EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101062/2025

Sitting at Aberdeen on 1, 2, 3 and 4 December 2025

Employment Judge Smith

Mrs J Mitchell	**Claimant** **In person**
Aberdeenshire Council	**Respondent** **Represented by** **Mr R Taylor,** **Solicitor**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's claim of (constructive) unfair dismissal is not well-founded and is dismissed.

2. The claimant was not, at any material time in the case, a disabled person within the meaning of section 6 of the Equality Act 2010.

3. Accordingly, the claimant's claims of:

    3.1. Direct disability discrimination;
    3.2. Disability-related harassment; and,

    3.3. A failure to make reasonable adjustments,

fail and are dismissed.

4. The claimant's claim of unauthorised deduction from wages fails and is dismissed.

REASONS

Introduction

1. In a claim form presented on 29 May 2025 the claimant presented various complaints to the Employment Tribunal. These complaints were crystallised at a preliminary hearing held on 2 September 2025 before Employment Judge Sangster, and a list of issues prepared. Four distinct legal claims were identified:

    1.1. Constructive unfair dismissal;

    1.2. Direct disability discrimination, in relation to a single allegation (that Mrs Mairi Dawson stated to the claimant, in October 2024, "not to be paranoid" and "you do tend to be a bit more paranoid");

    1.3. Harassment relating to disability, in relation to the same single allegation; and,

    1.4. A failure to make reasonable adjustments, based on a practice of the respondent in requiring employees to clean particular areas within certain time limits.

2. A fifth claim was allowed to proceed as an amendment to the claim form. That claim was an unauthorised deduction from wages claim relating to £262.14 allegedly deducted from the claimant's wages by the respondent on 29 May 2025.

3. There were time limit issues in relation to the discrimination, harassment and reasonable adjustments claims, owing to the date of the event complained about as the act of direct discrimination/harassment (October 2024) and the more complicated position regarding time limits in reasonable adjustments claims. Depending on my judgment in relation to the disability issue, it may have become necessary for me to determine time limits in relation to these claims.

4. The hearing spread over four days and concluded on the morning of the fourth day. As both parties had indicated that they would request written reasons in

any event, I decided to reserve judgment once the parties had completed their submissions.

5. The claimant represented herself and the respondent was represented by Mr Taylor. I am grateful for them both for their civil manner and the constructive assistance they both provided to me during the course of the hearing.

The evidence

6. I heard evidence from the claimant herself in support of her case. From the respondent I heard evidence from:

   6.1. Mrs Mairi Dawson (Cluster Cleaning Services Supervisor and sometime line manager of the claimant);

   6.2. Miss Sarah Morrice-Burgess (Facilities Operating Co-ordinator and the claimant's line manager at the very end of her employment; Mrs Dawson's line manager);

   6.3. Miss Jennifer Duthie (Cluster Business Manager; Miss Morrice-Burgess' line manager); and,

   6.4. Mrs Maureen Work (HR Advisor).

7. In general, I found the claimant and all of the respondent's witnesses to be credible. They all gave careful thought to what they were asked and did their best to convey their knowledge of events and explain why things happened as they did. Also in general, I found the claimant and all of the respondent's witnesses to be reliable, but that assessment is qualified. I did find that the respondent's witnesses were somewhat more reliable than the claimant because their answers were usually on point with precisely what they were being asked; by contrast, the claimant's answers were sometimes vague or had a tendency to traverse the outskirts of what was being asked rather than reach the destination directly, and she also seemed unsure of several of the essential components of the positive case she had put forward to the Tribunal. That is not to say that I found the claimant to be an unreliable witness: she was not. Her evidence was reliable, subject to those qualifications I have mentioned.

8. The claimant had recorded a large number of meetings and conversations at which she and others (including the respondent's witnesses) were present. No attempts were made by her to request permission of the other participants to record, and it was all done behind their backs. The sheer extent of the covert recordings was such that essentially an entire lever arch file of

handwritten transcripts were available to the Tribunal. Whilst this did cause me to question the claimant's good faith in her approach to the conversations and meetings themselves, no point was taken by Mr Taylor in relation to the impact such recordings ought to have on the credibility or reliability of the claimant as a witness and I decided I should not let the matter affect my own assessment of the claimant as a witness. In the event, both sides drew my attention to the transcripts during the course of the hearing.

9. The productions file amounted to 729 pages and I was directed to some of the documents within that file during the course of the evidence. The transcript file (which also included some further additional documents that were not in fact transcripts of recordings) amounted to 434 pages and I was directed to several of those as well.

10. I was careful to remind the parties on several occasions that unless they directed my attention to a particular document during the course of the evidence, normally the Tribunal would not look at it (it being for the parties to present the evidence they would wish the Tribunal to take into account).

Findings in fact

11. Having heard the evidence, I have made the following findings in fact. My findings are only those which it has been necessary to make in order to determine the claims before me. The findings have been made according to the standard applicable in Employment Tribunals, namely the balance of probabilities.

12. The respondent is a local authority which employs some 12,000 people, including 10 at Fraserburgh North school.

13. The claimant commenced employment with the respondent as a Cleaner on 17 April 2017.

14. The respondent issued the claimant with a statement of employment particulars, in a document headed "Contract of Employment". Insofar as it is material to this case, within the section "Your Salary Details" the written terms state that "Aberdeenshire Council reserves the right to recoup any overpayments."

15. The claimant was based at Fraserburgh North school and initially worked 13½ hours per week. At some point in or around 2019 her hours increased to 27 per week owing to the departures of a colleague and, subsequently, that colleague's replacement.

16. The claimant was for a time also employed on additional hours at Fraserburgh Academy, but this second post concluded in 2022. This additional role is relevant to this case because of events that may have happened in early 2021. At some point in that year a concern was raised about the claimant. Whilst I was not taken to any documents relating to this and the oral evidence in relation to it was somewhat patchy, the claimant explained in her own words that the concern raised was about her allegedly monitoring children using the toilets at the school, and of her allegedly intimidating staff and pupils at the school. It is not necessary for me to decide whether the concerns raised were well-founded or not, but they were certainly raised.

17. In evidence the claimant took me to some of her GP records from around this time. An entry for 25 February 2021 records the claimant telling her GP that she was "not coping too well" and that she "feels like her Anxiety is extreme". A further entry for 1 March 2021 records the claimant telling the administrator at her GP practice that she suffers from "anxiety with palpitations", and another from 25 March 2021 records her telling the GP that she was "feeling a little better still issues going on at work feels like it is personal management still the problem... seems to be coping meantime will contact me if anything changes".

18. The records from early 2021 show the claimant being prescribed Propanolol, which is a well-known medication used to treat (amongst other things) the symptoms of Anxiety. It is not clear how long the course of medication was, but a further record on 13 October 2021 shows the claimant discussed "restarting" Propanolol, which suggests that the original course from March 2021 had ended at some point prior to 13 October 2021.

19. The claimant was signed off as unfit for work by reason of "stress at work" at the 13 October 2021 GP appointment. Whilst initially for a period of a few weeks, her period of absence in fact lasted several months and only ended in May 2022.

20. In none of the documents I was shown did the claimant's treating medical practitioners confirm, or otherwise indicate, that she had Anxiety. The claimant told me that she had not in fact had a formal diagnosis of Anxiety, and she could not remember ever being told that she did have it. It was when asked why it was that she thought she had Anxiety she said that "I just thought that if you put Anxiety, you must have it".

21. The claimant was asked about the effect of what she described as "Anxiety" had on her. She said that she stopped socialising and worried when receiving "wrong looks" in the street. She described being upset and that her confidence had been knocked. Although she said nothing about what her

previous social interactions had been prior to February 2021, and nothing about any particular incidents of receiving “wrong looks”, this evidence was unchallenged and I therefore accepted it even though it was fairly general.

22. The concerns that had been raised about the claimant’s conduct at Fraserburgh Academy were apparently resolved in or around May 2022. I was not told precisely what the resolution was or indeed shown any documents relating to it, but it is clear that irrespective of any decision that may have been made in relation to the allegations against the claimant, the employment continued and she returned to work at that time. It was also very clear to me, however, that as a result of the concerns being raised about her the claimant developed very strong feelings of animosity towards Mrs Dawson. In the hearing itself the claimant repeatedly asserted that in fact, Mrs Dawson had made the whole thing up and also put to Mrs Dawson that she had gone as far as instructing another employee to fabricate a statement against her. No evidence was put before me that suggested that either proposition was substantiated, but it is not necessary for me to make a finding either way.

23. The claimant gave further evidence about the effect of what she described as “Anxiety” had on her ability to carry out day-to-day activities, upon her return to work in May 2022. She started to take “extreme measures” at work, essentially in order to protect herself from further allegations. This included, she told me, talking to the clocking out machine at the end of term because she believed it was faulty and falsely recording her start and finish times (her concern being that she would then be accused of something else).

24. The claimant supplied a disability impact statement, which I read carefully. That evidence was not challenged by Mr Taylor and again, I accepted it for that reason. In relation to Anxiety, very little is said. Mention is made of the claimant withdrawing from socialising and the “extreme measures” referred to above, and additionally to the claimant having problems with sleeping (having nightmares, being unable to sleep and having to take sleeping pills), although no particular time (or period) is specified in relation to the sleep disturbance.

25. In her impact statement the claimant states that she has been “prescribed medication (Sertraline, 100mg) for anxiety”, although I was not shown any records that would verify this or indicate when the medication was indeed prescribed. Sertraline was not mentioned in the parts of the claimant’s GP records I was shown (2021) so I can only presume that this prescription must have been issued at some later stage. It was unclear when, or in what circumstances.

26. In her impact statement the claimant stated that “these difficulties have persisted over a number of years”.

27. The claimant went on maternity leave in October 2022, slightly earlier than planned owing to a health issue. She returned to work from maternity leave on 1 November 2023.

28. On 5 February 2024 the claimant emailed Mrs Dawson to indicate that she had a stomach bug and would therefore not be attending work. On 14 April 2024 the claimant went off sick once again, this time with tennis elbow. That period of absence lasted until 28 April 2024. On 30 April 2024 Mrs Dawson notified the respondent internally that by that time the claimant had had 18 calendar days’ sickness absence across two occasions, in both the prior six- and twelve-month periods.

29. On 4 June 2024 the claimant was off sick once again, with an arm-related problem. On 11 June 2024 Mrs Dawson again notified the respondent internally that by that time the claimant had had 17 calendar days’ sickness absence across three occasions, in both the prior six- and twelve-month periods.

30. The respondent’s Attendance Management Procedure imposes trigger points in relation to sickness absence, with the policy aims being to monitor and minimise such absences. In basic terms, the trigger points are used to prompt managers into a discussion with the employee in order to further those policy aims. Trigger points are set at 10 calendar days’ absence within a six-month period, or 16 days’ within a twelve-month period, and separately, three occasions of absence within a six-month period and five occasions within a twelve-month period.

31. It was clear that by 11 June 2024 the claimant’s level of sickness absence (17 days) had exceeded the trigger points for both the six- and twelve-month periods in terms of calendar days, and that it had also hit the trigger point for the number of occasions of absence within the six-month period (three). None of it related to Anxiety or ADHD.

32. On 1 July 2024 – the final week of the school year – the claimant spoke with Mrs Dawson. The claimant covertly recorded the conversation. During the conversation Mrs Dawson informed the claimant that she had hit the trigger points and that once the claimant returned to work after the school summer holidays she was going to “put [her] on attendance management for three months”. Of course, the claimant would not be at work during the school summer holidays as the school itself would be closed. Logically, monitoring

the claimant's absence from work could only be properly done at a time when she was expected to be at work.

33. The Attendance Management Procedure envisages line managers taking action once trigger points are met, which specifically includes "placing an employee on a period of attendance monitoring", with the period itself being set by the Procedure as three months. It is clear that this is what Mrs Dawson's intention was at this time, and what she was expressing to the claimant. In my judgment, the subject of monitoring was spoken about by Mrs Dawson as something that would have to happen in the future but in a conversational rather than formal way; the conversation of 1 July 2024 was not a formal meeting as such. In addition, the transcript of the recording does not show Mrs Dawson telling the claimant that the period of monitoring would specifically start on her first day back at work after the summer holidays.

34. I took the view that it was in these circumstances unrealistic for the claimant to believe that the period of monitoring would begin as soon as her first shift after the summer holidays began, particularly where the Respondent has a formal process, where she would have expected to have had a formal meeting with Mrs Dawson about it at the start of the monitoring period (as Mrs Dawson actually told her would happen, towards the end of the 1 July 2024 discussion) and where she could have expected to receive some formal communication from her employer in writing about it (as the Procedure itself envisages).

35. The school summer holidays came and went, and the claimant returned to work at Fraserburgh North on or around 20 August 2024. Mrs Dawson wanted to give the cleaners a chance to get back into the work routine after the holidays, and thus she held off on convening the formal meeting with the claimant about attendance management. In my judgment, that was something she could reasonably have decided to do.

36. On 3 September 2024 Mrs Dawson wrote to the claimant inviting her to her office for a meeting to discuss her absences and the trigger points. That meeting was due to take place on 12 September 2024, and it did take place on that date. Present were the claimant, Mrs Dawson and Miss Morrice-Burgess. The claimant once again covertly recorded the conversation.

37. At this meeting the claimant was informed that the three-month period of monitoring would commence that day. The claimant queried why the period had not started as soon as the school year started, and Mrs Dawson again explained that she could not have started the period without having a meeting with the claimant first. The claimant was asked if that was alright, and she agreed that it was. During the discussion the claimant was informed that there

would be three periodic review meetings on a roughly monthly basis from that point onwards, and the potential consequences of further absences (and indeed no further absences) were also explained. The meeting was followed up in writing the same day.

38. During the meeting of 12 September 2024 the subject of physiotherapy came up in discussion, concerning "cutbacks". In passing, the claimant mentioned problems within the NHS as she was "still waiting for an ADHD assessment" and could be waiting a long time for it. ADHD was never mentioned in the meeting again, by anyone. Less still did the claimant say that she had ADHD, or that she thought she had it. It was simply a fleeting comment on a matter which did not relate to the subject of the meeting itself.

39. On 8 October 2024 the claimant spoke to Mrs Dawson. Again, she covertly recorded the conversation. The conversation itself was lengthy and the transcript amounted to some 26 pages of text. Part of the way during the claimant's evidence I was played a part of the audio recording of this conversation. Mrs Dawson had cause to speak to the claimant because a complaint had been made by the nursery staff the week before, about certain things not having been cleaned.

40. Listening to the conversation itself, it was clear to me that this was a genuine two-way conversation and one in which the tone was entirely appropriate on both the claimant's and Mrs Dawson's parts, throughout. There was nothing to indicate to me that Mrs Dawson approached it from the standpoint that the claimant had done anything wrong. In particular, I noted how frank the claimant was prepared to be with Mrs Dawson about the requirements of her work, her personal/health issues, and the understandable pressures of being a mother to a toddler. This level of openness on the claimant's part was surprising given the personal animosity she felt towards Mrs Dawson, and the suspicions she held about her.

41. As to her involvement in the conversation, I also noted that Mrs Dawson's manner of speaking to the claimant was similarly open. She was at no stage oppressive or even verging on robust. Mrs Dawson appeared to me to converse with the claimant in a civil way, respectful of the claimant's position as someone under her line management. There were at least two occasions where Mrs Dawson provided reassurance to the claimant that she did not need to "watch her back" (the claimant's words) or otherwise be concerned about what others may say about her work. This was a matter raised by the claimant in the conversation, albeit directed at other people and *not* Mrs Dawson.

42. At one point during the conversation, where the claimant was talking about her family situation with Mrs Dawson, the claimant mentioned that she was (still) waiting for a referral for ADHD. She said that she thought there had "always been something" but since having her child things had got worse. She then mentioned an example from the day before, of giving her son the key to her car and him then locking himself inside. She said to Mrs Dawson that she wished to reduce her hours as she was "not enjoying it; it's just too much".

43. A few minutes later in the conversation Mrs Dawson accepted (and the transcript records) that she said to the claimant "don't be paranoid", and that, "you do tend to be a bit more paranoid". However, this was not in relation to the earlier part of the conversation about ADHD; it was in relation to a topic the claimant had mentioned, namely getting her tasks done within her hours of work.

44. Having read the transcript and listened to the recording of this part of the conversation, the proper context of those comments being made by Mrs Dawson is this. The concern on the claimant's part was that someone may complain to Mrs Dawson that a particular cleaning task had not been carried out by the claimant. Ahead of saying "don't be paranoid" and "you do tend to be a bit more paranoid", Mrs Dawson – in a reassuring way – explained to the claimant that if she needed assistance she just needed to ask, and that if someone did approach her with a concern about the tasks not being completed she would, as her line manager, have to deal with it as she would in relation to any employee. In saying "don't be paranoid" and "you do tend to be a bit more paranoid" Mrs Dawson was trying to reassure the claimant and, in my judgment, emphasise to her that her concerns about someone complaining were unlikely to come to fruition. The purpose of her making those comments was only to reassure.

45. In her reply the claimant in fact acknowledged and endorsed Mrs Dawson's comments ("aye I ken"). She went on to say that her worry was about "our past history" - meaning the 2021 concerns raised about the claimant and Mrs Dawson's handling of those – and that "it" would happen again. I accepted the claimant's evidence which was that the "it" was a reference to the 2021 concerns (described by the claimant in evidence as "the false allegations Mairi made previously"). Whilst the comments did relate to the claimant's feelings of worry, they related to her worries about a repeat of 2021 and not to Anxiety as a psychological condition. The comments had no relation whatsoever to ADHD.

46. Whilst the claimant did get slightly upset during her reply to Mrs Dawson, I find that this was not in relation to the comments made by Mrs Dawson (which

the claimant had endorsed) but in relation to the events of 2021 and her perception of them. I am reinforced in this view because in her comments immediately following this she talked about people "looking at [her] differently" and "not knowing the full story". This was plainly about the 2021 events and not a reference to tasks not being completed within the claimant's working time, which had been an earlier subject of the conversation.

47. The conversation continued, for several more minutes. The claimant remained an active participant in it. Mrs Dawson remained respectful and understanding, whilst re-stating her responsibilities as line manager. The conversation drifted into other subjects such as cleaning equipment/appliances, the use of chemicals, and holidays. The claimant did not appear to be upset or unwilling to continue. There is no indication that in the remainder of the conversation the claimant took issue with the two mentions of paranoia by Mrs Dawson.

48. Furthermore, after the conversation ended the claimant took no action in terms of raising any objection to the "paranoia" comments with Mrs Dawson, or indeed anyone else in the management chain or the respondent generally. That was despite knowing at that time that she had a recording of the conversation (covertly obtained) which was incontrovertible proof of what Mrs Dawson had said, and despite her already strong sense of ill-feeling towards Mrs Dawson. The first mention of a "paranoia" comment was only in a grievance filed some two months later (on 9 December 2024), as one comment amongst several (none of which are put forward to this Tribunal as amounting to unlawful discrimination or harassment), somewhat buried within the sixth item of a much broader complaint. Whilst there is no expectation that every wronged individual will immediately complain, given that the claimant put this particular allegation front and centre of her claims of direct discrimination and harassment to the Tribunal, and given her general willingness to be frank, I found the lack of a significant and relatively prompt complaint surprising.

49. In my judgment, the purpose of Mrs Dawson making the "paranoia" comments was not to violate the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for her. The sole purpose of those comments was to reassure. Further, in my judgment the claimant herself did not perceive that the comments had the effect of violating her dignity or create the necessary environment. She accepted in evidence that "paranoia" is a term that can be used freely in conversation (i.e. in a non-clinical sense), which I too accept, where it is used to describe an unnecessary worry over something (for example). That is the context in which it was used here. Taking into account all my relevant findings as to the conversation itself and its proper context, and considering the matter

objectively, I do not find that it was reasonable for the "paranoia" to have had those effects even if the claimant had perceived them to (which I have not found she did not have).

50. The claimant did not attend the first attendance management review meeting (scheduled for 10 October 2024). I was not told why and therefore can make no finding as to the reason. She did attend the second review meeting, which was ultimately held on 11 November 2024.

51. Having discussed the situation regarding her working hours, with effect from 13 October 2024 Mrs Dawson agreed to reduce the claimant's working hours from 27 to 17 per week. I was shown a plan of Fraserburgh North school which showed which areas would be covered by the claimant (coloured blue) in the 17 hours and those which would be covered by the additional cleaner, working the ten extra hours (coloured green).

52. Mrs Dawson gave evidence about how the areas came to be decided upon. This evidence was unchallenged by the claimant and I accepted it. The respondent adopts a set of principles set down by the British Institute of Cleaning Services (BICS), the essence of which is mathematical. The process involves identifying the area of each part of a building to be cleaned, in terms of its square meterage. Depending on which part of a building it is, a "productivity rate" is then applied to each individual part, which results in a projected timeframe for cleaning it. The "productivity rate" changes depending on which type of room it is, as some rooms involve significantly more effort to clean than others.

53. The examples which Mrs Dawson gave were school toilets (which require more effort to clean and restock, and more regular cleaning, thus the "productivity rate" is low) compared with classrooms (which would generally only require less intense daily cleaning and restocking, resulting in a higher "productivity rate"). Those examples seemed to me to be apt. Requiring Cleaners to clean particular areas within certain time limits was something the respondent had a practice of doing, and the BICS methodology was the means of how those areas and time limits came to be determined. That is something which would have applied to any Cleaner irrespective of whether they had Anxiety, ADHD or indeed any disability.

54. In the claimant's case, Mrs Dawson was the one who set the blue area of Fraserburgh North as the areas she was required to clean. She did this by applying the BICS principles and by taking account of a checklist of the things that would need cleaning daily and those which would need cleaning weekly. Whilst the claimant was contracted for 17 hours per week, Mrs Dawson ensured that the overall result of the BICS formula was that the demands on

the claimant would be limited to around 15½ hours' work. That, she explained, would allow the claimant some leeway to ensure she was able to catch up within time if she had fallen behind, or so she could deal with an emergency.

55. On 11 November 2024 the claimant met Mrs Dawson for what was meant to be the second attendance management review meeting. The claimant again covertly recorded that meeting. It was not suggested by the claimant that Mrs Dawson behaved inappropriately or unlawfully on this occasion. It was not suggested that Anxiety or ADHD were mentioned, nor "paranoia", nor indeed was there a repetition of the comments about paranoia made on 8 October 2024.

56. The meeting itself involved quite a lengthy discussion about the division of labour at Fraserburgh North, as between the claimant and her colleague working the ten-hour shift. The discourse was respectful and constructive. Whilst the claimant expressed scepticism about her ability to fully clean the school hall within her allotted hours and made suggestions about how things could be better organised. Mrs Dawson engaged with the discussion in a way that was constructive but firm: her decision was that responsibility for cleaning the hall would not be divided between the claimant and her colleague, nor should the claimant divide the hall into "squares" and only clean part of it in each shift.

57. There was a suggestion by Mrs Dawson that the claimant had in fact been undertaking tasks she did not strictly need to do (or do as often), and in evidence the claimant tentatively accepted that this may have been the case. Mrs Dawson reassured the claimant that she only needed to do the things she was expressly required to do as set out in her checklist, at the frequency set out in that checklist.

58. When asked whether the work demands and timings on the claimant placed her at a disadvantage in comparison to people who do not have Anxiety or ADHD, the claimant stated that because of Anxiety and ADHD, she was unable to prioritise tasks and was more likely to forget to do things. She pointed to an example of being interrupted to get someone a black bag and then forgetting to clean a table, and of forgetting to clean a couple of bins. I was not told if these were real examples or not, and if they were, when they were said to have occurred and whether the respondent may have known about them. In essence, her point was that she was less able to comply with the requirement, but it was a point made very generally and without any cogent evidence in support. However, her evidence was that she had only noticed becoming forgetful upon her return from maternity leave in October 2023; that struck me as being unusual given that ADHD is known to be a lifelong condition.

59. The claimant was never subject to performance management at any point in her employment, nor was there any evidence that of a persistent inability on the claimant's part to meet the requirements on the checklist within her 17-hour working week or persistent complaints from the school about things not having been done. The only evidence that suggested any particular difficulty in complying with the requirement consisted of the concerns expressed by the claimant to Mrs Dawson in the meeting of 11 November 2024, but that was specific to the school hall and the size of that space rather than a difficulty with the requirement in general, stemming from an impairment.

60. The claimant was absent from work from late November 2024, initially because of her son's sickness but then as a result of sickness in her own right. In all of the relevant fit notes supplied by the claimant the reason for her unfitness was given as "stress at work". No mention was made of Anxiety, nor of ADHD. Ultimately, the claimant would never return to work.

61. On 9 December 2024 the claimant emailed Miss Morrice-Burgess with a grievance. The target of the grievance was Mrs Dawson, and within the email the claimant made eight individual complaints against Mrs Dawson. These concerned a range of matters including:

    61.1. Being placed on attendance management;

    61.2. That Mrs Dawson had said the respondent would not allow time off even for emergencies;

    61.3. That Mrs Dawson alleged that certain tasks had not been completed by the claimant;

    61.4. That the claimant had been informed that "if Mairi doesn't get me on attendance she'll go down the capability route" (although the claimant confirmed in evidence that Mrs Dawson had not in fact said that to her herself, and couldn't remember who she thought had told her);

    61.5. A number of comments having been made by Mrs Dawson (including the "paranoia" comments of 4 October 2024, although these were not top of the claimant's list);

    61.6. A complaint that Mrs Dawson had said she was going to speak to a member of staff about paper towels when the claimant had not blamed that member of staff;

61.7. Mrs Dawson apparently asking whether the claimant had received an email regarding voluntary severance and chemicals (I was not shown any such email); and,

61.8. An alleged desire on Mrs Dawson's part to get the claimant "fired", with particular reference back to the events of 2021.

62. At point 3 within the grievance the claimant mentioned having informed Mrs Dawson that she was waiting to be "tested for ADHD" and that she had been waiting for this since being on maternity leave. This was at the start of a short paragraph in which the claimant also said she had informed Mrs Dawson of parts of her cleaning area (the blue zone) which "I think will be a struggle" and that Mrs Dawson was not willing to discuss this. Having read this paragraph carefully, it was not clear to me whether what the claimant was saying the difficulties she was contending existed were linked to ADHD in some way.

63. Miss Morrice-Burgess replied to the claimant the same day, less than three hours later. She sent the claimant a copy of the respondent's Grievance Procedure as an attachment to the email. The claimant's grievance said nothing about what she wanted by way of a resolution to the complaints she had raised, so within her email Miss Morrice-Burgess asked the claimant to state what she wanted by way of a resolution.

64. The claimant did not respond to this request until 16 February 2025, nor did she follow up with Miss Morrice-Burgess about the progress of her grievance in the meantime. It was not clear to me why there was such a delay on her part in answering what was a straightforward request from Miss Morrice-Burgess, particularly in circumstances where the claimant's sickness did not prevent her from dealing with Miss Morrice-Burgess and Mr Scott Rennie (of the respondent's HR department) via email on various other occasions in the intervening period, and from engaging in various telephone calls with Miss Morrice-Burgess (all covertly recorded) concerning her employment, on 13 December 2024, 17 January 2025 and 5 February 2025. The answer, when it eventually came on 16 February 2025, was that the claimant wanted an apology, to be managed by someone other than Mrs Dawson, and for her perceived treatment at the hands of Mrs Dawson to stop.

65. Despite having taken no action in relation to the grievance for more than two months herself, the claimant wrote to Miss Morrice-Burgess on 24 February 2025 asking where she stood in relation to it. On 4 March 2025 Miss Morrice-Burgess wrote to the claimant regarding a number of matters, including the grievance but also a stress questionnaire and to inform her that the respondent's Occupational Health (OH) practitioners could not test or

diagnose ADHD, so she would need to go back to her GP in order to pursue those things.

66. As regards the grievance, in her letter Miss Morrice-Burgess explained that the reasons for delay in progressing the grievance were, firstly, the claimant's own delay in sending through what she was seeking by way of a resolution, and secondly, because Miss Morrice-Burgess had originally wished to wait for OH to comment on whether the claimant was fit to participate in a grievance process. She further explained that as the claimant wanted the grievance to progress, it would be progressed. The claimant was informed that she would be invited to a grievance meeting and that the appointed chair would contact her directly about this.

67. A discussion was then had internally between Miss Morrice-Burgess and Mrs Work (of HR) about the claimant's grievance and the appropriate way forward. As a result of Miss Morrice-Burgess' proximity to the persons involved it was decided that someone else should have conduct of the grievance. That person was Miss Jennifer Duthie, Cluster Business Manager, who was above Miss Morrice-Burgess in the management hierarchy.

68. On 14 March 2025 the claimant resigned, on one month's notice. Her resignation email, sent to Miss Morrice-Burgess, stated:

> "*It is with great sadness that I have to resign my position that I have held for the past eight years at Fraserburgh North school. I have enjoyed my time there and found the staff extremely supportive throughout my time there. I feel that under the management of Mairi Dawson it is no longer a safe or positive working space and this has negatively impacted my health. Please take this as my month's resignation email starting from today 14/03/2025.*"

69. The claimant's resignation was accepted by Miss Morrice-Burgess via email on the same morning. Miss Morrice-Burgess informed her that her final day of employment would be 11 April 2025.

70. The claimant was asked why she resigned. From her answer I was able to find that there were three reasons. The first reason – and in my judgment, the primary reason, given the lengths at which she described it – concerned her being placed on attendance management from 12 September 2024 rather than (as she had understood it) from around 20 August 2024, when she returned to work on the first day of the school year. The second reason was what she described as her grievance having been ignored. The third reason was that the claimant contended that she had been told, in March 2025, that reasonable adjustments would only be put in place at the discretion of management.

71. I have made findings as to what actually happened in relation to the attendance management reason and the grievance reason already. As to the third reason, the evidence showed that in a report of 11 March 2025 an OH practitioner stated, in relation to a question about reasonable adjustments, that "The above modifications would be at managers discretion as advised today."

72. Whilst the claimant took issue with this comment, in my judgment her criticism of the respondent in respect of it is entirely misplaced. Firstly, the person making the comment was not an employee of the respondent and was instead entirely independent of it. The respondent uses an external OH provider, PAM OH Solutions, for referrals and advice. PAM is an entity entirely independent of the respondent, and it was their adviser, Ms Christina Macintosh, who made the comment. Secondly, the comment was to my mind a fair one. Whilst not perfectly legally worded, what it seemed to me to be driving at was a recognition on the part of OH that as a matter of law, the duty to make reasonable adjustments only extends to those adjustments which it is reasonable for the employer to have to make, and also to the fact that OH was not in a position to force management to take any particular step. As a result, whilst I have accepted that this comment was the third reason why the claimant resigned, it was not conduct that was attributable to the respondent.

73. The OH report itself is of some assistance on the question of disability. Whilst not a doctor, Ms Macintosh is a Registered Mental Nurse (RMN) and a considerable degree of respect is therefore to be granted to what she said, in my judgment. She reported that the claimant was not diagnosed with an underlying mental health condition but did have medication for the symptoms of anxiety and low mood, which were reported as being moderate to severe at that time. The report records that the reason for her absence from work has been "perceived work-related stress" and that her "symptoms appear to be linked to work" but that she is "engaging in her day-to-day activities as well as hobbies independently".

74. Ms Macintosh's assessment of the claimant was that she believed there were "no medical barriers preventing [her] from engaging in her working duties however she is experiencing symptoms related to perceived work-related stress which are a barrier in her returning to work. It is likely that once this is addressed, [the claimant] would be fit to engage in her duties...". Ms Macintosh did not comment on whether she believed the claimant might meet the definition of disability within the meaning of the **Equality Act 2010**; indeed, she was not asked to.

75. On 18 March 2025 Miss Duthie wrote to the claimant inviting her to a grievance meeting, intended to take place on 24 March 2025. On 19 March 2025 the claimant wrote back saying that her previously proposed resolutions of an apology or being managed by someone else were "off the table" and that she now wanted money. The meeting was subsequently rearranged in order to give the claimant more time to present documents, but on 28 March 2025 the claimant terminated the process and informed Miss Duthie that she would not attend the reconvened meeting.

76. On 13 April 2025 the claimant's employment duly came to an end upon the expiry of a month's notice, rather than the 11 April date cited by Miss Morrice-Burgess in her email accepting the resignation.

77. On 29 April 2025 the claimant was paid her full entitlement to salary and statutory sick pay (SSP), albeit for the full month of April rather than the part-month she had been in employment until. On 11 August 2025 the respondent wrote to her identifying that there had been an overpayment made to her in respect of salary. The claimant agreed in evidence that the respondent had overpaid her for that month and thus I had no hesitation in finding that there had in fact been an overpayment as set out by the respondent in its letter.

78. There was no evidence that any monies had in fact been deducted from anything properly payable to the claimant. Certainly, the claimant would have had no entitlement to be paid for the full month of April as her employment ended on the 13th. Having examined the respondent's letter – the contents of which were not disputed by the claimant in evidence – I have reached the conclusion that what actually happened here was not that a deduction was made from the claimant's wages at all, but that she was in fact overpaid and by way of its letter of 11 August 2025 the respondent sought to recover the overpayment from her by requesting she make a payment back to it. The claimant agreed that she had not made the payment requested, and thus on the face of things she continues to owe the respondent the overpaid amount.

The law

Constructive unfair dismissal

79. An employee who terminates the contract of employment may nevertheless claim to have been dismissed by the employer if the circumstances are such that she is entitled to terminate it by reason of the employer's conduct. This concept is known as a constructive dismissal. The entitlement to terminate must be a contractual entitlement. The leading case on whether there has been a constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp*** [1978] IRLR 27 (England and Wales Court of Appeal), and there are four tests to be satisfied in this regard. Those are:

79.1. Did the employer breach the employee's contract of employment?

79.2. If so, was that breach fundamental?

79.3. If so, did the employee resign in response to that breach or for some other reason?

79.4. If so, did the employee nevertheless affirm or waive the breach through his words or his conduct?

80. In this case the claimant contends that she was constructively dismissed because she resigned in response to a breach of the implied term of mutual trust and confidence. The definition of that term was set out by the House of Lords in the case of ***Malik & another v BCCI*** [1997] IRLR 462. It is an implied term of every contract of employment that "the employer shall not, without reasonable and proper cause, conduct itself in a way which is calculated or likely to seriously damage or destroy the relationship of mutual trust and confidence with the employee".

81. A breach of the implied term is always fundamental, automatically satisfying the first and second of the ***Western Excavating*** tests: ***Morrow v Safeway Stores plc*** [2002] IRLR 9 (Employment Appeal Tribunal).

82. The fundamental breach of contract by the employer must be an effective cause for resignation, even if it is not the sole cause: ***Jones v F Sirl & Son (Furnishers) Ltd*** [1997] IRLR 493 (EAT).

83. In relation to waiver/affirmation, the Tribunal must decide whether waiver or affirmation has occurred by reference to the various factors in play, including those pointing towards or against the employee having insisted that the contract should continue (***W E Cox Toner (International) Ltd v Crook*** [1981] IRLR 443, EAT). One common factor pointing towards affirmation is the delay in resigning, but there is not – as a matter of law – any particular period of time by which an employee must resign in response to the fundamental breach lest he or she lose the right to assert that they have been constructively dismissed. It is always a matter of degree in each particular case, governed by the facts.

84. Delay of itself does not generally amount to affirmation but can be (and usually is) an important factor in determining whether affirmation has occurred (***Chindove v Wm Morrison Supermarkets Ltd*** UKEAT/0201/13, 26 June 2014, unreported). Other factors may also be relevant to this question, not least the employee's length of service (***G W Stephens & Son v Fish*** [1989] ICR 324, EAT), the employee's protests regarding the employer's conduct

(such as the raising of a grievance or complaints), and the personal circumstances of the employee. This is not, however, intended as an exhaustive list as ***W E Cox Toner*** reminds Tribunals that this must involve a multifactorial analysis.

85. **Section 95(1)(c)** of the **Employment Rights Act 1996** deems a termination by the employee in the circumstances described above as amounting to a dismissal by the employer. In this case it is not in dispute that the claimant has sufficient qualifying service so as to enjoy the right not to be unfairly dismissed (under **s.94**).

86. If the claimant establishes that she was constructively dismissed it is for the respondent to prove (under **s.98(1)**) that the principal reason for the dismissal was a potentially fair one. In this case, Mr Taylor quite properly accepted that no potentially fair reason for dismissal was being advanced by the respondent and therefore it ought to follow that if I find the claimant to have been constructively dismissed, that dismissal would be unfair.

Disability

87. The definition of who qualifies as a disabled person under the **Equality Act 2010** is contained within **section 6(1)**, which reads as follows:

"*A person (P) has a disability if—*

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

88. The first of the component parts of the definition is the existence of an "impairment". Underhill J (President, as he then was) in ***J v DLA Piper UK LLP*** [2010] IRLR 936 (EAT) suggested that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, there will generally be no need to actually consider the "impairment condition" in detail (at [40]):

"*In many or most cases it will be easier (and is entirely legitimate) for the Tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the Tribunal to try to resolve the difficult medical issues."*

89. Of assistance in answering this question is the Office for Disability Issues' *Guidance on matters to be taken into account in determining questions relating to the definition of disability*. Whilst the *Guidance* does not take precedence over **s.6** itself I have taken it into account, where necessary. In particular, I noted from section A5 of the *Guidance* that Anxiety – one of the two impairments relied upon by the claimant – is expressly referred to as an impairment.

90. However, in cases where Anxiety is asserted as an impairment the EAT made an important observation in ***J*** (at [42]):

> *"The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at paragraph 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – 'adverse life events'."*

91. Also of assistance to me has been the Equality and Human Rights Commission's *Statutory Code of Practice on Employment*, which I have similarly taken into account where necessary. On the question of "impairment" paragraph 7 of Appendix 1 is clear that the focus must be on the effect of the impairment, not its cause. That reflects paragraph A3 of the ODI's *Guidance*.

92. The word "substantial" in **section 6(1)(b)** is further defined by **section 212(1)**. It means something *"more than minor or trivial"*. This imposes a relatively low threshold. It is a matter of fact for the Tribunal to determine (***Rayner v Turning Point*** (2010) UKEAT 0397/10/0511, EAT).

93. The cumulative effects of an impairment should be taken into account when determining whether it is "substantial". An impairment might not have a substantial adverse effect on a person's ability to undertake a specific day-to-day activity on its own. However, its effects on more than one activity, taken together, could result in an overall substantial adverse effect. I noted the hypothetical example given in the *Guidance* (at section B4) is of a person with depression who experiences a range of symptoms which, taken together, may surpass the "substantial" test.

94. On the question of what is "substantial", paragraph 9 of appendix 1 of the EHCR Code recommends that *"Account should… be taken of where a person*

avoids doing things which, for example, causes... substantial social embarrassment."

95. "Day to day activities" encompass activities which are relevant to participation in professional life as well as participation in personal life, and the Tribunal should focus on what the claimant cannot do, not what they can do. A non-exhaustive list of examples of "day to day activities" is found at section D3 of the *Guidance*, and from section D16 they may also include those required to maintain personal well-being. Account should be taken of whether the effects of an impairment have an impact on whether the person is *"inclined to carry out or neglect basic functions such as eating, drinking, sleeping, keeping warm or personal hygiene"*.

96. **Paragraph 2** of **schedule 1** to the **Equality Act 2010** defines "long-term" in the following terms:

> *"(1) The effect of an impairment is long-term if –*
>
> *(a) it has lasted for at least 12 months,*
>
> *(b) it is likely to last for at least 12 months, or*
>
> *(c) it is likely to last for the rest of the life of the person affected.*
>
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*"

97. The Tribunal must consider all three of the scenarios set out in sub-paragraph (1) (***McKechnie Plastic Components v Grant*** (2008) UKEAT/0284/08, EAT). "Likely" in this context has been held to mean it is a "real possibility" and "could well happen", which is a lower threshold than "probable" or "more likely than not" (***SCA Packaging Ltd v Boyle*** [2009] IRLR 746, House of Lords).

98. All the circumstances of the case should be taken into account in determining whether the impairment is likely to recur (*Guidance*, section C7). In relation to medical treatment, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, the treatment is to be ignored and the effect is to be regarded as likely to recur (section C11).

99. The burden is on the claimant to prove that she met the **s.6** definition during the time period in question.

<u>Failure to make reasonable adjustments (PCP cases)</u>

100. **Section 20 Equality Act 2010** provides as follows:

> (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.*

101. **Section 21** sets out that a failure to comply with the **section 20(3)** requirement is a failure to make reasonable adjustments.

102. In relation to a provision, criterion or practice (PCP), a Tribunal must take care to identify it but should not take too technical an approach *(**Carrera v United First Partners Research*** UKEAT/0266/15, EAT). A PCP is typically something that the employer does, can be found in the arrangements it makes, or exists in a state of affairs (***Archibald v Fife Council*** [2004] IRLR 651, House of Lords). It should be something that is capable of being applied beyond the case of a single employee and would not usually apply to every instance of "unfair" treatment (***Ishola v Transport for London*** [2020] IRLR 368, EAT). In the specific context of disciplinary procedures, a flawed process applied on a one-off basis is not something that is likely to amount to a PCP (***Nottingham City Transport Ltd v Harvey*** [2013] EqLR 4, EAT).

103. The reasonable adjustments regime does require a comparison. As Simler P observed in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 (EAT):

> "*The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question… For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances... The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective*

basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."

104. In ***Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley*** [2012] EqLR 634 the EAT held that if the substantial disadvantage complained of is not because of the disability the duty to make reasonable adjustments will not arise. In that case the disadvantage to the employee was financial to the employee, as a result of personal and family circumstances. That disadvantage would have been the same for non-disabled employees. Whilst ***Bagley*** pre-dated ***Sheikholeslami***, it serves to illustrate the point made by Simler P in the latter case.

105. In order for the duty to be engaged, the employer must have had knowledge (actual knowledge or constructive knowledge, in the sense that it reasonably ought to have known) not only of the disability, but also that the disabled employee was likely to be placed at the substantial disadvantage (**schedule 8 paragraph 20 Equality Act 2010**).

106. As to the reasonable steps that should be taken to avoid the disadvantage, it is correct to observe that the steps need not remove the disadvantage entirely: it is enough for a Tribunal to find that there would be "a prospect" of the adjustment removing the disadvantage. That does not, however, mean there has to be a "good" or "real" prospect of that occurring (***Leeds Teaching Hospital NHS Trust v Foster*** [2011] EqLR 1075, EAT).

107. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment. The duty arises by operation of law and it is not essential for the employee themselves to identify what should have been done, although commonly they do so (***Cosgrove v Caesar and Howie*** [2001] IRLR 653, EAT). The EHRC *Code of Practice on Employment* lists factors which might be taken into account when deciding if a step was a reasonable one for the employer to have taken (paragraph 6.28) and I have had regard to them in deciding this case.

Direct discrimination

108. **Section 13(1) Equality Act 2010** provides as follows:

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

109. Direct discrimination involves a comparison exercise between how the claimant was treated and how another person was treated. That other person – the comparator – must be someone whose circumstances were not

materially different to those of the claimant, save that they did not have the same protected characteristic (**s.23**). In this claimant's case, the statutory comparator must therefore not be a person who had Anxiety or ADHD.

110. Whilst a comparator can be real or hypothetical, the treatment itself must be less favourable and not merely different (***Schmidt v Austicks Bookshops Ltd*** [1977] IRLR 360, EAT). Whether the comparison is sufficiently similar is a question of fact and degree for the Tribunal (***Hewage v Grampian Heath Board*** [2012] IRLR 870, Supreme Court).

111. It is not enough to establish less favourable treatment in comparison to the statutory comparator; the reason for the treatment itself must be the protected characteristic. It need not be the sole reason (***Owen and Briggs v James*** [1982] IRLR 502, Court of Appeal), nor indeed the main reason; so long as the protected characteristic is an operative cause of the less favourable treatment, that is enough to satisfy **s.13** (***Nagarajan v London Regional Transport*** [1999] IRLR 572, House of Lords).

Harassment

112. **Section 26 Equality Act 2010** provides as follows:

"(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect."

113. Conduct that amounts to harassment cannot also amount to direct discrimination (**s.212**); it can be one or the other, but not both. It is however common for claims of harassment to also be put on the basis, *esto*, that it is direct discrimination. This is such a case.

114. Harassment does not require a comparison exercise, and it also does not require that the reason for the treatment be the protected characteristic. However, the unwanted conduct must relate to the protected characteristic. That concept is a wider one but in principle it would almost inevitably include unwanted conduct that was done because of a protected characteristic (***Bakkali v Greater Manchester (South) t/a Stage Coach Manchester*** [2018] IRLR 906, EAT). Tribunals have no jurisdiction to consider freestanding claims of harassment where there is no relation to a protected characteristic. Where there is no relation to a protected characteristic, the claim must fail and it is not necessary to go on to consider the other elements (***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336, Court of Appeal).

115. As to the perpetrator's purpose, the Tribunal must assess the alleged harasser's motive or intention. In "effect"-type cases, as **s.26(4)** states, the analysis must take into account the claimant's own subjective perception but also decide the matter objectively using a test of reasonableness, whilst taking into account the other circumstances of the case.

116. As broad as it is undoubtedly is, the concept of harassment is not without its boundaries. As the EAT said in ***Dhaliwal****:*

> "*We accept that not every... adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*."

117. For a disability-related harassment claim to succeed it remains the legal position that the individual claimant must themselves have the disability (***Peninsula Business Services Ltd v Baker*** [2017] IRLR 394, EAT).

<u>Unauthorised deductions from wages</u>

118. **Section 13 Employment Rights Act 1996** confers upon workers the right not to suffer unauthorised deductions from wages. The starting point for determining whether there has been a deduction from wages (authorised or not) is therefore to identify what sum, in *"wages"*, was *"properly payable"*.

119. *"Wages"* is defined by **s.27**. The term includes *"any sums payable to the worker in connection with his employment"* including specific modes of remuneration set out at **s.27(1)**, but excluding those set out under **s.27(2)**.

120. *"Properly payable"* appears in **s.13(3)** and has been determined to mean sums to which the worker has some legal – but not necessarily contractual – entitlement (***New Century Cleaning Company Ltd v Church*** [2000] IRLR 27, Court of Appeal; ***Helliwell & another v Axa Services Ltd & another*** UKEAT/0084/11/CEA, 25 July 2011, unreported). An Employment Tribunal is entitled to interpret the terms of the contract in order to determine what is "properly payable" (***Agarwal v Cardiff University*** [2019] IRLR 657, Court of Appeal), and what is "properly payable" requires a finding of fact (***Davies v Droylsden Academy*** UKEAT/0044/16, 11 October 2016, unreported).

121. The second stage – often taken for granted or otherwise uncontroversial – is the *"occasion"* of the payment and, by extension, the deduction. Both occasions must be the same (***Murray v Strathclyde Regional Council*** [1992] IRLR 396, EAT) and it is necessary to identify that point in time with precision.

122. **Section 13(3)** provides the definition of the word *"deduction"* for the purposes of the unauthorised deductions jurisdiction under **Part II** of the **Act**:

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

123. The third stage is therefore to identify the sum actually paid in *"wages"*, and compare the two. The difference between the sums is the *"deduction"* for **s.13(3)** purposes, and it can include a total non-payment (***Delaney v Staples*** [1992] IRLR 1919, House of Lords).

124. The fourth and final stage is to identify whether the deduction was *"authorised"*. **Section 13(1)** provides for two situations in which a deduction is authorised: either where *"the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract"* (**s.13(1)(a)**) or where *"the worker has previously signified in writing his agreement or consent to the making of the deduction"* (**s.13(1)(b)**). The term *"relevant provision"* is defined in **s.13(2)**.

125. To succeed in an unauthorised deductions claim a claimant must therefore satisfy the Tribunal that an identifiable sum of wages was properly payable to

him on a particular occasion, that this was not paid on that occasion (either in part or not at all), and that the *"deduction"* that results was not authorised in either of the two senses cited above.

126. In relation to the recovery of overpayments, **s.14** provides that:

> *"(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of -*
>
> *(a) an overpayment of wages, or*
>
> *(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,*
>
> *made (for any reason) by the employer to the worker*."

Analysis and conclusions

127. In the paragraphs that follow I shall set out my conclusions in relation to each of the claimant's claims. It is not my intention to rehearse the parties' submissions but I have borne them in mind when reaching my decision.

Disability

128. I shall first deal with the claimant's contention that at all material times in the case she was a disabled person within the meaning of **s.6 Equality Act 2010**, by reason of ADHD and/or Anxiety.

129. By "material time" I of course mean the material time in relation to the claims which are before the Tribunal. The claims of direct discrimination and harassment are based on comments I have found were said on 4 October 2024. However, the failure to make reasonable adjustments claim in principle covers a broader time period than just one day. Based on my findings as to when the claimant contended she was becoming more forgetful and finding it difficult to complete her work tasks within her working hours, I have taken the "material time" for the purposes of the reasonable adjustments claim as being 13 October to around 20 November 2024 (the date the claimant reduced her hours to 17, and the date she began her final absence from work).

130. As to ADHD, there is simply no evidence before me that the claimant had this impairment at the material time. She may well have been referred for testing in the past, but for whatever reason this has not materialised and it may never

materialise. She is not to be criticised for that as such matters are largely out of her control. Equally, the claimant frankly accepted that she did not know whether she does in fact have ADHD; she is not clinically trained and not to be criticised in that regard either. But it is not for the Tribunal to fill the evidential gap: the burden of proof is on the claimant and in my judgment she has not proven, even on the balance of probabilities, that she has the impairment of ADHD. Whilst she could point to one or two fairly vague examples of forgetting things (such as cleaning a desk or leaving her car keys with her son in the car) and to having a difficulty in prioritising certain cleaning tasks, these of themselves did not satisfy me that the claimant had the impairment of ADHD. In relation to this contention, the claimant did not come close to satisfying the burden.

131. As to Anxiety, there is also no evidence before me that the claimant had this impairment at the material time. The case of ***J*** reminds us that there is a distinction to be drawn on the one hand between cases where there is clinical Anxiety (as a mental health condition) and those where the *symptoms* of anxiety arise as a reaction to adverse life events. To be clear, the absence of evidence is in relation to Anxiety as it is clinically described, not to the symptoms (of which there was evidence).

132. Such medical evidence as was placed before me did not show that the claimant had the impairment of Anxiety. The mentions of the word “anxiety” in the claimant’s GP notes from 2021 were all references to the use of the word by the claimant rather than an endorsement by any clinician (see paragraph 16), and therefore did not of themselves prove that the claimant had the impairment at that particular time. In addition, none of the fit notes I was shown, from any time in the employment, stated that the claimant had Anxiety. All used the phrase “stress at work”, or words to the same effect (paragraphs 18 and 59). That was the common picture in 2021 and also later in 2024/25, after the claimant began her final period of absence.

133. Of particular value to me in deciding this matter was the OH report of 11 March 2025. Whilst it did not deal with the situation in 2021 or the following years, and it post-dated the material time, it did provide useful information in relation to the situation faced by the claimant in early 2025 and I considered that it might offer some assistance as to the material time of the claim given that it was written not long after. That report, however, was very clear that at least at that time the claimant was able to engage with day-to-day activities, and that there was no medical barrier to her returning to work (and thus her ability to carry out the day-to-day activity of work): the impediment was the work-related issues with her management that was the bar (paragraphs 72 and 73). It did not indicate that the situation was different at the material time of the claim.

134. Respecting Ms Macintosh's position as an RMN working in OH, I took the view that the words she used within that report looked to be carefully chosen and that she was likely to fully understand the difference between clinical Anxiety and reactive symptoms of it (i.e. the ***J*** distinction). I rejected the claimant's contention that the contents of the report were "false": no specifics were provided as to what was false, and her main issue with it seemed to revolve instead around Ms Macintosh's comment about adjustments being at the discretion of management (which I have found to have been misplaced: paragraph 71).

135. Stepping back and looking at the claimant's situation in the round, on the balance of probabilities this appeared to me to be a classic situation falling into the second of the ***J*** categories and therefore not an "impairment" situation within the definition set down by **s.6**. I have reached this judgment for the following reasons:

135.1. The claimant suffered from work-related stress in late 2021 as a reaction to concerns having been raised as to her conduct at that time (the alleged monitoring of children in the toilets, etc: paragraph 15). The effects she described (worrying about receiving "funny looks" in the street, withdrawal from socialising: paragraph 20) are in my judgment better explainable as a reaction to being on the receiving end of such allegations, particularly given the nature of the allegations in circumstances where the claimant lived and worked (in a relatively small community in Fraserburgh). Her short-term use of Propanolol (paragraph 18) at this time was consistent with that.

135.2. The claimant's strong feelings of animosity towards Mrs Dawson in the aftermath of the 2021 events, her taking of "extreme measures" to prevent a repeat (paragraph 23), and the contents of her 9 December 2024 grievance were also, in my judgment, consistent with the claimant's symptoms being a reaction on the claimant's part to the same adverse life event and the person she considered had made the whole thing up. This was not, in my judgment, a "recurrence" of an impairment or something relating to one, but simply how the claimant reacts to adverse life events.

135.3. The claimant's concerns about needing to "watch her back" in October 2024 (paragraph 40) - more than two years later – were also consistent, and best explainable in my view, as a reaction to the events of 2021 and her ongoing animosity towards/mistrust of Mrs Dawson rather than by any impairment (paragraph 46). That was at the material time of the claims.

135.4. The views of Ms Macintosh, as expressed with the OH report of 11 March 2025, were also consistent with the claimant's symptoms having arisen from adverse life events rather than any impairment, namely the claimant's perception of management and of the events she complained about in her grievance of 9 December 2024, rather than an underlying impairment. I note her express mention of the claimant being able to engage in day-to-day activities at that time, which was also consistent.

135.5. The claimant resigned in March 2025 but, significantly, she did not resign because of the demands of her work or difficulties in complying with the requirement to complete tasks within particular timeframes. Her reasons were different (see paragraph 69).

136. For these reasons, I have concluded that because the claimant has not satisfied the Tribunal that she was a "disabled person" within the meaning of **s.6 Equality Act 2010** at any material time in the case. It follows that her claims of direct discrimination, disability-related harassment (because of the rule in ***Baker***) and a failure to make reasonable adjustments must fail and they are dismissed.

Constructive unfair dismissal

137. I have accepted that the claimant resigned for three reasons, of which the first was paramount (paragraph 69). The key question (as per ***Western Excavating***) is whether in relation any of those given reasons the respondent had in fact committed a fundamental breach of contract, entitling her to resign.

138. In paragraphs 70 and 71 I dealt with the third of the claimant's reasons for resigning. My factual findings in that regard dispose of this issue entirely: the comment of Ms Macintosh that reasonable adjustments would only be put in place at the discretion of management were indeed made, but in no way were they an act done by the claimant's employer, the respondent. They were words used by an independent external clinician and, in any event, to all intents and purposes summed up the correct legal position regarding reasonable adjustments.

139. The second reason for the claimant's resignation was her contention that her grievance had been "ignored". My factual findings in relation to what actually happened are from paragraphs 61 onwards. In my judgment, the claimant's contention that her grievance had been ignored is wide of the mark and cannot be sustained.

140. The grievance was acknowledged immediately – within a matter of hours – by Miss Morrice-Burgess, and the claimant herself did not reply to the latter's perfectly reasonable request (for her desired resolution) for more than two months. In my judgment, Miss Morrice-Burgess' request was an important one that needed the claimant's input because pretty much in its entirety the grievance concerned the working relationship between the claimant and her line manager, Mrs Dawson. I accept that not every grievance needs a stated resolution but this one very much did, in its proper context. Miss Morrice-Burgess therefore had reasonable and proper cause for holding off on taking further action in relation to the grievance until the claimant specified her desired resolution.

141. In addition, given the claimant had been absent through sickness since the start of December 2024 it was open to Miss Morrice-Burgess to hold off in taking action in relation to the grievance until OH had commented on her ability to participate. She had reasonable and proper cause for that decision also. However, once the claimant indicated (in late February 2025) she wanted the grievance to progress Miss Morrice-Burgess respected that and took steps to progress it without delay and without then waiting for OH input.

142. The claimant did not chase up the grievance at any point between 9 December 2024 and 16 February 2025, despite being able to engage with the respondent on a variety of other matters within that time, as I have found.

143. In my judgment, even if the respondent could be criticised for not simply going ahead and starting its formal process without the claimant's sought resolution shortly after 9 December 2024 (and that is not a criticism I would make in this case) the delay between that time and the end of February/early March 2025 (when real steps began to be taken) was in reality the fault of the claimant, not the respondent.

144. Once the claimant did specify the resolution she wanted, the respondent acted. Whilst there was a modest delay between the claimant indicating her desired resolution and the invitation to the grievance meeting by Miss Duthie, this was explained by Miss Morrice-Burgess' consideration that she was too close in proximity to those concerned to hear it herself, the need to take HR advice (from Mrs Work), by the need to appoint another manager (Miss Duthie) to hear it, and for Miss Duthie to take steps to arrange the meeting. None of these delays were unreasonable and in my judgment the respondent had reasonable and proper cause to take the steps it did.

145. I remind myself that a fundamental breach of contract has to be something very serious that undermines the entire employment relationship. The grievance was not ignored, but it was delayed and such delays as there were

did not, in my judgment, amount to a fundamental breach of contract on the part of the respondent.

146. The principal reason for the claimant's resignation concerned the start of the attendance management period on 12 September 2024 rather than on or around 20 August 2024, the first day back after the school holidays. My findings in relation to what actually happened are at paragraphs 30 to 36, above.

147. In short, based on my findings I could not accept the claimant's submission that this amounted to a fundamental breach of contract on the part of the respondent. The claimant had not been told that she would start the attendance management period on any particular date, only that it would be upon her return after the summer holidays and in a general conversation with Mrs Dawson rather than a formal setting. She could expect to be invited to a meeting to discuss matters at the start of the period and it was in my view unreasonable for her to believe that the starting gun would be fired on the first day back, with no meeting or discussion with Mrs Dawson at all.

148. It is somewhat regrettable that the meeting did not take place until some three weeks into the autumn term (12 September 2024), but in my judgment there was a reasonable and proper cause for Mrs Dawson to wait a short while before formally starting the process with the meeting. As I have found, she wanted to let the Cleaners (including the claimant) settle back into their routines at the start of the year.

149. In my judgment, in relation to none of the three reasons given by the claimant for resigning did the respondent fundamentally breach the implied term of mutual trust and confidence. Those concerned had reasonable and proper cause for everything they decided and did.

150. In these circumstances my judgment is that the claimant has not proven she was dismissed within the meaning of **s.95**, and as such I am bound to dismiss her claim of unfair dismissal as not being well-founded.

Unauthorised deduction from wages

151. In my judgment this case can be disposed of swiftly; it is wholly misconceived. Fundamental to such a case is that a deduction from wages properly payable to the claimant must be made, and in this case nothing has been deducted from the claimant's wages at all. As my findings at paragraphs 77 and 78 make clear, all that happened was that in August 2025 the respondent requested that the claimant make repayment of an overpayment she accepts had in fact been made to her earlier, in April. The unauthorised deductions

regime is in these circumstances excluded by virtue of **s.14(1) Employment Rights Act 1996.**

152. For these admittedly brief reasons, it follows that this claim must necessarily be dismissed.

Entered in register: 15 January 2026
and copied to parties