Case Number: 2300230/2023

EMPLOYMENT TRIBUNALS

Claimant: Ms. C Pinto

Respondent: City & Essex Limited

Heard at: London South (by video)

On: 7, 8, 9, 10 and 11 April 2025

Before: Employment Judge Cawthray
Ms. Leverton
Ms. Mitchell

Representation
Claimant: Ms. Dalmau, Trade Union Representative
Interpreter for Claimant: Ms. Whitfield
Respondent: Ms. Nicol, Solicitor

JUDGMENT having been delivered orally on 11 April 2025 sent to the parties on 16 April 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Background, evidence and procedure

1. The Claimant presented her claim to the Tribunal on 13 January 2023 following ACAS early conciliation taking place between 2 November and 14 December 2022.

2. A case management preliminary hearing took place on 31 October 2023 in front of Employment Judge Rice-Birchall at which the issues were discussed and a preliminary hearing took place on 22 May 2024 in front of Employment Judge Evans.

3. At the start of the hearing the Employment Judge discussed the issues with the parties and read the list of issues that had been provided. Ms.

Dalmau confirmed that some allegations were withdrawn, as indicated in the issues below. The parties confirmed the list of issues included all the issues in the claim. During the hearing the parties were reminded that the Tribunal would only be determining the issues as set out below.

4. The Employment Judge discussed timetabling with the parties, and explained it was necessary to ensure the timetable was carefully managed.

5. The Employment Judge explained that all the pages in the bundle would not be read, and the parties must direct the Tribunal to the documents they say must be read. At the start of the hearing the parties listed the key reading they wished the Tribunal to undertake.

6. The Claimant's son assisted the Claimant in locating page numbers in the paper bundle. Ms. Whitfield interpreted for the Claimant whilst she was giving evidence but Ms. Dalmau confirmed that the interpreter's services were not required for any other part of the hearing. No specific adjustments, other than regular breaks, were required.

7. The parties had provided an agreed bundle of 446 pages. The Claimant provided a witness statement for herself and also called Mr. Yakub as a witness. The Respondent provided witness statements for Michelle Stanford, Bruce Herbst and James Hookway. All the witnesses swore on a holy book or affirmed and were cross examined and asked questions by the Tribunal as appropriate.

8. Both parties made closing oral submissions, and in addition Ms. Dalmau provided written submissions.

Issues

The Issues use the same numbering for ease of reference.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the unfair dismissal complaint] made within the time limit in the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of?

1.3.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.2 Was the dismissal for a potentially fair reason under section 98(2) Employment Rights Act 1996?

2.3 Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant?

2.4 The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

2.5 If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

2.5.1 there were reasonable grounds for that belief;
2.5.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
2.5.3 the respondent otherwise acted in a procedurally fair manner;
2.5.4 dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal

3.1 Does the claimant wish to be reinstated to their previous employment?

3.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the claimant?
3.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.6.3 If not, for what period of loss should the claimant be compensated?
3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.6.5 If so, should the claimant's compensation be reduced? By how much?
3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.6.7 Did the respondent or the claimant unreasonably fail to comply with it?
3.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
3.6.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
3.6.11 Does the statutory cap apply?

3.7 What basic award is payable to the claimant, if any?

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Wrongful dismissal / Notice pay

4.1 What was the claimant's notice period?

4.2 Was the claimant paid for that notice period?

4.3 If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

~~**Disability**~~
~~5.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:~~
~~5.1.1 Did they have a physical or mental impairment: osteoarthritis?~~
~~5.1.2 Did it have a substantial adverse effect on their ability to carry out day-to-day activities?~~
~~5.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?~~

~~5.1.4 Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?~~
~~5.1.5 Were the effects of the impairment long-term? The Tribunal will decide:~~
~~5.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?~~
~~5.1.5.2 if not, were they likely to recur?~~

Discrimination arising from disability (Equality Act 2010 section 15)

6.1 Did the respondent treat the claimant unfavourably by:

At the start of the hearing Ms. Dalmau said the Claimant was withdrawing the alleged unfavourable treatment at 6.1.1, 6.1.1.1, 6.1.1.2, 6.1.1.3 and 6.1.2.

~~6.1.1 The claimant was never invited to a meeting to discuss her disability with Ms. Stanford, despite:~~
~~6.1.1.1 The claimant making repeated requests to Ms. Stanford from August 2021 until her dismissal a year later in August 2022;~~
~~6.1.1.2 Ms. Stanford first agreeing to organise a meeting in August 2021; and~~
~~6.1.1.3 Mr. Edwards finding after the Claimant's grievance hearing on 22 June 2022 that Ms. Stanford should arrange a meeting.~~
~~6.1.2 The claimant remained on toilet duties until her dismissal, despite making repeated requests to return to kitchen duties; and despite the Respondent being aware of the impact that her disability had on her ability to perform this task;~~

6.1.3 The claimant was required to use annual leave to attend medical appointments concerning her disability, and was required to miss or reschedule some of these appointments when her annual leave requests were turned down by Ms. Stanford or her daughter, Melissa Stanford, with insufficient explanation.

6.1.4 The claimant was ultimately dismissed for raising issues about her disability with the respondent and making requests for reasonable adjustments. The respondent has used the claimant's interaction with Ms. Viner as an excuse to dismiss the claimant because of her disability.

6.2 Did the following things arise in consequence of the claimant's disability: the claimant's inability to carry out all aspects of her substantive role.

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

6.4 Was the treatment a proportionate means of achieving a legitimate aim?
The Respondent says that the legitimate aim in relation to 6.1.3 is to ensure work is completed appropriately in order to service the client

The Respondent says that the legitimate aim in relation to 6.1.4 is to protect the reputation and contract with the client.

6.5 The Tribunal will decide in particular:
6.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
6.5.2 could something less discriminatory have been done instead;
6.5.3 how should the needs of the claimant and the respondent be balanced?

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

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

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

7.2 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

7.2.1 Designating employees duties without taking into account their health condition, length of service or any other relevant factors.

7.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that she was designated a specific task which she was unable to perform without difficulty or without further exacerbating her condition?

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

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

7.5.1 Taking the claimant off toilet duties and returning her to table and kitchen duties;
7.5.2 Considering alternative duties which would be more suitable for the claimant given her disability; and
7.5.3 Considering other ways in which the claimant could be batter facilitated in carrying out her designated duties with her disability.

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

7.7 Did the respondent fail to take those steps?

8. Victimisation (Equality Act 2010 section 27)

8.1 Did the claimant do a protected act as follows:

8.1.1 On 14 June 2022, the claimant raised a formal grievance against Michele Stanford and Melissa Stanford for bullying and trying to force the claimant out of work by refusing and/or ignoring her requests for reasonable adjustments. The claimant asked to return to kitchen duties because her disability made cleaning toilets especially difficult as it involved bending down. Although the claimant did not use the express language of ‘reasonable adjustments’ or ‘disability’, her requests were for reasonable adjustments as a result of her disability;
8.1.2 On 14 June 2022, the claimant had a brief conversation with Ms. Viner in which she explained that she had osteoarthritis which made cleaning the toilets difficult, but that she was using the proper channels to resolve the issue;

8.1.3 On 22 June 2022, the claimant attended a grievance meeting in Holborn at which she explained that Michele Stanford and Melissa Stanford had become increasingly hostile towards her since she discussed her health condition and

had refused and/or ignored her requests to return to kitchen duties because of her disability.

8.2 Did the respondent do the following things:

8.2.1 On 16 June 2022, the claimant was suspended by Michele Stanford two days after the claimant had brought a grievance against her and Melissa Stanford.

8.2.2 On 4 August 2022, Michele Stanford chaired the claimant's disciplinary hearing and did not conduct the hearing in a manner that gave the claimant a reasonable opportunity to present her case. The respondent failed:

8.2.2.1 To properly investigate by not obtaining a statement from Ms. Viner; and/or
8.2.2.2 To provide evidence where it states that approaching and discussing matters with clients is against company policy and deemed gross misconduct, or evidence that the claimant had been made aware of this policy.

8.2.3 On 8 August 2022, the claimant was dismissed for gross misconduct. The respondent did not consider an alternative sanction despite the claimant's length of service and clean disciplinary record.

8.3 By doing so, did it subject the claimant to detriment?

8.4 If so, was it because the claimant did a protected act?

8.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

9. Remedy for discrimination or victimisation

9.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

9.2 What financial losses has the discrimination caused the claimant?

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

9.4 If not, for what period of loss should the claimant be compensated?

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

9.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
9.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

9.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.9 Did the respondent or the claimant unreasonably fail to comply with it?

9.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

9.11 By what proportion, up to 25%?

Findings of fact

9. The Tribunal made findings of fact, on the balance of probabilities, based on the evidence presented and as necessary to determine the issues in the claim.

Background to claim

10. On 5 October 2022 the Claimant's first ACAS Early Conciliation certificate was issued. On 14 December 2022 the Claimant's second ACAS Early Conciliation certificate was issued.

11. The Claimant submitted her ET1 on 13 January 2023.

Policies/Procedures

12. The Respondent has Disciplinary Procedure which sets out a sensible process for conducting and managing disciplinary matters. It contains examples of gross misconduct and starts by stating:

    "Generally, gross misconduct includes any serious breach of conduct or duty that brings the Company into disrepute, or actions that are inconsistent with the relationship of trust and confidence required between the company and its employees".

13. It contains a non-exhaustive list of examples of gross misconduct.

14. In relation to holiday, holiday requests are granted on a first come first served basis. A request for holiday may be refused if there are not enough site based staff on the date/dates requested.

15. Medical appointments can be taken by using holiday, sick leave or unpaid leave. The Respondent does not refuse staff time off to attend medical appointments.

16. Ms. Stanford explains in her witness statement that on one occasion, the date of is not known, the Claimant had a weeks' holiday booked. The Claimant told Ms. Stanford that she had a medical appointment one of the days and wished to cancel holiday and take sick leave. Ms. Stanford told the Claimant it was prebooked as holiday and that is how it would be allocated.

Background to Claimant's employment

17. On 1 August 2010 the Claimant transferred to the Respondent under

TUPE. At this point it was recorded that her continuous service was from 1 May 2000. There is some dispute about when the Claimant actually started working at her previous employers but we have not considered it necessary to determine this for the purposes of this claim. It is accepted the Claimant had a considerable period of service. At the point of transfer the Claimant was employed as a Cleaning Operative and worked 20 hours a week.

18. The Respondent provides cleaning services to clients. From 4 January 2011 the Claimant worked 17.5 hours a week, 3.5 hours per day.

19. The Claimant has been involved in disciplinary and grievance processes prior to the events of this claim. It is not necessary for the issues in this claim to set out all the historical events, and the Tribunal made findings of fact in relation to only those considered necessary for determining the issues in this claim.

20. Mr. Yakub, the Claimant's supervisor, observed that the Claimant struggled to bend down in 2010 and he would assist her with hoovering, which he considered she struggled with due to arthritis.

21. Mr. Yakub states his relationship with Site Manager, Ms. Michelle Stanford, was strained during his employment, which was between 2010 and 2019.

22. In September 2012 the Claimant's supervisor, Mr. Yakub, witnessed the Claimant showing a member of the client' staff a letter. Mr. Yakub notified Ms. Stanford and wrote an incident report.

23. On 19 October 2012 the Claimant attended a disciplinary meeting at which one of the allegations was that she had been discussing personal and Respondent correspondence with the client staff. At the meeting, which was chaired by Mr. Vince Turner and also attended by Ms. Michelle Stanford, Site Manager, it was explained that concerns should be raised via the line management structure and not with the client and was directed to the Respondent's website. The notes of the meeting record Mr. Turner as stating:

    "There seems to be a culture from some of the staff that worked with the old company that you can speak to News International staff about our company. Staffs need to realise that when you do this you are bringing the company into disrepute, which can lead to disciplinary action."

24. The Claimant responded by saying Ms. Stanford had given her a paper on this.

25. With reference to a skin condition, the Claimant was told she had to inform the Respondent about any medical conditions. The Claimant was sent an outcome letter on 30 October 2012. No disciplinary sanction was given.

Ms. Stanford wished to take the opportunity to ensure that the Claimant, and all staff, were clear on the position regarding engaging with client staff.

26. Following this meeting the Claimant was sent a letter on 30 October 2012. The letter explained that it was to ensure the Claimant was aware of the correct process of raising any issues relating to employment and that the Claimant agreed to report any medical conditions found that affected her work. No disciplinary sanction was given for showing correspondence to client staff as Ms. Stanford wanted to ensure the Claimant was clear on the standards and that this was not appropriate.

27. Following this Ms. Standford told all staff not to discuss personal and business matters with client staff, but were encouraged to greet and be polite.

28. On 31 October 2012 the Claimant raised a grievance against Mr. Turner and Ms. Stanford for bullying and harassment. A grievance meeting took place on 27 December 2012. At the end of the meeting the Claimant confirmed she was fit to work and happy with the hours and where she worked.

29. The Claimant, and other staff, moved to a new building in September 2014 due to the client's relocation. The relocation resulted in shift pattern changes, whereby cleaning was to be undertaken mainly in the morning. At that time the Claimant worked 17:30 – 21:00. A meeting to discuss the service changes took place on 9 September 2014. The Claimant did not wish to work mornings due to childcare matters.

30. At the meeting potential shift options were discussed.

31. The Claimant was sent a letter dated 12 September 2014 setting out arrangements. The letter sets out that the Respondent sought to accommodate the Claimant's preferred evening working hours, as opposed to morning shifts, on a temporary basis but would mean working 18:00 – 21:00 and would involve wiping surfaces to reduce noise for the client, before moving to morning work.

32. The Claimant was reminded again, by Mr. Turner, not to discuss Respondent matters with client staff.

33. The Claimant contacted the CAB about this matter. We consider it likely at some stage that Ms. Stanford was informed that the Claimant had contacted CAB.

34. Following the meeting the Claimant raised a grievance against Mr. Turner and Ms. Stanford. A grievance process took place, and the Claimant's grievance was not upheld and she appealed.

35. A grievance appeal meeting took place on 28 November 2014 conducted

by Sandra Ribeiro. The Respondent agreed with the Claimant that she would work 18:00 – 21:00 Monday to Thursday and 18:00 – 22:00 on a Friday. The Claimant would undertake cup collection and general cleaning duties as and when required. The follow up letter noted:

"I am very pleased that we have been able again to accommodate you. However, I would remind you that you may be required to change your hours on either a temporary or permanent basis to meet the needs of the business in the future."

36. The Claimant was absent from work due to her knee in July and August 2016. On her return from work Mr. Yakub gave the Claimant a device to pick up rubbish with.

37. The Claimant said in oral evidence she showed Ms. Stanford a letter regarding personal independence payments (PIP) in 2016 and that Ms. Stanford referred to her having had her disabled badge taken off her. Ms. Stanford says she was not shown this letter. On balance, noting the evidence as a whole, in particular the Claimant had recently had a knee operation the Tribunal find that the Claimant did show Ms. Stanford this letter.

38. The Claimant was absent from work due to "low back pain" for a week in March 2018. On her return to work she told Ms. Stanford she could not bend down to load the dishwasher and needed to sit during this task. Ms. Stanford expressed concerns about the Claimant sitting on a high stool and said this would need to be reviewed.

39. Covid 19 pandemic resulted in workplace changes. The Claimant had a period of furlough leave. In July 2020 Ms. Stanford discussed work arrangements with the Claimant. As a result of covid cup collection was no longer in required as the client moved to using paper cups.

40. In July 2020 the Claimant's working hours increased to 20 hours per week, following discussion and the Claimant worked from 14:00 to 18:00 Monday. The change was discussed with the Claimant, who had wanted a change in hours to support her son as he had been unwell, and the Claimant signed a Change to Terms of Employment Form on 14 August 2020. The Claimant started work in the ladies washrooms. The majority of cleaning for the client was performed in the mornings. It was clarified in oral evidence, and we accept, the Claimant's role was to service and maintain the washrooms/toilets, not to undertake a full clean as this was done in the mornings.

41. On 11 May 2021 the Claimant messaged Ms. Stanford and said she had been given a hospital appointment for the next day and wouldn't be able to attend work.

42. There is no evidence of the Claimant raising any concerns about washroom/toilet duties until 24 July 2021.

43. On 24 July 2021 the Claimant emailed Ms. Stanford and said:

    "I was informed yesterday by Melissa that I will be doing the toilets. Just to remind you regarding my knee, back and shoulder pains. My knee clicks when I am bending down, as also with my back pain and shoulder due to this I may benfi…"

44. Ms. Stanford replied on 26 July 2021 and said:

    "You are employed as a cleaner and all the task you carry out including bending, you have been cleaning toilets plus kitchens presently. We are reverting back to the way we worked before Covid19, which you did. Unless you have developed a condition and not inform us you will be carrying out the task Melissa has explained to you.

    If you have a medical condition please bring medical evidence to support this."

45. Ms. Stanford's oral evidence, supported by evidence of Mr. Hookway and Mr. Herbst, is that employees often tell her they are unable to do certain tasks and the Respondent's approach is to ask employees to provide a GP note setting out what they can and cannot do so that the Respondent can consider any possible and appropriate adjustments.

46. On 4 August 2021 the Claimant sent Ms. Stanford an email. The email says *"I have received this letter from the GP".* Attached to the email is a document that appears to list a number of conditions. The copy in the bundle is not readable. It is not in dispute that the document refers to osteoarthritis and a document dated 18 June 2024 refers to osteoarthritis in knee in October 2014 and osteoarthritis lumbar spine September 2016. Ms. Stanford replied the same day and said: *"We will need to have a meeting to discuss this matter. I will arrange one as soon as I can."*

47. A formal meeting did not take place.

48. However, following this email chain Ms. Stanford discussed the situation with the Claimant and explained that she needed more information from her GP about how any conditions and treatment affect her role. Ms. Stanford relayed the position to Head Office who told Ms. Stanford more information from the Claimant's GP was needed to move forward. Ms. Stanford spoke with the Claimant several times about the need for further information. We do not consider the Claimant fully understood what else she should provide and that Ms. Stanford did not explain in a way that was understandable to the Claimant what documentation she was seeking.

49. The Claimant did not provide any further documentation from her GP.

50. The Respondent has access to Occupational Health, but did not refer the Claimant at any time.

51. The Claimant was absent from work due to stress between 24 November 2021 and 23 January 2022. The Respondent understood the absence to be due to difficulties relating to her son. On returning to work the Claimant undertook her usual duties.

52. On 12 May 2022 Ms. Stanford explained her approach to bank holiday cover with the Claimant. She followed up the conversation in an email. The Claimant had been concerned about working bank holidays due to not being able to leave her son. Ms. Stanford reminded the Claimant of the grievance procedure and explained that if the Claimant had a grievance about her she could email the payroll email address.

53. On 10 June 2022 the Claimant had a conversation with Jane Viner in the toilets. Jane Viner is a senior member of staff of News UK. The Claimant knew who Jane Viner was as she had cleaned for that client for many years.

54. The Claimant's evidence, as set out in her witness statement, was that on 14 June 2022 she was in the toilets at work and Jane Viner came in and saw the Claimant was upset. The accounts of the conversation as described by the Claimant vary in the contemporary documents and the Claimant's witness statements.

55. The Tribunal finds that the Claimant told Jane Viner that she had difficulties cleaning the toilets due to her health and that she would be raising concerns with Head Office. The Claimant says Jane Viner said she would speak to Daren Shinnick about the situation, but she asked her not to. It is noted that, as set out below, in her disciplinary meeting the Claimant said the conversation in the toilet with Ms. Viner was on 10 June 2022. The Tribunal find that a conversation took place with Ms. Viner, and given the account set out in the disciplinary notes are more detailed in relation to timing and closer to the events, it found the conversation was likely to have taken place on 10 June 2022.

56. On 13, 14 and 15 June 2022 the Claimant attempted to find Ms. Viner at her desk. Ms. Viner worked at a floor location that the Claimant was not supposed to access.

57. On 14 June 2022 the Claimant emailed Ian Hookway, the Respondent's Managing Director, with a grievance about Ms. Stanford and Michelle Stanford. She said she felt she was being unfairly treated and bullied due to her health problems and referred to her work being changed from kitchen to toilet duties and being refused holiday requests.

58. Mr. Hookway forwarded the email to Wendy Dove, Manager. The email from the Claimant was not in the Bundle but Mr. Hookway forwarded it to Ms. Dove at 10:03am. The Claimant does not start work until 14:00. Accordingly, based on the timing of the emails in the Bundle, the Tribunal consider the Claimant submitted her grievance before going to work on 14 June 2022.

59. Ms. Dove contacted the Claimant, by email, the same day. She said she would arrange a grievance meeting but also explained the company would need information from her GP, in the form of a fit note/Med 3 on what duties she was unable to undertake so the Respondent could consider what adjustments were appropriate.

60. On 15 June 2022 the Claimant tried to located Jane Viner. She could not find her and asked another member of News UK staff where Jane Viner sat. She did not speak to Jane Viner on 15 June 2022.

61. On 16 June 2022 Ms. Stanford was contacted by Sarah Duncan, Facilities Manager for News UK, by email, in which Ms. Duncan said that a cleaner named Sylvia or Cynthia had been looking for Jane Viner and asked Ms. Stanford if she knew who this was and why they wanted to speak to Ms. Viner.

62. Also on 16 June 2022 Daren Shinnick, Senior Property & Facilities Manager for the client News UK, contacted Ms. Stanford and about the Claimant's health issues and whether she had raised any concerns with the Respondent's HR team. Ms. Stanford emailed head office enquiring about the matter.

63. Mr. Ian Hookway attended Ms. Stanford's office on 16 June 2022. Mr. Ian Hookway told Ms. Stanford that the Claimant had lodged a grievance against her and her daughter.

64. Ms. Stanford suspended the Claimant on 16 June 2022. The Claimant was suspended for allegedly attempting to contact News UK staff. The Claimant was sent an email at 14:38. The email explained that she was suspended on full pay and that a disciplinary meeting would be arranged.

65. Ms. Stanford submitted an incident report, and within the report she sets out that she considered the reason the Claimant was contacting Jane Vinder was because the Claimant had raised concerns about herself and Michelle Stanford. The incident report notes Ms. Stanford spoke with HR before speaking with Ms. Duncan and Mr. Shinnick and that she spoke with the Claimant who confirmed she had tried to contact Ms. Vinder.

66. On 16 June 2022, after being notified of suspension, the Claimant telephoned Jane Viner. The Claimant's witness statement sets out that she phoned Jane Viner when she got home to tell her she had been suspended. Paragraph 30 of her witness statement states: "*I believe that if Jane explained to Michelle that I had not asked her to intervene on my behalf, it would make a difference."* At paragraph 31 the Claimant states: *"Jane picked up the phone. She was concerned about my health and asked for updates on my grievance claim. She offered to take further action on my behalf to sort the grievance claim, but I thought that would make things worse with Michelle. I thanked her for offering to help in this way but I told her that it would be best to sort it out myself."*

67. Paragraph 66 of Ms. Stanford's witness statement states:

"I subsequently found out verbally from the Facilities Manager that the Claimant had contacted Claudette Curtis [Director of Property & Facilities News UK] and had allegedly spoken to her on the phone for around an hour. I believe that the Claimant obtained Ms Curtis' number from searching online. It was also brought to my attention that the Claimant called Jane Viner in her personal time outside of work following her suspension".

68. In response to a Tribunal question Ms. Stanford said she had got mixed up and that the Claimant only contacted Ms. Curtis and not Ms. Viner by phone and that she was told the Claimant had called Ms. Curtis by Mr. Shinnick on 17 June 2022. This does not accord with the Claimant's evidence, in which she accepts she telephoned Ms. Viner.

69. The Claimant, at paragraph 17 of her witness statement, says she made multiple verbal requests to be removed from cleaning the toilets. No clear evidence was given on when any such requests were made of Ms. Stanford.

70. The Respondent's client did not participate or provide any documentation as part of the disciplinary process.

71. On 17 June 2022 the Claimant was invited to a grievance meeting.

72. The Claimant attended a grievance meeting on 22 June 2022. The meeting was chaired by Jason Edwards, General Manager and Diana Garzon, Site Manager from a different location.

73. The Claimant's grievance was not upheld. The Claimant was notified of the grievance outcome in an email dated 5 July 2022. The email set out information on how the Claimant could appeal the decision. Attached to the email was an outcome document. The grievance chairs did not consider the Claimant had been pushed out or bullied by Ms. Stanford or Melissa Stanford. They determined that the Claimant had wished to and agreed to work the afternoon/evening shift which involved cleaning toilets. They noted that the Claimant had been asked to provide a GP note in relation to what she could/could not do and considered there was an established holiday booking process within the site.

74. The Claimant did not appeal the grievance outcome, and in an email dated 12 July 2022 emailed the Respondent to say she would not be appealing and looked forward to meeting with Ms. Stanford to discuss operational matters. Attached to this email was a fit note dated 8 July 2022. The fit note referenced low back pain and knee osteoarthritis. It said the Claimant may be fit for work and commented: *"Finds it difficult to bend over due to knee and back pain. Toilet cleaning is difficult for her has a result. To be given other duties such as kitchen cleaning."* This is the first fit note which referred to the Claimant's osteoarthritis.

75. The Claimant was invited to a disciplinary meeting, scheduled to take place on 19 July 2022, by an email on 14 July 2022. The letter explained that the allegation was that on 15 June 2022, after submitting her grievance, "*it is alleged that you attempted to make contact with Jane Viner, Global Head of Facilities and Real Estate Transformation at News UK, and Daran Shinnick, Senior Properties and Facilities Manager at News UK, to discuss issue on site."*

76. The email says approaching and discussing matters with employees of the client is against company policy and is deemed as Gross Misconduct. The email explained that she was entitled to be accompanied by a trade union representative or a colleague. The email also stated: *"I do hope the meeting will allow us to discuss the situation fully, and would advise you that, should you not be able to provide us with a satisfactory explanation, for the above, your employment may be at risk."*

77. The Claimant was not able to attend the disciplinary meeting scheduled for 19 July 2022 due to swelling and pain in her feet. The Claimant requested that her niece accompany her as her representative.

78. The Respondent informed the Claimant that could not be accompanied by her niece.

79. The meeting was rescheduled, initially for 27 July 2022 but this was postponed on receipt of a fit note stating the Claimant was not fit to work between 18 to 31 July 2022.

80. The Disciplinary Meeting was conducted by Ms. Stanford and James Hookaway, Head of Business Support. The Claimant was accompanied by Charmaine Ranger-Plumber. During the meeting the Claimant raised a number of matters that were not related to the disciplinary allegation but were grievance related matters.

81. The Claimant had been provided with Ms. Stanford's incident report and the email from Ms. Duncan prior to the disciplinary meeting. During the meeting the Claimant said that she had looked for Jane Viner and asked someone where Jane Viner sat. The Claimant said that an assumption had been made about why she was looking for Ms. Viner, the assumption being it was about her grievance. The Claimant said the previous week, 10 June, Jane Viner had seen the Claimant in the toilets and that she was not feeling well and Jane Viner asked her if she was ok. During the meeting the Claimant was asked if she contacted Ms. Viner by telephone. The Claimant said she phoned Jane because she had been suspended for looking for Jane. She said she had known Jane Viner for a long time.
82. There is no reference to the Claimant contacting Claudette Curtis anywhere in the disciplinary meeting notes. The Tribunal understand that at the time of the disciplinary meeting the decision makers were only aware of attempts to contact Ms. Viner.

83. The meeting closed and Ms. Stanford and Mr. Hookway spoke with HR and considered their decision. They made a joint decision. On 8 August

2022 the Claimant was emailed with the outcome of the disciplinary hearing. The email explained that it had been decided the Claimant had acted as alleged and this was considered gross misconduct. The email explains that the Respondent considered that the Claimant's actions could have brought the Respondent into disrepute and could have caused a breakdown in client relations and affected the contract on site. The email explained the termination was effective immediately and set out the right to appeal. The email attached a document which set out conclusions. This referenced the Claimant seeking out Jane Viner on two occasions, once before and once after suspension. At the end it reads:

"Conclusion – Termination of Employment
Based upon the evidence and confirmation by CP that she did actively try and seek out JV, and subsequently contact her via telephone following her suspension, my decision is that CP has broken Company Procedure and her actions are deemed as gross misconduct, therefore I am terminating her employment…"

84. The Claimant appealed the decision to dismiss her on 15 August 2022. Within the appeal email she refers to her osteoarthritis and says it impacts her ability to do complete certain tasks. She says she *"first made Michelle Stanford aware of these issues in Augus 2021*." In the email the Claimant sets out that she had a conversation with Jane Viner in the toilets about her health and told her she was going through the proper channels to resolve things. She says she looked for Jane Viner the next day to thank her. The Claimant said she had tried to call Jane Viner after being suspended to clear up a misunderstanding. The Claimant set out that she considered Ms. Stanford to be a biased chair, in view of the recent grievance the Claimant had raised against her, and that her explanations were not listened to. The appeal had four points:

    a. Ms. Stanford was biased
    b. The Claimant was subjected to detrimental treatment having raised concerns about her health and impact on work
    c. That the sanction was unreasonable
    d. That no other sanctions were considered.

85. An appeal hearing took place on 16 September 2022, following three postponements. The hearing was conducted by Mr. Bruce Herbst, Executive Operations Director.

86. The Claimant attended the appeal hearing with her trade union representative, Elena Margetts and her son. During the appeal hearing the Claimant raised a number of matters not related to the disciplinary appeal.

87. After the appeal hearing Mr. Herbst considered the matter, and considered management of similar cases previously. He attempted to obtain statements from News UK staff but they are were not forthcoming. Mr. Herbst considered a dismissal in July 2021 in which an employee was dismissed. In that case, there were concerns about poor performance, but

it was found that the employee had committed gross misconduct by contacting clients and discussing employment issues which was considered to bring the Respondent into disrepute.

88. Mr. Herbst did not consider Ms. Stanford to be conflicted in view of the fact the Claimant had not appealed her grievance outcome and referred to moving forward positively with Ms. Stanford. He did not consider the Claimant had been subjected to detrimental treatment having raised concerns about her health. He considered the sanction to be appropriate due to the Claimant's actions in contacting a senior employee of the client bringing the Respondent into disrepute as he considered the Claimant's actions amounted to gross misconduct.

89. The Claimant was sent the disciplinary appeal outcome on 3 October 2022. It explained the decision to dismiss the Claimant was being upheld. Attached to the email was a document which contained details on discussion points and the outcome. Within the attachment Mr. Herbst sets out his decision in relation to the grounds of appeal and that he considered Ms. Standford's involvement was appropriate and there was no bias, that there was no evidence to suggest discrimination and the sanction was considered in view of the respondent's policy. It concludes by stating:

"We are satisfied that the sanction imposed is appropriate in this case, in that you were dismissed for bringing the Company into disrepute by actively engaging a senior client in internal Company matters. Furthermore, you have confirmed you actively sought to obtain contact details for said client to engage further after the initial conversation and being instructed not to do so by management."

Law

Unfair dismissal

90. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the Respondent under section 95, but in this case the Respondent admits that it dismissed the Claimant.

94.— The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the

provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

91. Section 98 of the Employment Rights Act 1996 deals with the fairness of dismissal. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

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

98.— General.
(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
(3) In subsection (2)(a)—
(a) "capability" , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications" , in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.
(6) [Subsection (4)]4[is]5 subject to—
(a) [sections 98A to 107]6 of this Act, and
(b) [sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992]7 (dismissal on ground of trade union membership or activities or in connection with industrial action).

93. In misconduct dismissal there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions of *Burchell v British Home Stores Lrd IRLR 379 and Post Office v Foley 200 IRLR 827.* The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer *(Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563).*

94. In relation to the reason for dismissal, in *Abernethy v Mott, Hay & Anderson [1974] ICR 323* it was held: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

95. Where a decision is made for more than one reasons, the Tribunal is obliged to identify the principal reason. The Tribunal is not restricted to finding the reason is that relied upon by the employer, or that argued for the employee, the Tribunal can make its own determination on the reason for dismissal.

Polkey

96. The Employment Judge agreed with the parties at the start of the hearing that if it concluded that the Claimant had been unfairly dismissed it should consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might have been fairly dismissed.

97. Where a dismissal is unfair on procedural grounds, the Tribunal must also consider whether, by virtue of *Polkey v AE Dayton Services [1987] IRLR 503, HL*, there should be any reduction in compensation to reflect the

chance that the claimant would still have been dismissed had fair procedures been followed.

98. The law in this respect is set down in the cases of *Polkey v AE Dayton Services Ltd [1987] UKHL 8, Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604*.

Contributory Fault

99. It was agreed with the parties that if the Claimant had been unfairly dismissed, the Tribunal would address the issue of contributory fault, which inevitably arises on the facts of this case.

100. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2) provides as follows:

"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

101. Section 123(6) then provides that:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Notice pay/wrongful dismissal

102. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provided, by a payment in lieu of notice.

103. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter.

Discrimination arising from disability

104. The legislation regarding complaints of discrimination arising from disability is set out at section 15 of the Equality Act 2010, set out below.

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

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

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

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

105. The approach to determining Section 15 claims was summarised by the Employment Appeal Tribunal in *Pnaiser v NHS England and Another [2016] IRLR 170. This* includes:

- In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;
- The "something" that causes the unfavorable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavorable treatment, and so amount to an effective reason for or cause of it;
- Motives are not relevant;
- The tribunal must determine whether the reason or the cause is "something arising in consequence of B's disability";
- The expression "arising in consequence of" can describe a range of causal links. The causal link between the something that causes unfavorable treatment and the disability may include more than one link;
- Knowledge is only required of the disability. Knowledge is not required that the "something" leading to the unfavorable treatment is a consequence of the disability.

106. The respondent will successfully defend the claim if it can prove that the unfavorable treatment was a proportionate means of achieving a legitimate aim. Legitimate aims are not limited to what was in the mind of the employer at the time it carried out the unfavorable treatment. Considering the justification defence requires an objective assessment which the tribunal must make for itself following a critical evaluation of the position. It is not simply a question of asking whether the employer's actions fell within the band of reasonable responses.

107. The Equality and Human Rights Commission Code of Practice suggests the question should be approached in two stages:

- Is the aim legal and non-discriminatory and one that represents a real, objective consideration?

- If so, is the means of achieving it proportionate – that is appropriate and necessary in all the circumstances?

108. The Code goes on to say that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. “Necessary” here does not mean that the treatment is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means (see *Hampson v Department of Education and Science [1989 ICR 179 and Hardys & Hansons plc v Lax [2005] ICR 1565.)*

109. Justification therefore requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (*Hensman v Ministry of Defence UKEAT/0067/14*). The Tribunal has to take into account the reasonable needs of the employer, but it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the treatment is reasonably necessary.

110. The Equality and Human Rights Commission Code of Practice in paragraph 5.2.1 suggests that if a respondent has failed to make a reasonable adjustment it will be very difficult for it to show that its unfavourable treatment of a claimant is justified.

111. A section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability. This is also part of the knowledge defence applicable to complaints of failure to make reasonable adjustments.

112. The Code, at paragraph 5.14, suggests that *“Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a “disabled person”2.* At paragraph 6.19, the Code goes on the say:

“The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend upon the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.”

113. *Gallop v Newport City Council [2014] IRLR 211* established that when considering the extent of an employer’s enquiries into whether an employee is disabled, an unquestioning reliance on Occupational Health advice may not be sufficient to enable an employer to rely on the knowledge defence.

114. Knowledge on the part of a person employed by the respondent is likely to be imputed to the respondent. It will either be actual knowledge, or knowledge which ought reasonably to have been transmitted to the appropriate person.

115. The Claimant specifically directed us to consider *City of York Council v Grosset [2018] EWCA Civ 1105.*

Duty to make reasonable adjustments

116. The legislation regarding complaints of a failure to make reasonable adjustments is contained within sections 20 and 21 of the Equality Act 2010.

117. Section 20 of the Equality Act 2010 states:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

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

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

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

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

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

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

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

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

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

(d) any other physical element or quality.

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

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

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

21 Failure to comply with duty

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

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

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

118. The duty to make reasonable adjustments appears in section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3) – *"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage."*

119. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

120. In *Environment Agency v Rowan [2008] ICR 218* it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

121. The words "provision, criterion or practice" ("PCP") are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In *Ishola v Transport for London [2020] EWCA Civ 112* it was said: *"all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."* It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

122. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

123. Substantial disadvantage is such disadvantage as is more than minor or trivial.

124. In *County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the* Employment Appeal Tribunal summarised the following additional propositions:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;
- It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; s/he need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;

- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s);
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:

  The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
  The extent to which it is practicable to take the step;
  The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities; -The extent of its financial and other resources;
  The availability to it of financial or other assistance with respect to taking the step;
  -The nature of its activities and size of its undertaking;
  - If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

125. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.*

126. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

127. An important consideration is the extent to which the step will prevent the disadvantage. Although the Equality Act 2010 uses the term "avoid", this is not an absolute test. (The position is different in auxiliary aid cases where the employer has to take such steps as it is reasonable to take to have to provide the auxiliary aid).

128. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law: Romec Ltd v Rudham [2007] All ER(D) (206) (Jul), EAT. The Court of Appeal put the matter this way in Griffiths v Secretary of State for Work and Pensions [2017] ICR 160:

"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."

129. Broadly speaking, and all other things being equal, the more effective the adjustment is likely to be the more likely it is to be a reasonable adjustment; the less effective it is likely to be, the less likely it is to be reasonable. Effectiveness must be assessed in the light of information available at the time, not subsequently: Brightman v TIAA Ltd UKEAT/0318/19 *2 July 2021* (paragraph 42).

Victimisation

130. Section 27 Equality Act 2010 states:

Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

131. The law on victimisation is designed to make sure that employees can raise concerns about discrimination without fear of repercussions. Victimisation has a specific legal meaning.

132. A claimant is protected when he or she complains about discrimination even if they are wrong and there has been no discrimination. However, a claimant is not protected if they made an allegation in bad faith, namely they did not really believe it was discrimination.

133. In considering the link between the protected act and the detriment a Tribunal needs to consider how to interpret the word 'because' in section

27. The law requires more than a ‘but for’ link: it is not enough to say that, if the Claimant had not made the complaints, then the bad treatment would not have happened.

134. The Tribunal must consider what was in the mind of the decision maker, consciously or subconsciously. *Chief Constable of West Yorkshire v Khan [2001] ICR 1065 HL* suggests must find the ‘core reason’ or the ‘real reason’ for the act or omission. The Equality and Human Rights Commission Code at paragraph 9.10 also makes it clear that the protected act need not be the only reason for the decision.

135. The person who subjects a claimant to a detriment needs to have known that the claimant did the protected act.

136. The EHRC Employment Code, drawing on the case law under the previous discrimination legislation, contains a useful summary of treatment that may amount to a ‘detriment’:

‘Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment’.

Conclusions

137. The Tribunal has set out its conclusions, which are unanimous, in the order of the list of issues. The conclusions were reached by applying the established legal principles to the facts. The Tribunal considered the submissions made by the parties in full, and the case law to which it was directed.

Unfair Dismissal

138. The context and background to the dismissal is important, and therefore findings of fact have been made as required. However, the issues for determination are clearly set out under the section headed Issues above.

Reason for dismissal

139. The first issue for determination was: what was the reason for dismissal?

140. The Claimant suggests that there was a long standing plan to dismiss her and remove her from the Respondent's employ. The Tribunal do not consider there to be any evidence that this was the case.

141. The findings of fact demonstrate that the Claimant has raised a number of grievances historically. The Respondent ensured that her grievance on 14 June 2022 was considered by an independent person promptly, and before moving to any disciplinary meeting.

142. The Claimant's witness statement, and Mr. Yakub's witness statement, seek to create a picture that Ms. Stanford wished to remove the Claimant and sought to change her hours and duties against her wishes. The facts do not demonstrate this to be the case, and indeed set out that the Respondent has sought to engage and accommodate working preferences.

143. The evidence given by Ms. Stanford and Mr. Hookway was clear, the reason for the Claimant's dismissal was her conduct, namely seeking to find Ms. Viner and then calling her.

144. The Tribunal do not consider her dismissal to be for any other reason.

145. The Tribunal concluded that the Claimant's conduct was the reason for dismissal, and this was a potentially fair reason under section 98(2)(b) of the Employment Rights Act 1996.

146. As the Respondent has shown a potentially fair reason for dismissing the Claimant, the next legal issue for consideration is that set out in section 98(4) of the Employment Rights Act 1996. This provision always bears repeating:

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

147. The test of fairness is tied into the reason for dismissal, which was found to be conduct. It also considers the size and resources of the Respondent, in this case the Respondent is a relatively large employer providing cleaning services for large clients. A further key point is that the test looks at whether the employer acted reasonably or unreasonably. This effectively imports a "band of reasonable responses" test. The question is whether this employer acted reasonably given the reason for dismissal. <u>It is not for the Tribunal to substitute its view on what the Respondent should or should not have done.</u>

148. When considering fairness in conduct dismissals the correct approach is set out in British Homes Stores v Burchell [1980] ICR 3030 and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. The Tribunal must also have regard to the ACAS Code of Practice on Discipline and Grievance Procedures 2015 (the Code).

Did the Respondent have a genuine belief the Claimant had committed misconduct and were there reasonable grounds for that belief?

149. The next issue for determination is: did the Respondent have a genuine belief that the Claimant had committed misconduct and were there reasonable grounds for that belief?

150. The Tribunal concluded that the Respondent did have a genuine belief based on reasonable grounds. Ms. Stanford and Mr. Hookway were joint decision makers. They considered the evidence available, namely the reports from the client and heard directly from the Claimant, including the Claimant's account of what had happened in relation to contacting Ms. Viner.

151. The decision makers took into account the context of the situation in that previously the Claimant, indeed all staff, had been informed they must not discuss business or personal matters with the client.

152. The contemporaneous documentation and the Respondent's oral evidence was clear on why the Claimant was dismissed, as explained in the outcome email and attachment. It was the Claimant's conduct in relation to seeking out Ms. Viner in the office and phoning her to discuss work matters. The Claimant was not dismissed for the discussion in the toilet.

153. Mr. Herbst evidence on why the appeal was not upheld and why he considered there had been gross misconduct was also clear.

154. The decision makers formed a belief that the Claimant had attempted to contact Jane Viner in the office, on a floor she was not authorised to access, and that she had telephoned her and that this constituted gross misconduct. This belief was reasonably formed as in essence, it came from the Claimant, who admitted this conduct.

155. The Tribunal concluded that there was a genuine belief that the Claimant had committed misconduct and there were reasonable grounds for the belief.

Did the Respondent carry out a reasonable investigation?

156. Again, this issue, being whether at the time the belief of misconduct was formed had the Respondent had carried out a reasonable investigation is a question of the band of reasonable responses.

157. The Claimant contends that a reasonable investigation was not undertaken.

158. As set out in the findings of fact above, there was no separate formal investigation meeting with the Claimant. However, prior to suspending the Claimant Ms. Stanford asked the Claimant if she had sought out Ms. Viner and she confirmed she had. Further discussion about the alleged conduct took place during the disciplinary meeting and the Claimant clearly admitted that she had been looking for Ms. Viner and that she had called her after she was suspended.

159. The Respondent's Disciplinary Procedure, as per the findings of fact above, is non-contractual, and we conclude it sets out a sensible guide for managing disciplinary matters.

160. The ACAS Code of Practice on Disciplinary and Grievance Procedures, at paragraph 5, under the heading "Establish the facts of each case" states:

"5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing."

161. The Code itself gives an employer flexibility in how to approach an investigation. The extent and form of an investigation will vary depending on the facts of a case. The holding of an investigation meeting is not a mandatory requirement, but in many cases will be required. In other cases, the investigation will only involve an employer collating relevant evidence.

162. The Tribunal also note that at paragraph 6 the Code states: *"In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing."*

163. This provision is to ensure impartiality. In many cases a line manager may undertake the investigation. In the circumstances of this particular case, the investigation was essentially the information reported to Ms. Stanford by the client and the Claimant's own admissions. The client did not wish to provide any statements or be involved in the process beyond the initial reporting. Taking into account the events and allegations against the Claimant, we conclude the Respondent did carry out a reasonable investigation.

164. However, even if the Tribunal are wrong in this respect, it concluded that the fact that the Claimant was able to put forward her explanation for her actions during the disciplinary hearing, and further at the appeal stage, meant that the Claimant had the opportunity to give an explanation and therefore this cured any potential unfairness in relation to her not being interviewed during a separate investigation stage.

165. The legal test is that an employer must hold such investigation as *"is reasonable in the circumstances".* The Tribunal concluded, in view of the admission of the alleged misconduct by the Claimant, that the investigation in this case was reasonable.

Did Respondent otherwise act in a procedurally fair manner?

166. Again, both the ACAS Code and the Respondent's own Disciplinary Policy are relevant in considering this issue. The key points include:

- That an employer acting fairly will give sufficient details of the allegations and the evidence being considered in enough time before the disciplinary hearing;
- The employee is permitted to be accompanied by a fellow worker or trade union representative;
- The employer must consider whether or not disciplinary or any other action is justified and inform the employee in writing;
- The employee has a fair chance to set out their case at a disciplinary hearing; and
- That the employee is offered the right of appeal.

167. The Tribunal concluded that on balance, the Respondent did act in a procedurally fair manner.

168. The Respondent investigated in a proportionate way. The Claimant was notified of the allegations against her. The Claimant had a full chance at the disciplinary hearing to put forward any comments and representations she wished, indeed the Claimant admitted to seeking out Ms. Viner and the calling her.

169. The invitation to the disciplinary hearing gave clear information about potential consequences and informed the Claimant of her right to be accompanied, indeed she was accompanied by a colleague.

170. A disciplinary hearing was held with two managers. Ms. Stanford and Mr. Hookway. At the hearing the Claimant had a full opportunity to present her position.

171. No decision was made until after the hearing had been concluded and the decision makers sought guidance from HR.

172. Prior to the disciplinary hearing the Claimant had not raised any concern about Ms. Stanford potentially being biased. Indeed, she chose, after careful thought, not appeal the grievance outcome and appeared to be willing to move forward with Ms. Stanford.

173. The evidence indicates that the decision was reached on the allegations alone. Further, Mr. Hookway, an independent manager, was also a joint decision maker, and this would have prevented any potential bias, although the Tribunal did not consider there to be any.

174. The Claimant submits that the outcome was predetermined, however as set out above, the reason for dismissal clear, and a full and detailed disciplinary hearing was held to ensure the Claimant had a full opportunity to present her case.

175. The Claimant was informed of the outcome in writing. The outcome documentation was clear and set out the decision.

176. The Claimant was offered the right to appeal, and did appeal. A full appeal process was undertaken. A full and detailed consideration took place at the appeal stage. Mr. Herbst went back to client but also looked at whether there had been other cases which had involved disciplinary action for similar conduct, as noted in the findings of fact.

177. The Claimant submitted that the Respondent did not take into account her long service or record. The witness evidence was candid, they did not, as they considered the gross misconduct alone was sufficient to warrant dismissal. It does not appear that any alternative sanctions were considered, and it was noted the Respondent was concerned about reputational risk. The Tribunal does consider these elements could have been better considered at the time and addressed.

178. However, on balance, considering the procedure as whole the Tribunal considered the Respondent acted in a procedurally fair manner.

Range of reasonable responses

179. Finally, considering section 98(4) in totality, if all the above tests have been met, the Tribunal must consider whether dismissal within the range of reasonable responses. It is important to restate that the Tribunal must not substitute its own view, it must consider if dismissal was one of the options open to the Respondent. It does not matter whether the Tribunal would have decided differently.

180. Given the reasonable finding that the Claimant had committed an act of gross misconduct, in view of the Claimant's conduct and the information known to the Claimant that discussing personal and work matters with clients was not permitted and could be considered an act of gross misconduct for bringing the Respondent into disrepute, and noting the process in totality the Tribunal concluded the Respondent's decision to dismiss the Claimant fell within a range of reasonable responses.

181. The Claimant's complaint of unfair dismissal fails.

182. As it was found dismissal was fair, substantively and procedurally, the Tribunal did not go on to consider Polkey or Contributory Fault.

Wrongful dismissal/notice pay

183. The Claimant was dismissed without notice and brings a claim in respect of her entitlement to 12 weeks' notice.

184. Dealing with the Breach of Contract claim, the Tribunal must consider whether the Claimant fundamentally breached the contract of employment by an act of gross misconduct which entitled the Respondent to dismiss without notice.

185. In distinction to the claim of unfair dismissal, where the focus is on the reasonableness of managements decisions, and immaterial to what decision the Tribunal would have reached it must decide whether the Claimant was guilty of conduct serious enough to entitle the Respondent to terminate the employment without notice.

186. The Tribunal consider the Claimant made a conscious decision to try and find Ms. Viner on 13, 14 and 15 June 2022 and to call her on 16 June 2022. The Claimant took such seps in full knowledge she was not permitted to discuss personal or business matters with client.

187. The Tribunal understand the Respondent was concerned about potential reputational risk.

188. In view of the fact the Claimant knew that it was not permitted to discuss personal or business matters with client the Tribunal concluded that, on an objective assessment, on the balance of probabilities, the Claimant's actions were sufficiently serious to amount to a fundamental breach entitling the Respondent to dismiss the Claimant without notice.

189. In reaching its conclusion on this point the Tribunal considered it significant that after suspension and being told the allegation of misconduct was in relation to seeking out Ms. Viner the Claimant then chose to telephone Ms. Viner and discussed her health and grievance with Ms. Viner. The Tribunal consider this conscious decision and action on the Claimant’s part amounted to gross misconduct.

190. The Tribunal conclude that the Claimant did commit an act of gross misconduct entitling the Respondent to dismiss without notice.

191. The Claimant's claim of breach of contract in relation to notice pay fails and is dismissed.

Knowledge of disability

192. As set out above, on 4 August 2021 the Claimant sent Ms. Stanford a copy of her medical history. This set out she had osteoarthritis. Accordingly, the Tribunal consider the Respondent had actual knowledge of the Claimant’s disability at this time.

193. The Tribunal understand Ms. Stanford is not a medical expert and was not aware how this condition impacts the Claimant specifcally, but as noted above, no formal meeting was arranged, no referral to Occupational Health was made and it does not seem that the Claimant was clear on what else she needed to provide. It is noted she sent a fit note after Ms. Dove set out in an email what was required.

194. The Tribunal went on to consider if the Respondent had constructive knowledge at any time prior to August 2021.

195. As set out above, it was found the Claimant showed Ms. Stanford a letter regarding PIP in August 2016. The Tribunal consider that this should have resulted in further enquiries being made, particularly in view of the

fact this was in close proximity to knee surgery, notwithstanding the fact she had a fit note saying she was fit to work. The Tribunal consider further enquiries could have included a more detailed discussion with the Claimant or a referral to Occupational Health.

196. The Tribunal consider that if such enquiries were made the result of would have been that the Respondent would understand the Claimant was restricted due to osteoarthritis.

197. On balance, it was determined that the Respondent had constructive knowledge of the Claimant's disability from August 2016.

Discrimination arising from disability – section 15 Equality Act 2010

198. The Tribunal then moved to considering the discrimination arising from disability complaint.

199. As set out above, it concluded that the Respondent should have had knowledge of the Claimant's disability from August 2016.

200. The first issue for consideration is whether the Respondent treated the Claimant unfavourably. The Claimant alleges the following unfavourable treatment.

194. 6.1.3 The claimant was required to use annual leave to attend medical appointments concerning her disability, and was required to miss or reschedule some of these appointments when her annual leave requests were turned down by Ms. Stanford or her daughter, Melissa Stanford, with insufficient explanation; and

195. 6.1.4 The claimant was ultimately dismissed for raising issues about her disability with the respondent and making requests for reasonable adjustments. The respondent has used the claimant's interaction with Ms. Viner as an excuse to dismiss the claimant because of her disability.

201. The Tribunal has set out conclusions in relation to each allegation of unfavourable treatment below. In reaching the decision it kept in mind that "unfavourably" is not defined in the Equality Act 2010 but the Code assists and states: "must have been put at a disadvantage. The Code notes that *"Even in an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."* The Code gives examples of unfavourable treatment, including, refusal of a job; dismissal; a shift to night working; a team move to an open-plan office.

6.1.3 The claimant was required to use annual leave to attend medical appointments concerning her disability, and was required to miss or reschedule some of these appointments when her annual leave requests were turned down by Ms. Stanford or her daughter, Melissa Stanford, with insufficient explanation

202. The Claimant has not set out any detail of any occasions where she says she was required to use her annual leave to attend medical

appointments. We were not directed to any documentary evidence to support this assertion.

203. The Claimant has not set out any detail of when she was required to miss or reschedule appointments when her annual leave requests were turned down. We were not directed to any documentary evidence to support this assertion.

204. Accordingly, the Tribunal do not consider the facts on which this allegation of unfavourable treatment have been made out.

205. This allegation fails.

6.1.4 The claimant was ultimately dismissed for raising issues about her disability with the respondent and making requests for reasonable adjustments. The respondent has used the claimant's interaction with Ms. Viner as an excuse to dismiss the claimant because of her disability.

206. The Tribunal do consider being dismissed amounts to unfavourable treatment. However, it does not consider the Claimant was dismissed for raising issues about her disability with the Respondent and making requests for reasonable adjustments. The Tribunal does not consider the Respondent has used the Claimant's interaction with Ms. Viner as an excuse to dismiss the Claimant because of her disability.

207. Only part of the allegation is made out as unfavourable treatment, the dismissal, but accordingly the next issue for us to consider was if the following arose in consequence of the Claimant's disability:

the claimant's inability to carry out all aspects of her substantive role.

208. In view of the later fit note, the Tribunal consider that by virtue of the Claimant's osteoarthritis she was not able to carry out all aspects of her substantive role, noting she was employed as a cleaning operative. The role of cleaning involves a range of tasks, but as noted above, at the point of dismissal she was servicing the toilets, not undertaking a full clean.

209. As set out in the summary of the law above, there must be "something arising" in consequence of the Claimant's disability; and the unfavourable treatment must be because of that "something arising."

210. In reaching our conclusion we considered the guidance in *Pnaiser v NHS England and anor [2016] IRLR 170 EAT* which summarised the proper approach to determining section 15 claims.

211. The Tribunal considered whether the claimant's inability to carry out all aspects of her substantive role had a significant influence on, and so was an effective cause of the, unfavourable treatment, namely the decision to dismiss the Claimant.

212. As set out above, the Tribunal determined that the Claimant's conduct in seeking to find Ms. Viner and then telephoning her were the

reasons why she was dismissed in the context of the Claimant knowing she should not discuss personal or business matters with the client.

213. The dismissal was not directly because of the “something arising”. However, as noted in *Pnaiser,* the causal link between the “something” that causes unfavourable treatment and the disability may include more than one link. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

214. The Tribunal followed the *Pnaiser* guidance and considered, as per paragraph 31b of Psnaier, why the Respondent dismissed the Claimant. As set out in the conclusions relating to the unfair dismissal complaint above, the Tribunal consider that the reason why she was dismissed was the Claimant searching out and contacting Ms. Viner. The decision makers were clear that this was the reason and they were concerned about potential reputational damage to the Respondent. The Tribunal do not consider the Claimant’s inability to do all aspects of her job to have had any influence on the decision makers decision to dismiss.

215. The Claimant submits that she was crying in pain in the toilets which led to a discussion with Ms. Viner which led to her seeking out Ms. Vinder and then her dismissal.

216. The Tribunal kept in mind there may be more than one causal link.

217. The Tribunal accept the conversation with Ms. Viner in the toilet resulted from the Claimant being upset and struggling in the toilet. However, the Claimant was not dismissed because of that, or something that naturally or causatively flowed from that. The Claimant made a conscious decision to seek out Ms. Viner, on a floor that she was not supposed to access, on three occasions, and then telephoned the Ms. Viner. The Claimant took these steps. It was these actions that she was dismissed for. She did not need to contact Ms. Viner, to say thank you or otherwise, and she did not need to call her. Indeed, she knew that she should not.

218. The Tribunal do not consider the misconduct was caused by disability or the something arising in consequence. It was due to a decision made by the Claimant.

219. The Tribunal do not consider her inability to carry out all aspects of her role as being an operative cause in the unfavourable treatment, the dismissal. It concluded that, on an objective assessment, in this case, the “something” did not have a significant influence on the unfavourable treatment.

220. Accordingly, it was not necessary to consider if the unfavourable treatment was a proportionate means of achieving a legitimate aim.

221. The allegation fails.

Reasonable adjustments

222. The importance of a methodical approach to reasonable adjustments complaints has been emphasised in case law.

223. As set out above, the general conclusion was that from August 2016 the Respondent had constructive knowledge of the Claimant's disability. However, in dealing with a reasonable adjustment complaint it is important to remember to consider and address the requirement for knowledge of the substantial disadvantage as well.

224. The Claimant asserts that the Respondent had the following PCP:

<u>Designating employees duties without taking into account their health condition, length of service or any other relevant factors.</u>

225. The Respondent denies applying such a practice.

226. A PCP must be construed widely and with regard to the purpose of legislation to eliminate discrimination against those who suffer disadvantage from a disability. There must be an element of repetition, actual or potential. A one-off decision which was not the application of a policy is unlikely to be a practice.

227. In this case the Tribunal do not consider there to be sufficient evidence to support a conclusion that this was a practice operated by the Respondent. The documents and evidence we were directed to relate to this case only. Further, as set out above, the findings of fact demonstrate that the Respondent was seeking to support the Claimant and willing to discuss, agree and vary her working hours and the tasks she undertook at several times during her employment. Indeed, in 2020, the change in duties moving from cup collection was discussed and there is no evidence that the Claimant raised any concern about her ability to perform any tasks.

228. There was no evidence that the Respondent had practice of designating employees duties without taking into account their health condition, length of service or any other relevant factors.

229. It was noted that the Respondent has adopted an approach that requires staff with health conditions to obtain a fit note/med3 setting out restrictions, and although that was not understood by the Claimant, the Respondent's evidence was clear that adjustments are considered on receipt of such medical information.

230. The Tribunal concluded that alleged PCP was not a practice, criterion or provision.

231. Accordingly, the complaint for failing to make reasonable adjustments fails. The Tribunal did not go on to consider any other elements of the complaint as the first stage has not been made out.

Victimisation

232. The first matter for consideration was whether the Claimant did a protected act. The Claimant says they did three protected acts, and we considered each separately.

233. The first alleged protected act is set out as:

8.1.1 On 14 June 2022, the claimant raised a formal grievance against Michele Stanford and Melissa Stanford for bullying and trying to force the claimant out of work by refusing and/or ignoring her requests for reasonable adjustments. The claimant asked to return to kitchen duties because her disability made cleaning toilets especially difficult as it involved bending down. Although the claimant did not use the express language of 'reasonable adjustments' or 'disability', her requests were for reasonable adjustments as a result of her disability.

234. The 14 June 2022 email is short and the main paragraph reads:

> *"I am really sorry to bother you, but I send this to you as I have been having continuous problems with Michelle Stratford and Melissa. After working with Michell for over 30 years, I cannot believe how they are making me feel at work. I feel that I have been treated unfairly by them, and feel pushed out, and bullied due to my health problems (For example: when my working position was changed from working in the kitchen to toilets). I am also facing problems in regards to my holiday, as they have been refusing my requests."*

235. Therefore, the grievance does not read the same as the alleged protected act. However, on a plain reading, the Tribunal consider that the grievance email on 14 June 2022 was an allegation that the Respondent's staff had contravened the Equality Act 2010 for treating the Claimant badly due to her health.

236. The Tribunal consider this was a protected act, and refer to it as Protected Act 1.

237. The second alleged protected act is:

8.1.2 On 14 June 2022, the claimant had a brief conversation with Ms. Viner in which she explained that she had osteoarthritis which made cleaning the toilets difficult, but that she was using the proper channels to resolve the issue;

238. The findings of fact set out it was determine the Claimant said to Ms. Viner in the conversation in the toilets. As noted above, the Tribunal do not consider this was precisely what was said.

239. Further, and in any event, on this alleged protected , as specifically framed, the Tribunal consider the Claimant was explaining she had osteoarthritis which made cleaning the toilets difficult, but that she was using the proper channels to resolve the issue, does not constitute an allegation (express or not) that the Respondent, or its staff, had contravened the Equality Act 2010. We do not consider the alleged statement can be sensibly read as an allegation.

240. This is not a protected act.

241. The third alleged protected act is:

8.1.3 On 22 June 2022, the claimant attended a grievance meeting in Holborn at which she explained that Michele Stanford and Melissa Stanford had become increasingly hostile towards her since she discussed her health condition and had refused and/or ignored her requests to return to kitchen duties because of her disability.

242. The Tribunal do find that at the grievance meeting the Claimant made this allegation and that this constitutes a protected act. We refer to this as Protected Act 3.

243. The Claimant alleges that she was subjected to five separate detriments, and again we have dealt with each in turn.

8.2.1 On 16 June 2022, the claimant was suspended by Michele Stanford two days after the claimant had brought a grievance against her and Melissa Stanford.

244. The Tribunal consider that a reasonable view of suspension is that it amounts to detriment.

245. However, it considered whether the suspension was because the Claimant did any or all of the Protected Acts.

246. The Tribunal do not consider the suspension was because of, in any way, the Protected Acts, indeed, suspension took place before Protected Act 3 and therefore cannot be because or related to Protected Act 3.

247. The Tribunal concluded that Ms. Stanford suspended the Claimant because she had sought out, and admitted to seeking out, Ms. Viner and the Respondent was concerned about potential reputational risk. There is no evidence to suggest that the fact the Claimant raised a grievance two days prior had any bearing on the decision to suspend. The consideration of suspension was triggered the client reports to Ms. Stanford and the Claimant's admission of seeking out Ms. Viner.

248. It was noted that the Claimant has raised a number of grievances historically, and there is nothing to suggest any attempt to retaliate.

249. The allegation fails.

8.2.2 On 4 August 2022, Michele Stanford chaired the claimant's disciplinary hearing and did not conduct the hearing in a manner that gave the claimant a reasonable opportunity to present her case.

250. The Claimant, as evidenced by the notes of the disciplinary meeting, had an opportunity to make any comments that she wished and present her case at the disciplinary hearing.

251. Accordingly, as this was not found to have happened as a matter of fact, the alleged detriment in this allegation is not made out.

252. The allegation fails.

The respondent failed: 8.2.2.1 To properly investigate by not obtaining a statement from Ms. Viner; and/or sought from client

253. As set out in the findings of fact, the client did not wish to participate in the Respondent' disciplinary process.

254. In these circumstances, noting the Tribunal consider a reasonable investigation took place in view of the circumstances, namely the Claimant's admission, the Tribunal do not consider the alleged detriment happened.

255. The alleged detriment in this allegation is not made out.

256. The allegation fails.

The respondent failed: 8.2.2.2 To provide evidence where it states that approaching and discussing matters with clients is against company policy and deemed gross misconduct, or evidence that the claimant had been made aware of this policy.

257. As set out in the findings of fact, the Claimant was clearly instructed, first in 2012, that it was not permitted to discuss personal and work matters with the client and that it was considered action that could bring the Respondent into disrepute and could lead to disciplinary action. The Respondent's Disciplinary Policy states:

"Generally, gross misconduct includes any serious breach of conduct or duty that brings the Company into disrepute, or actions that are inconsistent with the relationship of trust and confidence required between the company and its employees".

258. The alleged detriment in this allegation is not made out.

259. The allegation fails.

8.2.3 On 8 August 2022, the claimant was dismissed for gross misconduct. The respondent did not consider an alternative sanction despite the claimant's length of service and clean disciplinary record.

260. The Tribunal consider that a reasonable view of dismissal is that it amounts to detriment.

261. However, it went on to considered whether the dismissal was because the Claimant did any or all of the Protected Acts.

262. The Tribunal do not consider the dismissal was because of, in any way related to, the Protected Acts.

263. The Tribunal conclude that the Claimant was dismissed because she had sought out, and admitted to seeking out, and telephoned Ms. Viner and this was deemed to be gross misconduct.

264. As per our conclusions in relation to the allegation of suspension, there is no evidence to suggest that the fact the Claimant raised a grievance on 14 June 2022 had any bearing on the decision to dismiss her.

265. It was noted that the Claimant has raised a number of grievances historically, and there is nothing to suggest any attempt to retaliate. The decision to dismiss was made jointly by Ms. Stanford and Mr. Hookway.

266. The allegation fails.

Time limits

267. As the Claimant was not successful in any of her complaints the Tribunal did not go on to consider time limits as it was not necessary to do so.

Approved by:

Employment Judge Cawthray

7 May 2025