EMPLOYMENT TRIBUNALS

Claimant: **Miss. Nicola Lancaster**

Respondent: **Lincolnshire County Council**

Heard at: **Lincoln**
Nottingham (21st January 2025 only)

On: **1st November 2025 (Reading day for the Tribunal)**
4th, 6th and 7th November 2025
20th January 2025
21st January 2025 (In Chambers)

Before: **Employment Judge Heap**

Members: **Mr. C Goldson**
Mr. G Edmondson

Representation
For the Claimant: **Mr. I Lancaster – Lay Representative**
Respondent: **Ms. B Clayton - Counsel**

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is well founded and succeeds. However, even had a fair process been adopted the Claimant would have still been fairly dismissed and it is appropriate to reduce any compensatory award by 100% to reflect that. Further and/or alternatively the Claimant's culpable and blameworthy conducted was the entire cause of her dismissal and it is just and equitable to reduce both any basic and compensatory award by 100% to reflect that.

2. The complaint of a failure to make reasonable adjustments fails and is dismissed.

3. The complaint of discrimination arising from disability fails and is dismissed.

4. The complaint of unauthorised deductions from wages is well founded and succeeds.

5. If the parties cannot reach agreement on the issue of remedy in respect of the complaint of unauthorised deductions from wages, then a Remedy hearing will be listed.

REASONS

BACKGROUND

1. This is a claim by Miss Nicola Lancaster (hereinafter referred to as "The Claimant") against her former employer, Lincolnshire County Council (hereinafter referred to as "The Respondent"). It is a claim of unfair dismissal, discrimination relying on the protected characteristic of disability in respect of a complaint of a failure to make reasonable adjustments and discrimination arising from disability and of unauthorised deductions from wages.

2. The Claim Form was presented by the Claimant on 24th April 2023 following a period of early conciliation which took place between 29th March 2023 and 13th April 2023.

3. The claim was listed for five days of hearing time. One day was vacated which had been due to be deliberations by the Tribunal because it was necessary for there to be a further two days added to that listing in order to complete the evidence and submissions and for the Tribunal to conclude our deliberations. Those two days could not run concurrently with the original listing but we are satisfied that that did not cause any issues as to fairness. The hearing took place at the Lincoln Magistrates Court with the exception of the final day which was for the Tribunal to deliberate which took place in Nottingham given the absence of a Court room at Lincoln on 21st January 2025.

4. The first day of hearing time was used for reading in. That was necessary because although the witness statements were relatively brief, the hearing bundle ran to over 1050 pages.

5. There were a number of preliminary matters which we dealt with before commencing the hearing but after we had completed our reading in. The first of those were adjustments for the Claimant. It was not in dispute before us that the Claimant was disabled by reason of fibromyalgia, depression and hearing loss[1], although as Mr. Reynolds confirmed during initial discussions with the Tribunal as to preliminary matters only the first two conditions are engaged in the claim. As to adjustments, Mr. Reynolds confirmed that nothing else was required other than breaks as and when required by the Claimant, for patience to allow her to respond to questions and assistance if required navigating the hearing bundles. Those accommodations were agreed and implemented where necessary.

6. A further preliminary matter discussed was that the claim primarily concerned the Claimant's accessing records of two service users within the directorate in which she worked. Those were potentially vulnerable people, one of whom has now sadly passed away, and we did not consider that it was appropriate to name them either during the hearing or in the Judgment. Neither party objected to their names being reduced to initials and we are satisfied that this would not

[1] That having been conceded by the Respondent on 5th December 2024.

detract from the ability of members of the public to understand the decision that we have reached and that expressly naming the individuals was not necessary. We have therefore referred to them by agreement as "SD" and "BD".

7. A further matter which had arisen shortly before the hearing was due to commence was that the Respondent had made an application for Mr. Tony Kavanagh who dealt with the Claimant's appeal against her dismissal to give evidence remotely from Spain where he was on holiday. That application was refused on the basis that the Spanish Government had not given permission for evidence to be taken from that jurisdiction.

8. We therefore raised with Ms. Clayton who represented the Respondent what the position was in respect of Mr. Kavanagh giving evidence. Ms. Clayton indicated that there was no prospect of permission being granted within the necessary timeframe and that accordingly as Mr. Kavanagh was in Spain for the duration of the hearing the Respondent would rely only on his witness statement and ask that the appropriate weight be attached to it.

9. This led to an application being made by Mr. Reynolds to strike out the ET3 Response. Substantially the same application had already been refused by the Employment Judge hearing the case on 31st October 2024. Mr. Reynolds had on the same day requested a Reconsideration of that decision in the event that Mr. Kavanagh was not permitted to give evidence. The application also related to what were said to be breaches by the Respondent of case management Orders and an issue that we had raised because we had insufficient copies of the hearing bundle from the Respondent.

10. Employment Judge Heap determined that whilst this had been termed as an application for Reconsideration it was not appropriate to exclude the non-legal members also hearing the case from playing a part in that decision. We therefore determined that we would consider the matter as a fresh application and heard from both parties in respect of it.

11. We refused the application with oral reasons given at the time. The basis of that refusal was that we did not accept the submissions of Mr. Reynolds that the Claimant was in any way prejudiced if Mr. Kavanagh did not give evidence. In fact, quite to the contrary. The Claimant would be cross examined as to her contentions about the unfairness of the appeal process, Mr. Reynolds would have the opportunity to re-examine her and submissions could be made. We would invariably attach less or even no weight to the evidence of Mr. Kavanagh and that could only be to the detriment of the Respondent and not the Claimant. As to the matter of documents that had already been dealt with by a different Employment Judge earlier in the proceedings and there could be no reasonable suggestion that a fair hearing was not possible. As to the matter of a shortage of bundles, that was a matter for the Tribunal, had been rectified and could not be said to prejudice the Claimant.

12. As it was, as a result of the fact that we had to extend the hearing by a further two days an application was made by Ms. Clayton to call Mr. Kavanagh to give evidence at the resumed hearing. That was not objected to by Mr. Reynolds as he asserted that there could not be a fair hearing without it. Mr. Kavanagh was able to attend and we heard evidence from him.

13. As we have already observed, we could not conclude the hearing within the original listing. One of the reasons for that is that during the course of the Claimant's evidence we became very concerned about how she was presenting and whether she was in fact well enough to continue giving evidence. The Claimant appeared to be experiencing difficulties with comprehending even basic questions in cross examination and appeared frequently confused. That was not intended as any disrespect to the Claimant but as a genuine concern that we were not reassured that she was able to give her best evidence. Whilst Mr. Reynolds sought to assure us that the Claimant wanted to continue, we could not in conscience allow that to happen without some medical evidence that she was fit to do so. That would not have been fair to either party but particularly not to the Claimant given that hers was the only evidence that we would hear on her side and she needed to be in a position to give her best evidence.

14. The Claimant was able to secure an emergency appointment with her General Practitioner who provided a letter to the Tribunal confirming that the Claimant had the capacity to continue to answer questions and that it was in her best interests to continue. Having got that confirmation, we continued with the hearing. The Claimant thereafter appeared to improve considerably in her presentation during cross examination.

15. Shortly before the re-commencement of the hearing in January 2025 Mr. Reynolds made a renewed application to strike out the ET3 Response. In accordance with a direction made by Employment Judge Hutchinson that was a matter which came before us on 20th January 2025.

16. This arose from the late disclosure by the Respondent of some additional documents. In addition to that issue itself, Mr. Reynolds submitted that the document proved a point that the Claimant had been making that there had been no return to work meeting on 6th December 2021 and that that had been relied on by Ms. Clayton in her cross examination of the Claimant prior to the adjournment of the first set of hearing dates.

17. We refused the application with reasons given orally at the time. In short, there was nothing before us to say that the Respondent had deliberately withheld the recently disclosed documents or that cross examination of the Claimant by Ms. Clayton had in any way been put other than in accordance with what the legal representatives believed the position to be at the time. There was no detriment or disadvantage to the Claimant given that the Respondent now accepted that there was no return to work meeting on 6th December 2021 and that could only be a matter that was positive in terms of her evidence and her credibility. The matter could be addressed in submissions and there could be no question that a fair hearing did not remain possible, particularly given where we were in the proceedings. Our view was that we should simply get on and hear the rest of the evidence.

THE ISSUES

18. The claim was the subject of two Preliminary hearings which took place before Employment Judge Ahmed on 14th September 2023 and Employment Judge Hutchinson on 10th April 2024.

19. Employment Judge Hutchinson set out in his Orders the matters that the Tribunal would be required to determine. However, following discussions as to the discrimination complaints the allegations were refined by Mr. Reynolds. He confirmed the following after discussion with the Claimant:

    (a) The only conditions engaged in respect of the claim were depression and fibromyalgia. Hearing loss was not relied upon;

    (b) In respect of the claim for a failure to make reasonable adjustments the provision, criterion or practice relied upon was the requirement to conclude the disciplinary process within a certain amount of time. That was said to place the Claimant at a substantial disadvantage because she was unable to participate because of her cognitive issues caused by depression and in the case of fibromyalgia, brain fog, and the reasonable adjustment would have been to have waited until the Claimant was sufficiently recovered to require her to attend; and

    (c) In respect of the complaint of discrimination arising from disability this was limited to an act that was said to be unfavourable treatment which was the concluding of the disciplinary hearing on the day of that hearing. The "something arising" which the Claimant says caused that unfavourable treatment was because of her cognitive issues and/or her absence on sick leave.

20. In view of the helpful clarification of those matters from Mr. Reynolds, Ms. Clayton sought to refine the legitimate aim relied upon by the Respondent. That was said to be the need to resolve proceedings promptly for all involved.

THE HEARING, WITNESSES AND CREDIBILITY

21. During the course of the hearing we heard evidence from the Claimant on her own account.

22. On behalf of the Respondent we heard from:

    (i) Julie Picken – a Learning & Development Coordinator with the Respondent who carried out an investigation into the allegations that led to the Claimant's suspension and later dismissal;

    (ii) Joanna Tubb – a Head of Service who conducted the disciplinary proceedings which resulted in the Claimant's dismissal; and

    (iii) Tony Kavanagh – An Assistant Director of the Respondent who dealt with the Claimant's appeal against her dismissal.

23. We considered that all of the witnesses that we heard from on both sides were credible and were seeking to give us an honest account of events. We were particularly impressed with the evidence of Mr. Kavanagh. His evidence was consistent, logical and he made concessions where appropriate including that he would not have continued with the disciplinary hearing with the Claimant in circumstances where she was in no fit state to continue. We come to the circumstances of that later.

THE LAW

24. It is necessary at this stage to say a little about the law and the role of an Employment Tribunal in complaints of this nature.

Unfair Dismissal

25. Section 94 of the Employment Rights Act 1996 ("ERA 1996") creates the right not to be unfairly dismissed.

26. Section 98 deals with the general provisions with regard to fairness and provides that one of the potentially fair reasons for dismissing an employee is on the grounds of that employee's conduct. The burden is upon the employer to satisfy the Tribunal on that question and the Tribunal must be satisfied that the reason advanced by the employer for dismissal is the reason asserted and which is a potentially fair reason for dismissal falling under either Section 98(1) or 98(2) ERA 1996 and, further, that it was capable of justifying the dismissal of the employee. A reason for dismissal should be viewed in the context of the set of facts known to the employer or the beliefs held by him, which cause him to dismiss the employee (**Abernethy v Mott, Hay & Anderson 1974 ICR 323, CA**).

27. If an Employment Tribunal is satisfied that there was a potentially fair reason for dismissal and that that is the reason advanced by the employer, then it will go on to consider whether the employer acted fairly and reasonably in treating that reason as a sufficient reason to dismiss.

28. The all-important question of fairness in this regard is contained with Section 98(4) ERA 1996 which provides as follows:-

> *"(4) Where the employer has fulfilled the requirements of subsection (1),* (in this case that they have shown that the reason for dismissal was redundancy) *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

29. The burden is no longer upon the employer alone to establish that the requirements of Section 98(4) are fulfilled in respect of the dismissal. This is now a neutral burden.

30. In conduct cases, a Tribunal is required to look at whether the employer carried out a reasonable investigation from which they were able to form a reasonable belief, on reasonable grounds as to the employee's guilt in the misconduct complained of (**British Home Stores v Burchell [1980] ICR, 303 EAT**).

31. An Employment Tribunal hearing a case of this nature is not permitted to substitute its judgment for that of the employer. It judges the employer's processes and decision making by the yardstick of the reasonable employer and can only say that a dismissal was unfair if either falls outside the range of reasonable responses open to the reasonable employer (**J. Sainsbury Plc v Hitt [2003] ICR 111, CA**). Many employees will be able to point to something the employer could have done differently, or indeed better, but that is not the test. The question for the Tribunal is whether the employer acted within the range of reasonable responses open to it or, turning that question around, could it be said that no reasonable employer would have done as this employer did?

Equality Act 2010

32. The discrimination complaints brought by the Claimant are of discrimination arising from disability and a failure to make reasonable adjustments. The relevant statutory provisions dealing with those complaints are contained within Sections 15, 20, 21 and 39 Equality Act 2010 ("EqA 2010").

EHRC Code

33. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

Discrimination in employment

34. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

(1) An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2)An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3)An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(4)An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(5)A duty to make reasonable adjustments applies to an employer.

(6)Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—

(a)unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or

(b)if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8)Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

Discrimination arising from disability

35. Section 15 deals with the question of discrimination arising from disability and provides as follows:-

"(1) A person (A) discriminates against a disabled person (B) if:-

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

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

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

36. There is no requirement in a Section 15 complaint for there to be identification of a comparator. All that is required is that the Claimant is able to show unfavourable treatment, in that regard some detriment, and further that there are facts from which it can again be established that that unfavourable treatment was in consequence of something arising from disability. The Code assists in

the interpretation of the term "unfavourable" treatment and provides that it requires the employee to have been "put at a disadvantage" (paragraph 5.7 of The Code).

37. It is not sufficient, however, to simply show that a person is disabled and receives unfavourable treatment, that unfavourable treatment must be in consequence of something arising from the disability.

38. Equally, the unfavourable treatment in question is not the disability itself but must arise in consequence of the employee's disability – such as disability related sickness absence. This means that there must be a connection between whatever led to the unfavourable treatment and the disability (paragraph 5.8 of The Code) and which can be referred to as the "causation" question.

39. The Employment Appeal Tribunal provided a useful analysis with regard to the causation question in the context of a Section 15 EqA 2010 claim in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305**. **Weerasinghe** sets out a two-stage approach and that, firstly, there must be something arising in consequence of the disability and secondly, the unfavourable treatment must be "because of" that "something".

Failure to make reasonable adjustments

40. Section 20 EqA 2010 provides that:

> *"Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2)The duty comprises the following three requirements.*
>
> *(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(4)The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a)removing the physical feature in question,

(b)altering it, or

(c)providing a reasonable means of avoiding it.

(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a)a feature arising from the design or construction of a building,

(b)a feature of an approach to, exit from or access to a building,

(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d)any other physical element or quality.

(11)A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12)A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

41. Section 21 provides that:

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

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

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

42. It will therefore amount to discrimination for an employer to fail to comply with a duty to make reasonable adjustments imposed upon them in relation to that disabled person (paragraph 6.4 of The Code).

43. However, the duty to make reasonable adjustments will only arise where a disabled person is placed at a substantial disadvantage by:

- An employer's provision, criterion or practice ("PCP").
- A physical feature of the employer's premises.
- An employer's failure to provide an auxiliary aid.

44. Where the claim relates to a PCP, this "should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions" imposed by the employer (paragraph 6.10 of The Code).

45. Matters resulting from ineptitude or oversight on the part of the employer will not, however, amount to a PCP (see **Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley UK EAT 0417/11**).

46. The duty to make reasonable adjustments only arises insofar as an employer is required to take such steps as it is reasonable to take in order to avoid the substantial disadvantage to the disabled person. A Tribunal is required to take into account matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

Unauthorised deductions from wages

47. Section 13 Employment Right Act 1996 provides for the protection of wages of a worker as follows:

"***13 Right not to suffer unauthorised deductions.***

(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 worker's 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 worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker 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.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

48. It follows from that that if there is a deduction made from the wages of a worker from that which are properly payable to them, that will be an unauthorised deduction from wages unless the provisions of Section 13 Employment Rights Act are satisfied by the employer or, otherwise, if the deduction is an excepted deduction within the meaning of Section 14 Employment Rights Act 1996.

FINDINGS OF FACT

49. We have set out below our findings of fact based upon the evidence that we have heard. The parties should note that we have limited our findings of fact to those matters which are necessary to make a proper determination of the claim. We have not dealt with each and every point in dispute between the parties if those matters are not necessary for that determination but that they can be assured that we have taken into account all documents to which we have been taken, the witness evidence that we have heard and the helpful written and oral submissions of both the Claimant and the Respondent.

The Claimant's professional background and her role with the Respondent

50. The Claimant is a social worker. Prior to the matters that led to her dismissal she had had a long and unblemished career and we have no doubt that she was dedicated to her job and was very good at it. She commenced employment with the Respondent on 3rd April 1991 and continued in employment until her employment was terminated with effect from 31st January 2023. As at the date of termination of her employment the Claimant therefore had over thirty years employment with the Respondent.

51. As a registered Social Worker with Social Work England the Claimant was obligated to comply with their Code of Conduct and Professional Standards of Social Work England. That included a duty to maintain professional boundaries.

The Mosaic system

52. The Respondent operates an electronic case management system called the Mosaic system. It holds case records of service users who are accessing the services that the Respondent provides. It goes without saying that the information stored in the Mosaic system is of a personal and sensitive nature.

53. For that reason, when accessing Mosaic a warning message is displayed on each occasion (see page 581 of the hearing bundle). That warning message reads as follows:

> *"Mosaic – Acceptable Use*
>
> *You must only access and use information held on Mosaic for official purposes aligned with your role and this must be on a need to know basis. If you are in any doubt about your authority to access or use any information held on Mosaic contact your manager.*
> *This system contains personal and sensitive data and therefore the principles of the Data Protection Act 2018 and the General Data Protection Regulations apply. Please refer to your organisational data protection policy for further information.*
> *The Council reserves the right to monitor use of Mosaic for a number of purposes including to maintain and ensure security of systems and information; to ensure the Council remains compliant with their regulatory and legislation framework in force at the time; and to check for unauthorised use.*
> *By logging into Mosaic, it is deemed that you have accepted the conditions above".*

54. There had also been training on the use of Mosaic when it was first introduced, the ability to access refresher training and ongoing IT and peer to peer support (see pages 528 and 529 of the hearing bundle). We are satisfied that the Claimant knew how to use Mosaic and knew what she was and was not permitted to access in her role.

55. Some local authorities are able to limit access to cases to those who require it in order to do their work but we understand that to be expensive and time consuming (see page 529 of the hearing bundle). It is not something that the Respondent does and effectively matters are left on trust that those accessing records are doing so because that is necessary for them to perform their duties.

56. If an employee is aware that a service user is known to them in a non-professional capacity the expectation is that they will inform their line manager who would arrange that access is restricted.

57. Reports can be run on the Mosaic system, however, to see who has had access to relevant cases.

The Claimant's ill health absence

58. The Claimant had surgery and was absent from work as a result between 7th June 2021 and 4th October 2021. The surgery had some complications which caused the Claimant to need an extended period of leave afterwards and we accept her evidence that she was in significant pain and discomfort. There were issues as to workload upon her return to work but we do not need to deal with those matters for the purposes of making our decision on the remaining issues before us.

Accessing the records of SD and BD

59. The Claimant's neighbours, who it was agreed at the outset we would refer to as SD and BD were, service users of the Respondent's social work provision. They were not service users assigned to the Claimant and given her personal connection with them she was not permitted to access their records. That was something that the Claimant was aware of. As well as being neighbours of the Claimants, SD and BD were good friends of hers and that had included BD staying with the Claimant for a period of time (see page 530 of the hearing bundle).

60. It is now accepted by the Claimant that during the course of her ill health absence she accessed the records of SD and BD. We accept that that was done because they had asked the Claimant what was happening with their cases. It may have been with the best of intentions but we are satisfied that the Claimant knew that what she was doing was wrong.

61. It became known to Karen Burton, a senior manager, that the Claimant had expressed an interest in the cases of SD and BD and she authorised a review of the Mosaic system in respect of the relevant service user records. That determined that the Claimant had accessed the records on numerous occasions in 2018 and 2021 including during times that she was on sickness absence. Arrangements were made for SD and BD's records to be locked down (see page 545 of the hearing bundle). No potential conflict had been flagged by the

Claimant as it should have been so that access to the records of SD and BD on Mosaic was restricted.

62. Ms. Burton had asked the Claimant about the records on 22nd November 2021 and her reply had been that she must have accessed them if that was what the evidence said (see page 547 of the hearing bundle). She was also asked if SD and BD were aware that she had been accessing their records and the Claimant replied in the negative.

63. A further review of Mosaic also identified that the Claimant had accessed the records of six other service users that it was believed that she had no reason to access in her role as a social worker.

64. Given that the Respondent was concerned that those actions raised safeguarding and data protection concerns, a decision was made to suspend the Claimant. Given the allegations against the Claimant which were serious we are unsurprised that the decision was taken to suspend her.

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

65. On 6th December 2021 the Claimant was suspended by the Respondent. We accept that she was not at work that day as paperwork completed by the Respondent suggested and that she had in fact telephoned the Respondent earlier that day to report that she would be absent because of what she suspected was Covid-19. There was also a suggestion in the suspension letter that the Claimant had been suspended during a Teams meeting. We accept the Claimant's evidence that that was inaccurate and that she was in fact suspended over the telephone. Understandably, that came as a shock to the Claimant.

66. The Claimant was subsequently sent a letter confirming her suspension which set out the following allegations against her:

> *"On numerous occasions you have accessed the case records of service users, held on the County Council's MOSAIC system; these being the records of cases that are not open to you in your role as a Social Worker and, therefore, you have no reason or authority to access the records and the personal service user information contained within them.*
>
> *Two of the case records accessed by you and accessed on numerous occasions, are those of service users who are known to be your neighbours with whom you have a close personal relationship and, therefore, you have failed to maintain the professional boundaries you are required to maintain as a registered Social Worker.*
>
> *You have accessed such records on occasions when you were not at work, during a period of certified sickness absence, thereby engaging in activity that could hinder or affect a prompt return to work contrary to the Council's Sickness Absence Policy".*

67. The letter set out that the allegations represented serious misconduct which involved breaches of confidentiality, data breaches giving rise to serious safeguarding concerns, breach of the Respondent's Code of Conduct and breaches of the Professional Standards of Social Work England.

68. We accept that it was reasonable and necessary to suspend the Claimant given the nature of the allegations against her.

69. The letter set out that an investigator would be appointed and would be in touch with the Claimant and gave details of sources of support during the suspension period.

Pay during suspension

70. We accept the Claimant's evidence that she was verbally told that she was being suspended over the telephone by both Karen Burton and Vicky Lee and that she was told that that suspension would be on full pay.

71. The letter of suspension set out the terms on which the Claimant was to be paid during the time that she was suspended. In that regard the letter said this:

> *"Pay – During your suspension you will continue to receive contractual pay, which will be the normal remuneration applicable immediately prior to your suspension.*
>
> *……*
>
> *Sickness – Whilst you continue to receive contractual pay, should you fall ill during your suspension from duty, normal contractual sick pay entitlements will operate for the period of the illness. Therefore, albeit your suspension from work will continue, your pay may be affected by your sickness absence in the same way as if you were not suspended. You must comply with the sickness absence reporting procedures, in full, in the same way you would were you not suspended from work. You may also be referred to Occupational Health is (sic) felt appropriate".*

72. The Claimant submitted a Statement of Fitness for Work ("Fit Note") dated 14th December 2021 which signed her off sick with anxiety which signed her off as being unfit to work until 8th January 2022. Further Fit Notes followed.

73. It is common ground that the Claimant was paid sick pay during her period of suspension. The Respondent maintains that that was because she was on sick leave during her suspension. That was firstly with Covid-19 and thereafter as a result of anxiety.

74. On 31st August 2022 the Claimant's trade union representative made a complaint to Paul Bassett, the Respondent's Head of Adult Frailty & Long Term Conditions, on the Claimant's behalf. The letter covered a number of concerns including the Claimant's health, an alleged breach of confidentiality regarding knowledge of her suspension, a loss of confidence and issues as to pay. It is the latter which concerns us in these proceedings and the relevant part of the letter said this:

> *"Nicky has been suspended since 6 December 2021 and in her suspension letter from yourself under the paragraph on Pay it states that Nicky will be suspended on her contractual pay during her suspension. Then under Sickness you state that if Nicky falls ill then sick pay entitlements will apply and indeed this has been the case through Nicky's suspension. However, thus is*

not supported by either LCC's Disciplinary Policy or Sickness Absence Policy, I've attached a copy of the Disciplinary Policy sent to Nicky for your reference. This policy makes no reference to the Sickness Absence Policy superceding the Disciplinary Policy with reference to the suspension of an employee.

Therefore, Nicky should have her contractual pay reinstated and this should be backdated to cover the whole period of her suspension."

75. Oddly, we have not seen the Disciplinary Policy but we have no reason to doubt that Mr. Graham was wrong about the fact that it referred to suspension on full pay as is in our experience normally the case. Mr. Bassett replied to the complaint letter on 26th September 2022. He also did not suggest that what was said about the Disciplinary Policy by Mr. Graham was incorrect. He did, however, provide a comprehensive reply to each of the issues raised. Again, we are concerned here with the issue of pay during suspension and the relevant part of the letter said this:

"Nicky has received contractual salary payments throughout her suspension in accordance with the terms of her suspension as detailed in the letter of suspension, dated 6 December 2021, that Nicky was handed at her suspension meeting[2]*.*

The Council's letter of suspension clearly identifies that normal 'sick pay' provisions operate in the event a suspended employee is deemed unfit for work and would normally be absent from work were he/she not suspended. This term of suspension, which the Council has operated for many years, and I would have thought you to be familiar with, sits within the letter of suspension as the most appropriate place for it to be communicated to and understood by those employees who find themselves suspended from work. As you identify, reference to this provision does not sit within either the Council's Sickness Absence Policy or the Disciplinary Policy and never has done. However, that does not serve to make it any less a well-established term of suspension from work. As stated, this clearly identified provision sits where it needs to be for clarity and understanding by those who need to be aware of it.

There are no grounds for having Nicky's pay adjusted in the way you request".

Occupational health referrals

76. Julie Picken was asked to investigate the allegations against the Claimant and sought to make contact with her so as to enable her to do so.

77. She was not initially able to do so and reported that to the Claimant's area manager, Vicky Lee, who wrote to the Claimant indicating that she expected her t remain contactable and engage with the disciplinary process (see page 421 of the hearing bundle). That was consistent with the Claimant being on a period of suspension. She also indicated that she would arrange an appointment with Occupational Health.

[2] Again, that is not correct as there was no suspension meeting only a telephone call with the Claimant.

78. That referral was undertaken on 2nd February 2022. The purpose of the referral was to seek advice in connection with the Claimant's fitness for work and fitness to take part in the disciplinary proceedings and absence management meetings (see page 425 of the hearing bundle). The Occupational Health adviser opined that the Claimant was not at that time fit to engage in any management processes due to her anxiety and depressive symptoms.

79. The relevant parts of the report said this:

> *"In my clinical opinion Ms. Lancaster is currently unfit for her normal role due to significant anxiety and depressive symptoms. This is likely to be the case until at least the expiry of the current fit note and has talking therapy. Currently due to the severity of her symptoms is also temporarily unfit to engage in management processes.*
>
> *I have advised Ms. Lancaster to contact her GP for a medication review.*
>
> *I would advise if a significant memory problem is identified and the return to work date is protracted then please re refer Ms Lancaster for an occupational health physician appointment for advice on ongoing fitness for work".*

80. A further occupational health assessment was undertaken in June 2022 and the relevant parts of the report said this:

> *"Nicola is unfit for work in any capacity due to their continued symptoms linked to their mental health. There are no adjustments or modifications that management could implement to expedite their return to work at this time. They require further time to engage with healthcare professionals to address their presenting symptoms however, there do appear to be workplace stressors, workload issues and interpersonal difficulties at work. As a result, I strongly recommend that a conversation takes place with the employee to understand the impact of this. It would be advisable for management to complete a Stress Risk Assessment, this will assist in identifying what is positive about work as well as what stressors the employee perceives."*

81. A further update as to the Claimant's ability to participate in the investigation process was provided by occupational health at the Respondent's request on 17th June 2022. That opinion was that the Claimant was not fit in any capacity to participate in the investigation and that once she had completed a course of Talking Therapy which she was due to commence imminently that may be a more appropriate time for participation in the investigation process. No further Occupational health referrals were made.

<u>The investigation process</u>

82. As indicated above, Julie Picken was asked to investigate the allegations against the Claimant. Her appointment to deal with the investigation was settled on 7th December 2021.

83. Ms. Picken made a number of attempts to discuss the allegations and the investigation process with the Claimant but was ultimately unable to speak with

her or deal with matters in correspondence because she was told by the Claimant that she was unwell and would not be able to respond.

84. By 11th November 2022, almost a year after her appointment to lead the investigation into the allegations against the Claimant, Ms. Picken had still been unable to speak with her. We accept that without speaking to the Claimant, Ms. Picken was unable to advance the investigation.

85. She sought advice from Mr. Bassett who determined that the process needed to continue and he accordingly wrote to the Claimant and her trade union representative, Mr. Graham, to say that Ms. Picken would be providing the Claimant with written questions to answer the following week (see page 551 of the hearing bundle). We accept that realistically that was the only way that matters could proceed.

86. The Claimant's evidence before us was that a reasonable timescale to conclude the disciplinary process would be, in her words, a couple of years. We do not agree with that assessment, it benefitted no one for serious allegations to be hanging over the Claimant and for the service to be affected for the users who were down a social worker. The Respondent had waited a reasonable time and had put in place measures for the Claimant to give her written account by answering questions if she was unfit to attend an interview.

87. Ms. Picken sent the questions to the Claimant by email on 14th November 2022 and by post on 23rd November 2022 (see pages 553 and 554 of the hearing bundle) after she had been told that the document containing the questions could not be opened. The questions followed the format which Ms. Picken would have asked the Claimant had she attended an interview and provided a space for the Claimant to type her response.

88. The Claimant sent a long email in reply setting out details about her physical and mental health and that she was struggling to cope. She set out that she was fully reliant on her trade union representative to respond to correspondence and that she had provided them with the information from Ms. Picken. The closing passage of her email said this:

> *"I am struggling to cope. At this time I am fully reliant on my union representatives to respond to correspdences* (sic) *for me having had support I have provided them with information. If this is not responded too* (sic) *timely I can do little about it. I have been advised that they will still continue to support me."*

89. The obvious implication from that was that the Claimant's trade union representative would be responding on her behalf and that she was unable to do so directly.

90. On the same day Ms. Picken emailed Mr. Graham providing a further copy of the document containing the questions that she required answers to and asked for a response to be provided by 2nd December 2022. Another copy was also sent to the Claimant.

91. However, Mr. Graham replied on the afternoon of 2nd December 2022 to say that whilst the Claimant had said that Unison would be answering the questions posed on the Claimant's behalf she had never been well enough to discuss them

and so he was not in a position to provide any answers (see page 504 of the hearing bundle).

92. Mr. Graham also set out that the Claimant's mental health and well-being had deteriorated since the last occupational health assessment and that she was not well enough to participate in an interview. He suggested that Ms. Picken extend the deadline for the interview questions to be answered until an updated occupational health assessment had been obtained.

93. We accept the evidence of Ms. Picken that Mr. Bassett determined that the investigation report should be concluded on the available evidence. We have not heard from Mr. Bassett about why he determined to take that course but there is reference in Ms Picken's investigation outcome to the Respondent not seeing a need for a further referral. The rationale for that was said to be that the Respondent was that they were satisfied that the Claimant had been accessing all necessary medical advice and support and that they considered that occupational health's primary purpose was to provide advice and support for employees at work or returning to work and did not *"have a useful contribution to make at this point"* and that such a referral would be made if she was considering a return to work.

94. It would have been better in our view to have obtained an updated occupational health assessment before concluding the investigation so that the Respondent could have had a better understanding of whether the Claimant may have been able to participate in the process and in what terms. There was no reason why occupational health could not have had a useful input in that regard and in our experience their involvement is not simply limited to workplace arrangements for an employee at work or on a return to work.

95. Ms. Picken concluded her investigation on 13th December 2022 and produced an investigation outcome letter to the Claimant (see pages 505 to 508 of the hearing bundle). She concluded that there was a case to answer and that matters should proceed to a disciplinary hearing. The Claimant was told that in the event that she failed to attend a disciplinary hearing that it might proceed in her absence and she was given options as to attendance elsewhere other than at her designated workplace or to attend remotely. She was advised that she remained under suspension and was provided with details of some employee support arrangements.

96. The investigation outcome letter did not engage with the reasons why Ms. Picken determined that there was a case to answer but we accept her evidence before us that the Claimant had not denied the allegations or provided any explanation or suggested any sources of evidence to explore so that she concluded her investigation on the basis that the allegations appeared to hold weight. We are also assisted in respect of her rationale by her investigation report which we deal with further below.

97. The Claimant subsequently contacted Ms. Picken seeking advice about completing her answers to the questions that had been asked of her previously. She was advised that the investigation was complete but her responses could be sent to her an area manager, Vicky Lee.

98. As we have touched on above, during the course of her investigation Ms. Picken produced an investigation report. That was not shared with the Claimant with the outcome letter but it was subsequently sent to her with an invitation to a disciplinary hearing. The report set out the steps that Ms. Picken had taken to investigate the allegations against the Claimant and what information she had before her. As part of the investigation process Ms. Picken had the relevant Mosaic audit report data which showed that the Claimant had accessed the records of SD and BD on 13 separate occasions (see page 530 of the hearing bundle).

99. Mr. Picken also conducted interviews with relevant witnesses. She had interviewed Daniel Blankley on 14th December 2021. Mr. Blankley was a Mosaic Development and Support Officer with the Respondent and he confirmed that staff should only be accessing records if it was applicable to the work that they were undertaking at that time (see page 528 of the hearing bundle) and that Ms. Picken had interpreted the details correctly as to the Claimant's access of the Mosaic system referred to above.

100. Ms. Picken also interviewed Karen Burton, the Claimant's line manager, who had raised with her the question of her accessing records before her suspension. Ms. Burton provided a note of that discussion that she had taken where the Claimant had said that she must have accessed the records if that was what the evidence said. Ms. Burton also set out that the Claimant had had training and could access refresher training and support and that there was no reason for her to have accessed the records of SD and BD. Ms. Burton also set out that if a person is known to someone within Adult Care Services who use that service then they should make that known and consideration would be given to restricting access to those records. That accorded with the evidence of Ms. Tubb before us.

101. Ms. Picken also interviewed another social worker within the service, Kim Wright. Ms. Wright explained that the Claimant had sent her a message after she had been spoken to by Ms. Burton on 22nd November 2021 about accessing the records of SD and BD. She said that the message from the Claimant had said that she thought that she had got herself into trouble, that she had accessed records and that Ms. Burton had confronted her about it. She said that she had advised the Claimant to seek advice from her union but that she no longer had any of the messages and could not recall exactly what had been said.

102. Ms. Picken also had a further audit report which showed that during the period 7th June 2021 to 4th October 2021 the Claimant had accessed the records of a further six service users during the period of her sickness absence recovering from surgery. They did not live locally to the Claimant and there was no obvious connection between them. Ms. Burton had been asked about them and she said that it was strange that they had been looked at but it may have been a matter of the Claimant checking if her supervisees had actioned matters or curiosity.

103. Of the allegations against the Claimant, Ms. Picken found there to be strong evidence which supported them. On the basis of the information that she had to hand those were reasonable conclusions and we are satisfied that a reasonable investigation was carried out based on what was known at that stage.

Information from the Claimant

104. As touched upon above, after receiving the investigation outcome letter from Ms. Picken the Claimant had contacted her regarding provision of the information requested by way of the interview questions. She subsequently sent her responses to Ms. Picken, Ms. Lee and Unison on 6th January 2023 and included a mitigation statement and asked that all attached documents be taken into account. We are satisfied that they were.

105. In relation to all parts of the allegations where it was alleged that the Claimant had accessed service user records including those of BD and SD she said that she had no written minutes or record of those matters and that without further information she was unable to respond in full. She attached a document entitled "So why do we access records". That did not address the allegations against her.

106. The Claimant did not at this or any other time before the provision of her witness statement for these proceedings admit that she had accessed the records of SD and BD **and** (our emphasis) that she should not have done so.

107. Much of the statements, information and documentation supplied by the Claimant did not deal with the allegation against her but were complaints about pay, contact, professional negligence and her health.

The disciplinary hearing and outcome

108. By way of a letter dated 11th January 2023 the Claimant was invited to a disciplinary hearing to take place on 27th January 2023. The Claimant was advised that the panel would be comprised of Joanna Tubb as chair and Tracey Perett, Head of Hospitals, who would be a panel member. She was also told that Ms. Lee and Ms. Picken would be in attendance along with Human Resources ("HR") representatives. The letter set out the allegations against the Claimant as per the suspension letter, that a range of sanctions were open to the Respondent, including dismissal, and that she would have the opportunity to hear and question all evidence and provide a statement on her own behalf (see page 513 of the hearing bundle).

109. The letter included the investigation report which had been prepared by Ms. Picken and the interview records which she had collated.

110. Ahead of the disciplinary hearing taking place the Claimant requested 46 separate reasonable adjustments to be made to enable the hearing to proceed. The vast majority of the adjustments were agreed by the Respondent. Some of the adjustments related to the length of the disciplinary hearing. The Respondent indicated that the length of the hearing could not be pre-determined but that regular breaks could be offered. We are satisfied that whenever the Claimant did need a break one was provided for her.

111. However, the disciplinary hearing did not proceed smoothly. It had been agreed that the Claimant and her trade union representative would join the hearing from offices of the Respondent in a location separate to that of the other participants and the panel. The hearing was to be conducted by Microsoft

Teams and the Respondent provided a laptop which it was intended that the Claimant would use.

112. When the Claimant and her trade union representative, Mr. Graham, arrived at the location for the hearing there were problems with the computer that had been allocated which meant that they were approximately 45 minutes late joining the hearing and had to use Mr. Graham's equipment to do so. We accept that that caused the Claimant significant anxiety. There had been a breakdown in communication between those liaising with the Claimant and the panel so that the panel believed that a short delay to the hearing had been requested when in fact the Claimant and Mr. Graham were prevented from successfully joining the hearing because of access problems. When they managed to join, the hearing had already started and had been underway for 15 minutes. We accept that that caused the Claimant distress although the panel did ensure that the hearing was restarted with Ms. Picken going back to the beginning of her report (see page 809 of the hearing bundle).

113. The management case against the Claimant was presented. This was read out from a document that had been prepared by Ms. Picken. The Claimant was not expecting that to happen and again we accept that it caused her stress.

114. Presentation of the management report took approximately 40 minutes. After a short adjournment at the Claimant's request Mr. Graham was given the opportunity to ask questions of Ms. Picken. We should note that there has been criticism of Ms. Tubbs in terms of the matter of breaks. However, there is no evidence that a break was ever refused or that the length of the break was not as the Claimant asked for. Indeed, when Mr. Graham asked for the first adjournment he only asked for two minutes but in fact was provided with longer than that.

115. As we have observed above, Mr. Graham had the opportunity to ask questions of Ms. Picken. The thrust of those questions was effectively a challenge as to proof that the records from Mosaic related to the Claimant or to prove in some cases that she had accessed them. There were several interventions by Ms. Tubb during the course of those questions but we do not find that they were oppressive or unnecessary.

116. After Mr. Graham had questioned Ms. Picken there was a 45 minute break for lunch following which the panel heard from Ms. Lee. The Claimant had not been expecting that to take place and asked for a ten minute break via Mr. Graham. The break provided was slightly shorter than that at nine minutes but no complaint was made about that at the time. Mr. Graham was then given the opportunity to ask questions of Ms. Lee which mainly focused around the Claimant's health and occupational health input.

117. After that point there was a further break between 14.29 and 14.35 at Mr. Graham's request because he referred to the Claimant flagging both physically and mentally. Shortly prior to that break taking place it was made clear by Ms. Tubb that the intention was to conclude the hearing that day. We do not find that there was any practice that meant that that had to happen but was borne from Ms. Tubb's experience that it was better for all concerned to conclude everything in one sitting. Mr. Graham made clear that he did not consider that it was reasonable to proceed beyond 5.00 p.m. but that was not accepted by Ms. Tubb who made it clear that whilst breaks would be offered, the hearing

would conclude that day. She referenced delays and the late start although Mr. Graham not unreasonably pointed out that that had not been his fault of the Claimant's.

118. During the course of the break the Claimant became very distressed and had to leave the room where she had been sitting with her trade union representative. She began having a panic attack and heart palpitations. We accept the Claimant's evidence that she was in a terrible state and we accept her evidence of what physically happened to her as a result. We do not set that out here because it is sensitive and personal in nature and it is not necessary to include it to understand the decision that we have reached. Suffice it to say that the Claimant was in no fit state to continue with the hearing. Indeed, paramedics were called to tend to the Claimant by the First Aider at the premises who had initially been called to see her. She was released into the care of her friend on the agreement that she would stay with her that night and that she would not be left alone. We accept that otherwise the Claimant would have been taken to hospital.

119. The hearing reconvened at 14.35 and Mr. Graham was asked to present the Claimant's case. He explained that the Claimant had suffered a panic attack and was with the First Aider who had dialled NHS 111 and asked for an extension to the break to 3.00 p.m. to see if she had recovered. Clearly, that request should have been agreed to immediately given the circumstances. However, one of the HR officers in attendance, Ms. Dexter, took the view that the Claimant did not want to be present – rather than she was not medically fit to be present – and asked Mr. Graham if he was aware of the evidence that she had been due to present and whether he could do that on her behalf.

120. Mr. Graham explained that it was not a case that the Claimant did not want to be present but that she was suffering from heart palpitations that she could not control and reiterated his request for a short amount of additional time. Ms. Dexter made plain that she felt it would be better for the Claimant not to prolong matters and to conclude that day. It was eventually agreed that they would return at 3.00 p.m. to review matters at that stage.

121. At 3.00 p.m. Mr. Graham reported that an ambulance had been called for the Claimant. He explained that the Claimant was suffering from chest pains, pains in her head and back, that he was distressed and crying and trying to be sick. He made it plain that in those circumstances the Claimant was not in any fit state to take part and suggested that there was no option to adjourn. There was no expression of concern for the Claimant from any of the people present at the hearing other than Mr. Graham. The emphasis was very much on concluding the hearing that day.

122. Ms. Tubb asked Mr. Graham whether he could present the Claimant's case for her. He explained that he was not going to do that and the notes record that he said this:

> *"I'm not going to do that because of what is actually happening not, an ambulance is coming. I've been sat with her, she is a Union member, distressed, incredibly distressed. She has a written statement which she's prepared. It's written in her own writing and she wants to put her side of the story and I think we cannot do anything until…. I don't think it's right and appropriate to continue at this time and it's not about delaying things. It's a*

recognition that I have a Trade Union member and you have a member of staff who at this point in time is going through a medical crisis right here in Kelly House".

123. We agree with Mr. Graham's assessment that given the circumstances there needed to be an adjournment. We are very concerned that there was very little consideration about the Claimant's health given that the Respondent was being told that she was suffering with chest pains and an ambulance had been called.

124. Ms. Tubb continued to press Mr. Graham to present the Claimant's case on her behalf despite him making plain that he could not do that and she wanted to deal with that herself. Ms. Tubb referred to the hearing having only been effective for two hours and that there had been a lot of delays. Mr. Graham again sensibly requested an adjournment and made it plain that it would not be fair to continue. He made it plain that the Respondent was capable of adjourning hearings, that an ambulance had been called and that they needed to be supportive (see page 834 of the hearing bundle).

125. Ms. Tubb said that she would adjourn the hearing for five minutes to seek advice. Upon reconvening the hearing she asked Mr. Graham again whether he would be presenting the case on behalf of the Claimant. Mr. Graham explained again that for the reasons that he had already given he would not. Ms. Tubb refused the request for an adjournment saying that the panel had all of the information from the Claimant in terms of her statement, mitigation and other documents to enable them to proceed and that they felt that if the meeting was reconvened the same thing would happen.

126. There was no consideration given that the Claimant had a handwritten statement that the panel had not seen that she wanted to read out and that she had managed to attend the hearing in the first instance. The panel were not medically qualified to assess whether the same situation would occur again and it would have been reasonable given that she could not proceed and Mr. Graham could not present the case on her behalf to have granted the adjournment. We find that it was outside the band of reasonable responses to proceed in those circumstances. Mr. Kavanagh who dealt with the appeal against dismissal – very fairly in our view – accepted that in the same circumstances he would not have gone ahead and would have reconvened.

127. Nevertheless, Ms. Tubb refused the adjournment and Mr. Graham left the meeting shortly thereafter. The hearing then continued in the absence of Mr. Graham and the Claimant. The decision taken was to dismiss the Claimant for gross misconduct with effect from 31st January 2023 (see page 838 of the hearing bundle).

128. We should observe that there is criticism of Ms. Tubb and the panel for not taking steps to go to see the Claimant when she experienced her medical episode or reaching out to her afterwards to check on her health. We accept the evidence of Ms. Tubb that that would not have been appropriate given the circumstances.

Letter confirming the dismissal

129. Ms. Tubb wrote to the Claimant on 31st January 2023 informing her of her summary dismissal for gross misconduct. The letter went over the procedural issues that had arisen and the decision to continue in her absence.

130. The letter then went over the allegation against the Claimant and found all of them proven. The letter is a lengthy one and so we do not set it out in full but in relation to the first allegation the conclusions included these:

- Mosaic data showed that the Claimant had accessed the records of SD and BD on numerous occasions;
- The Claimant had never been a worker on their cases and had no reason or authority to access the records;
- She had messaged another social worker to seek advice and saying that she had accessed the records;
- That during sickness absence the Claimant had accessed more records without reason or authority on cases that she was not the key worker for;
- That during a meeting with Ms. Burton on 22nd November 2021 when asked if she had accessed the records the Claimant said that if there was evidence that she had then she had done so;
- That none of the information provided in response to Ms. Picken's questions provided a satisfactory explanation to the allegation; and
- The present and historical medical position did not provide an explanation for the conduct.

131. As to the second allegation the panel found the allegation that the Claimant had failed to maintain the professional boundaries of a registered social worker to be proven on the basis of her accessing the records of BD and SD which contained sensitive personal information in circumstances where she knew full well that she should not access it.

132. The panel also found the third allegation to be proven in that the Claimant had accessed records whilst on sickness absence. That was said to be in breach of a number of the Respondent's policies and something which could have hindered or affected a prompt return to work.

133. The letter set out that the Claimant's conduct was considered to constitute gross misconduct and that her last day of employment would be 31st January 2023. She was advised of her right of appeal and how to exercise that.

The appeal against dismissal

134. The Claimant exercised her right of appeal and did so by letter dated 13th February 2023. She set out the following points in support of her appeal:

- That she had not been able to present her case because of a medical episode experienced at the disciplinary hearing and that requests for an adjournment had been refused;
- That she wanted to ask questions;
- That she wanted to present her evidence and to have that considered;

- That she had requested access to work diaries, calendars and telephone communications to challenge the allegations and that those requests had been refused;
- That two emails of evidence submitted on 24th January 2023 had been rejected which had prejudiced her; and
- That reasonable adjustments had not been made.

135. Glen Miller, Senior HR Adviser with the Respondent set out his responses to the Claimant's points of appeal on 23rd February 2023 (see pages 861 to 864 of the hearing bundle). We have not heard from Mr. Miller as to why he felt the need to do so given that a decision on the appeal lay with Tony Kavanagh, the Assistant Director of People and Organisational Support and a panel member, Afsaneh Sarbouri. Nevertheless, nothing turns on that.

136. The Claimant was invited to an appeal hearing on 24th March 2023 by letter dated 28th February 2023 (see pages 865 to 867 of the hearing bundle). Unfortunately, that appeal hearing was unable to proceed and had to be rescheduled to 9th May 2023. That was because Mr. Kavanagh had contracted Covid-19 on the date as originally scheduled. The Claimant is critical of him not proceeding but we accept his evidence that it would have been inappropriate to proceed because of a risk of infecting others and also that Mr. Kavanagh felt too ill with the effects of Covid to do so and would not have been able to give proper attention to the hearing and the appeal. We find that he took the only sensible course open to him which was to postpone the hearing and relist it on the first available date. The delay was in all events not significant and needs to be considered against the backdrop that part of the Claimant's case is that the disciplinary process should have taken longer than it actually did.

137. Prior to the appeal hearing taking place the Claimant wrote to Mr. Miller with a number of documents that she wanted to be taken into account. The Claimant's evidence on day four of the hearing before us was that this was all of the evidence that she would have wanted to present at the disciplinary hearing. We are satisfied that Mr. Kavanagh considered it before taking a decision on the appeal.

<u>Leavers form, P45 and job advertisement</u>

138. Prior to the appeal hearing taking place the Claimant received a leavers form (see page 869 of the hearing bundle) and her P45 (see page 927 of the hearing bundle). Whilst we can see why the Claimant considers that this was indicative of the fact that she was not going to be reinstated and her appeal had been pre-judged, we accept that this was not the case and that this was simply a processing issue by a third-party organisation over which the Respondent had no control.

139. Similarly, the Claimant had seen a job vacancy advertised with the Respondent for a social worker at the Market Rasen location via the job site Indeed. That was around 8th March 2023 (see page 873 of the hearing bundle). The Claimant again formed the view that this meant that her appeal had been pre-judged. We accept the evidence of Mr. Kavanagh, however, that this was not the case and had the Claimant been reinstated the recruitment would simply have stopped. We accept that the recruitment of social workers is very difficult and that the step to start recruitment was therefore necessary.

Reasonable adjustments for the appeal hearing

140. Akin to the requests made prior to the disciplinary hearing, the Claimant made a number of requests for reasonable adjustments to be made for the appeal hearing. The vast majority of those were agreed including for the Claimant to be accompanied at the appeal venue by friends for support. Although they could not be present in the hearing itself they were able to be present outside in order to provide the Claimant with support.

Appeal hearing

141. The appeal hearing proceeded on 9th May 2024 and took place over four hours between 1.30 p.m. and 5.30 p.m. The Claimant was accompanied by a trade union representative, Tracey Harrison. HR Advisers were also in attendance and Ms. Tubb attended to present the management case. We are satisfied that the Claimant was given all opportunity to present her case and evidence and that the panel gave that all due consideration.

142. The Claimant changed course at the stage of the appeal and accepted that she had accessed the records. The position that she had previously adopted at the disciplinary stage had been a challenge to the Mosaic records. However, despite now accepting that she had accessed the records she did not accept as she did before us that she had been wrong to do so.

143. Instead, at the point of appeal the Claimant's case was that her former line manager, Mary Farmery, had given permission for her to access the records of SD and BD. There was questioning of Ms. Tubb by Tracey Harrison as to why Ms. Farmery had not been interviewed as part of the investigation.

144. Mr. Kavanagh naturally considered that that was a relevant issue if the Claimant had had authorisation to access the records and determined to look into the matter because it was accepted that Ms. Farmery had not previously been interviewed. We accept that that was because the Claimant had not raised that matter before the appeal stage and that Mr. Kavanagh accepting that that required investigation was part of his neutral and considered approach.

145. Mr. Kavanagh's panel member, Afsaneh Sabouri, emailed Vicky Lee on 12th May 2023 asking if Ms. Farmery had given permission to the Claimant to access the records on the system and why she had not been interviewed as part of the investigation. The reply from Vicky Lee said this:

> *"I have spoken to Mary. She wasn't in the LP post in 2018 when NL first looked at records so wouldn't have had authority to allow access to records. Mary advises that she had never been approached by NL regarding accessing the records and was unaware of her accessing the records until it was highlighted and KB[3] discussed with NL. This would be why Mary was not interviewed as part of the investigation".*

[3] A reference to Karen Burton

146. It would have been better for Afsaneh Sabouri or Mr. Kavanagh to have spoken to Mary Farmery directly and obtained a formal statement but there is nothing at all to say that the account was correct and no evidence at all that Ms. Farmery gave any authorisation as the Claimant alleged.

Appeal outcome

147. Following the enquiries made in respect of authorisation from Mary Farmery, Mr. Kavanagh and the panel determined the Claimant's appeal against her dismissal and communicated that to her on 11th May 2023. We are satisfied that before reaching their decision the panel and Mr. Kavanagh particularly took the appeal seriously and considered all points that the Claimant and her trade union had raised.

148. We are also satisfied that the appeal panel took a balanced approach and took into account not just factors which weighed against the Claimant but also those which might have amounted to mitigation if made out. The panel also found some of the allegations upheld at the dismissal stage not to be made out. In that regard, the panel did not uphold the allegations regarding the Claimant having accessed the records of six other service users (other than SD and BD) because that appeared to them to have been in the course of her role as a social worker and that whilst accessing records whilst on sick leave had not been professional and was a breach of the Respondent's policy, in isolation the panel did not find that that amounted to serious misconduct.

149. However, the panel did uphold the allegation as to the accessing of records of SD and BD. We are satisfied that on the available evidence that was clearly open to them given that the Claimant had now admitted that she had accessed the records and the further investigations in relation to the assertion that she had authority from Mary Farmery had confirmed that not to be the case. However, that was not the end of the matter and the panel did consider the issues of mitigation and whether to impose some other sanction other than dismissal for gross misconduct.

150. Relevant to the issue of mitigation in respect of the allegation which was upheld regarding accessing the records of BD and SD included the issue of authorisation which was investigated and also the Claimant's length of service and a previously unblemished career which Mr. Kavanagh considered to be a mitigating factor (see page 1050 of the hearing bundle).

151. However, as outlined in the appeal outcome letter (see pages 1049 to 1051 of the hearing bundle) there were a number of serious factors which weighed against the Claimant which we accept had to be taken into account in reaching the decision on appeal. Those were as follows:

- There was significant access by the Claimant of her neighbours (BD and SD's) records;
- She was not the case worker of BD or SD;
- Her access and interest in the records was not professional;
- During the investigation and at the original hearing there was no request or witness evidence brought forward that the Claimant's manager had been aware of her access;

- Social Work England's Code of Conduct and that of the Respondent was clear on the requirement for professional boundaries and the appropriateness of accessing information;
- The Mosaic Acceptable Use Statement was clear about useage; and
- The position as to Mary Farmer's awareness of the Claimant's actions had been checked and she had not been aware until the matter was raised with her by Karen Burton.

152. Given that the Claimant maintained her stance that she had done nothing wrong at the appeal stage we are satisfied that at no point before these proceedings would she have admitted her wrongdoing and that would have included at any reconvened disciplinary hearing had Ms. Tubb and the panel elected to deal with matters in that way. We find that she would have maintained the position that she adopted in the documents sent prior to the disciplinary hearing that there was no evidence of her guilt in respect of any of the allegations made. To that end, reconvening the disciplinary hearing whilst being the correct thing to do would have made no difference whatsoever to the outcome.

153. We accept the evidence of Mr. Kavanagh that he considered alternative sanctions to that of dismissal but ultimately could not have any trust or confidence that the Claimant would not repeat her actions having regard to the position that she had adopted on appeal. The relevant part of the outcome letter in that regard said this:

> *"Clearly having a 30-year unblemished service record is a mitigating factor given this is your first occasion of 'wrongdoing'. However, within this consideration, the breach of the County Council's Code of Conduct and those laid down by Social Work England are very serious and would be considered gross misconduct. This alongside there is also no reflection and remorse on your part, or acceptance of wrongdoing, regrettably leaves the organisation with very little option. My conclusion therefore is that you still view your practice as acceptable. This is therefore not compatible with your continued employment with the Council. It is my decision that with regret your summary dismissal was a reasonable response".*

154. We should observe in this regard that this is in many ways a very sad case. The Claimant made a grave error of judgment in accessing the records of SD and BD which has effectively ended a successful career which she very much loved. If the Claimant had, as she did before us, admit her wrongdoing and apologise then we consider it more likely than not from the evidence of Mr. Kavanagh that he would have considered allowing the appeal and invoking some lesser sanction short of dismissal. It is therefore a great shame that the Claimant did not admit guilt and express remorse at that stage but ultimately faced with the Claimant maintaining that she had done nothing wrong in accessing the records, we accept that Mr. Kavanagh could not have any confidence that she would not commit similar acts in the future and that was too great a risk for the Respondent to take. That was particularly the case taking into account the role that the Claimant held with the Respondent and the need to be able to have absolute trust in her.

CONCLUSIONS

155. Insofar as we have not already done so above, we set out here our conclusions in respect of the claim before us. These conclusions are the unanimous conclusions of this Employment Tribunal.

Unfair Dismissal

156. The first question that we are required to consider is whether the Respondent had a potentially fair reason for dismissal and, if so, what that reason was and whether that was the reason upon which the Respondent relies.

157. We remind ourselves that the Respondent relies upon conduct as being the potentially fair reason for dismissal and the burden is upon them to satisfy us on that point. We therefore need to be persuaded by the Respondent that there was a set of facts known to them or beliefs held by them which caused them to dismiss the Claimant and that those facts or beliefs related to her conduct.

158. There has been no real challenge to the fact that it was conduct which was operating on the minds of both the disciplinary and appeal panels when taking their decision. It is clear to us that the Respondent has met the burden of establishing that it was conduct that caused the dismissal given the Claimant's actions in accessing the data of SD and BD without any authorisation to do so.

159. However, that is not the end of the matter and we turn then to the question of whether the Respondent had conducted sufficient investigation to be able to form a reasonable belief, on reasonable grounds, that the Claimant was guilty of the misconduct that caused her dismissal. We have focused here on what the real issue was which was the accessing of the records of SD and BD.

160. We are satisfied that at the stage of the Claimant's dismissal the Respondent had conducted a reasonable investigation into the allegations against the Claimant so as to form a reasonable belief on reasonable grounds that she was guilty of the misconduct alleged. The Respondent had the Mosaic reports and the evidence from Daniel Blankley that supported how those records had been interpreted. There was also the evidence of Karen Burton that the Claimant had originally admitted that if the evidence supported her having accessed the records – which it did - then she must have done so. Although the Claimant had changed tack by the time of the disciplinary hearing there was nothing which she said which was persuasive that she had not accessed the records. Indeed, there could not have been because she now accepts that she had.

161. There was also the evidence of Kim Wright regarding the message sent by the Claimant to her admitting that she had accessed the records and thought that she was in trouble. Although there was no physical evidence in respect of the messages sent between the Claimant and Ms. Wright, taking into account the overall picture of the Mosaic records and the evidence of Ms. Burton it was reasonable to accept that the Claimant had accessed the records.

162. Although Ms. Farmery was not interviewed before the original decision was taken to dismiss the Claimant, that was because the focus at that time had been that she denied accessing the records. It was not until the appeal stage that the Claimant again changed tack and accepted that she had accessed them but claimed that she had been authorised to do so. The investigation and disciplinary panel could not cover off on something that the Claimant had not previously told them and, in all events, that was a matter that was remedied on appeal when it was raised.

163. We then turn to the question of whether dismissal was within the band of reasonable responses open to the Respondent. It clearly was. The Claimant – as she now accepts – had accessed the records of SD and BD who were neighbours of hers and not in the context of her social work role. She had no authorisation to do so. The records of SD and BD had sensitive and private information within them and the Respondent was rightly concerned about safeguarding, the data protection implications and that the Claimant had breached both their own policies and the Social Work England Code of Conduct. Had it become a matter of public knowledge that the Claimant had acted in this way in accessing private records of individuals where she had no legitimate business doing so, that could have been a huge reputational issue for the Respondent.

164. However, we also need to consider whether the dismissal was procedurally fair. We are satisfied that it was not. The disciplinary panel should not have pressed on in dealing with the hearing when the Claimant because too unwell to participate and in circumstances where her trade union representative was unable and/or unwilling to proceed in her absence. No account was taken of the fact that the Claimant required attendance by a paramedic and there was nothing at all to suggest that her illness was anything other than entirely genuine.

165. It is no answer in our view to say that the panel had all of the information that they needed as Mr. Graham had made it plain that the Claimant had a handwritten statement that she wanted to read from. It was her entitlement to do that and the hearing should have been adjourned as Mr. Graham contended for more than once and reconvened when the Claimant was sufficiently recovered to participate. Given that she was able to participate without issue in the appeal hearing, that would not have been a protracted delay. The decision to press ahead and conclude the hearing was therefore outside the band of reasonable responses and rendered the dismissal unfair.

166. However, whilst the dismissal was procedurally unfair and the Claimant is entitled to a declaration to that effect, as agreed with the parties we go on to consider whether had a fair procedure been adopted that the Claimant would not have been dismissed (see **Polkey v AE Dayton Services Ltd [1987 IRLR 503**).

167. We are entirely satisfied that even had the disciplinary panel reconvened and heard what the Claimant had to say that she would nevertheless have been fairly dismissed in any event. There is no evidence that the Claimant would have said anything other than asserting that there was no evidence that she had accessed the Mosaic records and in all events, she accepted in cross examination that all of the information that she had wanted to present was

presented at the appeal stage and we accept that Mr. Kavanagh read it and took it into account. Nothing within that documentation altered the fact that the Claimant had accessed the records in question when she had no authorisation to do so, no legitimate reason to do so and knew full well that she should not have done so.

168. The appeal against the Claimant's dismissal was dealt with entirely fairly for the reasons that we have already given. The only thing that could have been done better was for Ms. Farmery to have been interviewed directly rather than by Vicky Lee but there is no evidence at all to suggest that what had been said to have been her account was inaccurate. However, that was not a decision that was outside the band of reasonable responses.

169. The appeal outcome also fell squarely within the band of reasonable responses for the reasons that we have already given. We are therefore satisfied that even if a fair procedure had been operated, the Claimant would nevertheless have been dismissed anyway and so a 100% reduction should be made to any compensatory award.

170. We have also considered as agreed with the parties whether there should be a reduction in respect of either a basic or compensatory award. We begin with the basic award. Section 122(2) ERA 1996 provides that where a Tribunal considers that the conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award the Tribunal shall reduce that amount accordingly. We make many of the same observations here as we did in respect of the fairness of the decision taken on appeal. It is now not in dispute that the Claimant accessed the records of SD and BD. It is also not in dispute that she should not have done so. The Claimant did not access those records for work purposes. She did not have authorisation to do so and she accepts now that she knew that doing so was wrong.

171. The Claimant had had training on Mosaic and avenues were available to her for refresher training and support. Even if it had not been, on each of the many occasions that the Claimant accessed the records she would have seen the clear authorisation warning message displayed on Mosaic. The actions of the Claimant were extremely serious and as we have already observed could have caused considerable reputational damage and breached both data protection and the Respondent's own policies as well as her professional Code of Conduct. The Claimant showed no contrition or insight until the preparation of her witness statement for these proceedings and we accept that there could be no trust that she would not repeat her actions again. Her denial of the allegations in light of the evidence and her own knowledge that she was guilty of the misconduct alleged in respect of the records of SD and BD was not to her credit and compounded her conduct.

172. Whilst the Claimant has referred at the hearing before us to her actions being influenced by brain fog arising from her depression and fibromyalgia, that was not something raised with the Respondent at the material time and there is quite simply no evidence that her actions were influenced by such matters.

173. In all of those circumstances we consider that it is just and equitable to reduce any basic award by 100% to nil to reflect the severity of the Claimant's actions.

174. Section 123(6) ERA 1996 provides that where the dismissal was to any extent caused or contributed to by any action of the complainant then it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. Again, and for the same reasons as in respect of the basic award, we consider that it is just and equitable to reduce any compensatory award by 100% to nil.

175. For all of those reasons, it would not be just and equitable for the Claimant to receive either a basic or compensatory award irrespective of the fact that her dismissal was unfair.

Discrimination arising from disability

176. As we have set out above, the alleged unfavourable treatment relied upon was the concluding of the disciplinary hearing on the day of that hearing. The "something arising" which the Claimant says caused that unfavourable treatment was because of her cognitive issues and/or her absence on sick leave.

177. We are satisfied that the conclusion of the disciplinary hearing on the same date as it had commenced was an act of unfavourable treatment. Although there was nothing that the Claimant would have said that would have made any difference to the outcome for the reasons that we have already give above, to continue in the circumstances was highly insensitive and deprived her of her right to make representations which she was entitled to do.

178. However, there is no link between that unfavourable treatment and the "something arising" from the relevant disabilities. The decision was not taken either because the Claimant had cognitive issues nor because she had been absent on sick leave. The decision was taken purely on the basis that Ms. Tubb formed the view in relation to disciplinary cases that it was best for all parties, the employee included, to conclude matters in one sitting rather than to elongate the process.

179. There being no necessary causal link between the unfavourable treatment and the "something arising" from disability in each case, this part of the claim fails and is dismissed.

Failure to make reasonable adjustments

180. As helpfully identified by Mr. Reynolds during discussions about the issues in the claim the PCP relied upon is the practice of concluding disciplinary proceedings within a certain time period. We do not accept that the Respondent applied that PCP. There was no evidence before us of any time limit or restriction imposed by the Respondent of disciplinary proceedings having to be concluded within a certain period of time.

181. Whilst it is fair to say that the Respondent wanted to conclude matters within a reasonable amount of time, that does not amount to a PCP that applied a certain time period.

182. Even if it had, the Claimant was not placed at any evidenced substantial disadvantage by that PCP. The claimed substantial disadvantage was that the Claimant was unable to participate in the disciplinary process because of her cognitive issues caused by depression and in the case of fibromyalgia, brain fog. Whilst it is fair to say that during the investigation the Claimant was saying that she could not participate and that was supported by the occupational health opinion, in point of fact she did participate upon receipt of the investigation outcome letter. The Claimant completed the questions that she had been asked some time earlier by Ms. Picken to complete and submitted detailed documents and representations. That was particularly the case at the appeal stage and all of those documents were taken into account. She also had representation by her trade union at all stages who took the lead in asking questions to probe and test the management case. There is nothing that the Claimant has told us that she would have said by way of representations that she was prevented from saying by reason of any cognitive issues. The only reason that she was unable to conclude the disciplinary hearing was because she suffered a panic attack not because of cognitive issues or brain fog. The Claimant was not therefore placed at any substantial disadvantage even had we found that the Respondent had applied the claimed PCP.

183. However, even if we had found that the PCP was applied and the Claimant was placed at a substantial disadvantage, we would have found that the Respondent did make a reasonable adjustment in delaying the disciplinary process. We accept the submissions of Ms. Clayton that having delayed the process from the point of suspension to the disciplinary hearing by 14 months that was a reasonable adjustment. The Claimant's evidence on what additional time should have been given was extremely vague and her answer that it should be about "a couple of years" appeared to be plucked out of the ether. Given the need to balance the Claimant's needs with that of the service and its vulnerable service users we are satisfied that the Respondent made all necessary reasonable adjustments.

184. For all of those reasons this part of the claim therefore fails and is dismissed.

<u>Unauthorised deductions from wages</u>

185. We deal finally with the complaint of unauthorised deductions from wages relating to the Claimant not being paid full pay for the period of her suspension. The starting point is what was properly payable to the Claimant during that period of suspension.

186. The Claimant was told verbally that she would receive full pay during her suspension and that was confirmed in the suspension letter. It is also the default position given that suspension is intended to be a neutral act and not a punishment. Whilst we have not seen the Disciplinary Policy, the assessment of Mr. Graham that it provided for suspension on full pay and did not reference that something different would happen if someone became ill during suspension was not challenged by Mr. Bassett.

187. Whilst the Claimant was submitting Fit Notes her suspension was at no point terminated and the clear expectation of the Respondent – as evidenced by the comments of Vicky Lee in her letter to the Claimant – was that notwithstanding her ill health she was expected to be contactable and make herself available to attend meetings.

188. Whilst it can be said that it would be logical that if an employee goes off sick then they will receive sick pay rather than normal pay, that is on the basis that they cannot work. In contrast, someone on suspension is already being prevented from attending work and their ill health makes no difference to that position. Moreover, as we have already observed immediately above the Claimant was not being treated as if she was on anything other than suspension.

189. Having suspended the Claimant, the amount properly payable to her was her full contractual pay which she had been told verbally that she would receive and what the position was said by Mr. Graham to be under the Disciplinary Policy.

190. That being the case we turn to the question of whether the deduction was authorised to be made by virtue of a statutory provision, a relevant provision of the Claimant's contract or whether she had previously signified her consent in writing to the deduction being made. The only consideration here would be the Claimant's contract of employment.

191. We have not been taken to any contractual policy which sets out the position in Mr. Basset's letter that being taken ill during a period of suspension commutes an entitlement only to sick pay. The Respondent candidly accepts that there is no suspension policy and we are satisfied that Mr. Bassett's letter has no contractual effect.

192. Whilst Mr. Bassett's letter appears to hint at there being a longstanding arrangement as to payment during suspension in the way that he proposed and thus the suggestion made that it had resulted in an implied term by way of custom and practice, we have not heard from Mr. Bassett or anyone else about that nor do we have any other evidence about any such implied term. Clearly, Unison were not aware of it or Mr. Graham would not have written to Mr. Bassett on the Claimant's behalf in the terms that he did.

193. It follows that in failing to pay to the Claimant the full pay that she was entitled to under the terms of her suspension the Respondent made an unauthorised deduction from her wages and this part of the claim is well founded and succeeds.

The way forward

194. Given the findings that we have made in respect of **Polkey** and contributory fault and that the calculation as to the complaint of unauthorised deductions from wages should be capable of agreement, we have not at this stage listed any Remedy hearing.

195. Although we recognise from the Tribunal file that this has not previously appeared possible we urge the parties to work sensibly and cooperatively with each other to seek to agree the position on remedy. If they have not reached agreement within 28 days of the date that this Judgment is sent to them then they should contact the Tribunal with dates of availability in order for a Remedy hearing to be listed.

Approved by:

Employment Judge Heap

26th March 2025

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

....26 March 2025.....

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FOR THE TRIBUNAL OFFICE