Case Number: 1306579.24

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Ms Jones	Birmingham City Council

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Midlands West **ON** 12-13 January
3 – 5 March 2026

EMPLOYMENT JUDGE Harding

Representation
For the Claimant: In Person
For the Respondent: Mr Heard, Counsel

REASONS

Judgment and reasons having been announced orally to the parties at the conclusion of the hearing on 5 March 2026, and the written judgment having been sent to the parties on 10 March 2026, these written reasons are provided following a request from the claimant dated 12 March 2026.

Background

1 This case had originally been listed for a five day final hearing to take place between 12 and 17 January 2026. At this stage there were two claimants, Ms Jones and Ms Williams. On 18 December 2024 Ms Jones had written to the tribunal asking to make what she termed an application to amend her claim to add claims of disability, age and sex discrimination. On the 31 December 2024

she wrote asking for what she termed reinstatement of her disability discrimination claim. These letters were treated as an application to seek an extension of time to make a reconsideration application regarding earlier judgments dismissing Ms Jones' age, sex and disability discrimination claims on withdrawal. This application was dealt with on 12 January 2026, the first day of the final hearing. I refused the application for an extension of time for a reconsideration application, for the reasons that I announced orally at the time. It followed from this that a further application made by Ms Jones to postpone the final hearing to enable any reconsideration application to be dealt with was likewise refused.

2 On the second day of the hearing, however, (13 January 2026) I granted an application from the then claimants (Ms Jones and Ms Williams) to postpone the hearing. That application was made on the basis that the bundle of documents that was before me was incomplete and consisted solely of the respondent's documents.

3 The claimants agreed that they could provide copies of their documentation to the respondent within 14 days, and I made orders to deal with this, and made orders for the preparation of a revised bundle of documents. The hearing was re-listed, part-heard, to take place 3 – 9 March 2026.

4 In the interim Ms Williams settled her claim and so, accordingly, the only claim that came back before me was that of Ms Jones.

The Issues

5 Whilst the claimant's claim form made reference to a number of different claims all but the claim for unfair dismissal had been withdrawn by the claimant's then representative prior to the January 2026 hearing. It was the respondent's case, in respect of the unfair dismissal claim, that the claimant was dismissed for capability (long term ill health), the claimant's that she was dismissed for conduct, namely her refusal to provide a photograph for what was known as the Birdie system.

6 It was the claimant's case that her dismissal was unfair because the requirement/instruction to provide a photograph was unreasonable and in breach of data protection laws. This instruction, the claimant asserted, had caused her ill health. It was the claimant's case that what she was in fact being required to produce was biometric data/ sensitive personal data, making her concerns about privacy and data processing all the more reasonable. The claimant also asserted that she had been misinformed by the respondent that provision of a photograph was a CQC requirement, when it was not. It was the claimant's case that a fact finding meeting held on 26 July 2023 was mishandled because she was not given the right to attend that meeting with a trade union representative. It was also the claimant's case that, because she would not provide a photograph, she

was unreasonably transferred to work at a different place of work, which caused financial loss, isolation and ill health. The claimant's case was that this was a retaliatory measure implemented by the respondent because she would not provide a photograph for Birdie. All of these factors were said by the claimant to render her dismissal unfair.

Evidence and Documents

7 I had before me a respondent's bundle of documents running to 720 pages and a claimant's bundle of documents running to 252 pages. There was also a small supplementary bundle of 22 pages produced by the respondent, without objection from the claimant, on the first day of the January hearing.

8 In terms of witness statements, the claimant produced a witness statement for herself. The respondent produced statements for Ms Smith-Woodman, Multi Disciplinary Team Manager and Ms Pugh, Service Manager. Both of these witnesses attended to give evidence. There were also statements from Mr Perry, a Multi Disciplinary Team Manager who had not been involved in the claimant's case directly but who had conducted disciplinary investigations involving other employees who had refused to provide photographs for the Birdie system, and Ms Kaur who was not involved in the claimant's case but had been the dismissing manager in another case where an employee had refused to provide a photograph for Birdie. These witnesses did not attend the tribunal; the relevance of their statements was said to be that they gave background information as to the respondent's roll out of the Birdie system.

Findings of Fact

9 Whilst the majority of my findings of fact are contained in the section that follows, some further findings, particularly those that also form a conclusion, can be found within the conclusions section of these reasons. From the evidence that I heard and the documents I was referred to I made the following findings of fact:

> 9.1 Ms Jones was a grade 2 Homecare Assistant working 18 hours per week. She started work with the respondent on 22 July 1997. As a home care assistant she worked in the community going into the homes of people who required care from Birmingham City Council.
>
> 9.2 The care services provided by the respondent are regulated by the Care Quality Commission. Their role is to monitor, inspect and regulate services to ensure they meet certain standards. Regulation 19(3) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 states that certain information must be available in relation to people employed to provide these services, and that information is specified in Schedule three. Schedule three states that the information required includes "proof of identity including a recent photograph".

9.3 Historically, the respondent had kept, where required, physical copies of employees' photographs at Lifford House, including a photograph of the claimant. However, in 2023 Lifford House was closed down, as was another one of the Council's properties, Lancaster House. This coincided with a transition to working from home on a regular basis. For these reasons a policy decision was taken by the respondent to go paperless; essentially there was no longer the space to store paper copies of documents and paper copies were not, in any event, accessible when working from home.

The claimant's contract

9.4 The claimant was employed under what was known as the Birmingham Workforce contract, the terms of which were collectively negotiated, page 132. It stated in relation to the Data Protection Act/GDPR that, page 149;
"in line with the requirements of the Data Protection Act 2018 (including UK General Data Protection Regulation) Birmingham City Council will keep personal data relating to you. Personal data, or personal information, means any information about an individual from which that person can be identified.

9.5 The contract further explained that there was a special category of personal data known as sensitive personal data which required a higher level of protection. The contract then stated:
"We will only use your personal information when the law allows us to. Most commonly we will use your personal information in the following circumstances;
i) where we need to perform the employment contract,
ii) where we need to comply with a legal obligation,
iii) where it is necessary for the legitimate interests pursued by us or a third party and your interests and fundamental rights do not override those interests".

9.6 Under the heading work location/job role it was said that each person's appointment was subject to a mobility clause which provided for the movement of staff to alternative work locations for business reasons. It was further said that if there was a business need the employee might be required to work in any directorate or location within the Birmingham conurbation at the discretion of the respondent, page 141.

The Birdie system

9.7 In 2022 the respondent decided to start using a system known as Birdie, as part of it's transition to a paperless office. The Birdie system is a

widely used system, it's use is commonplace amongst those working in the care industry and the system is also on the NHS assured suppliers list. The respondent decided to adopt the system following a procurement process which involved the respondent's IT department testing the system to ensure that it was fit for purpose.

9.8 There are two parts to the Birdie system; firstly, there is an App which can be downloaded onto a user's mobile phone (i.e. the mobile phone of both the citizen who is due to receive care and the employee who is due to provide care). The App records the time and date of any care visits, the name of the carer who will be visiting and what care the citizen is due to receive. Employees can use the App to access care plans and to record what time they enter and leave the citizen's home.

9.9 There is also a "back office" function. This is an office-based part of the system which is accessible only to management members of staff. This part of the system is used by management to enable them to plan care visits and audit the quality of care and it is also used to hold staff information. It also holds information such as training records, DBS numbers and next-of-kin details.

9.10 As mentioned above, hard copy photographs of carers used to be stored at Lifford House but when that closed down the respondent decided that the photographs which needed to be held for CQC identification purposes would be uploaded and stored on the Birdie back office system. Next of kin emergency contact details and date of birth, for identification purposes, were also to be stored there. This was in keeping with the respondent's aim to move towards a paperless office

9.11 The Birdie licence agreement, page 456, stated at clause 11.1 that to enable the respondent's use of the Birdie Services it may be necessary for Birdie to use customer data to the extent necessary *to enable the respondent to use the platform and services* including monitoring services (my emphasis). The respondent agreed to this by way of clause 11.1.

9.12 Under clause 11.2 it was agreed that Birdie had a licence to store, use, reproduce, display and transmit customer data *in an anonymized format for analytical purposes to improve the services* (my emphasis).

9.13 At clause 12.1 it was stated that Birdie and the respondent would comply with all applicable data protection laws.

9.14 Pausing there, it can be seen that the terms of the licence agreement both (i) required Birdie to comply with data protection laws and (ii) also strictly limited the circumstances in which Birdie could process customer data.

9.15 The Birdie system went live on 17 April 2023, page 141 claimant's documents, and in April 2023 the respondent started to request a digital photograph, next of kin emergency contact details and date of birth information from their carers. There were 194 members of staff working in regulated services who were asked to provide this information and, as events transpired, six members of staff objected, one of whom was the claimant. Ultimately, the other five members of staff were subject to disciplinary action, and were dismissed.

9.16 In April and May 2023 Ms Jones was requested on a number of occasions to provide a photograph to be uploaded onto the Birdie system. In particular, during a one-to-one supervision meeting on 18 May 2023 Ms Gooding, the claimant's line manager, informed the claimant that it was a CQC requirement that the respondent had a photograph of all the staff they employ and that this would be kept on the Birdie system, page 191. The claimant failed to provide the information requested.

9.17 On 22 June 2023 Ms Gooding sent an email to the claimant and other members of staff asking for next-of-kin details and date of birth, page 146 claimant's documents.

9.18 On 5 July 2023 Ms Gooding emailed the claimant asking her to provide her date of birth, next-of-kin details and a photograph in accordance with the CQC requirement by no later than 7 July 2023, page 147 claimant's documents. She did not do so.

9.19 Ms Gooding emailed the claimant again on 10 July requesting a photograph for the Birdie system by no later than 14 July 2023, page 148 claimant's documents. She also reminded the claimant that she still needed to provide her date of birth and next-of-kin details. On 11 July Ms Gooding emailed the claimant again asking her to let her know if she was sending the information she had asked for with regards to Birdie, namely her date of birth, next-of-kin details and "in accordance with CQC requirement, I also need a photo to upload onto Birdie", page 149 claimant's documents.

9.20 On 12 July the claimant emailed Ms Gooding to say that she did not wish to have her details on the Birdie system, page 150 claimant's documents.

9.21 That day Ms Gooding emailed the claimant stating that she must provide a photograph for CQC purposes. She attached information to her email setting out the CQC requirements for the employment of staff in a care setting. The claimant accepted that what Ms Gooding attached to this email was a document headed "Provider and CQC Inspector FAQs for

meeting requirements of employment for Regulation 19", which appeared at pages 573-578. This document made it crystal clear that what the CQC required by way of Schedule three was proof of identity, including a recent photograph, page 573.

9.22 Ms Gooding pointed out in her email that the respondent was currently preparing for a CQC inspection. She explained that the respondent needed to check they were compliant and that providing a photograph was part of this. She further wrote that if she did not receive this information by midday on 20 July 2023 she would have no alternative but to take disciplinary action, page 151 claimant's documents.

9.23 Ms Jones did not provide the information requested. She was then asked to attend a fact finding meeting to take place on 26 July 2023. This fact finding meeting did not go ahead because there was a disagreement between the claimant and the respondent about whether the claimant could be accompanied by her union representative at that meeting. The claimant had requested to be allowed to attend the meeting with a union representative, and the respondent initially took the view that this was not necessary as it was not a formal meeting. However, it was ultimately agreed that a union representative could attend with the claimant, page 200 claimant's documents.

The move to AMH

9.24 A decision was then made by the respondent to move Ms Jones into a role where a digital photograph would not be required, which was a role working at the Anne Marie Howes (AMH) care home in Sheldon. Residential care homes did not use the Birdie system, hence a digital photograph not being required for this role. I do not find that the move to AMH was a punitive or retaliatory measure on the part of the respondent. I explain in the conclusions section below why I have not made this finding.

9.25 Ms Jones worked at AMH between 27 July 2023 and 9 August 2023, when she reported sick from work. She did not return from this sickness absence prior to her dismissal, which was on 15 April 2024 (her effective date of termination). The claimant submitted a number of fit notes over this period which stated that stress at work was the reason for her sickness absence.

9.26 On 27 July Ms Jones had emailed Ms Gooding asking why she had been sent to AMH and asserting that she had been sent there by management to "prove a point of their authority, control and bullying tactics due to her refusal of her biometrics being put on the Birdie app", page 161 claimant's documents.

9.27 On 8 August 2023 Ms Gooding emailed the claimant, page 163 claimant's documents. It was explained to the claimant in this email that the respondent was required to hold certain information for staff that conducted regulated activities, and that the respondent no longer held hard copies of the required information and this therefore needed to be stored on an electronic system. It was explained that any employee not willing to provide the respondent with this information, i.e. a photograph, was unable to continue with the regulated activity unless they worked in a residential setting. It was said that as the claimant did not wish to provide a photograph the respondent had been left with no alternative but to move her to another place of work until the photograph was provided. It was acknowledged that the claimant had expressed concerns that biometric data was being requested which would be stored on the Birdie app. It was explained that no biometric data would be held on the system, although a photograph would be uploaded onto the Birdie system. It was also explained that the photograph would be on the Birdie system and not the Birdie application and that the only people with access to the information would be in the management team, as well as regulated bodies as necessary. Ms Gooding wrote that she would be willing to explore alternative locations to AMH but, in terms of continuing with regulated activities (in the absence of a photograph), the only places that she was able to offer were day centres or care centres. Ms Gooding expressed the hope that the claimant would now feel able to provide the respondent with a photograph.

9.28 The respondent held what were termed contact meetings with the claimant to discuss her sickness absence on 26 September 2023, and 31 October 2023. The October contact meeting had originally been scheduled for 23 October, but the claimant failed to attend this meeting, informing the respondent that she had forgotten about it, page 226.

9.29 Another contact meeting was also scheduled for 28 November 2023 but this did not take place because the manager due to hold the meeting was absent from work and the claimant declined the option of having an alternative manager conduct the meeting, pages 181-182.

9.30 During the course of the contact meetings that did take place the claimant stated that she was stressed because of the requirement to provide a photograph for Birdie and also because she had been moved to work in AMH.

The first Occupational Health referral

9.31 It had been agreed during the first contact meeting that the claimant would be referred to occupational health, and this was duly done. The claimant had an appointment with occupational health on 5 October 2023

and a report was then written up. After a delay the report was released to the respondent. It was confirmed in the report that the claimant was off work with work-related stress and that the claimant felt that the stress had occurred after the issue arose in relation to digital photographs, page 292. It was recorded that the claimant had reported that she had suffered with anxiety for the past 20 years and the current situation was worsening her mental health. It was recorded that working at AMH involved more travel for the claimant and that she was the primary carer for her two children, the oldest of whom had a disability, and the current work arrangements prevented her from caring for her children.

9.32 It was recorded that the claimant was currently not fit for work due to her stress and anxiety, which the claimant felt was entirely down to the management situation and her working hours. It was suggested that adjustments which might help resolve the situation included allowing the claimant to work in the community and a resolution to the workplace ID issue. As to a return to work date, it was said that none could be identified as the claimant had stated she would consider a return to work once these issues had been resolved. It was said that a phased return would be recommended on her eventual return to work. It was said that if the management issue was resolved the claimant would be likely to be able to provide consistent attendance in the future and that the Equality Act was likely to apply.

9.33 This report accurately reflected what the claimant had told occupational health, which was that she was not well enough to return to work if either she was required to work at AMH or if she was required to provide a photograph for the Birdie system.

First full case hearing

9.34 On 2 January 2024 the respondent wrote to the claimant to invite her to a full case hearing, to be conducted by Ms Emma Pugh, Service Manager Adult Social Care, pages 175 – 176. The claimant was offered a choice of two dates for the hearing, namely 24 January and 26 January. She was told that the hearing was to take place under the respondent's Managing Absence procedure and that it was in relation to her current period of long-term sickness absence. She was informed of her right to be accompanied. At the request of the claimant and her union representative the meeting was in fact scheduled for 30 January at 10.00am, page 311. The revised time and date of the meeting were confirmed to the claimant in writing, page 311.

9.35 The claimant and her representative, Mr Oulds, failed to attend the hearing on 30 January. The respondent was not informed in advance that they would not be attending. The meeting went ahead in the claimant's

absence and Ms Pugh carried out a detailed review of the claimant's sickness absence history, pages 313 – 320. In summary, it was noted that the claimant had currently been absent for 23 weeks and that in the three years preceding this the claimant had had a further 22 weeks of sickness absence equating, therefore, to nearly one year off sick in the past three years. It was noted that there was no identified return to work date and noted that the claimant's absence was having a direct effect on the service that could be offered to citizens. This was not just because cover was required for the claimant's shifts but also because arranging cover increased the number of different carers who might have to be sent to a citizen.

9.36 Ms Pugh raised a number of questions about the claimant's case and the meeting was adjourned at this point in order for those questions to be responded to. These questions included why the claimant was moved to AMH and what factors were taken into consideration, page 321.

9.37 Ms Pugh wrote to the claimant on 31 January 2024 to advise her that the meeting had gone ahead in her absence, pages 326-327. She informed the claimant that she had decided to adjourn the hearing and was reconvening it on 28 February 2024. She stated that she had made this decision because she required further information in order to make a decision on the claimant's case and she also wanted to provide the claimant with a further opportunity to attend the hearing. The claimant was additionally provided with details of the respondent's employee assistance programme.

Second full case hearing

9.38 On 5 February 2024 Ms Pugh wrote to the claimant to invite her to attend a reconvened full case hearing to take place on 28 February 2024, pages 329-330. She was informed of her right to be accompanied. Ms Pugh wrote that she was requesting additional information from both the claimant and her manager and responses were required by 12 February 2024. She wrote that it would only be the additional information that was considered on 28 February as she had already considered the other information. The claimant was informed that in accordance with the respondent's Managing Absence procedure the hearing could result in the termination of her contract of employment. The claimant was advised that the reconvened hearing would go ahead on this date whether the claimant was present or not.

An alternative to Birdie

9.39 Also on 5 February 2024 Ms Gooding wrote to the claimant noting that it had not been possible to conduct an initial fact-finding meeting with

the claimant because she had been absent from work due to ill health. It was explained that the purpose of the fact finding meeting was to discuss the claimant's concerns in relation to her photographic identification and how it was stored. It was said that the respondent wanted to provide the claimant with information on how the data would be stored securely, who it would be viewed by and the purpose of having it stored so that the respondent was not in breach of it's CQC requirements. Ms Gooding acknowledged that the claimant had concerns about use of the Birdie system for storing her photographic identification and offered an alternative, in the form of storing the information on the local drive (OneDrive/Microsoft teams), which was an internal council system. Ms Gooding wrote that if the claimant was in agreement with this then please could she provide an up-to-date photograph and the claimant would then be able to return to her substantive post, page 201 claimant's documents. Pausing there, by this point, therefore, the respondent was only requiring the claimant to produce a photograph for storage on the system, it had dropped the requirement for next of kin emergency contact details and date of birth.

9.40 This email produced an angry response from the claimant who emailed Ms Gooding telling her not to use "psychological operations" on her, nor to insult her intelligence, page 109. She accused Ms Gooding of being untruthful. She complained that she had been sent to AMH as a punishment for not consenting to having a digital photograph on the Birdie app. She wrote that a digital photo ID was not a CQC requirement as management had stated. She wrote that the alternative that she had been offered, Microsoft Teams, was not safe. She wrote that the treatment she had received regarding the digital ID had been atrocious and had opened a whole can of worms about the appalling way she had been treated by the respondent all through the years.

9.41 The reconvened full case management hearing duly took place on 28 February 2024, pages 331-341. Ms Pugh was supported by Ms Argentieri from HR and Ms Anderson, Team Leader Home Care, was in attendance to present the management case. The claimant attended with her union representative, Mr Oulds. Mr Oulds said that the claimant had been unable to attend the previous full case hearing hearing on 30 January and that he had not been informed of the time of it, and that this is why he had not attended. Mr Oulds suggested that the first meeting needed to be "redone" with both him and the claimant in attendance. The respondent's response to this was that it was the claimant's responsibility to inform her representative of the time and date of the meeting and that the letter that had been sent to the claimant had contained this information. Ms Pugh then adjourned the meeting in order to check that the invitation letter had contained the date and time of the meeting, and to

consider her position. Once she had done this Ms Pugh informed the claimant that the reconvened hearing would go ahead.

9.42 The meeting then continued with the respondent re-capping on what had been discussed and considered at the earlier full case hearing, pages 333-334. There was discussion about the claimant's sickness absence record and the fact that, currently, there was no return to work date for the claimant in the foreseeable future. The claimant stated that some of the sickness absence should be discounted because 15 days of it was due to Covid and a period of absence for sciatica was as a result of an accident at work. The claimant stated that her current absence was due to issues with management. She stated there was no need for the respondent to have a digital ID of her in the system. She stated that she did want to come back to work but wanted to work in the community, as she had always done.

9.43 There was discussion about the claimant's move to AMH. It was explained that she was moved because she had refused to provide photographic identification to be stored on the Birdie system and therefore the view had been taken that she could not work in the community. It was said that AMH was the nearest alternative location to the claimant's home address. Ms Anderson confirmed that as far as she was aware the claimant was not able to return to her usual place of work (in the community) without providing a photograph, which she was continuing to refuse to do.

9.44 The claimant stated that working at AMH caused issues for her with her childcare because she had to leave the house around 6.30am, which impacted her children's welfare and education. When working in the community, she explained, she had been able to drop them to school. The claimant stated that she had raised concerns about working at AMH during her contact meetings but had been told that unless she gave a digital photograph for Birdie she could not work in the community as it was a CQC requirement. She stated it was not a CQC requirement that the respondent held a photograph in that format. She stated that requiring a photograph was a violation of her basic human rights.

9.45 She was asked when she thought she was likely to be able to return to work and she stated that would be when she was working back in the community and also when her children's welfare was taken into account. She said that management were stopping her from returning to work.

9.46 Mr Oulds stated that the claimant was ready, willing and able to return to work. The claimant was asked what the main issue was that was causing her to be off work with stress, was it around the photograph for

Birdie or the fact that she was expected to work in AMH. The claimant stated it was all interlinked and she was sent to AMH because she would not provide a digital photograph.

9.47 Ms Pugh adjourned to consider her decision. She reconvened the meeting and informed the claimant that she was going to adjourn the meeting for a second time in order to explore if there was an alternative work location nearer to the claimant's home which might enable the claimant to return to work. The claimant was informed that a further meeting would be held week commencing 18 March 2024.

Enquiries about alternative roles

9.48 Ms Pugh then contacted the Care Centre Manager, the Service Manager and the Head of Service and asked if they had any vacancies for carers in either day centres or residential care centres, which Ms Pugh considered offered the closest match to the type of role that the claimant had been carrying out in the community. She was told by all three individuals that they had no vacancies.

The decision after the second full case hearing

9.49 On 1 March 2024 Ms Pugh wrote to the claimant to inform her of her decision, pages 342-343. As 2024 was a leap year this letter was sent two days after the full case hearing. Ms Pugh confirmed in her letter that in order to try and facilitate a return to work she had explored whether there were alternative work locations for the claimant and it had been confirmed that there were none. She also wrote that it was her understanding, however, from the full case hearing that the claimant was ready to return to work at the end of her current sick note, which expired on 5 March 2024. She wrote that she therefore expected the claimant to return to work on 6 March 2024. She wrote that as part of the return to work discussions would be had with the claimant in relation to supplying a photograph, which was described as a Care Quality Commission requirement. She wrote that she would reconvene the full case hearing week commencing 18 March 2024.

Invitation to third full case hearing

9.50 The claimant did not return to work on 6 March 2024. A further fit note was submitted signing her off sick for 4 weeks, page 346. She was signed off with stress at work. On 6 March 2024 the respondent wrote to the claimant inviting her to attend a reconvened full case hearing to take place on 20 March 2024. She was also given the option to make written submissions. She was advised that under the respondent's Managing

Absence procedure the hearing could result in a decision to terminate her contract of employment.

9.51 On 7 March Ms Gooding held a contact meeting with the claimant, pages 355-356. The claimant told Ms Gooding that she was even more depressed now, and she said that she had just been prescribed antidepressants. It was agreed that the claimant would be referred again to occupational health. It was confirmed that the claimant could not give a date for when she would be returning to work.

Second referral to occupational health and postponement of third full case hearing

9.52 That day the respondent referred the claimant to occupational health. The respondent then decided to postpone the full case hearing, which had been scheduled for 20 March, because an appointment for occupational health came through for the claimant for 21 March. Ms Pugh wrote to the claimant on 19 March to confirm that the hearing was being postponed for this reason, and that it would be rescheduled for 9 April 2024, page 357.

9.53 On 4 April 2024 Ms Gooding conducted another contact meeting with the claimant, page 359 - 360. The claimant told Ms Gooding that the issue about the photograph was taking too long and her ongoing sick leave was causing anxiety and depression. The claimant confirmed that she preferred not to give a photo as Birdie was an American company and she felt her personal data could be lost. The claimant also stated it was too far for her to travel to work at AMH.

9.54 On 5 April 2024 the claimant submitted a further fit note, signing her off until 30 April 2024 with stress at work, page 358.

Third full case hearing

9.55 The reconvened full case hearing duly took place on 9 April 2024, pages 361-368. The claimant was present and was supported by Mr Oulds. At the point when the hearing took place the claimant had not provided her consent for the occupational health report to be released to the respondent. I prefer the evidence of the respondent, however, and find that the claimant did show Ms Pugh a copy of the report on her phone during the meeting. I prefer the evidence of Ms Pugh because that is consistent with what is recorded in the interview notes of 15 April and it is also consistent with what is recorded in the outcome letter.

9.56 In the report the claimant was said to be not fit for work and it was said that in fact her mental health had worsened with the ongoing work

issue relating to use of a photograph for ID purposes. It was said that a satisfactory resolution to the workplace issues was required to enable her to return to work. As to the estimated return to work date it was said: “not applicable - when the above can be resolved and her mental health improves”, page 235 claimant’s documents.

9.57 During the full case hearing the claimant was asked what was keeping her off work, was it the location of work or the requirement to submit personal data on the Birdie system. The claimant said it was everything. The claimant stated that she wanted to return to work and for the restrictions to be lifted but she did not want to provide her photo ID and that was a reason for her absence from work. She stated that she was not sure why she needed to provide a digital ID if she wanted to work in the community. She stated that she wanted to return to work but did not want her details on the Birdie system and it was management who were preventing her from returning to work.

9.58 The claimant was asked whether she was fit to return to work and would be prepared to supply a photograph for the Birdie app. The claimant did not answer this question directly, she said that she was suffering with anxiety and stress as a result of the requirement to work at AMH. She stated that it was unnecessary how management had operated and it was her human right to object to supplying a photograph. The claimant was asked whether both AMH and the Kenrick Centre were too far for her to travel and she said that they were. The claimant pointed out that she had worked for the respondent for 27 years. The claimant’s position therefore remained during this meeting, as the claimant herself accepted, that the requirement to produce a photograph for Birdie and/or to work at AMH meant that she could not return to work as either of these things would cause her ill health would continue.

<u>The decision to dismiss</u>

9.59 Ms Pugh adjourned the meeting in order to consider her decision. She decided to dismiss the claimant. The claimant, she noted, had now been absent since 9 August 2023, a period of 8 months. There was, moreover, no date identified by when the claimant might return to work. They were in something of a catch 22 situation, Ms Pugh considered, with the ongoing requirement to provide a photograph for the Birdie system, and the claimant’s refusal to do so, plus the difficulties with travel to AMH, meaning that the claimant continued to be unable, as a result of ill health, to return to work. This catch 22 situation meant that the claimant’s sickness absence was, in Ms Pugh’s view, effectively open ended with no return to work date that could be identified.

9.60 I accept the evidence of Ms Pugh and find that she did not take into account earlier periods of sickness absence when making her decision to dismiss. I accept her evidence and find that the decision was taken on the basis of this latest period of absence alone. I also accept her evidence and find that her decision to dismiss the claimant was not pre-determined. I will explain why I have accepted this evidence in my conclusions section below.

9.61 Ms Pugh took into account that the claimant was in a role where sickness absence had a direct impact on the care that could be provided to citizens. In particular, the claimant's shifts were being covered by colleagues, meaning that citizens would not necessarily receive care from their regular care givers. Additionally, this meant an increased workload for the claimant's colleagues. She took into account also that the claimant's clear position was that she wanted to return to her role in the community, yet that was the role for which there remained a requirement to provide a photograph for Birdie. Lastly, she took into account that she had not been able to identify any other vacancy to offer to the claimant.

9.62 A further meeting took place on 15 April 2024 in order for Ms Pugh to inform the claimant of her decision, pages 370-371. Ms Pugh informed the claimant that she had decided to terminate her employment. She noted that whilst the claimant had said she was ready, willing and able to return to work the reason for the claimant's absence was closely linked to the refusal to provide an photograph which could not be resolved until the claimant returned to work. She explained that in her view this meant that the claimant's sickness absence was open ended. She also explained that claimant had said that she was unable to work at AMH and that no other temporary work locations could be found for her.

9.63 Ms Pugh pointed out that the most recent occupational health report had stated that the claimant was not fit to return to work and, moreover, there was no return date in the foreseeable future unless or until the photograph issue had been resolved. She noted that the claimant had also now said that working from either Kenrick or AMH was not an option for her. The claimant was informed of her right to appeal.

9.64 Ms Pugh's decision was confirmed to the claimant in writing by way of letter dated 15 April 2024, pages 372-373. It was confirmed in this letter that the claimant's last day of employment was 15 April 2024 but that she would be paid 12 weeks pay in lieu of notice.

The claimant's appeal

9.65 On 22 April 2024 the claimant appealed the decision to dismiss her, pages 378-379. She queried whether she had been dismissed for anxiety,

which she described as being disability discrimination. She wrote that Ms Pugh had ignored her statement that she was well enough to come back to work in the community. She wrote that she had been told that a digital photograph was a CQC requirement and that this was false information. She stated that digital ID was not a mandatory requirement and if an individual opted out of digital identity the respondent should revert to a standard manual process.

9.66 There was then a delay with the appeal because the claimant's appeal did not make its way to the People Advisory team, who at that time dealt with appeals, page 208, and then the process for dealing with appeals changed. All of this led to the claimant resubmitting her appeal on 11 June 2024, page 204.

9.67 It was not until 7 February 2025 that the claimant was invited to attend an appeal hearing to take place on 25 February 2025, page 380. The meeting duly took place on 25 February 2025 and was chaired by Ms Wendy Griffith, pages 385-392. Neither the claimant nor her representative attended the appeal hearing. Ms Pugh presented the management case and Ms Griffiths then asked a number of questions. Ms Griffiths then adjourned the meeting to consider her decision and she concluded that the claimant's appeal was rejected. The respondent wrote to the claimant on 4 March 2025, pages 393 – 394, to confirm the decision. The claimant was also sent, on 14 April 2025, copies of the notes of the appeal hearing.

The nature of the requests for personal data made by the respondent

9.68 I do not find that there was any point, during the course of the events set out above, when the respondent requested the claimant to produce *biometric* data to be stored on the Birdie system, for the reasons I will set out in my conclusions below. Nor did the respondent request the claimant to produce sensitive personal data. Sensitive personal data is information such as information in relation to health or sexual orientation. The information requested, as set out above, was initially a photograph, date of birth and emergency next of kin details, and latterly just a photograph see paragraphs 9.16 – 9.19 and 9.39 above. Lastly, I do not find that the respondent was requesting this information in order for it to be stored on the Birdie app, it was requested in order for it to be stored on the Birdie back office system. I set out in my conclusions my reasons for making this finding.

9.69 Lastly, I do not find that, throughout this process, the respondent continually misrepresented the situation to the claimant by suggesting that it was a CQC requirement that a digital photograph be held by them. I explain why I have not made this finding in my conclusions section below.

The Law

10 Sections 98(1) and (2) of the Employment Rights Act 1996 set out the potentially fair reasons for dismissal. For the purposes of this section the burden of proof is on the respondent. Section 98(4) sets out what needs to be considered in order to determine whether or not the dismissal is fair. It states:

"the determination of the question whether the dismissal is fair or unfair…

(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."

11 For section 98(4) purposes the burden of proof is neutral.

12 In applying section 98(4) I have reminded myself that it is not for me to stand in the shoes of the employer and decide what I would have done were I the employer. Rather I have to ask whether the decision to dismiss fell within the reasonable range of responses open to the employer, judged against the objective standards of a hypothetical and reasonable employer. That I must not substitute my own view of the employee's competence (or more accurately for the purposes of this case capability) for that of the employer was made clear by Lord Denning Mr in **Taylor v Alidair Ltd 1978 IRLR 82** (a case in which the employee was dismissed for poor performance);
" Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent."

13 The case of **DB Schenker Rail (UK) Limited v Doolan UKEATS/0053/09** is authority for the proposition that when considering a capability dismissal the principles laid out in **British Home Stores v Burchell [1978] IRLR 379** are relevant. This case establishes that an employer must (i) establish the fact of its belief in the reason for dismissal, i.e. that the employer did believe that, in this case, the claimant was not able to perform the role because of ill health. There must also be (ii) reasonable grounds to sustain that belief, (iii) after a reasonable investigation.

14 The Court of Session in the case of **BS v Dundee City Council [2013] CSIH 91** provided a very useful summary of the principles to be derived from two of the leading authorities on capability dismissals; **Spencer v Paragon Wallpapers Ltd [1977] ICR 301** and **Daubney v East Lindsey District Council [1977] ICR 556**. The Court of Session said, paragraph 27;
From these cases three important themes emerge. Firstly, in a case where an employee has been absent from work for some time owing to sickness it is essential to consider the question of whether the employer can be expected to wait longer before dismissing the employee and, if so, how much longer. (The Court of Session go on in paragraph 28 to refer to this as a balancing exercise). Secondly, there is a need to consult the employee and take his views into account… this is a factor that can operate both for and against dismissal. If the employee states….that he hopes to be able to return to work in the near future that operates in his favour; if on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

Submissions

15 The claimant submitted that the whole process of dismissal was predetermined and not evidence led. She submitted that she believed her dismissal was unfair substantively and procedurally. Her right to be represented was denied and she was told to attend (the fact finding meeting in July 2023) without a representative. On 27 July 2023 she was transferred to AMH without a risk assessment. An occupational health referral was not made until she had been off sick for eight weeks and it was unreasonable to transfer her to AMH without assessing the impact of the transfer on her. The claimant submitted that her periods of sickness absence for sciatica and Covid were included in the case papers and that if these absences were irrelevant they should not have been included as part of the paperwork. The claimant submitted that she had been very unwell when she had Covid and that during this period she had been bombarded with constant emails and phone calls from the respondent. The claimant complained that on 5 December 2023 the respondent had asked her to do a DBS check despite recently having undergone one. That was unreasonable, the claimant submitted. The claimant submitted that her non-compliance with digital ID was part of the reason for her dismissal and she submitted that her refusal to provide a photograph was not an act of misconduct or insubordination but arose from genuine concerns regarding data protection. The claimant submitted that she had not been provided with sufficient transparency with regard to the process of providing her personal and biometric data.

16 The claimant submitted that the key question for me to consider was whether the instruction issued by the respondent (to provide a photograph) was reasonable. She submitted there was no evidence that alternatives were properly explored and that even if the instruction was reasonable dismissal for a single refusal based on privacy concerns was clearly disproportionate. She was a single mother with childcare responsibilities and a reasonable employer would have considered the impact on her before proceeding to dismiss. Dismissal was in any event disproportionate, the claimant submitted, when she was genuinely medically unfit.

17 Mr Heard, for the respondent, submitted that on the respondent's case the claimant was dismissed for capability not conduct. In this type of case the relevant circumstances to be considered included: whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer, **Spencer v Paragon Wallpapers [1976] IRLR 373**, what consultation there has been and what steps the respondent has taken to discover the true medical position, **East Lindsay District Council v Daubney [1977] IRLR 181**.

18 It was important background to this case, the respondent submitted, that there was clearly a legal obligation on the respondent to keep a photograph of those employees working in the community carrying out regulated activities. The respondent's decision as to how to store the photographs was a reasonable one which sought to further the legitimate interest of maintaining the information required by the CQC. The respondent had explained to the claimant how her photograph would be stored and who would have access to it and many of the claimant's concerns were erroneous and based on misunderstandings, it was submitted.

19 During meetings with the claimant it was ascertained on a number of occasions that there were two issues that were causing her to be unfit for work; the requirement to work at AMH and the requirement to produce a digital photograph. Those two hurdles remained throughout the duration of the events with which this case is concerned, it was submitted. The respondent did try to find compromises to resolve the situation. For example it was proposed that the claimant's photograph could be stored on Microsoft Teams. But that was not acceptable to the claimant. Moreover, on the respondent's case, Ms Pugh looked for alternative roles for the claimant. The respondent took reasonable steps to understand what the medical position was and the medical evidence was clear that unless these two hurdles were overcome the claimant would not be fit for work. These two hurdles remained and consequently there was no expectation that the claimant would return to work within a reasonable period.

20 As to the appeal, it was submitted that it was not admitted that there had been unreasonable delay in relation to this, but even if there had been this did not, in the circumstances of the claimant's case, render her dismissal unfair.

There was no evidence that the claimant had complained of any delay and no evidence that the claimant was disadvantaged in any way by the delay. The appeal hearing itself was detailed. Looking at the case as a whole, taking into account all the circumstances, including the efforts made by the respondent to try to resolve the claimant's issues, it would not be in accordance with fairness and equity for any delay to the appeal process to render the dismissal unfair.

Conclusions

The reason for dismissal

21 It was the claimant's case that she was dismissed, at least in part, because of her refusal to provide a photograph for the Birdie system. It was the respondent's case that the claimant was dismissed for capability, namely because of her long-term sickness absence. I find and conclude that the respondent has proved that the principal reason for the claimant's dismissal was her long-term sickness absence.

22 I do so for the following reasons. Firstly, Ms Pugh's evidence was clear and consistent on this issue. Secondly, her evidence was corroborated by all of the contemporaneous documentation which showed the respondent going through, at length, a management of absence process. There was nothing to suggest, on the evidence before me, that this was some sort of front or cover for, effectively, taking disciplinary action against the claimant for her refusal to provide a photograph. Indeed, had the respondent wanted to take disciplinary action against the claimant it clearly could have done so – it did, after all, in respect of the other five carers who also refused to provide a photograph, all of whom were dismissed for this. In such circumstances, it seemed to me, the most likely explanation for the choice of process adopted by the respondent was that they chose the process which addressed the concerns that were uppermost about the claimant in their mind at the time - i.e. her long-term sickness absence.

Was dismissal in all the circumstances fair?

23 Many of the points and criticisms made by the claimant of the respondent did not, in fact, relate directly to the circumstances of her dismissal at all. They related to the background against which the claimant's ill health arose. In summary it was the claimant's position that the request/instruction to provide information for Birdie was unreasonable for a number of reasons and/or unlawful and that this, along with the move to AMH (which was also said to be an unreasonable instruction) had caused her to be off sick. In a dismissal for long-term sickness absence that could, of course, potentially be relevant to the overall fairness of the decision to dismiss and therefore I address the main points raised by the claimant about this below.

24 The claimant asserted, repeatedly, that she was right to be very concerned about privacy because the respondent was (unreasonably) requesting her to provide *biometric* data, which would require very high levels of security. I have not found as a fact that the respondent was requesting the claimant to produce biometric data, paragraph 9.68 above. I did not make this finding because biometric data is data that is able to uniquely identify someone, typically from physical or physiological characteristics. Fingerprint scanning or iris scanning are examples of this. As the respondent correctly pointed out, what the respondent was requesting the claimant to produce was a different type of information; an ordinary digital photograph (as well as, initially, next-of-kin details and date of birth). Whilst an ordinary digital image will contain some of the physical characteristics of a person it is not by and of itself biometric data, because it is not something that uniquely identifies them.

25 Nor, on my findings, was the respondent requesting the claimant to produce sensitive personal data, as the claimant asserted, paragraph 9.68 above.

26 It was the claimant's case that her information would not be secure because it was going to be stored on the Birdie App not the Birdie back office system. However, I have rejected this and found as a fact that the information was to be stored on the Birdie back office system to which only a limited number of people had access, paragraph 9.68 above.

27 I made that finding for the following reasons. The claimant could point to just a single email which showed that one individual had queried, based on what they had been told by a Mr Hudson, whether the information was to be placed on the Birdie App or the Birdie back office system. However, that email aside, the messaging from the respondent was clear; this information was going on the Birdie system not the Birdie App. In fact, the respondent specifically wrote to the claimant to confirm that the information would be on the system not the App, see paragraph 9.27 above.

28 It was the claimant's case that the respondent had continually misrepresented the situation to her; in that the respondent had continually said that it was a CQC requirement that a digital photograph be held by them. However, I have not found as a fact that this is what the respondent said to the claimant, paragraph 9.69 above.

29 I did not make this finding because, put simply, it was largely inconsistent with the contemporaneous documentary evidence; there was just one occasion, on the documents put before me, where Ms Gooding came close to appearing to write in an email that it was a CQC requirement that a photograph be uploaded onto Birdie, namely her email of 11 July where she wrote:
"in accordance with CQC requirement, I also need a photo to upload onto Birdie", paragraph 9.19 above.

30 But emails, of course, are not always precisely written and the vast majority of the respondent's communications to the claimant made it very clear that the CQC requirement was for a photograph to be held:

- On 18 May 2023 Ms Gooding specifically informed the claimant that it was a CQC requirement that the respondent had a photograph of all the staff they employed, paragraph 9.16 above.
- On 12 July she emailed that the claimant "must provide a photograph for CQC purposes", paragraph 9.21 above.
- On 8 August 2023 she emailed the claimant, paragraph 9.27 above, explaining that the respondent was required to hold certain information for staff that conducted regulated activities and that the respondent no longer held hardcopies of the required information and therefore needed this to be stored on an electronic system.
- The claimant was also, of course, sent the CQC FAQ document by the respondent. This document made it absolutely clear that what the CQC required by way of schedule three was proof of identity, including a recent photograph, paragraph 9.21 above.

31 At the heart of the claimant's case was the suggestion that the instruction from the respondent to provide a photograph which was to be kept on Birdie (which the claimant asserted in part caused her ill health) was an unreasonable management instruction because there was a significant risk of unlawful processing of her data.

32 I concluded that the respondent had reasonable grounds to conclude that what they were implementing amounted to lawful processing/ was reasonable in circumstances where:

- The situations in which Birdie could process customer data were strictly limited to those where it was necessary to enable the customer (i.e. the respondent) to use the Birdie service or, in an anonymised format, for analytical purposes to improve the service, paragraphs 9.11 and 9.12,
- Where Birdie's licence agreement made it clear that Birdie were obliged to follow data protection laws, paragraph 9.13,
- Where Birdie is an industry standard system, paragraph 9.7,
- Where Birdie had been through an IT procurement process conducted by the respondent to test how the system worked, paragraph 9.7.
- Where the data was to be stored on the more secure part of the system, i.e. the back office system to which only a limited number of people had access.
- Where there was a clear and rational basis for needing the data; in relation to the photograph in order to enable the respondent to comply with a legal requirement, in relation to the date of birth to assist with identification and in relation to next-of-kin emergency contact details to enable the respondent to respond appropriately in an emergency situation

- i.e. this information was necessary for legitimate interests pursued by the respondent.

- As to the manner in which the photograph was to be stored, which was in reality at the very heart of the dispute between the parties, in circumstances where physical storage of the photographs was no longer possible and/or the respondent had made a decision to move towards paperless files, it was not unreasonable for the respondent to conclude it was necessary, in order to achieve those legitimate interests, to store the photograph digitally.

33 It was the claimant's case that the move to AMH was a punitive or retaliatory measure, in the sense that she was moved without any reasonable or rational basis as a knee-jerk reaction to her having raised concerns about provision of a photograph. and she asserted this also caused her to be ill. I have not found that the claimant was moved to AMH by the respondent as a punitive or retaliatory measure, paragraph 9.24 above. I did not make this finding for the following reasons. It is beyond doubt that the claimant's work in the community involved carrying out regulated activities and the respondent was legally required to have photographic identification of anyone carrying out such activities. Hardcopies of photographs were no longer available following the closure of Lifford House, paragraphs 9.3 and 9.27, and unless or until the claimant supplied a digital photograph the respondent would be in breach of Regulation 19(3) and Schedule 3 if it permitted the claimant to work in citizen's homes. In such circumstances, in reality, the respondent had little choice but to move the claimant. Such a move, moreover, appeared to fall well within the terms of the mobility clause contained in the claimant's contract, paragraph 9.6 above.

34 This, then, dealt with the specific points raised by the claimant in relation to what the claimant described as unreasonable actions on the part of the respondent, which she asserted had caused her to be ill. In terms of other points raised by the claimant during the hearing as to why her dismissal was unfair, it was the claimant's case that her dismissal was pre-determined. However, I have not found as a fact that this was so, see paragraph 9.60 above. This assertion on the claimant's part appeared to be based purely on the way in which the issue of attendance of her representative at the fact-finding meeting in July 2023 had been handled; where the respondent had initially told the claimant a representative was not necessary before agreeing that someone could attend with the claimant. But there is nothing about that from which pre-determination of the decision to dismiss can be inferred, particularly when the decision to dismiss was made by an entirely different manager under an entirely different process the best part of nine months later.

35 That still leaves the question of whether the claimant's dismissal was, in all the circumstances of the case, fair or unfair. Ultimately, I concluded that the dismissal was fair taking into account in particular the following points;

36 The respondent took steps on not one but two occasions to obtain medical advice on the claimant's prognosis. The first report was produced in October 2023, and at that time it was confirmed that no return to work date could be identified, paragraphs 9.31 and 9.32 above. The second report was obtained five months later in March 2024. Significantly, the respondent postponed the third full case hearing, which had originally been scheduled for 20 March, in order to allow this report to be produced, paragraph 9.52 above. In this report it was confirmed that the claimant was not fit for work, that her mental health had in fact worsened and once again it was confirmed that no return to work date could be identified for her, paragraph 9.56 above.

37 There was consultation with the claimant. The first attempt at this took place at a full case hearing on 30 January which both the claimant and her union representative failed, without explanation, to attend, paragraph 9.35 above. A second full case hearing took place on 28 February and, whilst it was initially at least the respondent's position that only additional information would be considered at the second case management hearing, in fact there was also discussion at this second case management hearing about what had been considered at the first case management hearing, paragraph 9.42 above. A further case management hearing took place on 9 April at which there was discussion once again about the claimant's prognosis and why she was unable to return to work. The claimant also, of course, had an appeal hearing, albeit one which was considerably delayed. She chose not to attend this appeal hearing. In the circumstances, therefore, the respondent gave the claimant four different opportunities under the formal process to discuss her situation with them, three of which were prior to the decision to dismiss being made.

38 For these reasons I concluded that the respondent had conducted a reasonable investigation into the claimant's ill health and had reasonable grounds on which to reach the conclusions that it did with regard to the claimant's ill health.

39 As to whether dismissal was within the reasonable range of responses, I concluded that it was. It was the claimant's case that Ms Pugh took into account earlier periods of sickness absence, in making her decision to dismiss, which she should not have done because she was required to discount them under the Managing Absence policy. However, I have not found as a fact that she did this, paragraph 9.60 above. I have found that Ms Pugh focused on the latest period of sickness absence only.

40 The claimant, at the point when she was dismissed, had been off sick for eight months under that latest period of absence, which was in itself a significant period of time. Moreover, and significantly, Ms Pugh reasonably concluded that the claimant's current period of sickness absence was open ended. This was because, as she concluded based on the information that was before her, the claimant and the respondent had effectively reached what she termed a Catch-

22 situation, or what might alternatively be described as an impasse. The claimant was clear that she would remain off sick whilst the requirement continued to produce a digital photograph or where the alternative employment available to her was at AMH. As the requirement to produce a digital photograph did continue and the only alternative employment was at AMH it was reasonable for Ms Pugh to conclude that the sickness absence was open-ended with no return to work date in sight. That is a significant factor when it comes to assessing whether the decision to dismiss fell within the reasonable range.

41 Other factors relevant to whether the dismissal was within the reasonable range of responses are that the respondent did explore, on my findings, whether alternative employment was available for the claimant with Ms Pugh making enquiries with the Care Centre manager, the Service Manager and the Head of Service about vacancies, paragraph 9.48 above. Moreover, she delayed her decision in order to enable these enquiries to be carried out. Additionally, even when these enquiries had proved fruitless Ms Pugh still did not move to dismissal. She took the assertion made by Mr Oulds during the hearing on 28 February, that the claimant was ready, willing, and able to return to work, paragraph 9.46, at face value; she delayed her decision until after the expiry of the claimant's current sick note to see if the claimant did return to work, paragraphs 9.49 and 9.50. That return to work, of course, did not happen. The claimant submitted a further two fit notes and remained off sick from work with the position remaining that it was not possible to identify any date for a return to work.

42 Attempts at a compromise in relation to the photograph had been made by the respondent with the respondent offering the claimant the option of having her information stored on Microsoft teams, something that was rejected by the claimant, and it had also dropped the requirement for next of kin emergency contact details and date of birth, paragraph 9.39 above.

43 Additionally, an employer acting reasonably will consider the impact of an employee's absence. Here, Ms Pugh reasonably took into account that the claimant's sickness absence did have an impact on the service, paragraph 9.61. In particular, citizens who required care would not necessarily be receiving care from their regular carers (either because of the claimant's absence or because others were having to cover the claimant's shifts), and there was an impact on the claimant's colleagues who were having to cover her work. Those are the types of factors which an employer acting reasonably can legitimately weigh into the balance in deciding whether dismissal is a reasonable response.

44 For the avoidance of doubt, I was mindful, when reaching this conclusion, that there was considerable delay in conducting the claimant's appeal. Allowing for the confusion that appeared to arise as a result of the change in the appeal process, there was a delay between June 2024 and February 2025. That is, without doubt, an unsatisfactory level of delay. However, on balance I concluded

that overall this did not render the dismissal unfair. Delay was not a point relied upon by the claimant either in her claim form or within her witness statement; it was a point that was raised by the tribunal during the hearing, mindful of the claimant's position as an in person litigant. The claimant, moreover, did not suggest that the delay had prejudiced her or been unfair to her in any way. In fact, of course, the claimant did not participate in the appeal process, which went ahead in her absence. Notwithstanding the delay, in circumstances where the claimant did not participate in the appeal, where she made no complaint about the delay, where there was no suggestion it had prejudiced her in any way and where the initial stages of the process up to dismissal were carried out promptly and without delay, I concluded that the delay in the appeal by and of itself did not render the dismissal unfair.

45 For these reasons I concluded that the claimant's dismissal was fair.

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Employment Judge Harding
Approved on: 17 April 2026