EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms M Garwood	Capital City College Group

Heard at: London Central **On**: 2,3, 4, 7, 9, 10 April 2025
In chambers: part 7 and 8 April 2025

Before: Employment Judge Lewis
Ms S Campbell
Dr V Weerasinghe

Representation

For the Claimant: Mr F Clarke, Counsel

For the Respondent: Mr I Ahmed, Counsel

JUDGMENT

Judgment was sent out to the parties on 16 April 2025. By email dated 23 April 2025, the respondent requested written reasons.

The unanimous decision of the tribunal was that:

(i) The respondent failed to make the reasonable adjustment of allowing the claimant to work from home from 14 March 2022, subject to a review after 3 months.

(ii) Subjecting the claimant to the sickness absence procedure without having first tried the reasonable adjustment was discrimination arising from disability contrary to section 15 of the Equality Act 2010

(iii) Dismissing the claimant was discrimination arising from disability contrary to section 15 of the Equality Act 2010

(iv) The claimant was unfairly dismissed.

(v) The claim for unauthorised deductions from wages was not upheld.

REASONS

Claims and issues

1. The claimant brought claims for failure to make reasonable adjustments, discrimination arising from disability, unfair dismissal and unauthorised deductions from wages. The issues were agreed as follows:

Unfair dismissal

1.1. What was the reason for the dismissal?
1.2. Was it a potentially fair reason in accordance with s98(2) Employment Rights Act 1996.
1.3. Did the respondent follow a fair and proper procedure prior to taking the decision to dismiss?
1.4. Was the dismissal reasonable in all the circumstances (within the band of reasonable responses)?

Disability

1.5. Was the claimant disabled at all material times by reason of dyspnoea?
1.6. If o, did the respondent have knowledge of the claimant's disability or should it reasonably have had knowledge of the claimant's disability?

Discrimination arising from disability – s15 Equality Act 2010

1.7. Did the claimant's inability to commute to the respondent's premises constitute 'something arising in consequence' of her disability?
1.8. Did the respondent subject the claimant to unfavourable treatment by (i) subjecting her to a sickness absence procedure (ii) dismissing her.
1.9. Wad the unfavourable treatment because of something arising in consequence of the claimant's disability?
1.10. Can the respondent show the treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

1.11. Did the respondent apply the following provision, criterion or practice: requiring employees to work on site in order to carry out their job role and duties?
1.12. Did that provision, criterion or practice place the claimant at a substantial disadvantage compared with people who did not have her disability, so that a duty to make reasonable adjustments arose? The claimant says the disadvantage was her inability to work onsite and therefore she was subjected to the ill-health capability management procedures and dismissed.

1.13. Would the following adjustment have alleviated this substantial disadvantage: allowing the claimant to work from home, wholly or partly?
1.14. If so, would it have been reasonable of the respondent to make that adjustment?

Unlawful deductions from wages (s13, 243 and 24 ERA 1996)

1.15. Was the claimant incorrectly placed on sick leave and hud she therefore have received full pay throughout the period she was placed on sick leave?
1.16. Alternatively, if she was correctly placed on sick leave, was she entitled to her full pay throughout her sick leave?
1.17. In the light of the above, did the deduction of £10,184.39 from the claimant's final pay received on 28 October 2022 for alleged overpayment of sick pay represent an unlawful deduction from wages?

Remedy

Procedure

2. The tribunal heard from the claimant and on her behalf, from Paulette Rose. For the respondent, we heard from Stewart Cross and Neill Scott. We had an additional witness statement from Kurt Hintz, but he did not attend to give evidence.

3. There was an agreed trial bundle of 493 pages; the Level 3 sickness absence meeting minutes; the OH referral; and an opening note from the claimant.

4. One of the issues before us was whether the claimant had the disability of dyspnoea at the relevant time. There was a discussion at the outset regarding whether the tribunal should decide that issue first, as the respondent preferred, or concurrently with the other issues, as the claimant preferred. On balance, we felt it most practical to deal with the matter concurrently. As there was also an unfair dismissal claim covering the same ground, it would save little tribunal time if we were to decide as a preliminary point that the claimant was not disabled. On the other hand, now the parties were present and prepared, it made sense to hear the totality of the evidence including what the claimant said she could and could not do during her employment, as regards the respondent's knowledge and so on.

Fact findings

5. The claimant started her employment on 16 January 2017 as an Executive Assistant to the Assistant Principal. From some time in 2019, this was Peter Phillips. Mr Phillips left in July 2022. The claimant was based at the respondent's City and Islington College. This was a large site with about 3500 students. There were about four or five other Executive Assistants at the time.

The claimant's disability

6. The claimant said she had the disability of 'dyspnoea' at the relevant time. The respondent disputed that she had a disability meeting the legal definition. Alternatively, the respondent said it did not know and could not reasonably have been expected to know that she had a disability. In terms of the relevant timing, the claimant was invited to a Level 1 sickness absence review meeting on 21 March 2021, was dismissed following a Level 3 absence meeting on 20 October 2022 and her appeal was heard on 6 February 2023.

7. We did not have a medical report prepared for this tribunal hearing. We therefore had to reach a conclusion from the evidence before us. The claimant told us that she understood 'dyspnoea' was an impairment constituting shortness of breath.

8. The claimant's GP notes show that the claimant saw her GP with a nasty chest infection in December 2018 and again in December 2019. On 7 October 2020, the GP diagnosed 'dyspnoea' for the first time. The claimant did not know what that term meant and it was explained to her. The claimant provided the respondent with a fit note stating 'dyspnoea' and that she could work from home.

9. The claimant saw her GP at the surgery on 23 October 2020 to review her dyspnoea and an X-ray was requested. There was a telephone consultation on the same matter on 6 November 2020. The claimant provided the college with a further fit note stating that she should work from home.

10. On 11 December 2020, the notes of a telephone consultation state under the heading 'dyspnoea' - 'still persists. Poor ex tolerance.' There is no explanation as to what 'poor exercise tolerance' meant, but that phrase appears again with more clarity in the respiratory physiotherapist letters (see below). On 6 January 2021, it is noted in a telephone consultation under 'dyspnoea review', 'has noticed it since summer but only acute illness was really bad chest infection last December. ?? this is a bit like post covid. Ref chest clinic st marys.' The next entry is a telephone consultation on 9 November 2021 and a fit note was issued from 1 November 2021 – 3 January 2022 stating 'dyspnoea'. Subsequent fit notes continued to state 'dyspnoea'.

11. The next entry in the GP notes was 20 May 2022 which noted 'been told chest clear but heart wall thin … so referred to cardiology – worried as fh (family history) of heart disease. Has put grievance in at work'. Fit notes were issued for 13 May 2022 – 5 August 2022 and then 6 August – 29 October 2022 stating 'dyspnoea'. These entries were followed by some telephone consultations about chest infections in June and December 2022 (no mention of dyspnoea). On a visit to the surgery on 23 December 2022 with an ongoing cough, a locum GP notes 'examination – not dyspnoeic' and recommends restarting inhalers. The next relevant entry, on 12 July 2023, is a review of type 2 diabetes. It notes that the claimant has lost weight and 'breathing has

improved a bit'. A fit note was issued, again with the diagnosis of dyspnoea, for 10 July – 11 September 2023.

12. Apart from the vague note about 'poor ex tolerance', none of these entries set out the effects of the dyspnoea, though as a matter of logic, the claimant must have described or demonstrated sufficient effects to have made the GP repeatedly diagnose dyspnoea, both on visits and in telephone consultations, and also there must have been enough to prompt the GP to refer for further investigations.

13. As a result of the GP's referrals, the claimant was seen by the respiratory physiotherapy clinic at Imperial College Healthcare from some time before May 2022 until her discharge in May 2023.

14. Professor Onn Min Kon, a Consultant Respiratory Physician, wrote a letter dated 11 May 2022. The diagnosis includes 'breathlessness' and 'unable to perform lung function'. He stated that the claimant had been increasingly breathless over the last couple of years and was now breathless on relatively minimal exertion. The letter referred the claimant to a Consultant Cardiologist as his department had not found any specific respiratory cause for the claimant's symptoms other than her weight and possibly fitness. Professor Onn Min Kon did not suggest the claimant's symptoms were not genuine.

15. Further tests in late 2022 showed there was no cardiac cause of the claimant's dyspnoea.

16. The claimant continued to be seen at intervals at the respiratory clinic at Imperial College Healthcare. The claimant was unable to remember the date of her first visit, but we have letters from Ms Klinge, a specialist respiratory physiotherapist, to the claimant's GP from 27 September 2022 regarding a clinic on 23 September 2022, which was clearly not their first review meeting, until discharge on 19 May 2023. We note here that the respondent did not see these letters during the claimant's employment. The claimant was taught breathing techniques to help manage her condition.

17. The 27 September 2022 letter, based on a clinic of 23 September 2022, notes on observation and treatment 'Highlighted alterations in breathing pattern again today, comparable to desired normal pattern of breathing at rest and how this can impact on/cause symptoms.' Under 'analysis', it says 'Follows prompts well during exercises but reports discomfort with reduced breathing… Nil signs of air hunger during session (yawning++ during previous assessment), but discomfort reported.'

18. The 7 November 2022 letter, based on a clinic on 28 October 2022 notes that the claimant had reported no change in her symptoms since their previous review. She said he was practising the exercises daily. 'We discussed how she has been getting on with aiming to increase her exercise/activity levels. She reports she has been walking to the end of her road and back, which takes approx. three minute each way. There seems to be an improvement in her exercise tolerance from her initial assessment'.

Under ‘treatment’, it is noted ‘reviewed exercises in sitting – dysfunctional pattern demonstrated’.

19. The 30 January 2023 letter based on a clinic on 27 January 2023, notes that she has now had her cardiology review and nil concerns were raised. ‘Since her last review, she has noticed that she is able to walk a bit further than previously We discussed aiming to continue to gradually increase her walking distance, implementing pacing strategies. She continues to do the breathing exercise regularly, mainly sitting.’ Ms Klinge still identified a dysfunctional breathing pattern when reviewing the sitting exercises. However, she noted ‘improvement in her exercise tolerance/distance. Continuing to gradually increase her walking distance’. A 6 – 8 week follow-up was arranged.

20. The 19 May 2023 letter, based on a clinic of that date, says ‘she reports her breathing symptoms have improved since her initial assessment and she is able to walk up and down the stairs in her house feeling less breathless,’ They discussed the goal of ‘to be able to complete a daily 10 minute walk without stopping. Discussed short-term goals in-between such as stopping as often as needed and counting rests and aim for reducing this during next walk etc.’. Analysis noted a slight improvement in breathing symptoms. The importance of adhering to breathing exercises was stressed as the claimant had lightly lapsed due to other health issues. It noted a plan to discharge.

21. The respondent suggests that we should not accept that the claimant had difficulty walking and similar effects because the GP records and respiratory clinic letters were predominantly based on what the claimant was reporting to the doctors. However, the evidence does not suggest to us that the claimant was inventing or exaggerating symptoms. The GP notes do not express any doubt about what the claimant is saying. The question was simply what was causing the condition. The GP was sufficiently concerned to refer for further tests. The doctors were sufficiently concerned to arrange investigations by two Consultants.

22. It is clear from Ms Klinge’s letters to the claimant’s GP that the claimant was having difficulties with walking. Ms Klinge never expresses any doubt about whether the symptoms are genuine. She conducted her own tests. She identified ‘dysfunctional patterns’ when the claimant carried out the exercises in front of her. It is true that the claimant was merely reporting the distance she could walk, rather than Ms Klinge taking her for a walk, but we would find it very surprising if the claimant was consistently fabricating that level of difficulty when talking to a respiratory specialist, and moreover we would find it very surprising if the specialist would not have identified a fabrication or exaggeration. The claimant was taking the trouble to visit these appointments. She was given exercises. Ms Klinge identified a dysfunctional breathing pattern on her own assessments.

23. The OH report on 14 March 2022 records that the claimant would become breathless if walking more than about 2 minutes at any one time, sometimes suffering chest pain and needing to sit down and rest. We appreciate that OH

was largely recording what OH had ben told by the claimant, but the report does not express any scepticism.

24. Taken together with the claimant's own evidence, which is broadly consistent with Ms Klinge's letters and the fit notes, we find that throughout the period October 2020 until the conclusion of the claimant's appeal in February 2023, and indeed ongoing at least to 19 May 2023, the claimant had substantial (non trivial) breathing difficulties when not sitting down, such that she could not commute into work from October 2020. These became progressively worse. There was marginal improvement in early 2023 but by May 2023, even walking only 10 minutes without pauses to rest was still only a goal.

25. In addition to her difficulties walking, we accept the claimant's evidence that she also had difficulty going up and down stairs in her house, again experiencing breathlessness, sometimes chest pains, and needing to rest. That seems logical and consistent to us that stairs would present an equal or greater problem than walking. We accept that the claimant had difficulty doing housework for the same reasons. We accept her evidence that throughout this period she did not go out (except for medical appointments, to which her nieces took her) and that she did shopping on line. She was unable to do the travelling involved on a commute to work.

Working from home

26. Each of the respondent's sites worked differently and the duties of the Executive Assistants were not identical, even though they had originally been given the same job description. The claimant had to provide administrative duties. These included, to varying extents, answering emails and phone calls, arranging meetings, compiling reports if required, managing the diary, typing letters for disciplinaries and taking minutes.

27. In late 2019 or early 2020, all staff were trained to use Teams, which then came to be used extensively within the college. Staff no longer had desk phones and calls were made through Teams. Meetings also came largely conducted through Teams.

28. From March 2020, as a result of the Covid pandemic, the claimant started working from home. She continued to work from home from then onwards.

29. Some communication difficulties arose between Mr Phillips and the claimant, which she raised in emails in August 2020 and February 2021. The claimant was concerned that Mr Phillips was not responding to her emails or attending the regular 1 to 1 meetings, which made it difficult for her to carry out her work.

30. From 8 March 2021, Covid restrictions were again lifted on students coming on to site (they had been temporarily lifted in September 2020) and the respondent started to encourage staff who had been working remotely to

return to work in person. The aim was to get everyone back. From 11 August 2021, all staff were required to return.

31. In August 2021, the claimant's father passed away. From 15 September 2021 – 29 October 2021, the claimant was on bereavement leave.

32. At the start of November 2021, Mr Phillips told the claimant that he expected her to return to work on the premises. He said he was happy to agree a phased return and put in place any supportive measures. He asked her to come in on 3 November 2021 for a return to work meeting. The claimant told him she could not come in to work on site. She said she would be unable to attend the meeting on 3 November 2021 and she felt HR and her union representative should be present at the meeting to discuss her return.

33. On 5 November 2021, Mr Phillips emailed to say that the claimant's fit note said she was fit to return to work from Monday 1 November 2022 and she had been expected to return to the college site on that day. He said she had worked remotely without authorisation for 5 days now and had failed to attend two return to work meetings set up on Teams for her convenience. He said that if she failed to return to the college site for her next working day, it may result in disciplinary proceedings. The claimant replied on Monday 8 November 2021 to say that she was struggling with Mr Phillips' approach to her return to work. She said she had an emergency appointment with her doctor on the Friday. She said she had constantly requested that the return to work meeting take place with her union representative present, and it was causing her stress that Mr Phillips was trying to call her on Teams to conduct the meeting with her alone.

34. On 10 November 2021, the claimant sent Mr Phillips a fit note dated 9 November 2021 which again stated 'dyspnoea' and that the claimant could work if she was allowed to work from home. This covered the period 1 November 2021- 3 January 2022.

35. The claimant had already told Mr Phillips that she had dyspnoea and its effects. Like the claimant, Mr Phillips had not known what 'dyspnoea' meant on the fit notes, so she had had to explain.

36. On 12 November 2021, Mr Phillips emailed to say he wanted the return to work meeting in order to understand the claimant's situation and how he could best support her return to work. He added, 'just to clarify, since August, there has never been an agreement that you can work remotely. I would like to discuss this in detail with you on Monday'.

37. On 15 November 2021, the claimant emailed Ms Roseman in HR to say that Mr Phillips had refused her request to have a union representative present at the return to work meeting. She said she needed their support because she had recently lost her father and was also going through health issues. She asked how she could expect Mr Phillips to listen to her concerns

at the proposed meeting when he was not even listening to her request to have a union representative with her.

38. Ms Roseman replied, explaining that a union representative was usually allowed for formal meetings and not for return to work meetings which were intended to be informal and supportive. She said they would arrange an Occupational Health ('OH') referral for get a better idea of the claimant's situation and what supportive measures could be put in place.

39. On 26 November 2021, Mr Phillips emailed the claimant in response to her fit note. He said he had reviewed the main duties of an Executive Assistant on her job description and 14 out of 16 duties required her to be on site. He said that he would record her as being on sick leave with immediate effect. He said he had asked for an OH assessment and he would like to arrange a weekly catch-up to check she was OK until she was well enough to return to work, which was expected at 3 January 2022.

Return to work meeting 9 February 2022

40. In the end, the respondent did allow the claimant's union representative (Ms Rose) to attend the return to work meeting and it was held on 9 February 2022.

41. The claimant again explained during the meeting that she was unable to travel to work due to her dyspnoea, but that she could work effectively from home as she had done successfully since March 2020. Mr Phillips was dismissive of the medical advice. He said he was not obliged to take it on board regarding where the claimant should be working.

42. We do not have clear evidence from the claimant as to whether it was at this meeting or previously that she first explained that she was unable to walk more than a few minutes due to her breathlessness and its general effects. As Mr Phillips was unfamiliar with the term 'dyspnoea' and as the whole discussion was regarding why the claimant could not come into work, we find on the balance of probabilities that the claimant would have explained when she first provided a fit note with 'dyspnoea' and repeated her points in November 2021 when asked to return. We also find that she explained again at the return to work meeting on 9 February 2021 to the extent that Mr Phillips allowed her to. The problem at the 9 February 2021 meeting was that Mr Phillips was brushing aside any talk of her medical condition. Mr Phillips was dismissive of the fit notes in the discussion and did not feel it was for the doctors to say whether the claimant could work from home or not. He did not want to talk about her health. He wanted to talk about her coming back on site. The claimant felt he was not listening to her.

43. Following the meeting, Mr Phillips emailed the job description where he had highlighted in red the sections which he felt could only be completed effectively on site. He said he would chase up the OH referral again. He said that as the claimant had refused the suggestion of a weekly welfare call, he would email her each term-time Monday and she could reply.

44. The claimant responded in an email dated 11 February 2022. She said the job description was on old document. She said she had been through that together with the latest version and she had been completing all the tasks perfectly well since the first lockdown, including since students were back in the college the first time in September 2020. The majority of tasks were computer based. She said the only issues had been when Mr Phillips had chosen not to respond to her email or calls or attend 1 to 1 meetings. The claimant noted that Mr Phillips had said in the meeting that there had been no complaints with her work and that she was highly regarded by her colleagues. The claimant added that she had always sent fit notes from her work email in the past and she did not want Mr Phillips to communicate on her personal email as that was stressful.

The OH report

45. On 23 February 2022, Ms Costello in HR made a file note of a conversation with the claimant. She said that she had been asked to arrange an OH referral and she had needed to obtain the claimant's agreement. Ms Costello noted that the claimant told her she was undergoing tests to discover the cause of her respiratory condition as she had previously been well. Ms Costello noted that the claimant said she had explained the situation to her manager who wanted her on site. She noted that the claimant had said she had had very little sickness before this, she loves her job and wants to be on site but cannot at the moment. The claimant had said she had previously come into work when she felt quite unwell so it was not that she did not want to work on site. It is recorded that the claimant thanked Ms Costello for the call and said that at least Ms Costello had listened to her which she did not always feel had been the case.

46. On the same day, Ms Costello made the OH referral. The claimant had a telephone consultation on 14 March 2022 and a report was prepared on that date. The claimant emailed Ms Costello in HR immediately afterwards to ask that the report be sent to HR, but remain confidential and not be sent to Mr Phillips. She said she only gave permission for the outcome to be disclosed to Mr Phillips. Ms Costello replied on 22 March 2022 to say she had received the report and that it was the respondent's practice to send such reports to the manager as they needed to know the background and how to support staff. She said the outcome on its own did not tell the whole story. However, the claimant did not change her mind. She said she felt very uncomfortable with Mr Phillips having full access to the report.

47. The claimant told the tribunal that she took this position because Mr Phillips had made it clear in all their discussions that he did not care what was happening with her health and only wanted her on site all the time. She felt he was ignoring the advice of what her GP, a medically qualified individual, was saying on the fit notes and was not listening to what she was herself telling him about her inability to come in.

48. The OH report summarised the position that the claimant had been on sick leave since 11 November 2021 with shortness of breath. The condition had come on gradually over 18 months and had gradually become worse. She had been working from home for over 18 months but had to go on sick leave as her manager would not allow her to continue to do so. OH recorded that the claimant had told them that she was unable to commute and could only walk for about 2 minutes before she became out of breath and had to sit down. She ad said she had had various inconclusive test results and needed further tests on her legs and lungs. She reported chest pains on occasions. She was due to see her specialist again at the end of May.

49. The OH letter concluded that the claimant was temporarily unfit to return to work due to her shortness of breath but should be fit enough to work from home when her current fit note expired on 4 April 2022. OH could not predict when she would be fit enough to travel and work in the office, as that depended on when she got a firm diagnosis and started treatment, but it would be at least a few months.

Supporting Attendance Policy

50. The Supporting Attendance Process says that when an employee hits a review point, they will normally be invited to an attendance review meeting. The aim of the meeting is to ensure that both employee and manager are doing everything possible to support the employee's attendance. There are three levels of review meeting. At the end of the Level 1 meeting, the manager usually issues a notification of unacceptable attendance with a further review date. Managers are expected to take HR advice if they have any doubts. Immediately issuing a notification may be insensitive or unhelpful in some cases, eg if the reason for absence is a condition under medical investigation. In such cases, regular communication and engagement are more important. At Level 3, dismissal is a possible outcome.

51. The Policy states that in most sickness absence situations, the levels should be followed through consecutively starting at Level 1. However there may be occasional circumstances where it is appropriate to start at a higher level or by-pass a level eg where an employee has repeatedly received notifications of unacceptable attendance or where ill-health retirement is a possibility or where the reason for absence is a serious illness and a sensitive and sympathetic approach is paramount. This may involve starting at a higher level providing good communication and support has been ongoing throughout the period of sickness.

52. The Policy also contains paragraphs on disability. It defines disability. It states that the respondent will take reasonable steps to support the attendance of disabled employees, making reasonable adjustments as necessary to help disabled employees remain in the workplace'.

Level 1 sickness absence review meeting

53. The claimant had supplied a fit note dated 14 January 2022 covering 4 January – 4 April 2022, referring to dyspnoea and bereavement, and again saying she could work if it was from home.

54. On 21 March 2022, the claimant was invited to a Stage 1 sickness review meeting. The meeting was held on 22 April 2022 with Mr Phillips, Kishan Narayan from HR and Adam Hartman, a UNISON steward. The meeting was to discuss the claimant's sickness absence first from August to October 2021 and then from November 2021 to date.

55. On 27 April 2022, Mr Hartman emailed Mr Phillips and Mr Narayan an annotated copy of the claimant's job description, which he said showed how the claimant could carry out the vast majority if not all of the claimant's duties from home. He stressed that the respondent's online technology was now very much embedded in how they worked and Teams was used routinely for meetings, face-to-face communications and interviews etc. Most documents which were now handled were electronic. In the past, the claimant had covered colleagues who were absent and perhaps she could now be supported by having any duties which could only be completed on site assigned to others.

56. The tasks on the job description included booking travel and accommodation, chasing up invoices and dealing with external complaints, monitoring emails, purchasing training, creating and sending out rotas, typing up template letters in regard to disciplinaries, handling telephone enquiries, purchasing items for events, collating information for research reports, taking minutes and attending major events such as Student Award Ceremonies or Professional Development Days.

57. The original job description had been written before the wide-spread use of Teams. The claimant told us and we accept that almost all of those tasks were done on-line, on the phone or in Teams meetings. The claimant did not minute meetings for the Board or senior management team. She did take minutes for Head of School meetings, but these were often held on Teams. Big events would happen once a term at most.

58. On 20 May 2022, Colleen Marshall wrote the outcome letter as Mr Phillips was absent from the college. Ms Marshall was Mr Phillips' line manager. She said she had written it in line with the meeting notes and in consultation with Mr Narayan. She said that in Mr Phillips' absence, she was covering the role of Assistant Principal and required the Executive Assistant to be physically present.

59. The outcome letter said that the claimant had confirmed there was no improvement in terms of her health or diagnosis. Her fit note dated 1 April 2022 and OH advice both said she was fit to work from home. The letter said Mr Phillips felt it was an onsite role. He also felt his office needed to be protected from students and staff members who required him. The annotated job description had been reviewed, but it was not feasible for the claimant's role to be completed in its entirety at home. It was a front facing role for all

students and staff. As the claimant was currently under medical investigation with no confirmed diagnosis or treatment, there was no end date, which was unsustainable for the college. They therefore needed to escalate to stage 3.

60. On 31 July 2022, Mr Phillips left and Ms Marshall took over as the claimant' line manager.

Grievance

61. Meanwhile, the claimant had tried to resolve her concerns about Mr Phillips' treatment of her informally. This included an attempt to speak to Ms Marshall and a meeting had been set up. However, Ms Marshall did not log on for the meeting and afterwards the claimant was told that was because Mr Phillips had told her that the claimant was on sick leave and therefore it was inappropriate to speak to her about work matters.

62. As she was unable to speak to Ms Marshall, the claimant felt she had to bring a formal grievance. She submitted this on 20 April 2022.

63. The claimant said that for some time, she had been asking Mr Phillips to complete outstanding tasks, respond to her emails or attend 1 to 1 meetings with her, and it was starting to impact her work in which she prided herself. She had tried to arrange a meeting with Ms Marshall, to discuss the matter, but Mr Phillips had told Ms Marshall that the claimant was on sick leave. As a result, a meeting which Ms Marshall had arranged to discuss the matter with the claimant on 26 November 2021 had been cancelled. The claimant attached emails of all the requests she had made to Mr Phillips which he had not responded to plus the emails she had forwarded to his senior manager to intervene.

64. The claimant stated that working from home had never been an issue until she had emailed Ms Marshall. After that, Mr Phillips had suddenly said she could not continue to work from home. The claimant said she had been completing her duties perfectly well from home since March 2020.

65. The claimant said that she had told Mr Phillips at the return to work meeting that she was not comfortable with his suggestion that they have weekly welfare conversations, but she was willing to have weekly email communications. That was agreed, but Mr Phillips had not sent any such emails.

66. The claimant also noted that her OH appointment did not take place until 3 months after it was initially requested.

67. The claimant said she felt bullied and victimised by Mr Phillips and that the situation had become personal to him. She said that she wanted to return to working from home as requested by her GP and OH, and for her pay to be restored to her complete salary.

68. The grievance was handled by Ms Husselbee, an external investigator. On 20 September 2022, Mr Narayan in HR emailed the claimant to say Ms Husselbee had completed her investigation into the grievance and he would be writing to the claimant by the end of the week with the grievance outcome. He asked the claimant's consent to re-refer her to OH to understand if there were any changes to her health. The claimant did not reply. Mr Narayan emailed again on 23 September 2022 to say the grievance outcome would actually be sent on Monday and to ask if the claimant had had the opportunity to consider OH. Again the claimant did not reply. On 26 September 2022, he emailed with the grievance outcome and asked whether there was any update on considering OH.

69. The claimant says she did not see these 3 emails asking for permission to refer her to OH. She says she would have responded had she seen them and that she would have agreed. We are not sure what happened here. The claimant appears to have received all other emails and presumably she received the final chaser as it also attached the grievance outcome. On the other hand, the claimant did usually respond to emails and state her position, as she had done regarding the first OH report. We believe the emails were sent correctly to the claimant but it may be that replying to the question regarding the OH referral was overlooked by the claimant amid all the other issues and correspondence which was going on regarding the claimant's pay and regarding the grievance and sickness absence review meetings.

70. By letter dated 26 September 2022, the grievance was rejected.

71. The claimant appealed the rejection of her appeal. Looking ahead, the grievance appeal was heard on 1 December 2022 by Stewart Cross, Group Director of Business Intelligence and Planning. The appeal outcome letter dated 14 December 2022 generally rejected the grievance appeal. Mr Cross rejected the allegation of silent bullying by Mr Phillips in the period after February 2021 but said he could not decide either way on the period August 2020 to February 2021 because of insufficient evidence. Mr Cross said it had been appropriate to treat the claimant as on sick leave in the period from November 2021 as '87.5% of the role was front facing'. When discussing the attendance procedures, Mr Cross wrote that 'the diagnosis you were given is not defined as being a disability under the Equality Act 2010'.

72. Mr Cross accepted in the tribunal that Mr Phillips' explanation for not responding to the claimant's emails was not a good one. However, it was a big jump from that to saying Mr Phillips was bullying the claimant as there was no evidence of intent. He said there were also capability and sickness issues on Mr Phillip's part, so he may have been struggling to deal with the work involved.

Level 3 Absence Review Meeting and dismissal

73. On 30 September 2022, Mr Narayan emailed the claimant to invite her to attend a Level 3 absence review meeting in front of Neill Scott, Group Director of Estates. The Head of HR would be present and Ms Marshall would

present the management case. The claimant could bring a union representative. The meeting would discuss the claimant's absence, its impact and the likelihood of returning to work on site. The claimant was advised that dismissal was a possible outcome.

74. The (rescheduled) meeting took place on 12 October 2022. Ms Rose accompanied the claimant. The meeting was chaired by Mr Scott. Ms Marshall attended plus Ms Hartley, Head of HR, and a notetaker.

75. Mr Scott saw the full OH report.

76. Ms Rose said that in meetings where she had accompanied the claimant, Mr Phillips had gone as far as to say that he would not take the fit notes into account. His position was that the business required the claimant to be 100% on site. She said that Mr Phillips had refused to consider any hybrid pattern and insisted the claimant would have to be on site 5 days / week.

77. Ms Marshall stated that the expectation of the role was that the executive assistant must be 100% on site during working hours as is the case with Assistant Principals. She said the organisation was happy to accommodate a phased return to work. Mr Scott then asked whether the claimant wanted to come back to work 100% on site.

78. The claimant said that it had always been her intention to return to work fully on site. However, her GP did not feel she would be able to work on site 100% of the time. There had been conversations about hybrid working, but Mr Phillips had taken an all or nothing position, and it had to be 5 days/week. The claimant said she felt she was being forced not to work instead of being supported to come back into work.

79. The claimant said that she did not want to work remotely on a permanent basis. She said she had an appointment the previous week which had given 'good news' and that she had another appointment with a Consultant at the end of the month to consider this.

80. The good news in question was that there were no problems with her heart. This made a big difference to the claimant psychologically and what she would feel able to do.

81. Mr Scott did not discuss the annotated job description item by item with the claimant or indeed with Ms Marshall. Mr Phillips had left by then. Mr Scott did not closely analyse each task and whether it could be done remotely or not. He accepted Ms Marshall's opinion and the recorded opinion of Mr Phillips that it was a 'front-facing' role and that 80% of the tasks required on site presence.

82. When the 'front-facing' description was explored with Mr Scott at the tribunal hearing, he tended to veer off into a discussion about the importance of students being on site. But the claimant was not a lecturer. In terms of the claimant's own function, the example repeatedly given to us by Mr Scott and

by Mr Ahmed when cross-examining the claimant was the 'gatekeeping role' ie intercepting students or staff members who came impromptu into the office seeking to speak to Mr Phillips. However, there was no evidence to contradict the claimant's assertion that students never came in to see Mr Phillips. The claimant said they would approach their tutor or Head of School with any queries. We find that credible. In relation to staff, the claimant said staff were usually given appointments and meetings were prearranged. Again, this strikes us as credible and we had no evidence that staff were in the habit of just dropping in.

83. When pressed on why, apart from this, the claimant needed to be on site, Mr Scott's evidence was extremely vague. He did not provide us with any clear analysis.

84. Mr Scott also did not investigate the possibility of the claimant taking on some tasks of her Executive Assistant colleagues in return for them taking on any of her tasks which did genuinely require attendance on site.

85. Mr Scott's main focus was on establishing when the claimant thought she might be able to return to site full-time. The claimant was unable to answer that. Mr Scott did not consider the possibility of imposing a further period for review himself of eg 3 months.

86. Mr Scott had had no disability training. He did not recognise the possibility that the claimant had a disability. Nor was he advised about any of this by HR. His general view was that post Covid, the College was trying to get everyone back at work, so the main issue was when the claimant would be able to return fully.

87. Mr Scott wrote on 20 October 2022 with the outcome. He said the claimant' ongoing absence currently stood at 226 days in the period 20 October 2021 to 20 October 2022. The medical certificates all stated that the claimant was only fit to work from home. The panel was presented with several documents showing meetings between the claimant and Mr Phillips where her role was discussed and it was clearly outlined that working from home was not feasible as the core functions of the role required the postholder to be on site supporting the Assistant Principal with their deliverables. The current situation was not sustainable. The claimant was therefore dismissed.

<u>Pay</u>

88. Mr Narayan emailed the claimant in a letter dated 13 September 2022 saying that she had been overpaid during her sickness absence. He said that her sickness entitlement was 6 months full pay and 6 months half pay. She should therefore have gone onto half pay from 15 February 2022. He said this did not happen because he had made an administrative error. He stated that the College was entitled under clause 11 of the claimant's contract of employment to deduct sums due including for overpayment. The total overpaid was £8,296,81. He could set off £6,464.64 against untaken annual

leave from the start of the claimant's sickness absence to August 2022 (if the claimant signed a letter in agreement). That left £1,832.17 which would be deducted. The claimant did not sign such a letter.

89. Clause 11 of the claimant's contract of employment authorises the college to deduct from her salary any sums due including any overpayments, loans or advances.

90. On 20 September 2022, Mr Hartman emailed Mr Narayan to point out that part of the claimant's grievance was reduction to half pay. Having complained about that, she found she was put back on full pay, so she understood that to be in resolution of part of her grievance. He asked for a monthly breakdown of the figure of £8,296,81 to check accuracy because her pay was reduced by £1,348.27 in March and £185.76 in April.

91. The claimant's final pay at the end of October 2022 included pay in lieu of notice and for untaken holiday entitlement. A deduction was made for £8,296.81 for 'overpayment recovery' and £1,887.58 for unpaid sick leave.

Appeal against dismissal

92. The claimant appealed. She said she felt dismissal was extremely harsh in the light of the encouraging medical evidence and that she was confident she would be able to return to work on site in the near future.

93. The appeal hearing took place on 6 February 2023 in front of Kurt Hintz. The claimant was represented by Mr Hartman. Mr Hartman said the good news which the claimant had received was a game-changer and that had been disregarded in the dismissal conclusion. He said it indicated that she could return to work on site in the foreseeable future. The claimant told Mr Hintz that she was not yet able to return to work full time on site but she would now be able to do 1 or 2 days on site.

94. Mr Hintz did not explore the possibility of a phased return or how much could be done on and off site at this point.

95. Ms Rose submitted a statement for the appeal. She said that Mr Phillips had insisted on the claimant returning fully to work on site or he would deem her off sick. He did not discuss or offer alternative roles or consider other adjustments. She said the dismissal hearing ignored the fact that the claimant had now been given an all clear following a series of tests for a potentially serious health concern.

96. By letter dated 15 February 2023, Mr Hintz rejected the claimant's appeal. He said it was now over 3 months since the Level 3 meeting and the claimant could still only return to work on site 1 or 2 days at most. He felt there was no reasonable prognosis which would enable her to return to work full-time on site as was required in her role.

Law

Unfair dismissal

97. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg capability.

98. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

99. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own decision.

Disability

100. The protection against disability discrimination is contained in the Equality Act 2010. There is also 'Guidance on matters to be taken into account in determining questions relating to the definition of a disability'. This Guidance must be taken into account if relevant, but it does not impose any legal obligations in itself and it is not an authoritative statement of the law.

101. A person has a disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. 'Substantial' means more than minor or trivial (s212).

102. There is no statutory definition of impairment. There is nothing in the legislation or Guidance which says the task of ascertaining if there was a physical impairment involves any rigid distinctions between an underlying fault, shortcoming or defect of or in the body on the one hand and evidence of the manifestations or effects of that on the other. An impairment can be something that results from an illness as opposed to itself being the illness. It can be cause or effect. (College of Ripon & York St John v Hobbs [2002] IRLR 185, EAT.)

103. There may well be cases where the specific cause of the disability is not known or has not been identified at the relevant time. What is important is that the employer considers the effect of the impairment. A tribunal should focus on the underlying facts which amount to the disability and the effects of it. (Urso v DWP [2017] IRLR 304, EAT.

104. Sch 1 para 8 covers the situation where the claimant has a progressive condition which has an adverse effect on his ability to carry out normal day-to-day activities, but the adverse effect is not yet substantial. In such a case, the claimant is deemed to have an impairment with a substantial adverse effect if the condition is likely to result in having that effect in the future. 'Likely' means 'could well happen'. (Guidance, para C3; SCA Packaging Ltd v Boyle [2009] IRLR 746, HL.)

Discrimination arising from disability

105. Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondent treated the claimant treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondent has a defence if it can show such treatment was a proportionate means of achieving a legitimate aim.

106. The tribunal must decide (1) whether the claimant was treated unfavourably and by whom; (2) what caused that treatment — focusing on the reason in the mind of the alleged discriminator (consciously or unconsciously); (3) whether the reason was 'something arising in consequence of the claimant's disability'. This only needs to be a loose connection and might involve a number of causal links. At this stage, it is an objective question which does not depend on the thought processes of the alleged discriminator. (Pnaiser v NHS England and anor [2016] IRLR 170)

107. A tribunal must carry out a critical evaluation on the question of objective justification. This involves weighing the needs of the employer against the discriminatory impact on the employee. The tribunal must carry out its own assessment on this matter, as opposed to simply asking what may fall within the band of reasonable responses. . (Gray v University of Portsmouth; Hardy & Hansons plc v Lax [2005] ICR 1565.)

108. Paragraph 5.12 of the EHRC Employment Code says that in justifying their treatment, employers must produce evidence to support their assertion that it is justified and not rely on mere generalisations.

109. The respondent will not be liable under section 15 if it shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

The duty to make reasonable adjustments

110. The duty to make reasonable adjustments is set out in sections 20 – 21 of the Equality Act 2010 and in Schedule 8. Where a provision, criterion or practice applied by the employer or a physical feature of the premises or a lack of an auxiliary aid puts a disabled person at a substantial disadvantage in comparison with people who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage or provide the auxiliary aid. Substantial' means more than minor or trivial (EqA s212(1)).

111. The House of Lords in Archibald v Fife Council [2004] IRLR 652 said this about the duty to make reasonable adjustments:

'The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination.' The Equality and Human Rights Commission's Employment Code addresses reasonable adjustments particularly in chapter 6. The Code does not impose legal obligations and it does not purport to be an authoritative statement of the law. Nevertheless, it can be used in evidence in tribunal proceedings and tribunals must take into account any part of the Code which appears relevant to any question arising in the proceedings.

112. At para 6.28, the EHRC Employment Code says the following factors may be relevant to whether an adjustment would have been reasonable: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial and other resources; the availability to the employer of financial or other assistance to make adjustments eg advice through Access to Work; and the type and size of the employer.

113. Under Schedule 8, paragraph 20(1), the employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

114. The EHRC Employment Code says at para 6.19 that employers must do all they can reasonably be expected to do to find out if someone has a disability and is likely to need adjustments.

Burden of proof under Equality Act 2010

115. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision..

116. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

117. The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, states:

'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

118. In cases for failure to make reasonable adjustments for the claimant's disability, by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. The claimant must establish that the duty has arisen and there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. It is not enough to show there was a provision, criterion or practice which caused substantial disadvantage. There must be evidence of some apparently reasonable adjustment which could be made. That is not to say that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not. (Project Management Institute v Latif [2007] IRLR 579, EAT.)

Compensation for discrimination

119. Where a claimant succeeds in a claim for discrimination, the tribunal may make a declaration and make appropriate recommendations. It may also award compensation for financial loss arising from the discrimination including compensation for injury to feelings or personal injury as applicable. Finally, a tribunal may award interest.

120. A tribunal can make an award for injury to feelings. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, stress, depression etc and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. Nevertheless, employment tribunals have to do the best they can on the available material to make a sensible assessment.

121. The Court of Appeal in Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102 identified three broad bands of compensation for injury to feelings. There is within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. Compensation must relate to the level of injury to feelings experienced by the particular claimant. The current claim was presented on 1 March 2023. For claims presented on or after 6 April 2022, the Presidential guidelines set the Vento bands as follows: A lower band of £990 - £9,900 (less serious cases), a middle band of £9900 - £29,600 (cases that do not merit an award in the

upper band); and an upper band of £29,600 - £49,300 (the most serious cases, with the most exceptional cases capable of exceeding that).

122. It is for the respondent to show that the claimant acted unreasonably in failing to mitigate. The burden of proof is on the wrongdoer. A claimant does not have to prove that she has mitigated her loss. It is not some broad assessment on which the burden of proof is neutral. If evidence as to mitigation is not put before the tribunal by the wrongdoer, it has no obligation to find it. Providing the information is the task of the employer. What has to be proved is that the claimant acted unreasonably. She does not have to show what she did was reasonable. The tribunal should not apply too demanding a standard to the victim, after all, she is the victim of a wrong. (Cooper Contracting Limited v Lindsey UKEAT/0184/15.)

123. The rules on interest are set out in the Employment Protection (Continuity of Employment) Regs 1996. Under reg 2, a tribunal may award interest on its award and must consider whether to do so. Under reg 3, the rate of interest is that fixed by section 17 of the Judgments Act 1838. Since July 2013, that has been 8%. Under reg 6, interest on injury to feelings runs from the date of the act of discrimination to the calculation date. For financial loss, interest runs from the mid-point between the discrimination and the calculation date. Under reg 4, the mid-point means the day that falls half way between the act of discrimination and the calculation date.

124. On grossing up, the claimant believed that injury to feelings on discrimination prior to dismissal is not taxable and need not be grossed up, whereas injury to feelings arising on dismissal is taxable and subject to the amounts involved, needs to be grossed up.

Discrimination: relevant time-limits

125. The relevant time-limit is at section 123(1) Equality Act 2010. Under s123(1)(a), the tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. A series of different acts, especially where done by different people, does not (without some assertion of link or connection), constitute conduct extending over a period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the CA held that ‘an act extending over a period’ can comprise a ‘continuing state of affairs’ as opposed to a succession of isolated or unconnected acts.

126. Under s123(3), failure to do something is to be treated as occurring when the person in question decided on it. Under s123(4), in the absence of evidence to the contrary, a person is to be taken to decide on failure to do something when he or she does an act inconsistent with doing it, or If he or she does no inconsistent act, on the expiry of the period in which he or she might reasonably have been expected to do it. A failure to make reasonable adjustments is a failure to do something. For limitation purposes, the time-limit will start to be counted from when one of the circumstances in s123(4) is

satisfied. However, it is possible for there to be a continuing omission, in which case, time will continue to run (Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288, CA).

127. Under s123(1)(b), if the claim is presented outside the primary limitation period, ie the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable. This is essentially an exercise in assessing the balance of prejudice between the parties using the following principles:

- The burden of persuading the tribunal to exercise its discretion to extend time is on the claimant.

- The tribunal should take in to account anything which it considers relevant, including whether it is still possible to have a fair trial of the issues. A tribunal may also form and consider a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for respondents to be put to defending a late weak claim and less prejudicial for a claimant to be deprived of such a claim.

- It will also be relevant to take it into account if the claimant did not realise a discriminatory action or omission had occurred, eg because a decision had not been communicated to her, or because she had been lulled into a false sense of security by the respondent saying it was still considering whether to make a reasonable adjustment.

- The existence of other claims which were presented in time may be relevant. On the one hand, it will mean that the claimant is not entirely unable to assert her rights. But on the other hand, the very facts which the claimant may seek to rely on for the late claim may already have to be explored for the timeous claims.

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account. The factors set out at section 33(3) are:
  - the length and reasons for the delay
  - the extent to which the evidence of either party might be less cogent because of the delay
  - the respondent's conduct after the cause of action arose, including whether they responded to requests reasonably made by the claimant to ascertain information relevant to the potential claim
  - the duration of any relevant disability, ie something which deprived the claimant of the mental capacity required in law
  - the extent to which the claimant acted promptly once she knew the act or omission might be capable of giving rise to a claim
  - the steps taken by the claimant to receive relevant expert advice and the nature of the advice received.

Conclusions

128. We now set out our conclusions. We will take the issues in what we think is the clearest order.

Was the claimant disabled at all material times by reason of dyspnoea?

129. The claimant had dyspnoea at the material time, ie at the very least, from 7 October 2020 when it was diagnosed by her GP until 19 May 2023 when she was last seen by the Imperial College Health respiratory physiotherapy clinic. We have set out in our fact-findings why we believe this to be the case.

130. Dyspnoea was a physical impairment. It was a respiratory condition which amounted to shortness of breath and sometimes led to chest pains. The impairment was sufficiently obvious for her GP to refer her for X-Rays and for other tests and for Professor Onn Min Kon in May 2022 to refer her to a Consultant Cardiologist. The Professor referred to the claimant being breathless on relatively minimal exertion. At the respiratory clinic, the claimant was taught respiratory exercises to help manage her condition. The claimant was given an inhaler by her GP at one point and had to be told to use it regularly, not only on acute episodes.

131. The fact that the cause of the impairment was not and has not been diagnosed does not mean it was not an impairment.

132. Throughout the relevant period, the claimant's impairment had a substantial adverse effect on her ability to carry out day-to-day activities. For much of the time, she could not walk for more than 2 or 3 minutes without breathlessness. Even by May 2023, when she had improved, completing a 10 minute walk without stopping was only a goal. Walking is a normal day-to-day activity and inability to walk more than 10 minutes without breathlessness and needing to stop and rest is clearly a substantial adverse effect on the claimant's ability to carry out normal day-to-day activity. This alone satisfies this part of the definition of disability. However, the claimant also had difficulty completing housework, using stairs in her own house, and going out. Apart from when her nieces took her to medical appointments, the claimant was unable to go out and do shopping. These are all normal day-to-day activities.

133. The substantial adverse effect was long-term in that it lasted at least 12 months. From 11 December 2020, if not before, the claimant had 'poor exercise tolerance' according to her GP notes. Her breathlessness gradually increased. As at 14 March 2022, the claimant had to stop and sit down to catch her breath after walking only a few minutes. On 28 October 2022 the claimant's achievement appeared to be walking to the end of her road and back (3 minutes each way). By the time of her discharge from the respiratory clinic on 19 May 2023, walking 10 minutes without pauses to rest was still only a goal. We appreciate this last date is subsequent to the relevant period,

but all the evidence suggests that the claimant was on a slowly improving progression and there is no reason at all to think she would have been any less affected as at the date of the appeal hearing.

134. For these reasons, we find that at the material time, the claimant had the disability of dyspnoea.

Did the respondent have knowledge of the claimant's disability or should it reasonably have had knowledge of the claimant's disability?

135. It is not necessary for the claimant to have used the word 'disability'. The question is whether the respondent knew – or ought to have known – at the relevant times that the claimant had the ingredients of the definition of disability.

136. The respondent had known of the impairment since the GP note of October 2020. The GP had consistently issued fit notes stating 'dyspnoea' and the claimant had explained at the outset what it meant as Mr Phillips was unfamiliar with the term. On or before 9 February 2022, the claimant explained to Mr Phillips that she was unable to walk more than a few minutes. The difficulty with the 9 February 2022 meeting was that Mr Phillips was not interested. He objected to being told by a GP that the claimant could not return to work. The OH referral dated 23 February 2022 stated] that the claimant 'has been off sick since November with a respiratory condition'.

137. We find that the respondent knew or ought to have known that the claimant had the elements of a disability at the very latest by 14 March 2022 when HR received the OH report which set out the impairment of shortness of breath, the fact that it had worsened over 18 months, the fact that she was now unable to walk for more than about 2 minutes without getting out of breath and sitting down, and that she was unable to commute for these reasons.

138. We do feel that the OH report ought to have been obtained sooner. On 26 November 2021, Mr Phillips told the claimant he had asked for an OH report, but inexplicably the referral was not until late February 2022. This was not obtained until 14 March 2022. However, what we can say in terms of knowledge is that certainly on and after 14 March 2022, the respondent knew or ought to have known the claimant had a disability.

Failure to make reasonable adjustments

Did the respondent apply the following provision, criterion or practice: requiring employees to work on site in order to carry out their job role and duties?

139. The parties agree that the respondent applied this PCP.

Did that provision, criterion or practice place the claimant at a substantial disadvantage compared with people who did not have her disability, so that a duty to make reasonable adjustments arose?

140. The claimant was at a disadvantage because she was unable as a result of her disability to commute to and from work at this time. The GP had consistently advised this in the fit notes. The claimant's dyspnoea meant she was only able to walk a few minutes without getting breathless and having to stop and rest. As a result of her inability to come in to work, she was subjected to the ill-health capability management procedures and ultimately dismissed.

Would allowing the claimant to work from home, wholly or partly have alleviated this substantial disadvantage:?

141. Allowing the claimant to have worked from home would have alleviated the disadvantage because she would not have had to commute and she did not find it difficult to work in her own home, largely sitting down.

If so, would it have been reasonable of the respondent to make that adjustment?

142. By 14 March 2022 (at the latest), the respondent knew or ought to have known that the claimant had a disability and that as a result, she was unable to commute into work. The question is therefore whether the respondent ought then to have made the reasonable adjustment of allowing her partly or fully to work from home.

143. We find that from 14 March 2022, the respondent failed to make the reasonable adjustment of allowing the claimant to do her job from home. The claimant had been working from home since the students had returned in March 2021 without any complaints through the summer term. The claimant was arbitrarily put onto sick leave in November 2021 apparently as part of the general efforts to bring everyone back to work as opposed to a response to any specific problems which had arisen with her working from home. This forced the claimant to stop working altogether at a time when she was able to carry out work from home. Indeed for the next 6 months, the claimant would be entitled to full sick pay for not working, when she could have been working. The claimant was not replaced while off and existing Executive Assistants were apparently covering her work anyway. Rather than make her stay off work, it would make more sense to allow her to work and if any tasks did need carrying out only on site, then her colleagues could have helped. This could have been subject to review after three months regarding the claimant's health and whether there were significant work difficulties.

Discrimination arising from disability – s15 Equality Act 2010

Did the claimant's inability to commute to the respondent's premises constitute 'something arising in consequence' of her disability?

144. Yes it did. She could not commute because of her breathlessness, her need frequently to rest, and occasional chest pain arising from her disability of dyspnoea.

Did the respondent subject the claimant to unfavourable treatment by dismissing her?

145. Dismissal is clearly unfavourable treatment.

Did the respondent subject the claimant to unfavourable treatment subjecting her to a sickness absence procedure?

146. The respondent argues that subjecting the claimant to a sickness absence procedure was not unfavourable treatment because it is a procedure for discussing sickness absence and accommodation.

147. Potentially, we would say that subjecting an employee to a sickness absence procedure is not necessarily unfavourable treatment. It could be neutral and even beneficial. The procedure can be a mechanism for offering support and exploring adjustments. However, in this case, subjecting the claimant to the sickness absence procedure was unfavourable treatment. She was rapidly escalated from Level 1 to Level 3 which caused her stress and led to her dismissal.

Was the unfavourable treatment because of something arising in consequence of the claimant's disability?

148. The treatment was because of something arising in consequence of the claimant's disability, ie the fact that she could not work 100% on site because of her difficulty commuting.

Can the respondent show the treatment was a proportionate means of achieving a legitimate aim?

149. The respondent's aim was to enable the role to be adequately performed. Otherwise there would be a significant impact on others in the department and daily operational issues.

150. Having the role adequately performed so as to avoid daily operational issues and avoid significant impact on others in the department is a legitimate aim. The question is whether the treatment was a proportionate means of achieving that aim.

(i) Dismissal

151. In terms of whether dismissal was a proportionate means, the impact on the claimant was severe. She lost her job. She had always worked. Prior to these events, she had had only 5 days off sick while working for the respondent. She prided herself on her work. The dismissal damaged her confidence at a time when she was vulnerable because of her health issues.

152. Regarding the respondent's reasonable needs, the respondent did not satisfy us that there would be dally operational issues and/or significant impact on others if the role was not performed 100% on site. The claimant

had performed her role from home since March 2020 and it is accepted there were no complaints or apparent issues. There would have been less work through the period of lockdowns but from March 2021, students were back. If there were daily operational issues arising from the claimant not being on site, we would have expected to see some mention in emails or more concrete examples given to us.

153. We have looked carefully at the job description as annotated by Mr Phillips and by the claimant. This is difficult for us to judge because the evidence from the respondent around the duties was limited. The main example put repeatedly by the respondent through the tribunal hearing was that the claimant needed to be present to sit in the front office to stop students and staff directly approaching and disturbing Mr Phillips. However, the claimant says – and we accept - that students never did just drop in to find Mr Phillips. He was far too senior. If they had complaints, they would go to their tutor or Head of School. We find that completely credible, and we were given no examples of any student actually just dropping in. Regarding staff approaches, the claimant said this was done by appointment. Again, we find that completely credible.

154. As regards the other listed duties, the respondent did not convince us that the majority could not be done remotely. Many of the tasks would be done by email or telephone wherever the claimant was sitting, for example booking travel and accommodation, chasing up invoices and dealing with external complaints, monitoring emails, purchasing training, creating and sending out rotas, typing up template letters in regard to disciplinaries, handling telephone enquiries, purchasing items for events, collating information for research reports. We can see there are a few tasks which might require personal attendance, for example taking minutes at meetings if held in person (although many meetings were held on Teams and the claimant was only responsible for some minute taking) or attending major events such as Student Award Ceremonies or Professional Development Days which occurred on average 1/term. The problem is that none of this was spelt out for us by the respondent witnesses. Mr Hertz, Ms Marshall, Mr Phillips did not give evidence. Mr Scott drifted into generalities and it appeared that he did not have a detailed understanding of the claimant's duties.

155. The respondent was focused on its general strategy of getting everyone back into work following Covid. It did not consider the claimant's additional needs or its obligations to her as a disabled person. The respondent was wedded to the idea that it must be all or nothing – the claimant had to come back to work on site 5 days/week, because everyone else had to, and she had to give a fixed date when she could do so. Mr Scott simply accepted Ms Marshall's wish to have the claimant 100% back on site. He did not go through the annotated job description and discuss with Ms Marshall or with the claimant whether and how each task could be done without the claimant coming in. He did not look at whether the claimant could have done some tasks off site and other Executive Assistants could have covered essential on site tasks for her, perhaps on a reciprocal basis with her doing some of their tasks. He did not consider whether it would help if the claimant came in even

once/week. Nor did the respondent try out some such arrangement on a temporary basis, given that the claimant had said she wanted and intended to return to work fully on site when she could. Instead, the respondent rushed through the dismissal process, deciding that a Level 3 hearing should be held at the same time as giving the Level 1 outcome, and skipping Level 2. We do not think the skipping of a stage sits easily with the circumstances envisaged by the Policy regarding when it would be appropriate to do so. When the claimant could not give a return date, Mr Scott did not consider setting one himself, for example in 3 months' time.

156. Mr Scott did not explore the significance of the 'good news' which the claimant had just received or consider waiting for what was said by the Consultant in the appointment at the end of the month. He did not ask the claimant whether she would agree to an updated OH report. We accept that the claimant had not answered the 3 emails requesting an OH report, but she had not actually refused, and this would have been an easy opportunity to ask her.

157. Mr Scott did not discuss or look into what the claimant had actually been doing from home from March – August 2021 and at the start of November 2021, to try to identify whether that had not worked or whether there were gaps from an operational viewpoint.

158. Nor did the respondent explain to the tribunal the practical impact of forcing the claimant onto sick leave in November 2021. Apparently the claimant was not replaced at that point. Mr Scott suggested that Ms Marshall used some of the other Executive Assistants to do her work. We were given no further detail of that or whether it caused problems at that point. We were given no evidence whatsoever of the pressures on the respondent of waiting any longer for the claimant to return on site.

159. At the appeal hearing, the claimant said she could come in for 1 or 2 days/week. Mr Hintz did not explore how that might work. He also did not do any kind of analysis of the tasks.

160. Neither Mr Scott nor Mr Hintz appears to have taken on board the significance of the 'good news' that there was no heart issue. This was likely to affect the claimant's prognosis. This was not a situation where the claimant was refusing to come back on a permanent basis after Covid.

161. Overall, we feel the respondent was at the time and certainly in the tribunal tending to rely on generalisations rather than producing much evidence to support its assertions.

162. The respondent therefore did not prove that the treatment was a proportionate means of achieving a legitimate aim and the claim is upheld.

(ii) Subjecting the claimant to a sickness absence procedure

163. It was not justifiable to subject the claimant sickness absence procedure because the respondent should first have tried out the reasonable adjustment of allowing the claimant to continue working from home.

164. Quite apart from that, it was not justifiable to decide to go to Level 3 immediately on the outcome of Level 1 and to jump Level 2. The Policy generally envisage the setting of further review dates and this never happened. Mr Scott did not even wait for what the claimant's Consultant was going to say at the end of the month.

165. The respondent therefore did not prove that the treatment was a proportionate means of achieving a legitimate aim and the claim is upheld.

Unfair dismissal

166. The reason for dismissal was capability, ie that the claimant was unable to work full-time on site.

167. This was a substantial reason of a kind which could justify dismissal. The question is whether it in fact did so, applying the band of reasonable responses.

Did the respondent follow a fair and proper procedure prior to taking the decision to dismiss?

168. The respondent did follow fair procedures in relation to the dismissal process itself. The invitation to the Level 3 meeting advised the claimant what would be discussed and that dismissal was a possible outcome. The claimant was told that she had the right to be accompanied. The claimant was in fact accompanied by her trade union representative to the meeting. She was allowed to make her points at a hearing. She was given the right of appeal. An appeal meeting was held where she was again represented. She was given an outcome.

Was the dismissal reasonable in all the circumstances (within the band of reasonable responses)?

169. We find that the dismissal was unfair. No reasonable employer would have dismissed the claimant at that point. The respondent knew she had been carrying out her duties without complaint from home, even after students returned in March 2021, until she went onto bereavement leave in September 2021. She was required to go onto sick leave when she could still have been doing some or all her duties from home. There was no analysis as to whether that arrangement could continue. This was in the context that the claimant had only been sick for 5 days prior to the pandemic and was not now saying she would need to work permanently from home. She said her aim was gradually to return. Her cardiac health had been cleared. A reasonable employer would also have taken into account that at the time of dismissal, she was about to see a Consultant at the end of the month and would have waited for that, as she had told the respondent it was good news. A

reasonable employer would have asked the claimant for an updated OH report at the Level 3 hearing or, when she said she was improving and could come in 1 or 2 days/week at the appeal hearing, notwithstanding that she had failed to respond to the 3 emails asking for a report. At the appeal, she confirmed she could attend site for 1 or 2 days/week. The respondent gave no thought to whether this could work. The respondent took a rigid all or nothing approach and was concerned only with when the claimant could return to work on site 5 days/week like everyone else and whether she could give a firm date for that. A reasonable employer would not have taken that approach.

Unlawful deductions from wages (s13, 243 and 24 ERA 1996)

Was the claimant incorrectly placed on sick leave and should she therefore have received full pay throughout the period she was placed on sick leave? Alternatively, if she was correctly placed on sick leave, was she entitled to her full pay throughout her sick leave?

170. The claimant was placed on sick leave because she was unable to come into work on site as her contract required.

171. The claimant was not entitled to her full contractual pay while not working because on sick leave. We answer these as purely contractual questions, separate from our conclusions on disability discrimination.

In the light of the above, did the deduction of £10,184.39 from the claimant's final pay received on 28 October 2022 for alleged overpayment of sick pay represent an unlawful deduction from wages?

172. We find that paying the claimant full pay from mid April until September 2022 was an administrative error as stated by Mr Narayan. The claimant had been put down to half pay from March 2022 because she had exhausted her contractual 6 months' full sick pay. The claimant argues that we should infer restoring her to full pay in April 2022 was an intentional decision by the respondent because she had raised the matter in her grievance. We appreciate there is a coincidence of timing, in that the claimant presented her grievance on 20 April 2022, which is broadly when her full pay was restored. However, if it was part resolution of the grievance, we would have expected to see an email to that effect from the respondent or for it to have been mentioned in the grievance outcome letter. We would also have expected the claimant to have been reimbursed for the deductions made in March and April.

173. We would also not understand on what basis the respondent would have made such a concession, since it would have implied before the grievance was heard that the respondent accepted the claimant should have been allowed to work from home. Alternatively, if the agreement was only for the neutral position for the duration of the grievance, why would it not have extended until the end of the grievance appeal process and, again, why would that not have been put in writing?

174. The deduction made from the claimant's final pay slip was therefore in respect of an accidental overpayment of wages. Such a deduction was permitted by the claimant's contract and by the legislation.

175. This is subject to one point. We have not seen any calculations to say that the sum of £8,296.81 was a correct calculation of the difference between half pay and full pay for the appropriate period and allowing for the March and part April deductions that had already been made. We do not know where £10,184.39 comes from. It was not argued before us in submissions that the calculation was wrong and we were not shown itemised evidence to that effect.

176. The claim for unauthorised deductions from wages is therefore not upheld.

Time-limits: reasonable adjustment claim

177. After we gave our decision on liability, Mr Ahmed drew to out attention that the claim for failure to make reasonable adjustments is potentially out of time, given that we said the duty arose on 14 March 2022, when the respondent was sent the OH report and had the requisite knowledge. There would then be the question as to when the respondent omitted to make the adjustment.

178. In the absence of an outright refusal, a person is taken to have decided not to do something when he or she does an act inconsistent with doing it. The letter with the Level 1 outcome dated 20 May 2022 stated that 'it is not feasible for your role to be completed in its entirety from home'. It also stated 'there is currently no end date when you can return to working on site. This is not a sustainable position for the College and we therefore need to escalate to stage 3 to consider your employment at the College'.

179. We would say that the letter dated 20 May 2022 constituted an actual decision not to make the reasonable adjustment of allowing the claimant to work from home. Alternatively it was an act inconsistent with allowing that adjustment. We do not accept the claimant's argument that it was subject to Level 3. The reference to Level 3 was to consider whether the claimant should be dismissed as a result. As we went on to see, the respondent's focus was on when the claimant was likely to be able to return to work 100% on site. We do not accept Mr Clarke's contention that the first inconsistent act was dismissal.

180. The claimant therefore had until 19 August 2022 to notify ACAS under the early conciliation procedure. She did not do this within that period. She therefore does not benefit from any extension of time for conciliation. The claim form was presented on 1 March 2023, six and a half months' late.

181. As regards whether we exercise our just and equitable discretion to allow in the claim late, there are a number of considerations. The claimant was physically and mentally unwell at the time and was focusing on keeping her

job. We can see why she may not have felt capable of starting a tribunal claim. However, that is not what she told us in the tribunal was the reason. She said the reason was that ACAS had told her that she had to wait until she was dismissed and nothing had been decided yet. She said she was also taking the advice of her union.

182. We can see why the claimant may have thought she ought to wait and see what happened. She was going through a sickness absence process. She was maintaining hope right up to the rejection of her appeal that she would be able to keep her job. ACAS may have given her wrong advice or she may have misunderstood the advice. We can appreciate that in a context where the claimant was continually having discussions about whether she could work at home, both before and after the 'knowledge' date, why she did not fasten on a particular point in time when it struck her that there was a refusal and tribunal action needed taking. We can see why that also might not have been obvious to ACAS or the union representatives.

183. Looking at what was happening around this time, the claimant submitted her grievance on 20 April 2022. The Level 1 sickness absence review meeting was held on 22 April 2022 and the outcome letter on 20 May 2022, which informed the claimant that there would now be a Level 3 hearing. Professor Onn Min Kon referred the claimant to a cardiologist on 11 May 2022. On 26 September 2022 was the grievance outcome. On 30 September 2022, the claimant was invited to the Level 3 meeting. Then on 20 October 2022 the claimant was dismissed. The claimant notified ACAS under early conciliation on 28 November 2022 and the certificate was issued on 9 January 2023. Meanwhile the grievance appeal was heard on 1 December 2022 and the outcome provided on 14 December 2022. The claimant's appeal against dismissal was heard on 6 February 2023 with an appeal outcome on 15 February 2023. The clam form was presented on 1 March 2023. A lot was going on in a compressed period

184. We have also considered whether there was any prejudice to the respondent caused by the delay in bringing the reasonable adjustment claim out of time. Mr Ahmed argued that the prejudice to the respondent was that the claim was stale. We do not think that this was the case or that the respondent was prejudiced by that. The substantial claim concerning the discriminatory dismissal was in time and would have been brought anyway. Whether or not the claimant should have been allowed to work from home was the central issue in that dismissal claim. There was a continuing factual context from March 2020, then March 2021, November 2021, 9 February 2022 up to 14 March 2022, the Levels 1 and 3, right up to the dismissal, the issue of the ACAS certificate, and the appeal outcome. The same issues would have to be explored whether or not there was a separate reasonable adjustment claim as such. There was no period when these issues went to sleep.

185. Mr Ahmed's other argument was that claim for unauthorised deductions is now framed as a loss of earnings claim arising from reasonable adjustments. We do not see the force of that point. The fact that the claimant might be able

to recoup some or all of the alleged deductions by way of compensation for failure to make reasonable adjustments is beside the point. The respondent knew from the ET1 that there was a claim for reasonable adjustments and what it was. It was able to do its own estimate of what the value of that claim might be.

186. As regards prejudice to the claimant, the claimant did still have her other dismissal claims. She also had the unauthorised deductions claim, but that was not about discrimination. Were we not to allow the reasonable adjustment claim, she would be deprived of potential compensation for the way she was treated prior to her dismissal. She felt strongly about the fact that she had been forced to go on sick leave and acquire a long sick record when she was in fact able to work from home.

187. Weighing up all the factors and particularly that the reasonable adjustments claim was part of the same factual matrix and central story, with no real prejudice to the respondent, we exercise our just and equitable discretion to allow in the claim.

Remedy

188. The claimant did not seek any recommendations for the discrimination.

Unfair dismissal

189. The parties agreed the claimant's gross weekly pay was £634.62 and net weekly pay was £482.30 and that these figures should be used for the calculation of compensation.

190. The claimant was employed for 5 whole years and was aged 49 at the termination date of 20 October 2022. The basic award for unfair dismissal is subjected to a statutory cap on the weekly gross pay. For dismissals in the year starting 6 April 2022, the cap was £571/week. The basic award is therefore **£4282.50**, calculated as 5 x 1.5 x £571.

191. For loss of statutory rights, we award **£500**.

192. Our award for loss of earnings arising from dismissal is made in respect of the section 15 discrimination claim. We cannot award such a sum twice, so we do not make any award for that as part of the unfair dismissal claim.

Discrimination

193. The claimant did not seek any recommendations for the discrimination.

The failure to make reasonable adjustments

194. As a result of not being allowed to work from home from 14 March 2022 (and indeed since November 2021), the claimant exhausted her contractual

sick pay and was put on half pay from March 2022. Although she was paid in full from mid April until her dismissal, that was later clawed back. Had she been allowed to work from home from 14 March 2022, she would not have been put on half pay.

195. We found that the respondent should have allowed the claimant to continue to work from home from 14 March 2022 by way of reasonable adjustment. We said this could have been subject to a review of the claimant's health and how the duties were working out after 3 months. We have asked ourselves whether we can say there is a percentage chance that after the 3 months, that adjustment would no longer have been reasonable. We have decided that we do not have sufficient evidential basis to say that. We know that the claimant's health was not worsening. Regarding whether the duties could have worked out, the whole point is that the respondent did not provide us with sufficient evidence that they could not be done, perhaps with some reasonable adjustments. We know that the claimant had been doing her job after the students returned with no complaints from March 2021. We know that when she was forced to go on leave, she was not replaced and other Executive Assistants were covering her. This suggested to us that other Executive Assistants could feasibly have covered what would have been a far smaller proportion of her job, ie any elements which she could not do from home. We therefore consider on the evidence we have that this would have been a reasonable adjustment for the period up to the termination date.

196. In terms of calculation, the period is 14 March 2022 – 20 October 2022.

For March 2022, £1348.27 gross was deducted. As a broad calculation, as the period started 14 March 2022, half of that should not have been deducted, ie £674.13 gross.

In April 2022, £185.76 gross was deducted wrongly.

From 1 May - 20 Oct 2022, we have no payslips, but we know that the respondent recouped on the basis of a 50% half pay calculation. The period was 24 weeks 5 days, which we round up to 25 full weeks. Applying the gross weekly pay, 25 x 634.62 = £7932.75. £7932.75 + 674.13 + 185.76 = **£8792.64 GROSS**

If 482.30 is 76% of 634.62, apply 76% to 8792.64 to get net figure ie **£6682.41 NET**

Loss of earnings arising from dismissal

197. The first issue concerns mitigation. The claimant's schedule of loss sets out the dates of temporary and permanent employment, the net weekly loss and deductions for ESA and pay in lieu of notice. The claimant obtained temporary work in September 2023 and a permanent job with no further losses from 1 January 2024. She claims 62 weeks' loss of earnings

altogether. The respondent says that she did not adequately mitigate her loss and should only be awarded 6 months' loss of earnings.

198. The claimant did not start looking for a job before her appeal outcome on 15 February 2023 because she really wanted her job back and assumed that she would be successful. Then after her appeal failed, she waited a few more months before starting to look. She did not feel confident when she started looking because she did not yet feel 100%. Finally she was able to get temp positions from September 2023 which gave her flexibility and a permanent job from 1 January 2024 with no further loss of earnings.

199. The claimant had physical and mental health problems. It would be far harder for her to find a new job than to have held onto her current job. She was not young. She was aged 49 at the termination date. At the time of dismissal and appeal, she was initially not able to work away from home more than 1 or 2 days/week. She still had mobility issues as at May 2023 according to the clinic discharge letter.

200. The entirety of evidence in this case indicates this is not a person who does not like to work or who is a malingerer. She had a very good attendance record. She felt humiliated by her dismissal and lost confidence. She had the physical and mental health difficulties we have mentioned. The respondent has not satisfied us that the claimant acted unreasonably in failing to look for alternative employment immediately and in failing to secure temporary work prior to September 2023 or a permanent job prior to 1 January 2024.

201. Loss of earnings, for 62 weeks net is £15,121.84, agreed as a figure in the schedule of loss (having deducted pay in lieu of notice and Employment Support Allowance).

202. The figure for pension loss for the same period is agreed at £1979.54 in schedule of loss.

203. Total past financial loss = **£17,101.38** (£15,121.84 + £1,979.54).

<u>Polkey / Chagger</u>

204. The respondent argues that there was a 25% chance that the claimant's employment would have been fairly terminated 3 – 4 months after dismissal. We disagree.

205. She was dismissed on 20 October 2022. The respondent is therefore suggesting there is a 25% chance that the claimant would have been fairly dismissed and without discrimination by 20 February 2023.

206. The appeal took place on 6 February 2023. By that time, the claimant could come in 1 – 2 days/week. As we have said, the claimant was not someone with a record of poor attendance or bad attitude. The claimant loved her job. Her health was on an upward trajectory. She had no objection in principle to returning to work. Her anxieties regarding her heart condition had

been addressed and she had been given exercises to gradually build up her breathing and mobility.

207. The time taken for the claimant to feel able to apply for a new job and then to get a new job following dismissal is not a reliable guide because it is far harder to get a new job than keep a job as we have already said.

208. We cannot see any basis for the suggestion that the claimant would have been fairly dismissed in a few months following her actual dismissal. We also come back to the fact that we never had any adequate evidence from the respondent as to why she could not do all or at least part of her job from home. It would be entire speculation to make any Polkey deduction.

Injury to feelings

209. By March 2022, the claimant had become anxious and depressed because of a number of factors in her life. She had had to cope with the effect of her dyspnoea since at least October 2020, which meant that she was unable to go out and shop, socialise, exercise or get into work. Her whole lifestyle had changed. This was compounded by her fear that this may be related to an issue with her heart, given her family's history of serious heart conditions. It was not until immediately before her dismissal that she was given the reassuring news that she did not have a heart condition. The claimant had also found Covid an extremely difficult time, and she lost her father in August 2021.

210. We do not make an award for the injury to feelings understandably caused by all these factors. Nor do we make any award for the claimant's stress and feeling that she was subjected to 'silent bullying' by Mr Phillips' ignoring her emails and not attending 1 to 1s or interacting properly with her. We only make an award for the injury to feelings caused by the actions which we have found to be unlawful discrimination.

211. Having said that, the other stresses on the claimant's physical and mental health are not irrelevant in that they made the discrimination even harder for her to cope with: work was another area of daily activity which was taken away from her and she lost it as a distraction to take her mind off all her other concerns. Both the failure to make the reasonable adjustment, thus meaning she was no longer allowed to work from home, and then her dismissal, deprived her of work. The claimant also had the stresses of being put through the sickness absence procedure and fighting for her job

212. In relation to the discriminatory acts prior to her dismissal, the claimant had the stress and upset of not being allowed to work from home, and acquiring a long sick record when her attendance had been good. She had taken a pride in the quality of her work including her attendance record, and she was made to feel this was not valued. She lost the distractions of work, as we have said. There were the stresses of the processes. There was the frustration that no one was listening to her. There was the feeling that she was not getting supported. The claimant was exhausted by having to argue

for her job and why she could do it from home. She could not understand why she received an absolute 'no' with no attempt to compromise. She was frustrated that she was suddenly told she could not continue to work from home when she felt she had been doing it with no difficulties.

213. In relation to her dismissal, there were all those same feelings plus the humiliation of having been dismissed from a job. She felt she was 'kicked into the kerb' without support. She felt she had not been given dignity because the value of what she had done from home is not acknowledged. Ends up being dismissed. She suffered a loss of confidence. She now finds it harder to be decisive in carrying out her work duties, whereas she used to pride herself on that.

214. To avoid double-counting, we will make a single award for the entirety of the claimant's injury to feelings caused by the unlawful actions. We consider that the middle of the middle band of Vento is appropriate. The claimant lost a job. She had a long period of stress prior to that. On the other hand, this is not a case involving, for example, a long campaign of deliberate harassment. Nevertheless, the respondent's actions and inflexibility were serious and hurtful.

215. We make a total award of £20,000 for injury to feelings. We apportion this as £8000 for pre dismissal discrimination and £12,000 for the dismissal.

Interest on injury to feelings

216. Interest on injury to feelings runs at 8% from the discrimination until the calculation date 10.4.25.

217. Interest on the pre dismissal injury to feelings is calculated from, say, 21 March 2022 when the claimant was invited to a Level 1 hearing.

21 March 2022 – 10 April 2025 – 1117 days.

£8000 x 8% = £640. Divide 365 x 1117 = **£1958.57**

218. Interest on the injury to feelings arising on dismissal is
20 Oct 2022- 10 April 2025 – 904 days.

12,000 x 8% = £960. Divide 365 x 904 = **£2377.64**

Interest on past financial loss

219. For financial loss, 8% interest runs from the mid-point between the discrimination and the calculation date.

Loss of earnings since dismissal - £15,121.84 + Loss of pension - £1979.54 = £17,101.38

20 Oct 2022 (dismissal) - 10 April 2025 – 904 days. Midway point is 452 days

£17,101.38 x 8% divide 365 x 452 = **£1,694.21**

Loss of earnings prior to dismissal (failure to make reasonable adjustment) = £6682.41

14 March 2022 (date reasonable adjustment should have been made) – 10 April 2025 – 1124 days. Midway point is 562 days

£6682.41 x 8% divide 365 x 562 = Interest on failure to make reasonable adjustments = **£823.13**

Grossing up

Totals:
Basic award - £4,282.50
Loss statutory rights - £500
Financial loss pre dismissal (reasonable adjustments) - £6,682.41
Interest on financial loss pre dismissal - £823.13
Financial loss on dismissal £15,121.84 and £1,979.54 pension loss
Interest on financial loss since dismissal £1,694.21
Injury to feelings on dismissal - £12,000
Interest on injury to feelings on dismissal - £2,377.64

Sub-total (taxable after £30,000) = £45,461.27

Injury to feelings pre dismissal - £8,000
Interest on injury to feelings pre dismissal - £1,958.57
Sub-total not taxable - £9,958.57

220. Our total award will be grossed up to allow for the likely tax which the claimant will have to pay on the award, so that she receives in her hand what we intend her to receive. We have taken it that the award for injury to feelings for discrimination prior to dismissal will not be taxed. The parties made no submissions on how grossing-up should be calculated, so we have done it as follows with the parties.

Total taxable award = £45,461.27 less £30,000 tax free = £15,461.27. This is the sum which must be grossed up.

The award will be paid in tax year starting 1 April 2025. In that year, the basic rate is 20% up to and including £50,270. Then the higher 40% rate applies. There is an additional rate of 45% on sums over £125,140. There is a personal allowance of £12,570.

The claimant says she earns £42,000 gross = £57,461.27 income. Less £50,270 = This would mean £7191.27 of her award will be subject to 40% tax. The claimant emailed her new contract showing she is earning £42,000. The respondent accepted that 40% tax would be payable on the £7191.27.

£7191.27 would be 40%
(15,461.27 – 7191.27) = 8,270 will be 20%

£8270 divided by 0.8 = £10,337.50
£7191.27divided by 0.6 = £11,985.45
Sub-total grossed up elements = £22,322.95

Add back the £30,000 tax free element = £52,322.95

Add back the award for pre dismissal injury to feelings = £9,958.57

Total award = **£62,281.52**

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Employment Judge Lewis

Dated: …24 April 2025……..

Judgment and Reasons sent to the parties on:

30 April 2025
…….....

…….....
For the Tribunal Office