. Where the duty to make reasonable adjustments is engaged, there will be a possibility of redeploying an individual into a job that they can do. Failure to do so may well be a failure to make

reasonable adjustments. I do not accept that raising the possibility is a detriment. Further, informing an individual of the possibility of ill-health retirement, when an individual is demonstrating difficulty returning to work, is not detrimental treatment.

7.15 In any event, I find on the balance of probability the reason is clear. Redeployment was suggested because it may be a way of making reasonable adjustments which the claimant could wish to pursue. Ill-health retirement was raised because long-term absence raises the possibility and it is reasonable to ensure an employee knows of the option. In no sense whatsoever is there any evidence that these matters were raised on the ground of any alleged protected disclosure. This allegation of detrimental treatment fails.

Detriment four; by inviting the claimant to a 'Fitness to Work Meeting' (around January 2022).

7.16 Ms Andreas wrote to the claimant on 25 January 2022, as referred to above. In that email she stated "regarding your ongoing absence from work, we have now reached a point where this is not something the business can sustain going forward. So we shall be proceeding to the next stage of our ill health process."

7.17 There is no specific criticism of the respondent's ill-health procedure. The claimant does not deal with this matter adequately or at all in evidence. It is unclear why she considered it to be detrimental treatment. It may be difficult for a claimant to establish that an employer applying appropriately, and with justification, a sickness absence policy could be acting in a detrimental manner. In this case, there is insufficient evidence on which I could find that the treatment was detrimental.

7.18 In any event, on the balance of probability, there was reference to proceeding with the ill-health process because of the claimant's continuing absence. There is no evidence on which I could find, on the balance of probability, that the treatment was on the ground of any of the alleged protected disclosures. This allegation of detrimental treatment fails.

Detriment five: by grading the claimant as underperforming (February/March 2022);

7.19 I have very limited evidence from the claimant. She does referred to Ms Andreas marking her down as underperforming at paragraphs 100 and 101 of her statement. However, she simply asserts that this is because she was a whistleblower or that it amounted to disability discrimination.

7.20 In February/March 2022, the claimant's line manager was Ms Andreas; she had become the claimant's line manager in August 2021.

7.21 The claimant had been rated as underperforming in 2019/2020 during end of year appraisal. That appraisal was conducted by Mr Gregg Ward on

about 28 January 2020, her then line manager. Ms Andreas was not involved in any discussion about the claimant's underperformance. She reviewed the available documents and noted there had been continuing concerns. There had been a performance improvement plan for the period from October 2020 to January 2021. The performance improvement plan related to core aspects of the claimant's work, particularly use of the RFID system, a key scanning system. She understood the claimant received a rating of underperforming for 2020/2021, again from Mr Ward. There was a further performance improvement plan put in place in July 2021. Ms Andreas had concerns arising out of her own interaction. She noted that frequently when the claimant signed in, it would be then difficult to locate her, even when active searches were undertaken. Ms Andreas also noted further performance difficulties. For example, the claimant had failed to deal adequately with restocking and causing partners to take remedial action.

7.22 On the claimant's return on 8 September 2021, Ms Andreas specifically sought to address the performance issues, but concluded the claimant was unreceptive. Ms Andreas ultimately concluded that she should also rate the claimant as underperforming in her 2021/2022 end of year grading.

7.23 I am conscious that I have not heard from Ms Andreas. However, that does not mean that I must reject her evidence. I have considered her evidence, the available documentation, and the evidence supplied by the claimant. As noted, the claimant has given little if any relevant evidence on the point. I am satisfied on the balance of probability that Ms Andreas maintained the claimant's grading as underperforming because she genuinely believed that the claimant was underperforming. There is no evidence of which I could find that Ms Andreas rating was given on the ground of any alleged protected disclosure.

7.24 This allegation fails.

Detriment six: since 13 November 2021 until the claim was submitted on 7 April 2022 (and ongoing) recording her as being on sick leave.

7.25 The rationale for this allegation is unclear. The evidence presented by the claimant is poor. In her statement, she refers to being marked down as sickness absence in circumstances where the respondent had failed to "implement all of my doctor's reasonable adjustments". She asserts that she could not return "due to their unlawful actions."

7.26 It follows that the claimant may be suggesting that she should not have been recorded as being on sick leave because the absence was caused only by the respondent's failure to make reasonable adjustments.

7.27 It is the respondent's position that the claimant was marked as being on sick leave because she was on sick leave, as she was not fit to attend work.

7.28 I will consider below what adjustments were made, and what adjustments were reasonable. It is clear the respondent engaged with the possibility of making adjustments. The claimant adopted an intransigent position, insisting that all of those adjustments suggested by her GP should be implemented as a precondition of her returning.

7.29 Individuals who have health issues may have a limited capacity to work. The reason why they are off work is their ill-health. It may be possible for the individual to resume some form of work if adjustments are made. That does not mean that the reason for absence is anything other than ill-health.

7.30 It was appropriate to mark the claimant as being absent due to sick leave. That reflected the reality of the situation. That is not detrimental treatment. In any event there is no evidence on which I could find that her being marked as absent due to sick leave was on the grounds of any of the alleged protected acts. It follows the allegation of detriment treatment fails.

Protected disclosures – claim 1

7.31 I should deal with the various alleged protected disclosures raised in claim one. The evidence given by the claimant is poor. The respondent has sought to take a pragmatic view and has not sought to dispute all of the alleged protected disclosures. However, the respondent has made limited concessions. In particular, the respondent notes that the claimant has failed to set out, for any of the alleged protected acts, what is the relevant failure, or why the claimant had a reasonable belief of that there would be the failure, or why the disclosure was reasonably made in the public interest.

7.32 I do not need to consider each alleged protected disclosures individually, as I have decided that none was the ground for any alleged detrimental treatment, regardless of whether they were protected or not.

7.33 I should say a little more about the relationship of the alleged protected disclosures to the alleged detrimental acts. It is necessary to consider the thought process of the person who was said to be responsible for the detriment. The evidence given by the claimant is limited. At times it is unclear which person she says is responsible for the alleged detriment. The relevant managers had limited knowledge of the alleged protected disclosures. Ms Andreas says she knew nothing of the alleged protected disclosures, except for the email of 21 October 2021 where the claimant raised issues about mobile shelving. Her concerns were addressed, and her evidence is the claimant's concerns formed no part of any reason for a decision. I accept Ms Andreas' evidence.

7.34 The claimant has given no credible evidence from which I could find that any alleged protected disclosures impinged on the mind of Ms Andreas were making any decision.

7.35 Similarly, Ms Ireland considers in her statement the alleged protected disclosures. She had no knowledge of the majority of the alleged protected disclosures. It follows they could not impinge on her thought processes. She had limited knowledge about the claimant's issues relating to pay. She was aware of some email sent to Melissa Linder and Paul Marsden. I accept her evidence that such matters had no influence on her decisions. Her evidence was not challenged in this respect.

7.36 I find there is no credible evidence that any of the alleged protected disclosures had a material influence on any individual who was either fully or partly responsible for any decision describes a detriment.

Disability

7.37 The claimant requested that the full details of her disability should not be revealed. For the reasons I have previously given, I agreed to that request.

7.38 Disability A concerns a mental health condition. The condition was diagnosed some time ago. I am satisfied that it will be lifelong. I am satisfied that at the material time, it was not having a specific impact on the claimant's ability to work, and that has been the claimant's case before me. In the circumstances whilst I find it was a disability, I find that it there is no evidence that it is relevant to claims raised. As it is not relevant, I need give not further detail.

7.39 It is unclear what is the impairment underlying disability B. In evidence before me, the claimant stated that she had Multiple Sclerosis. She may be right. However, there is no medical evidence in support. Her belief is insufficient evidence for me to find that she does have an impairment of Multiple Sclerosis. During the course of the hearing, the claimant filed further clarification on disability B, which she referred to as a physical disability. She described as follows:

> **I suffer from severe pain in my legs and joints, especially if I have been on my feet for up to one hour. Then what would happen is the front and heels of my feet and my knees would hurt me. I also start to feel dizzy and have already fainted twice on the train. My disability means that I am unable to carry more than 3 kg of weight. Otherwise, I start to experience more pain and feel dizzier, causing me to lose balance, making me more vulnerable and highly likely to cause more injury to myself.**

7.40 It is not necessary to identify the medical reason for an impairment. I simply have to be satisfied that the impairment exists. I am satisfied that the impairment exists as described. I am satisfied that it has a substantial adverse effect on day-to-day activity. The claimant's ability to carry weights is impaired, and this would affect her in general activities including domestic activities such as shopping. Her walking is limited, and she experiences dizziness. She stated that she has fainted twice on the train.

7.41 I am satisfied that this condition has lasted more than a year. I am satisfied that this continued for a number of years, and it appears to have started in 2017. At all material times, for the purpose of these claim, she was disabled as a result.

Discrimination arising from disability – claim one

7.42 The unfavourable treatment is said to be grading the claimant as underperforming in her February/March 2020 appraisal.

7.43 The matter arising in consequence of disability is said to be “the claimant’s underperformance (or part of it).

7.44 It is not clear to me that the claimant ever intended to bring this claim, and it may have been identified incorrectly in the previous list of issues.

7.45 It is the claimant’s case that she was not underperforming. She gives no evidence that there was any underperformance or any underperformance was a matter arising in consequence of disability. It is her case that she performed well, and better than most.

7.46 It follows the actual unfavourable treatment alleged is inappropriately grading her as underperforming. I considered, above, the evidence relevant to the claimant being graded as underperforming. The reason she was graded as underperforming is because she was underperforming and there were reasonable and rational grounds to sustain that view.

7.47 It is possible that her poor performance arose in consequence of a disability. However, that is not a case she has advanced, and there is insufficient evidence on which I could find that her performance was in consequence of either disability A or disability B.

7.48 It follows that the section 15 Equality Act 2010 claim fails.

Reasonable adjustments - claim one

7.49 Before me, the claimant’s focus has been largely on the question of reasonable adjustments.

7.50 I should first consider the alleged PCPs.

7.51 PCP one – the application of the absence management policy: there is an absence management policy. The claimant gives no evidence on it.

7.52 PCP two – requiring the claimant to use a standard trolley: I am not satisfied that this was a PCP applied to the claimant. She did have use of a smaller trolley which had been obtained by her manager, Gregg Ward. Her email of 23 September 2021 records that she had been using the trolley, but someone kept moving it. She was continuing to use it in

November 2021. I am not satisfied that at any time the respondent insisted she use some other form of trolley.

7.53 PCP three – requiring the claimant to work on a Saturday for 10 or 12 hour: Saturday work was part of the claimant's contract. However, by 23 November 2021, the claimant was offered reduced hours (eight hours and 15 minutes). Ultimately, she was given the option of not working Saturdays at all. It follows that there was, initially, a PCP which required Saturday work for up to 12 hours. However, that provision was varied.

7.54 For the duty to make reasonable adjustments to arise, it is necessary for the PCP to put the claimant at a substantial disadvantage when compared with others who are not disabled.

7.55 I have considered the disadvantages, as alleged.

7.56 It is arguable that disability B caused the claimant to be absent. The case has not been advance on the basis that disability A caused any absence. The case has been advanced in relation to the physical difficulties manifested by disability B.

7.57 Engagement with the absence management policy was minimal and occurred towards the end of the claimant's employment. However, the sickness absence procedure did not materially progress. Whilst it was possible that sickness absence procedure could have ultimately led to dismissal, the reality is that the absence simply led to the respondent engaging with the claimant when considering reasonable adjustments. Whilst I accept there was potential for the sickness absence policy to lead to dismissal, it had not progressed that far and I am not satisfied there is a substantial disadvantage. Any alleged disadvantage is not clearly identified.

7.58 The claimant also say she suffered disadvantage because the standard trolley increased pressure on her joints and was difficult to handle. First, the claimant did not consistently use the standard trolley, she had access to a preferred alternative. Adjustments can be made, even when not described as such, and even when there is no knowledge of any disability. The making of an adjustment is a question of fact. Making the preferred trolley available was an adjustment. Second, I do not accept there is evidence that demonstrates, on the balance of probability, that any trolley caused any specific difficulty to the claimant or put material increased pressure on her joints. I do not accept the claimant's assertion, to the extent she has provided any evidence at all, I find it does not support the alleged disadvantage.

7.59 The third disadvantage is said to be that she suffered fatigue caused by long days and the need to travel at busy times. She alleges that difficulty finding a seat on the train is said to exacerbate her dizziness. There is limited evidence. The medical evidence in support is poor. It has become apparent during this hearing that the claimant believes that she has

multiple sclerosis. However, there is no specific medical evidence in support, and that is a fresh allegation for which no amendment has been sought. The extent of the pain, fatigue, and dizziness suffered is unclear. I accept the claimant's evidence that she suffered some pain and that she had episodes of dizziness. She was concerned about travelling during busy times because she may be less able to obtain a seat on the train. I accept that longer days may lead to fatigue. I accept she makes out substantial disadvantage in this respect.

7.60 I next consider the adjustments identified by the claimant.

7.61 The first adjustment is said to be to not count her disability related absence. I do not find this to be a reasonable adjustment. It may be reasonable to treat disability related absence differently to other absences such as unpredictable short term absences. It is not reasonable to discount the absence altogether.

7.62 It may be appropriate for an employer to dismiss an employee when the employee's absence is in consequence of disability. It follows that it may not be a reasonable adjustment to simply ignore that absence.

7.63 I find it was not a reasonable adjustments in this case.

7.64 Adjustment two is said to be that she should always be allowed to use a smaller trolley. I do not accept that this is a reasonable adjustment. The respondent actively engaged with the claimant and sought to provide appropriate equipment. The claimant never made it clear to the respondent that she was using the trolley partly as a walking frame. If she had, it may have raised other questions about her safety, and the appropriateness of using a trolley as a walking aid, when it is not designed for that purpose. Her concern was about moving stock which was too heavy for her to carry. The respondent dealt with this by limiting the weight of items she would move to under 3 kg, and by providing her with a trolley to which she had access. The fact the claimant had a preference for a particular trolley is not enough to establish a failure to make reasonable adjustments. The respondent engaged with the claimant and found solutions that were reasonable.

7.65 Adjustment three is the request to work on Sundays rather than Saturdays. I do not find this to be reasonable adjustment. The purpose of an adjustment is to facilitate a claimant to undertake the work in a way that prevents a substantial disadvantage when compared to those who are not disabled. There may be occasions when a reasonable adjustment will be to change hours, or change jobs. However, the reasonableness must be considered in the light of the respondent's business needs. I accept the respondent's evidence that it was necessary to ensure that there was staffing on Saturday, which was the busiest day, and there was limited opportunity to work on Sundays. It was not reasonable for the respondent to potentially breach the contracts of others in order to accommodate the claimant's wish to work on Sundays. The respondent's managers

identified the claimant had difficulty with Saturday work, which revolved around the length of the shift and the difficulty travelling at busy times. Both of those issues were addressed. Ms Ireland continued to engage with the claimant to seek solutions. The claimant had the option of not working Saturdays at all. She was told that she would be considered for Sunday work as soon as a position arose. She was permitted to work alternate Sundays, her Saturday hours were shortened to assist in her travelling times that were convenient to the claimant. It was a matter for the claimant to decide if she would wished to continue working on Saturdays at all.

7.66 The respondent engaged with the claimant's request constructively and positively and sought to find solutions. The respondent proposed adjustments. Those adjustments were reasonable. The claimant has made it clear in her evidence that she considered the respondent top be under an absolute obligation to provide the adjustments as set out by, and identified, by her GP. The claimant was not willing to accept anything less. This is a misunderstanding of the Equality Act 2010. It is for the employer to consider what adjustments can be made, having regard to all the relevant circumstances, including any medical evidence. It is not obliged to implement anything proposed by a GP. The medical evidence the respondent had was limited. The claimant hindered the process by refusing to engage with occupational health.

7.67 The information provided by the claimant's GP was inadequate and the claimant never fully identified the difficulties that she had. Nevertheless, the respondent sought to accommodate the claimant and ultimately agreed to all of her requests, other than full-time Sunday working and paid fifteen minute breaks.

7.68 I find that the respondent has not failed in its duty to make reasonable adjustments.

7.69 It follows that no claim of failure to make reasonable adjustments succeeds on its merits in claim one.

7.70 I should note there are serious difficulties with time, and a number of the claims appears to be out of time in any event. However, as no claim can succeed on its merits, I do not need to consider time, as it relates to claim one, further.

Claim two

7.71 Claim two concerns the dismissal.

7.72 Ms Ireland dismissed the claimant. The respondent alleges the dismissal was for a potentially fair reason which related to conduct.

7.73 A reason consists of the facts or beliefs held by the manager who dismisses.

7.74 Viewed narrowly, the dismissal occurred because the claimant failed to attend work and this led to a disciplinary process concerning that absence. It is necessary to consider the context. The claimant had been on long-term sickness absence. As previously described, Ms Ireland engaged with the claimant in order to identify reasonable adjustments and to find a way to facilitate the claimant's return to work. By 8 February 2023, the claimant had agreed to return to work. She agreed to work Mondays, Wednesdays, Fridays and alternative Sundays from 07:00 to 16:00 each day, as evidenced in her email of 8 February 2023.

7.75 The claimant attended for work on 8 February 2023, thereafter she failed to attend. The claimant requested that she use her holiday in a large block on each Monday, Friday, and Sunday she worked and also on Wednesday 15 February. She was granted leave to 1 March 2023, but not thereafter. It would have been open to the claimant to take leave later in the year. The respondent had processes whereby leave must be approved. The claimant has not challenged those processes.

7.76 The claimant failed to attend on 6, 8, 10, 13 and 15 March. She gave no explanation. This led to the disciplinary process. On 8 March, the claimant was invited to a disciplinary meeting. She failed to attend on 10 March. Thereafter on 10 March, the claimant raised the issue of reasonable adjustments again. However, she filed no further fit note. She also alleged that she had been defrauded of pay in February 2023.

7.77 The disciplinary meeting was rescheduled for 15 March 2023, and the claimant failed to attend again. Ms Ireland took the decision to dismiss. She viewed the claimant's absence as unauthorised. She considered the conduct amounted to serious misconduct and she dismissed the claimant. She confirmed the decision in writing. The dismissal was without notice pay or pay in lieu of notice.

7.78 The first question is whether the respondent has established a reason for dismissal. It is the honest belief that the misconduct occurred which establishes the reason, the reason is established in this case.

7.79 Next it is necessary to consider the reasonableness of this decision. The first question is whether there were grounds to establish the reason. Here there were clearly grounds. The claimant had agreed to return to work having accepted the reasonable adjustments made. The claimant had in fact return to work on 8 February. Thereafter she had requested holiday. Some holiday had been agreed and she was required to return after 1 March. She failed to return and Ms Ireland sought an explanation. She had clear grounds to believe that the claimant's absence was unauthorised.

7.80 Next it is necessary to consider whether there had been an investigation which was open to a reasonable employer. There has been some suggestion that the 2015 ACAS code of practice on disciplinary and

grievance procedures was breached because there was no separate investigation and in any event, the disciplinary should not have been conducted by Ms Ireland given her involvement.

7.81 Paragraph 5 of the ACAS code 2015 records the importance of carrying out a necessary investigation into potential disciplinary matters without unreasonable delay. Paragraph 6 suggests, if practicable, different people should carry out the investigation and disciplinary. The purpose of the investigation is to establish the facts. However, it is not every allegation of misconduct which requires investigation. When the facts are clear and not in dispute, it may not be necessary to have a separate investigation, or to have separate people investigating and conducting the disciplinary. In this case, I find there was no need for separate investigation. The facts were clear and not in dispute. I find that, at the point when the dismissal occurred, an investigation had been undertaken, which consisted largely of asking the claimant for an explanation. This was a sufficient investigation and was one which was open to reasonable employer.

7.82 The final question is whether the dismissal was reasonable in all the circumstances, section 98(4) Employment Rights Act 1996. The burden is neutral.

7.83 Before me, the claimant has argued that her absence should not have been considered unauthorised. The rationale for that appears to be based on the explanatory notes to the GP's fit note. Under the section "What your doctor's advice means" there are two sub sections. This explains what is meant by "You may be fit for work." It says the individual could go back to work with the support of the employer. It states "Sometimes your employer cannot give you the support you need and if this happens your employer will treat this form as though you are not fit for work." It is the claimant's case that as all adjustments were not made as proposed by her GP, that she remained unfit for work, as confirmed by the GP, and therefore the absence was not unauthorised.

7.84 I do not accept the claimant's argument. The claimant had agreed to return to work. She had agreed the adjustments. If the position had materially changed, it was open to the claimant to return to her GP to seek another fit note. She failed to do so. Moreover, the claimant did not write to the respondent to say that she was unable work. Even when she sought holiday, she agreed to work on Wednesdays. As she could work on Wednesdays, taking holiday was not indicative of an inability to work because of ill health.

7.85 In any event, the claimant did not make it clear to Ms Ireland that her absence continued under any fit note.

7.86 Ms Ireland was acting reasonably in taking the view the claimant had sought to renege on their agreement without proper explanation. In the circumstances, the claimant's failure to attend was unauthorised absence.

I consider dismissal was within the band of reasonable responses of a reasonable employer.

7.87 It is necessary to consider the appeal. The appeal raised a number of points, as set out above. There is an accusation that the respondent had failed to implement reasonable adjustments. There is an assertion there was "no legal responsibility to return to work until all the reasonable adjustments had been implemented correctly." Before the tribunal there is now an assertion that the claimant's absence was not unauthorised because of continuing operation of a fit note. If that was the claimant's position, she never made it clear at the appeal stage, and it would not be reasonable to criticise Mr Towes for not addressing it specifically.

7.88 Mr Towes did deal with the points raised by the claimant, including the alleged failure to make reasonable adjustments.

7.89 I have considered whether either Ms Ireland or Mr Towse should have gone ahead without the claimant present. I am satisfied that the claimant made it clear that she did not intend to attend in person and there was no realistic option for either manager other than to proceed. I have also considered whether further medical evidence could have been or should have been sought. However, the claimant had previously made her position clear and the managers understood that the claimant did not wish to accept a referral to occupational health and there was no suggestion that she had changed her view.

7.90 In the circumstances I find that the appeal process and decision was one open to a reasonable employer. The matters raised by the claimant were fully considered. Mr Towse was entitled to reach a conclusion the claimant's absence was unauthorised, and that she had been dismissed reasonably. He specifically considered the partnership handbook. Serious misconduct is defined and does include unauthorised absence.

7.91 Finally, it is necessary to consider whether the claim of automatic unfair dismissal pursuant to section 103A Employment Rights Act 1996. For that to succeed, the sole or principal reason for dismissal must be a protected disclosure. As previously noted, Ms Ireland had limited knowledge of the alleged protected disclosures. I am satisfied that her sole reason for dismissal was the claimant's unauthorised absence. It follows that the claim of automatic unfair dismissal fails.

<u>Claim three</u>

7.92 Claim three makes further allegations of detrimental treatment for making protected disclosures. In addition, it brings claims of victimisation, harassment, discrimination arising from disability, and unlawful deduction from wages.

7.93 Claim three includes numerous alleged protected disclosures which could have been brought in previous claims. In addition, it refers to numerous further detriments allegations of harassment and allegations of victimisation, many of which could be brought in the previous claims. It is arguable to that the claims for unlawful deduction from wages and wrongful dismissal could also been brought in previous claims.

7.94 At the commencement of the hearing, I raised with the parties whether any claims which could have been brought in previous claims should be dismissed as being an abuse of process having regard to the rule in Henderson v Henderson. The claimant has given no submissions on this. I received very limited explanation from the claimant. Mr Kariyawasam stated that he was unable to include all claims when issuing claim two given the shortness of time. However, that explanation may have explained the omission of allegations which occurred after the presentation of claim one, but it did not explain why matters that could be brought in claim one were not brought in claim one.

7.95 I will consider the alleged detriments as identified by EJ Brown. For each I will consider whether it is out of time and in any event whether it is an abuse of process to bring it a separate claim, if the claim could have been brought earlier.

Detriment seven: marking the claimant down as having taken unauthorised absence (11 to 13 April 2022)

7.96 This allegation postdates claim one. It could be brought in claim two. I found the allegation fails. I do not accept the treatment was detrimental. The initial recording of the absence was consistent with the apparent facts, and it was later modified. In any event, there is no evidence on which I could find that it was on the ground of any protected act. Finally it is out of time. Time expired no later than 12 July 2022. The claimant has given no explanation for why it could not have been brought earlier. This is a minor matter, which could have been dealt with earlier, it is not just and equitable to extend time. I do not need to consider whether it is an abuse of process.

Detriment eight: reducing the claimant's sick pay to SSP (25 April 2022)

7.97 This allegation postdates claim one. The claimant fails to establish that this is detrimental treatment. Her pay was reduced because she had exhausted her contractual entitlement. To the extent this can be seen as a detriment, the explanation is clear, the claimant's contract was applied. There is no evidence on which I could find that the treatment was on the ground of any alleged protected disclosure. In any event it is out of time. The claimant has given no explanation as to why this, or any other claim, could not have been brought in time. It is not just and equitable to extend time. I do not need to consider if it was an abuse of process.

Detriment nine: causing the claimant's Universal Credit payments to be reduced (August, September and November 2022);

7.98 The claimant has given very limited evidence. This relates to a payment of £500 given to members of staff which I understand was tax-free. The claimant received a payment because she was a qualifying member of staff. This was a general payment made to a number of staff. It had nothing to do with the any alleged protected disclosures. The exact date of the alleged detriment is unclear. It appears to have occurred prior to August 2022, hence why there was the alleged ongoing effect. It should have been brought by no later than the end of November 2022. It is out of time. It is not just and equitable to extend time. I do not need to consider whether it is an abuse of process.

Detriment ten: cost of living payment.

7.99 This appears to be the same point as for detriment nine; it takes a matter no further.

Detriment eleven: isolating the claimant by putting her in the jewellery stockroom on her return to work (8 February 2023)

7.100 As part of the reasonable adjustments requested by the claimant, she was not required to lift anything more than 3 kg. For that reason, she was offered work in the jewellery stockroom. She accepted that adjustment. I do not accept that this can be seen as detrimental treatment by the respondent. It was an adjustment made at the request of the claimant and was agreed by her. Before me, the claimant said that it was detrimental treatment because she believed the respondent would, in some manner, accuse her of theft from the stockroom because she was working in isolation. Essentially, she alleges she was being set up and she mistrusted the respondent's managers whom she thought would plant evidence.

7.101 The reason for putting the claimant in the stockroom was because it was a proposed reasonable adjustment which the claimant agreed to. There is no evidence on which I could find that it was on the ground of any alleged protected disclosure.

7.102 Claim three was issued on 8 June 2023. The ACAS conciliation period was from 5 May 2023 to 5 June 2023. Time for bringing this claim expired on 5 July 2023. It is therefore brought in time. It is potentially an abuse of process, as it could have been brought in claim two. I do not need to finally resolve this, as I dismiss it on its merits.

Detriment twelve: threatened the claimant by email with dismissal for unauthorised absence (March 2023);

7.103 The claimant was subject to disciplinary proceedings because her absence was, on the face of it, unauthorised, which could lead to

dismissal pursuant to the respondent's policy. Raising this matter with her was not detrimental treatment. Moreover, the reason is clear. She appeared to have taken unauthorised absence and dismissal was a possible consequence. There is no evidence from which I could find that the action was on the ground of any alleged protected disclosure. This claim could have been brought in claim two. I do not have to determine whether it is an abuse of process to bring it as a separate claim. It is in time. I have determined the claim on its merits

Detriment thirteen: purposefully depleting the claimant's 2022 annual leave, preventing the claimant from using her annual leave beyond March 2023 and underpaying her in Feb 2023

7.104 There is a failure to adequately identify the alleged detrimental treatment. It is unclear what is meant by depleting the claimant's annual leave. She was allocated her annual leave entitlement and in no sense whatsoever was it depleted. The claimant fails to identify any detrimental treatment in relation to that. The claimant was not prevented from using her annual leave beyond March 2023. It was open to the claimant to use her annual leave in accordance with the normal procedures. The fact that she could not take leave exactly when she wanted, is not in my view detrimental treatment. In any event, the reason for that is established. The claimant was required to apply for holiday through the Workday system. Leave was allocated having regard to the business needs and leave booked by others. In no sense whatsoever is there any evidence from which I could find that the treatment was on the ground of any alleged protected disclosure.

7.105 I do not accept she was underpaid in February. This is dealt with by Ms McGrath in her evidence. The claimant has failed to identify any underpayment. The payroll system is quite complex and it involves accounting in various periods for which there are cut-offs. I accept Ms McGrath's evidence. The claimant received her full entitlement to pay. The claimant has not set out the basis on which she believed she was underpaid. I have specific regard to paragraph 20 of Ms McGrath statement. I do not need to set out the detail. I am satisfied that the respondent has explained how the pay was calculated and that the claimant received the appropriate net pay for February being £664.90, paid on 23 February 2023. It follows there was no detrimental treatment. The explanation is established. In no sense whatsoever was the treatment on the ground of any alleged protected disclosure. The claim is in time. I do not need to determine if it was an abuse of process not to bring it in claim two.

Detriment fourteen: by dismissing the claimant

7.106 Dismissal is governed by section 103A Employment Rights Act 1996. Dismissal is not covered by section 47B Employment Rights Act 1996. I consider section 103A Employment Rights Act 1996 above.

Detriment fifteen: not acknowledging or dealing with the Claimant's grievances at any point;

7.107 The claimant fails to set this allegation out adequately or at all. There were grievances that predated claim one. Those grievances were dealt with. There is clear evidence the claimant was invited to attend grievance meetings, but failed to do so. However, it is not clear exactly what the claimant has in mind, and what she believes is the relevant grievance. Of the grievances identified, they were dealt with. Moreover, the allegation appears to be out of time and this is no explanation for why it was not practicable to bring it in time. If the claimant had in mind historical grievances, they should have been brought in claim one and it would be an abuse of process to bring them at a significantly later date in claim three, when there is no good reason why she could not brought in claim one.

7.108 This is the case with the claimant simply fails to adequately identify the treatment, or prove the treatment occurred. There is nothing which suggests that any treatment relating to a grievance was on the ground of any alleged protected disclosure. This allegation fails.

Detriment 16: summarily dismissing the claimant and not paying her notice pay

7.109 The claimant did not receive notice pay. It is arguable that this claim would postdate claim two. The claimant was summarily dismissed. Failing to pay notice pay could be seen as a detriment. However, the reason is clear. The claimant was dismissed because her conduct, being unauthorised absence, was seen as a fundamental breach of contract, being serious misconduct pursuant to the respondent's policies. It was the belief that it was a fundamental breach of contract which caused the respondent to refuse to pay notice pay. In no sense whatsoever is there any evidence that the reason was on the ground of any alleged protected disclosure.

Detriment 17: dismissing the claimant's appeal

7.110 This allegation can be brought under claim three, as it appears to postdate the second claim. The respondent has established its reason for refusing the appeal. Mr Towse upheld the original decision because he was satisfied that the claimant's conduct amounted to serious misconduct pursuant to the policies, and he was satisfied that dismissal was an appropriate sanction. There is no evidence on which I could conclude that the refusal of the appeal was on the ground of any protected act. I therefore dismiss this allegation on its merits.

7.111 In claim three, the claimant purports to identify fourteen further alleged protected disclosures from the period to August 2021 until 15 March 2023. I do not need to consider any alleged protected disclosure in detail. The disclosures, as recorded on the issues, failed to identify adequately or at all what is said to be the information. The claimant's evidence does not

directly address any of the protected disclosures. She fails to adequately identify what is the information for any disclosure. She fails to set out what would be the relevant failure, or why she reasonably believe the failure would occur, or why it was reasonably made in the public interest. She fails to give any evidence concerning in what manner any alleged allegation of detrimental treatment was said to be on the ground of any protected disclosure.

7.112 I do not need to finally resolve whether any alleged protected disclosure included the disclosure of information, and if so whether it was protected. For the reasons I have given, the alleged claims detrimental treatment cannot succeed in any event.

<u>Discrimination arising from disability section 15 EQA – claim three</u>

7.113 Ther are two allegations of unfavourable treatment identified as follows: by Clare Ireland threatening the claimant with dismissal for unauthorised absence; and subsequently dismissing her.

7.114 I can deal with both of these together. I accept that the claimant was dismissed because of her unauthorised absence. The possibility of dismissal was raised in the correspondence, I take this to be what is meant by the threat of dismissal. It follows that the treatment is made out. However, in order to be treatment because of matters arising in consequence of disability, the absence itself would have to be disability related. I find that the claimant has failed to prove that the material absence, which was treated as an unauthorised absence, was absence arising in consequence of a disability.

7.115 In her evidence, the claimant alleged that her continuing absence was because of a failure to make reasonable adjustments, and viewed in that sense it may be possible to see it as arising in consequence of disability. However, I reject her evidence on this point. She was absent because she chose not to return. She had agreed the adjustments that would be made. She was capable of working. She wished to take holiday rather than work. At no point did she communicate to the respondent that her position had changed and she was incapable of work. I find she was capable of work at that time, and that her work would have been facilitated properly by the adjustments made. It follows that the absence was not disability related and the claim fails.

7.116 If I were wrong, I would also find that the respondent's approach was a proportionate means of achieving a legitimate aim. The aim revolved around the need to ensure that there was adequate staff cover. That was why it required attendance at work. The claimant breached contract by taking unauthorised absence; treating the absence as serious misconduct was a way of achieving the overall aim of providing appropriate staffing. Had the claimant been unfit for work, she could have obtained a further fit note and no doubt the respondent would have considered that. I find their approach was proportionate.

Harassment

7.117 I will consider each of the allegations of harassment

Harassment one - on 8 February 2023 – by Clare Ireland pressuring the claimant not to have a paid lunch break or paid fifteen minute breaks per hour [para 48 of C's FBPs dated 22.10.23].

7.118 It appears that this claim was not brought in either the second or third claims. Instead there is reference to subsequent further and better particulars. This does not appear to be further particulars of any existing claim and it appears to be an entirely new claim. It is unclear to me why it was included in the previous list. Such a claim would require an amendment. At the point when it was raised, in the further and better particulars, even if that were treated as an amendment, the claim is significantly out time. There is no explanation as to why the claim could not been brought earlier. I would not consider it just and equitable to extend time.

7.119 In any event, I find that the claimant fails to prove the Miss Ireland, in any manner, pressured the claimant not to have a paid lunch break or not to have fifteen minute breaks. Ms Ireland had always been clear with the claimant: breaks were unpaid. The claimant knew that. The claimant returned on that basis and having accepted the adjustments.

7.120 There is no evidence on which I could conclude that the purpose was to harass. I considered the effect, and I have had regard to the claimant's perception. Harassment cannot reasonably be said to be the effect. Ms Ireland was taking active steps to accommodate the claimant to make reasonable adjustments and she spent time with the claimant on 8 November to ensure that she was welcomed back and integrated. In no sense whatsoever can that action be seen as harassment.

7.121 In any event, I do not accept that the treatment related to disability. It related to the claimant's contract and the basis on which she would be paid. This allegation fails.

Harassment two - on 8 February Clare Ireland suggesting to the claimant that it would not be worthwhile for the claimant to return to work.

7.122 This allegation fails factually. The claimant fails to prove that Ms Ireland stated it would not be worthwhile for the claimant return to work. I preferred Ms Ireland's evidence on this point. This allegation of harassment fails.

Harassment three - on 8 February Clare Ireland refusing to implement all of the reasonable adjustments on her doctor's certificates (the respondent contends that these were not reasonable adjustments).

7.123 For the reasons already given, the respondent has not breached any duty to make reasonable adjustments. Ms Ireland did refuse to make all of the adjustments suggested by the GP, as previously considered. She did so for rational reasons, as previously considered. There is no fact from which I could find it was the purpose to harass the claimant. It is not reasonable for that treatment of had the effect of harassment. The claimant's expectation is that the respondent should have no choice other than to make the adjustments suggested by the GP. It is for the respondent to decide what adjustments are reasonable, and medical evidence is one matter that can be considered.

7.124 It is less clear whether it can be said it related to her disability. The consideration of adjustments took place in the context of disability. However, the reason for the decision related to what was necessary to avoid a substantial disadvantage, and what was reasonable for the respondent to have to make having regard to his business needs. However, I do not need to finally resolve this point. The treatment did not have the effect of harassing the claimant.

7.125 It follows that this allegation fails.

Harassment four - Clare Ireland threatening dismissal and dismissing the claimant.

7.126 I already explored the reasons for and the prior disciplinary procedure.

7.127 I have no doubt the claimant found the process unwelcome. However, there is no evidence from which I could conclude it was the purpose to harass. I also find it could not reasonably be said to have had the effect of harassment. An employee who breaches contract may be subject to procedures which are unwelcome and unpleasant. However there must be a process which allows for that disciplinary action to take place in legitimate manner. The respondent engaged with the process appropriately and reasonably, and it did not amount to harassment. In any event, I do not accept it related to disability. It related to the claimant's unauthorised absence, and for the reasons I have already found, I do not accept that unauthorised absence was caused by disability, albeit some of the claimant's thought processes revolved around her perceived rights as a disabled person.

7.128 It follows this allegation of harassment fails.

<u>Victimisation - claim three</u>

7.129 There is one allegation of victimisation - by paying the claimant £664 on 23 February 2023.

7.130 I have already consider this. The claimant was paid the appropriate sum due to her. As she was paid in accordance with the contract, this is not detrimental treatment which could amount to victimisation. No reasonable

employee properly apprised of the relevant circumstances would consider it to be detrimental treatment.

7.131 The claimant seeks to cite the various protected disclosures as also protected acts. She fails to set out adequately or at all which particular alleged protected act or acts led to the alleged victimisation. I find there is no evidence on which I could find that the alleged victimisation was because of the alleged protected acts. The claim of victimisation fails

Wrongful dismissal

7.132 Where an employee is in fundamental breach of contract, it is open to the employer to accept that breach and treat the contract as an end. In those circumstances the notice period is not payable. The basic work contract revolves around individuals making themselves available for work and the employer allowing the person to work. Individuals are entitled to take holiday, but contractual constraints can be imposed as to when that holiday is taken. Those constraints include agreeing holiday in advance having regard to the need for others to take holiday. Here I am satisfied that the claimant, even though she could have attended work, chose not to attend work. She was asked to return. She failed to do so. That was a fundamental breach of contract. The respondent was entitled to treat the contract as at an end and it did. The claim of wrongful dismissal fails. The claimant is not entitled to be paid for her notice period.

Unlawful deduction from wages

7.133 The claim of unlawful deduction from wages was put as follows: It is the claimant's case that on 23 February 2023 she should have been paid £1,700 not £664.

7.134 I have considered this. The claimant has given no proper evidence in relation to this matter. She does not explain why she believes the respondent's calculation is wrong. I reviewed the calculations given by Ms McGrath and I am satisfied the claimant received all wages due to her.

7.135 It follows, for all the reasons I have given, all the claims fail.

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Employment Judge Hodgson
Dated: 10 March 2025

Sent to the parties on:
19 March 2025

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For the Tribunal Office