EMPLOYMENT TRIBUNALS

Claimant: **Ms J Sinclair**

Respondent: **Crisis UK**

Heard at: **East London Employment Tribunal**

On: **7, 8, 9 and 10 October 2025**

Before: **Employment Judge Park**
Tribunal Member Daniels
Tribunal Member O'Callaghan

Appearances:

Claimant: **Mr D Simmons (solicitor)**
Respondent: **Mr J Jenkins (counsel)**

JUDGMENT having been given orally at the hearing on 10 October 2025 and sent to the parties and reasons having been requested in accordance with Rule 60 of the Employment Tribunal Rules of Procedure 2024.

REASONS

Claims and Issues

1. The claimant's claims were for unfair dismissal, discrimination arising from a disability and failure to make reasonable adjustments.

2. The claimant initially submitted an ET1 including claims for unfair dismissal, age discrimination, race discrimination, disability discrimination, a redundancy payment and for other sums owed. The claimant was initially unrepresented. She subsequently appointed solicitors and sought to amend her claim.

3. In total there were four preliminary hearings in the case. At the third preliminary hearing the application to amend was considered and allowed in part. Certain claims were withdrawn and dismissed. Following this hearing a list of issues was agreed, which was confirmed at the fourth preliminary hearing.

4. The agreed list of issues, including the permitted amendments, is appended to this judgment.

Preliminary matters – applications for strike out and adjournment

5. Directions had been given at the fourth preliminary hearings. Disclosure was due to have been completed by 11 June 2025, a bundle agreed by 18 June 2025 and witness statements exchanged by 15 August 2025. At that point the claimant was represented by solicitors.

6. On 9 September 2025 the respondent wrote to the Tribunal with an application to strike out the claimant's case on the basis that the claimant had not complied with the Tribunal directions, or alternatively unless orders were made. The respondent said that at that point:

    6.1. There had been some disclosure from the claimant. This had been provided piecemeal and included documents that did not appear relevant to the issues.

    6.2. The respondent had prepared a draft bundle and sent this to the claimant's solicitors. The respondent had sought to agree the contents. There had been correspondence between the parties during July and August and the bundle had not been agreed, in part due to the claimant continuing to provide additional disclosure in a piecemeal manner.

    6.3. On 29 August 2025 the claimant's previous solicitors stopped acting for her. At this point the bundle was not finalised and witness statements had not been exchanged. The respondent wrote to the claimant directly and proposed new dates for agreeing the bundle and exchanging statements.

    6.4. The claimant appointed new solicitors who started acting on 2 September 2025. They asked the respondent for 7 days to comply with proposed new dates for the outstanding directions.

    6.5. By 9 September 2025 the bundle was not finalised and statements had not been exchanged.

7. The respondent wrote to the Tribunal on 3 October 2025 and stated that the bundle remained unagreed and the claimant had not engaged in respect of the exchange of witness statements. The respondent provided a copy of the bundle it had prepared and its witness statements, which it said had been sent to the claimant password protected. A bundle of correspondence about compliance with directions was provided.

8. On 6 October 2025 the claimant's new solicitors made an application to postpone the hearing. Within the email they explained the reasons why directions still were not complied with, despite having taken over conduct of the case a month earlier. Broadly, they relied on what they said were

logistical issues due to only having been recently instructed. This included the need to seek advice from counsel on the claim itself. They also asserted that the bundle was not agreed and documents were missing which would affect the fairness of any hearing.

9. The respondent renewed its application for strike out at the start of the hearing. They said that at that point they were ready to proceed but they had still had no indication from the claimant that she was ready to exchange witness statements.

10. We heard submissions from both parties on the applications for strike out and postponement of the hearing. We also sought clarification of the current position from both parties. From this we ascertained:

    10.1. The respondent had provided a bundle. This was not agreed but there did not appear to be clearly identifiable documents that were missing.

    10.2. The respondent had prepared their witness statements and were ready to proceed.

    10.3. The claimant had prepared a draft witness statement but it was not finalised.

    10.4. We also noted that the application to amend made by the claimant earlier in the proceedings included a very detailed narrative of the claimant's account of events.

11. Having heard from both parties we decided to refuse both applications and that the hearing should proceed as listed. In reaching our decision we took into account the following:

    11.1. The two applications were diametrically opposed. Granting one party's application would inevitably cause prejudice to the other.

    11.2. The background circumstances that lead to both applications were essentially the same. The case was not fully prepared for the hearing. A bundle had been prepared but it was not agreed. Witness statements had not been exchanged. The respondent said that the current position was due to the claimant's non-compliance and the way to address the situation was to strike out the claim. The claimant said this would not be in the interests of justice and the way to address the situation was to postpone the hearing.

    11.3. There had been non-compliance by the claimant. She had not agreed the bundle with the respondent and neither had she been ready to exchange witness statements. The non-compliance was not total. She had disclosed some documents, albeit in a piecemeal manner. The respondent had been able to prepare a bundle and their own witness statements.

11.4. When deciding whether to strike out a claim there is a two-stage test. The threshold for considering strike out must be met. The Tribunal must then decide whether to exercise its discretion to strike out the claim or whether some other less draconian sanction should be applied. The decision must be made in accordance with the Overriding Objective and the need to deal with cases fairly and justly.

11.5. It was unclear exactly why the claimant had not complied with all directions. The claimant had relatively recently changed representation, and it appeared likely that some fault was with her previous representatives. Correspondence indicated they were engaged in protracted correspondence about the bundle that was not cooperative. However, the new solicitors had been on the record for a month and no good explanation had been provided for the lack of progress during that time, given that the hearing was imminent.

11.6. The reasons provided in the application for a postponement, which were also the reasons given for non-compliance, were not persuasive. The claimant's solicitors suggested that the case was complex which was not the case. It was also suggested that the claimant needed advice from counsel, which also should not be necessary at such late stages in proceedings when solicitors are instructed.

11.7. We did note that the claimant is disabled. She has had a stroke and this has affected her ability to concentrate. We took into account that this was likely to have some impact on the preparation for the case. However, this was not something that was relied on by the claimant's solicitor by way of explanation for any delay. On the contrary the claimant's solicitor expressly put forward alternative unrelated explanations.

11.8. Despite the lack of good explanation for the non-compliance we decided it would not be disproportionate to strike out the claimant's case. As noted, the non-compliance was not total. It appeared that preparation in recent months had gone awry leading to the current situation. This did not mean that a fair hearing was no longer possible. Striking out the claim would also be punitive towards the claimant when it appeared the current state of affairs was not clearly her responsibility.

11.9. We then decided what other action to take. The claimant sought a postponement, but the reasons provided in support of the application (which were also the reasons given for non-compliance) were not persuasive. Effectively the postponement was sought because the claimant was not ready due to her own non-compliance.

11.10. Having reviewed the situation as a whole, we decided that it was possible to go ahead and still have a fair hearing on the days listed. The time listed was relatively generous given the number of witnesses due to be called by both parties. A bundle had been prepared. The respondent had prepared witness statements and their witnesses were available. The claimant had indicated she had prepared a draft witness statement already and her case was set out in some detail in the pleadings and her application to amend the claim, which if necessary could also be relied on by the claimant.

11.11. We decided to adjourn the start of the hearing until the second day. During the adjournment the parties could exchange witness statements. There was also sufficient time that the claimant could prepare a supplementary bundle of any additional documents she wished to rely on which she said were not in the main bundle.

11.12. We decided this was in accordance with the Overriding Objective. There would be some prejudice to both parties. The claimant would have to rely on a draft witness statement which may not be as she ideally would like it to be. The respondent would need to proceed having only seen the claimant's statement shortly before the hearing. However, the prejudice suffered by both parties would significantly less than the prejudice to the claimant had her claim been struck out or that to the respondent had the hearing been postponed.

11.13. We were also mindful that this approach also balanced the needs of other Tribunal users. A postponement would have required a new hearing date to be listed which would otherwise have been available to list another case.

Procedure, documents and evidence heard

12. We were provided with the bundle that had been prepared by the respondent. On the second day, before we heard from witnesses, the claimant said she had an additional document. Following discussion it was clarified this was already in the bundle.

13. The parties had exchanged witness statements. The claimant relied on the draft statement that had been prepared. We read her statement and she was cross-examined.

14. The respondent called Christine Eyers and Shaun Parris as witnesses. They had both prepared witness statements and were cross-examined.

15. Both parties made submissions orally after the evidence was concluded.

Findings of fact

16. The claimant was employed by the respondent as a Functional Skills tutor. Her employment commenced in 2018. She was initially engaged to work for 13 hours a week. This subsequently increased to 15 hours a week over 2 days.

17. The respondent is a charity providing services to individuals experiencing homelessness. It operates Skylight centres. We understood that these are sites where the respondent provides various services to support homeless

people including education and training. The claimant worked at the respondent's Croydon Skylight.

18. In 2020 the respondent indicated that it was proposing to restructure these services nationwide. This proposal was potentially going to affect the claimant's role. The full restructure proposal was not announced until 1 September 2022. Consultation then started with the recognised trade union.

19. Some existing roles were matched with roles in the new structure. Other roles were at risk of redundancy. The claimant was informed that her role matched to the new role of Tutor (Lead Worker) so she was not at risk of redundancy. The respondent wrote to the claimant on 20 September 2022 to inform her of this and to invite her to a consultation meeting to discuss the situation for her personally.

20. At this time the claimant was managed by Jessica Parsons. Ms Parsons went on maternity leave in October 2022 and Tarron Pearson was appointed as temporary cover, so she line managed the claimant from that point. The claimant had very limited contact with Ms Pearson in person before her subsequent absence.

21. The claimant was signed off work in the middle of November 2022. She sent in a sick note dated 25 November 2022 saying *"flu like illness and hypertension"*.

22. At this point the claimant was managed by Ms Pearson. We did not hear any evidence from Ms Pearson. Ms Eyers reported in some detail that Ms Pearson was in contact with the claimant by telephone at the end of 2022. It is unclear how Ms Eyers knew this much detail given there were no notes from the time. However, the claimant has made reference to having telephone calls with Ms Pearson so we accept that there would have been some calls.

23. The claimant and Ms Pearson were also in contact by email in December 2022. Some of these emails related to sick notes. On 13 December 2022 the claimant informed Ms Pearson she could not remember her password and she had been locked out of the system. Ms Pearson said she would look into this. We noted by this point Ms Pearson was already using the claimant's personal email address for contact.

24. We heard a bit more about these systems from Shaun Parris, who worked in the respondent's HR function as a Senior People Adviser. The respondent had a number of different systems that could be accessed remotely. The main was referred to as CrisisNet. This is a system where employees can log annual leave, access pay information and other HR related matters. There is also the email system. Finally, there is the internal website. On the internal website employees can access updates and organisation wide communication. The same username and password is

used for all these systems. Without a password the claimant would not be able to access any of these systems, so she could not access her work email account or CrisisNet.

25. Ms Pearson responded by email and said that she would look into the claimant's access. The claimant's access was not restored at that time. We did not hear evidence from Ms Pearson and there is no other documentary evidence from this time about what happened. We do not know why Ms Pearson did not sort out this issue when it was first raised by the claimant.

26. Ms Pearson had been in contact with HR already about the claimant's absence. On 5 January 2023 she asked Mr Parris for support as she said she not received an up to date sick note and she had been trying to contact the claimant without success. Mr Parris then contacted the claimant directly on her personal email address asking for a sick note. He also informed her that Ms Pearson was trying to make contact to start discussions about *"support you may need upon your return to work"*. The claimant responded and provided a sick note, indicating hypertension and she was undergoing investigations.

27. We do not know if there were any discussions between the claimant and Ms Pearson about support or potential return to work at that time. We have no evidence from the claimant nor Ms Pearson about this and there was no other documentary evidence from that time, such as other emails.

28. The claimant provided medical evidence from late January 2023 that indicates she was still not well and was having various tests. The fit note dated 23 January 2023 states the claimant had hypertension and investigations.

29. The final position with the restructure was confirmed on 27 January 2023. At that point the claimant was still signed off work. A letter was sent to the claimant's work email address. This means the claimant did not receive the letter at the time.

30. On 6 February 2023 the claimant was signed off work for a further 2 weeks. Again, this certificate stated *"hypertension and investigations"*.

31. On 1 March 2023 Mr Parris wrote to the claimant on her personal email asking that she provide her next sick note. He also updated the claimant with the position on her sick pay and advised her that Ms Pearson had been trying to contact the claimant to discuss her wellbeing and *"explore return to work timescale"*.

32. Ms Pearson emailed the claimant on the 16 March 2023 to say she has been trying to call her for an arranged meeting but not been able to get through. The claimant acknowledged this email.

33. The claimant spoke with Ms Tarron on 22 March 2023. This is confirmed by an email from Ms Tarron on 23 March 2023. At this point an Occupational Health referral had been formally raised with the claimant. The email indicates that a referral form was sent to the claimant at the time, with a view to completing it at the next meeting on 6 April 2024.

34. On 22 March 2023 the claimant was also in contact with Mr Parris by email. The claimant explained more about her health at the time and advised Mr Parris that she had been updating Mr Pearson about the appointments and tests she had been having. In this email the claimant mentioned her GP had also recognised that she was suffering from anxiety. The claimant provided an indication of how serious her ill-health was, referring to it being *"life threatening"*. The claimant's sick note form 20 March 2023 states that the claimant has *"anxiety disorder, hypertension"*.

35. In this email the claimant also asks about a policy that Ms Pearson had mentioned. She refers to having the *"protected characteristic of anxiety"*. Mr Parris responds to suggest it is the disability policy. The claimant and Mr Parris appear due to have had a pre-arranged discussion at the time, but it appeared from the documents that this did not take place at that time. On 4 April 2023 Mr Parris emails the claimant and asked "*let me know if you would like to talk about the policy".* The claimant responded to say she is ill. There was no evidence of the claimant then following this up in any email. Neither did Mr Parris follow up any discussions about the policy.

36. In general, we noted the email correspondence with Mr Parris at this time indicated he was being supportive. He offered to participate in any conversations with the claimant and Ms Pearson and to generally provide assistance. He also mentioned to the claimant about the need to have discussions about timescales for her return to work.

37. According to Mr Parris the Occupational Health referral was not completed at the time. He says this was due to the claimant not agreeing to the contents of the referral and then not engaging. From the documentary evidence it is not clear what happened, but we can see the Occupational Health referral did not progress at that point.

38. Under the respondent's sick pay policy the claimant's pay reduced once her entitlement to full-pay had expired. Mr Parris was in contact with the claimant about this during May 2023. We understand the claimant was overpaid and some adjustments were made to the claimant's pay. Mr Parris provided regular updates on this. There are no emails from the time where the claimant objected to any adjustments to her pay being made.

39. On 5 June 2023 the claimant wrote to Mr Parris. From this email it appears there had been contact by both Mr Parris and Ms Pearson in late May. The claimant said she had some appointments but she also said *"I hope to give a definite return to work date once I have met with the experts".* She also confirmed she agreed to an Occupational Health referral being made and

her return to work plan could be discussed. Mr Parris responded to suggest a meeting. The claimant was also in contact with Ms Pearson the same day. The indication from these emails was that a Teams call was going to be arranged with the claimant and both Mr Parris and Ms Pearson present.

40. Ms Pearson sent the claimant a draft Occupational Health referral. The claimant responded on 15 June 2023 sending Mr Parris and Ms Pearson with some comments about inaccuracies in the referral. She asked to see the final draft before the referral was sent. During June there was further correspondence about the contents.

41. The Occupational Health referral was completed at the end of June 2023. It appears from an email dated 22 June 2023 from Ms Pearson that it was sent off around then. On reading the referral it was clear that the main focus was to ask about timescales for the claimant to return to work and support that could be provided when she did. The respondent did not expressly ask whether the claimant was permanently unfit for her role. Instead, they said they "*would like to understand the timescales for Juline returning to work and upon her returning to work any adjustments and support that can be put in place to facilitate her return to work*".

42. In June 2023 the claimant informed Mr Parris she had not been able to access her online account and her work mobile had not been working since April 2023. She stated that she had not accessed her Crisis login since November 2022. She said her manager knew and it required a manager to request a password reset. The claimant asked that documents to be sent to her personal email, which had been in use in any event. There is no complaint in this email, the claimant just sets out that she would like alternative arrangements being made. Within the documentary evidence we saw the claimant had not raised this issue since 13 December 2022.

43. Mr Parris arranged for all general correspondence and updates to be sent to the claimant's personal email from then on. He also sent the claimant a copy of the letter with the outcome of the restructure, that had originally been sent to her work email address in January 2023.

44. Around July 2023 Karen Wan, who also worked within the respondent's HR department, corresponded with the claimant about her sick pay and the fact she had been overpaid. On 11 July 2023 the claimant asked Ms Wan asked about the disability leave policy.

45. We were provided with a copy of the disability leave policy. This is a policy the respondent has that provides a mechanism for providing reasonable paid time off for employees with disabilities when they have disability related absences. The policy differentiates between planned and unplanned time off. Planned time off is when a disabled employee needs time off that is planned, e.g. for appointments, therapy or treatment. Unplanned leave is not defined but by inference we would conclude it would be unforeseen absences. When taking planned leave the employee needs to make an

application for disability leave by completing a simple form setting out the reason and the time required. It is similar to the type of form many employers have to request annual leave. The manager then grants the leave. The policy does not expressly set out a process for unplanned leave, given that it could not be asked for in advance. What we have noted is that policy does state that some sickness absences may not be recorded as disability related because the disability is not recognised or the individual has not disclosed their disability. In those circumstances the policy states that once those facts are known absences should be reviewed so they can be reassigned as disability leave retrospectively. The policy does not include any details of the process for doing this exercise. The policy also indicates that disability leave should be treated differently than straightforward sick leave. However, it also states that dismissal on the ground of ill health is an option when there is a prolonged absence where the individual is unable to return to work.

46. The claimant sent an email to Ms Wan and asked if she qualified for paid leave under the policy and said she would need support to apply. Ms Wan responded with more detail and sent the policy.

47. On 12 July 2023 the claimant flagged up with Ms Wan that she could not access the systems. Ms Wan acknowledge this and raised it with IT that day. On 13 July 2023 the claimant received instructions on how to access the systems. Separately Ms Pearson also was in communication with IT and they provided a new password to enable the claimant to access her accounts.

48. On 20 July 2023 the claimant spoke to Ms Pearson. Ms Pearson described that discussion as positive in an email the same day she sent to Karen Wan and Christine Eyers. She confirmed the claimant had access to the systems and steps were being taken to resolve the phone issue. She also said that the claimant *"actively said she wants to return to work"* and was seeing her GP to get the *"all clear"*.

49. On 25 July 2023 the claimant provided a further sick note. She said that she was seeing Occupational Health the following week and her doctor was *"aware I cannot return until Occupational Health have made an assessment."*

50. The claimant was reviewed by an Occupational Health doctor on 3 August 2023. This consultation was by telephone. The report records what the claimant told the doctor about her medical conditions. This indicated that she had cardiovascular disease but had also had a type of stroke. The claimant was also experiencing anxiety. The doctor advised that she was likely to be considered as disabled. The conclusion was that the claimant was unfit to return to her substantive duties and *"at present there is no foreseeable timeframe over which a return to work might be anticipated."* The doctor was unable to advise on any adjustments to enable the claimant to return to work.

51. The claimant has suggested she had difficulties in receiving the report. She says she saw it on 11 August 2023. The claimant did not raise any concerns about the content of the report at the time.

52. In August 2023 Ms Pearson left the respondent and Christine Eyers took over line management of the claimant until Ms Parsons returned from maternity leave. Ms Eyers contacted the claimant on 21 August 2023 and suggested arranging a time to catch up.

53. The claimant submitted a further sick note on 25 August 2023 which again stated she was not fit for work due to anxiety.

54. The claimant and Ms Eyers were due to speak on 31 August 2023. The claimant was unable to meet at the agreed time and it was rearranged for the following day.

55. An email from 4 September 2023 indicates the discussion took place on 1 September 2023. Neither Ms Eyers nor the claimant have provided any account of this discussion in their witness evidence, therefore the email is the only evidence we have of what was said. Based on the email of 4 September 2023 it appears to have been relatively detailed. Ms Eyers confirmed that they discussed the Occupational Health report and the claimant's health in some detail. Ms Eyers said *"We agreed that you are not fit to return to work and that there is unfortunately no foreseeable date based on the OH report and our discussion last Friday".* Ms Eyers confirmed that there would be a capability meeting. The claimant did not respond to this email or indicate at the time that this was an inaccurate summary of the call. There is no reason otherwise for us to conclude it was not an accurate summary of their discussion.

56. Ms Wan sent the claimant the capability policy the same day. On 8 September Ms Wan sent the claimant a formal invitation to a stage 3 capability meeting. The claimant did not raise any concerns about the nature of this meeting.

57. The claimant was in contact with Ms Wan and she sent an email asking about her pension and ill-health retirement. She asked for a breakdown in figures. Ms Wan informed the claimant she would need to contact the pension provider for that information.

58. The meeting went ahead on 14 Sept 2023. The claimant was accompanied by her trade union representative.

59. During this meeting Ms Eyers advised the claimant that they were able to go back and reclassify her absence as disability, which in effect meant she would be paid retrospectively.

60. At the meeting the claimant's representative spoke mostly on her behalf. He did not object to the meeting being held under stage 3 of the capability process.

61. The claimant did not say at the meeting anything that indicated she was in fact able to return to work, or may be able to do so in the future. She did not say that the Occupational Health report was wrong, or that her GP or other treating medical practitioners had said she was likely to be able to return soon. On the contrary, the claimant said very little. Her representative mostly spoke on her behalf and said that the claimant was ready to leave and they wanted a decision that day. Ms Wan said during the meeting that they had not intended to make a decision, but if that is what the claimant wanted her employment would end. There were then some discussions about what the claimant would receive as notice and holiday pay and confirming the termination date.

62. The claimant says now she did not agree to be dismissed. She has not challenged any specific part of the minutes of the meeting in her witness evidence. Her criticism was more general, relying on how she describes her state of mind at the time. Specifically, she said in her evidence that she was overwhelmed stressed and frightened.

63. We note that the claimant was suffering from anxiety. The notes also indicate that the claimant relied on her union representative to speak on her behalf and she said very little herself. However, we accept that the meeting was as described in the minutes taken at the time. These show that the claimant's trade union representative made representations on her behalf that she was ready to leave the respondent's employment.

64. In coming to this conclusion we have also relied on the correspondence that followed. We set out below what a summary of what occurred next. Overall, the correspondence from the claimant is consistent with the claimant agreeing that her employment would end because she was not fit to return to work. The claimant remained employed by the respondent for five weeks after the meeting. This was in effect the claimant's notice period. During this time the claimant did not appeal the decision to terminate her employment. She did not say anything in any emails or other correspondence indicating that she had been misunderstood during the meeting or the decision was wrong. On the contrary, the correspondence indicates the claimant was content with the situation.

65. The claimant was sent an outcome letter on 18 September 2023 with the minutes attached. The outcome letter said that the decision was the *"mutual end of your employment… with contractual notice on the grounds of ill health capability."* The letter summarised the decision and how that decision had been reached. It also set out what the claimant would receive in terms of notice pay, disability pay and accrued holiday pay. As the letter confirmed the termination of employment, it also said the claimant had the right to appeal the decision.

66. Ms Eyers sent the letter and minutes by email. In the email Ms Eyers thanked the claimant for the work she had done in her role. The claimant responded acknowledging this and thanked Ms Eyers for her *"kind words"* and said she would be in touch. She did not appeal the decision and at no point did she indicate that she did not agree with the decision.

67. There was subsequent correspondence between the claimant and Ms Eyers and Ms Wan. This related to the calculation of the sums the claimant was owed, particularly in respect of holiday pay. The claimant explains her concerns about the calculations clearly and there is no indication of her being upset or overwhelmed by the situation. She continues to thank Ms Wan for her support as these details were worked out. Again, there is nothing within the correspondence following the meeting that suggests the claimant had not actively agreed to the arrangements or decision that her employment would terminate.

68. The claimant's employment terminated on 20 October 2023. On 1 December 2023 the claimant raised a grievance. Our findings about this are minimal as no claims are pursued about this. The key points are as follows:

    68.1. The initial grievance was quite brief. It reads as a precursor to a Tribunal claim, as the claimant expressly says she will be pursuing a claim for constructive dismissal. She also complains of disability and race discrimination and the disability leave policy not being implemented.

    68.2. The grievance was considered by the respondent, albeit there were delays. A meeting was held on 6 March 2023. At this the claimant expanded on her complaints. She mentioned not being able to access the systems. The context for this was a complaint that she had not been offered voluntary redundancy as part of the restructure.

    68.3. The outcome was finally provided on 26 July 2024. The grievance was not upheld.

The Law

69. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed, the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

"98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that Case Number: 3202301/2019 26 of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection 2(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,

(b) […]

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

70. For the purposes of Section 98(2) ERA 1996 the definition of '*capability*' includes ill-health. That can be either long-term ill-health that prevents an employee from working or recurrent short-term ill-health.

71. The respondent is not required to prove that the claimant was incapable of performing their job. The respondent needs only establish they had an honest belief on reasonable grounds that the claimant was incapable of doing the work they are employed to do. (**Taylor v Alidair Ltd [1978] IRLR 82)**.

72. In **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** the EAT held that the function of the Employment Tribunal was to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair. This means that a dismissal can be fair, even if there may have been other options available to the employer. The Tribunal must not substitute its decision on this issue for that which was made by the employer.

73. A fair procedure an employer should follow before considering dismissal by reason of capability will depend on the circumstances. It would usually involve consultation with the employee, ascertaining the current medical position, giving the employee an opportunity to improve attendance and, where appropriate, considering whether there is alternative employment that could be offered. However, this may not always be required depending on the circumstances of the case.

<u>Discrimination arising from a disability – section 15</u>

74. Section 15 of the Equality Act 2010 provides:

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

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

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

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

75. In **Pnaiser v NHS England [2016] IRLR 170**, the EAT provided guidance as to the correct approach to a claim as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than

trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) *Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see **Nagarajan v London Regional Transport** [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…*

(d) *The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act…the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

(e) *For example, in **Land Registry v Houghton** UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

(f) *This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

(g) *Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of **Weerasinghe** as supporting this approach, but in my judgment those paragraphs read properly do not support her subjection, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.*

(h) *Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and* *does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.*

*(i) As Langstaff P held in **Weerasinghe**, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment. "*

76. The correct approach to a claim was summarised by the **Court of Appeal in City of York Council v Grosset [2018] IRLR 746**.

"36. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability.

37.The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" ...

38.The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something" …."

77. The meaning of 'unfavourable treatment' was considered by the Supreme Court in **Trustees of Swansea University Pension and Assurance Scheme v Williams [2019] ICR 230** (at para 27):

'… in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section.'

78. It is then necessary to look to the employer's defence of justification. S.15(1)(b) EqA provides that the unfavourable treatment may be justified, if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question must be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing

so (**Allonby v Accrington & Rossendale College & Others [2001] ICR 1189 CA)**.

79. Justification requires the Tribunal to conduct an objective balancing exercise between the discriminatory effect and the reasonable needs of the employer (**Ojutiku v Manpower Services Commission [1982] ICR 661** and **Land Registry v Houghton & Others UKEAT/0149/14**). It will be relevant for the Tribunal to consider whether any lesser measure might have achieved the employer's legitimate aim (**Naeem v Secretary of State for Justice [2014] ICR 472**).

80. The time at which justification needs to be established is the point when the unfavourable treatment occurs (**Trustees of University Pension and Assurance Scheme v Williams [2015] ICR 1197 EAT**]). When the putative discriminator has not considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification, although the test remains an objective one (**Ministry of Justice v O'Brien [2013] UKSC**).

<u>Failure to make reasonable adjustments – section 20-21 Equality Act 2010</u>

81. Section 20 of the Equality Act 2010 provides:

> *(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 imposes 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…*

The second and third requirements are not relevant for this case.

82. Section 21 EqA 2010 provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments, and further that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

83. The EAT in **Environment Agency v Rowan [2008] ICR 218** held that an employment tribunal considering a breach of the duty to make reasonable adjustments (under the then-current DDA 1995), must identify:

(a) the provision, criterion or practice applied by or on behalf of the employer; or
(b) the physical feature of premises occupied by the employer;
(c) the identity of non-disabled comparator(s) (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

This guidance continues to apply to claims brought under s. 20 – 21 EqA 2010 (see e.g. **Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins [2014] ICR 341** at [29] – [30], where the EAT also noted that it is necessary for the ET to identify the "step" or "steps" that the employer should have to take to avoid the disadvantage).

84. The Court of Appeal in **Ishola v Transport for London [2020] ICR 1204** has given detailed guidance as to the meaning of the phrase "provision, criterion or practice":

"35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs…

36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.

37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010 , all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

85. In considering whether the application of a PCP places a disabled person at a substantial disadvantage:

"one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able bodied"

Griffiths v Secretary of State for Work and Pensions [2017] ICR 150.

86. In considering whether an employer has complied with the duty to make reasonable adjustments, the focus must be on the practical steps that can be taken to alleviate the substantial disadvantage suffered, rather than the process by which a decision is reached, or the information obtained in reaching that decision. See on this point **Royal Bank of Scotland Plc v Ashton [2011] ICR 632**, and in particular the quotation from **Spence v Intype Libra Ltd** at (reference to section 4A is to the predecessor Disability Discrimination Act 1995):

"The nature of the reasonable steps envisaged in section 4A is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice … The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate or prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing."

87. Pool of comparators: has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? **Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651, [2004] ICR 954**: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

88. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (**Tarbuck v Sainsburys Supermarkets Ltd)**, it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments **(Watkins v HSBC Bank Plc [2018] IRLR 1015)**

89. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage. **Leeds Teaching Hospital NHS Trust v Foster UK EAT /0552/10, [2011] EqLR 1075**: when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage— there does not have to be a 'good' or 'real' prospect of that occurring. **Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)** - 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'.

90. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. **Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar):** it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

91. In **O'Hanlon v Commissioners for HM Revenue and Customs 2007 ICR 1359** the Court of Appeal considered the question of disability-related absence and sick pay. The court upheld the decision of the tribunal and the EAT that the Equality Act does not require an employer to pay full pay for all disability-related sickness absence. Paying full pay indefinitely would act as a disincentive for an employee to return to work. Only in exceptional circumstances would it be reasonable to expect an employer to pay an employee's salary in full for disability-related absence after entitlement to sick pay under the rules of a sick pay scheme have been exhausted

92. The EHRC Code includes examples of adjustments which may be reasonable:

    a. making adjustments to premises

    b. allocating some of the disabled person's duties to another worker

    c. transferring the worker to fill an existing vacancy

    d. altering the worker's hours of working or training

    e. assigning the worker to a different place of work or training or arranging home working

f. allowing the worker to be absent during working or training hours for rehabilitation, assessment or treatment

g. acquiring or modifying equipment

h. providing supervision or other support.

Discussion and conclusions

Discrimination arising from a disability

93. There are 4 allegations of less favourable treatment:

    93.1. The respondent failed to grant the claimant access to its systems from 10 November 2022 to 19 October 2023.

    93.2. The respondent deactivated the claimant's work mobile around March 2023

    93.3. The respondent failed to find alternative ways of establishing communication from 10 November 2022 until 22 October 2022.

    93.4. The respondent directed important documents to the claimant's work email address from 10 November 2022 until 19 October 2022.

94. The first question for us to address in respect of all four claims is whether the claimant has proved that the unfavourable treatment occurred as she has alleged. A summary of our findings of fact on these issues is as follows:

    94.1. The claimant did not have access to the various systems, including CrisisNet and her work email, from shortly after she was signed off work. She raised it with Ms Pearson in December 2022. No action was taken to restore her access at this time. The claimant did not inform anyone else of her lack of access at this point. The claimant did not raise the problem again until June 2023. When the claimant did raise it in late June 2023 it was dealt with promptly and access was restored by around 13 July 2023.

    94.2. The claimant did not have access from December 2022 until 13 July 2023 because during this time the respondent failed to restore her access.

    94.3. The claimant's mobile phone did stop working. No one knows why this happened. It is not the case that it was deactivated by the respondent. The claimant has not shown that anyone actually deactivated her telephone. All she has shown is that in mid-2023 her telephone was not working. She only informed the respondent of this in June 2023 and it was addressed relatively promptly.

94.4. At the claimant's request, the respondent used her personal email address at all times. This was an alternative way of communicating. It was used by Ms Pearson, Ms Parris and Ms Wan.

94.5. There was some information that was only being sent to her work email account during that time. The only person the claimant had informed she could not access her work email was Ms Pearson. The people writing to her work email address did not know the claimant could not access it. Once the claimant informed Mr Parris of the problem he made arrangements to send all information to the claimant's personal email.

94.6. The respondent had continued to send the information about the consultation and restructure to the claimant's work email address. This included the letter of 27 January 2023.

95. The claimant has partially made out the basic facts in respect of the first and fourth allegations of less favourable treatment. She has shown that the respondent failed to restore access to her accounts, but only between December 2022 and July 2023. She has also shown that the respondent sent important documents to her work email address for the same period.

96. The other two claims of discrimination arising from a disability do not succeed because the claimant has not shown the treatment complained of occurred. The respondent did not deactivate her work telephone. The respondent did establish alternative ways of communicating with her at all times.

97. In respect of the claim about the allegation that the respondent failed to grant access to the respondent's systems, we have had to decide the following:

97.1. when did that failure occur;

97.2. was it unfavourable treatment; and

97.3. was it due to the something arising from a disability.

98. The specific allegation against the respondent is that they failed to do something. When considering discrimination based on an alleged failure to act, we need to identify when that failure occurred. This involves identifying the time when it could reasonably be expected that the respondent should have remedied the situation. The claimant raised the problem with Ms Pearson in December 2022. Ms Pearson failed to take any action at the time. The question is when ought Ms Pearson have ensured the problem was resolved. On this point we have been able to consider evidence about what happened subsequently. The claimant raised the problem again on 23 June 2023 and it was remedied relatively promptly, within a month. Based on this evidence we can conclude that a reasonable time for this to be dealt with would be roughly a month. Taking into consideration

Christmas and New Year, we concluded the problem ought to have been dealt with by the end of January 2023.

99. This failure to restore access in January 2023 meant the claimant did not receive some emails that only went to her work email address while she was signed off sick. Some of those were important, such as the letter of 27 January 2023. She also could not access directly things like pay statements and policies.

100. However, we also have concluded that this treatment was not significant. The claimant raised it once in December 2022. She did not raise it again until June 2023. At that point the claimant was starting to discuss returning to work, so she wanted to engage with the respondent more. We did not accept that the lack of log on details before then made the claimant feel isolated. There is no contemporaneous evidence of this or that she had problems due to the lack of log in between December 2022 and June 2023.

101. In terms of reason for the treatment, the claimant said that the ‘something’ was her sickness absence. The respondent said there was no evidence of this. We did not accept the respondent’s position. It was clear from the circumstances that the claimant’s access was not promptly restored when she first raised the problem because she was signed off sick. If the claimant had been at work her access would probably have been restored promptly because she would have needed access to do her work. In the claimant’s case, restoring the access was not a priority because of her sickness absence.

102. Therefore, there was unfavourable treatment. It was due to the claimant’s sickness absence. The respondent did not put forward any defence of justification for this claim.

103. With this claim we must also consider the issue of jurisdiction. We have found that any failure by the respondent occurred at the end of January 2023, based on when the claimant raised the issue and when it ought to have been addressed. The claimant continued to not have access but she did not complain any further until 23 June 2023. When she did so the second time the issue was addressed promptly.

104. This means that a claim in relation to the original failure would need to have been started by the end of April 2023. No claim was pursued at that point. As we note, the claimant also did not complain about this situation at the time until she raised it again in June 2023, in anticipation of discussing her return to work.

105. This particular claim was not in the claimant’s original ET1. It was allowed as an amendment following an application by the claimant to amend her claim that she made in November 2024. The amendment was allowed in March 2025. This means the claim was only brought at the point the amendment was allowed which was over 18 months out of time. This claim can only succeed if we decide it is just and equitable to extend time until

March 2025 (taking into account that it was expressly raised in an application to amend made in November 2024).

106. The claimant has not put forward any clear explanation for why she did not pursue the claim at the time in 2023 or in her original ET1. Neither has she put forward any clear argument why we should grant an extension of time for this claim. We have noted that the claimant was very unwell at the time and has continued ill-health, including a further stroke in November 2023. Nonetheless, having looked at the evidence as a whole, including the procedural history of the case, we have decided it is not just and equitable to extend time for the following reasons:

106.1. While there was a failure by the respondent to deal with this issue, there is no evidence that there was any significant adverse impact on the claimant at the time. The respondent was in contact with the claimant using other means. The lack of access had some implications, but any discrimination was not deliberate and was essentially an oversight.

106.2. The claimant now says she felt isolated as a result of the lack of access. This is not consistent with the contemporaneous documentary evidence. The claimant did not chase up this issue until June 2023, and at that point it appears to be triggered by her starting to think about returning to work, hence she needed to reengage.

106.3. The evidence indicates that the claimant has reframed the significance of the lack of access at a much later date as her post-employment complaints have progressed. During the grievance and some at some points during these Tribunal proceedings the claimant has sought to advance a case that the respondent deprived her of the opportunity to be granted voluntary redundancy. She also at times sought to advance an argument that she had been constructively dismissed. The complaint about lack of access to systems links to these arguments, as there is a suggestion that because the claimant did not have access to certain communication she was unable to put herself forward for a voluntary redundancy package. There is no evidence to support this argument, such as evidence that voluntary redundancy was ever on offer to the claimant. Such arguments were not ultimately pursued by the claimant as part of this case. The claim about the lack of access appears to have been brought in to support other arguments that are no longer pursued, rather than as a free-standing complaint. Those other claims were not pursued, but the claim about the lack of access remained.

106.4. Taking the above into account, we have concluded it is not just and equitable to extend time in respect of this specific claim, as a free-standing cause of action. Therefore, the Tribunal does not have jurisdiction to hear the claim and it does not succeed.

107. The other potential less favourable treatment by the respondent was sending important documents to the claimant's work email. This links to the claim about the lack of access to the respondent's systems. Some important documents were sent to the claimant's work email only. The respondent did not do this because the claimant was signed off sick. They were sent to that email as that was the default mode of communication for some formal communication or group consultation material. The claimant had told Ms Pearson she could not access this but there was no evidence that she told Mr Parris or anyone else about her lack of access until June 2023, at which point he ensured everything was sent to her personal email. This claim does not succeed because the reason this information was sent to the claimant's work email was not the sickness absence itself. The treatment complained of does not arise from the claimant's disability.

108. For the above reasons, all the claimant's claims for discrimination arising from disability do not succeed and are dismissed.

<u>Reasonable adjustments</u>

109. The relevant provision, criterion or practice ("PCP") the claimant identified is the respondent's sickness and capability policy. This did apply to the claimant.

110. The part of the policy the claimant complains about is the entitlement to sick pay. The respondent has a sick pay policy. Employees receive sick pay that is higher than statutory sick pay. Employees initially receive full pay for a period of time when signed off work. Entitlement then reduces to half pay for a further period of time. After this any further entitlement to pay will be based on statutory sick pay. This policy was applied to the claimant as she was signed off work for a prolonged period of time. When her entitlement to full pay was exhausted her pay reduced. The claimant had also erroneously been overpaid so arrangements were made for repayment of those overpayments.

111. An employee's entitlement to be paid when on sick leave will generally be determined by the terms of their contract. The underlying position is that an employee is only entitled to be paid if they are ready and able to work in accordance with their contractual obligations. If an employee is not able to work they will not be entitled to their usual pay. There are different ways an employee may be entitled to some pay when signed off work including the following common arrangements:

    111.1. They may be entitled to receive statutory sick pay, if they meet the qualifying criteria. This is based on the statutory provisions rather than determined by the employer.

    111.2. The employer may have a contractual sick pay scheme. The employee will be entitled to be paid in accordance with that scheme if it is incorporated into their contract and they meet any relevant requirements in the policy.

111.3. The employer may have a discretionary sick pay scheme. There will be no entitlement to pay in these circumstances because it is not a contractual entitlement. However, the employer must operate any discretion in a way that is not unlawful or discriminatory.

111.4. An employer may have not clearly set out policy on sick pay in excess of statutory sick pay, but may decide voluntarily to pay an employee who is signed off work. This would be another form of discretionary sick pay, but provided on a more ad hoc basis.

112. In the claimant's case, her entitlement to sick pay was contractual. She received full pay for a period of time then half pay. The claimant says that due to her disability she was at a disadvantage because she was more likely to be absent for a prolonged period which ultimately lead to a reduction in her pay. All individuals who are signed off for prolonged periods of time will be in the same position, in that after a certain period of time their pay will reduce. It is generally understood that disabled employees may be more likely to be signed off work and therefore experience a reduction in pay. To this extent the respondent's sick policy did place the claimant at a disadvantage.

113. The claimant says that the adjustment the respondent should have made is to manage her absence under its disability policy. The disability policy does not provide an alternative way of managing absence. The policy provides a mechanism for disabled employees to receive additional pay when absent for disability related reasons. Within the policy disability leave is described as being a reasonable adjustment.

114. It is well established in case law that it generally will not be a reasonable adjustment to pay a disabled employee more than a non-disabled employee would be paid under an employer's sick pay policy. The occasions where increased sick pay would be a reasonable adjustment would be exceptional and depend on the circumstances. For example, it may be reasonable to pay an employee who remains signed off work because the reasonable adjustments that the individual needs to return to work have not been put in place. That was not the case for the claimant, who at all times was not fit to return to work even with adjustments in place.

115. In this case the respondent has a specific policy that provides a way for disabled employees to receive additional paid leave when they are absent for disability reasons in some circumstances. The policy states that disabled employees are entitled to disability leave, but when the policy is read as a whole it is clear that how it operates in practice is discretionary. The only qualifying criteria to be entitled to disability leave is that the individual is disabled under the Equality Act 2010. However, there are no clearly defined circumstances when paid leave should be granted. The policy acknowledges that the question of whether an individual is disabled may not be clear so require some discussion with the individual and potentially medical evidence. The policy anticipates a number of different circumstances when it may be paid and it is also specifies that the amount of paid disability leave will also depend on the employee's specific

circumstances. There is nothing that expressly states that an employee who is on long term sick leave whose entitlement to contractual sick pay has expired should automatically continue to be paid either in full or part. It simply allows for the possibility of additional paid leave being granted.

116. Taking this into account, the respondent's paid disability leave is not an automatic contractual entitlement, it is discretionary. The policy itself is a way to enable that discretion to be exercised, by providing guidance on what managers and employees need to do to exercise that discretion in appropriate circumstances. The existence of such a policy does not automatically mean that providing additional paid leave to a disabled employee is a reasonable adjustment. Whether additional paid leave to the claimant, or any other disabled employee, is a reasonable adjustment will still depend on the circumstances. In that respect it is similar to policies such as flexible working or working from home policies an employer may have. The policy may provide guidance on how working from home operates in practice. This will not necessarily mean that a disabled employee should be allowed to work from home, and whether that is a reasonable adjustment will depend on the circumstances. The disability leave policy is similar. The fact it exists means it may be an option, and something the respondent has considered can be provided, but whether it is a reasonable adjustment under the Equality Act 2010 will still depend on what is reasonable in the specific circumstances.

117. This means that we revert back to the question of whether it would have been a reasonable adjustment to pay the claimant in accordance with the disability leave policy and, if so, when that adjustment would have been made.

118. The relevant circumstances in the claimant's case are as follows:

118.1. The claimant was signed off work from November 2022 and she was paid in accordance with the respondent's sick pay policy. She initially received full pay and then this reduced to half pay.

118.2. At all times the claimant was unfit to work. By the time her employment terminated she was still unfit to return to work. Her absence was not prolonged because of any actions of the respondent, such as failing to put in place adjustments that may facilitate a return by the claimant.

118.3. The respondent does have a policy that enables them to grant additional paid leave. It does not apply automatically. For planned leave there must be an application. If there is unplanned leave, as with the claimant, a positive decision needs to be made by someone that paid leave will be granted. This involves consideration of the individual's circumstances on a case by case basis.

118.4. The claimant queried the policy in July 2023 and was provided with the policy. She did not pursue it further at the time. It was discussed again in the meeting on 14 September 2023, around 2 months after the claimant raised the issue informally. A decision was made immediately to grant disability leave and pay the claimant retrospectively.

119. The claimant's situation were not the exceptional circumstances where it could be a reasonable adjustment to extend sick pay once an employee's entitlement to contractual sick pay had been exhausted, under the case lase (see O'Hanlon V Commissioners for HM Revenue and Customs 2007 referred to above). Therefore there would be no automatic expectation that the respondent continue to pay the claimant in full.

120. In fact, the respondent did ultimately pay the claimant in full under their own policy, and that decision was applied retrospectively. Therefore, the adjustment the claimant sought was made, irrespective that it would not be an adjustment an employer would usually be obliged to make in the same circumstances. Any delay in reaching this decision would not be a failure to make reasonable adjustments, given that the policy the claimant relies on is clear that it is discretionary so the individual circumstances need to be taken into account first.

121. For these reasons the claim that the respondent failed to make reasonable adjustments does not succeed. The adjustment the claimant sought was ultimately made for the claimant. This was in accordance with the policy that the respondent had. However, had that policy not existed it was not a case where the extension of pay would have been a reasonable adjustment in the circumstances.

<u>Unfair dismissal</u>

122. There is no dispute in this case that the reason the respondent terminated the claimant's employment was capability, which is a potentially fair reason to dismiss. At the time of the meeting on 14 September 2023 the claimant had been absent for 10 months. The capability meeting was called because the claimant had been absent for a prolonged period and the Occupational Health report that said that she was not fit to return to work at that time and there was no foreseeable date for her return.

123. The questions we had to determine in order to decide whether the dismissal was fair in the circumstances were as follows:

123.1. Did Christine Eyers believe that that the claimant was unfit to return to work and unlikely to be able to do so within a reasonable time?

123.2. Was that conclusion based on up to date medical evidence and other evidence before her at the time?

123.3. Had there been adequate consultation and was a fair procedure followed?

123.4. Was dismissal within the range of reasonable responses available to Ms Eyers at that time. This includes considerations of whether there were alternatives and whether at that time the respondent could reasonably be expected to wait longer.

124. By way of medical evidence, the respondent had the fit notes the claimant had been sending providing and the Occupational Health report. The Occupational Health report was based on what the claimant told the Occupational Health doctor. The claimant herself had confirmed to Ms Eyers that she was not fit to return at all at the time. This was said both in a conversation on 1 September 2023 and during the meeting on 14 September 2023. The claimant also had seen the Occupational Health report. At no point did the claimant challenge the conclusions of the Occupational Health report, or suggest that in fact she would be able to return at some point soon.

125. The only evidence that suggested that the claimant may be able to return to work was from June 2023. In correspondence at that point the claimant had indicated to the respondent she was hoping to return to work and was just waiting for confirmation from her GP. There is no evidence that she said anything along those lines later on during August or September 2023. On the contrary, by this point the claimant was expressly stating to Ms Eyers that she was not fit to return. She also said she was looking at ill-health retirement, again confirmation that she did not view herself as fit to return to work then or potentially ever.

126. In the meeting itself the claimant said that she just wanted to go. We accepted that the record of the meeting was accurate and this is what she communicated to Ms Eyers. This stance is also consistent with how the claimant acted after in the 5 weeks after the meeting before her employment terminated.

127. Taking this into account we have concluded that Ms Eyers genuinely believed the claimant was not fit to return to work and the situation was unlikely to changes. This was shown by the medical evidence. In addition to this Ms Eyers was entitled to rely on what she had been told directly by the claimant about her ability to return to work.

128. In terms of investigation, there was quite minimal medical evidence, but in light of what the claimant was telling the respondent there was no reason to seek any additional evidence of investigate further. Had the claimant challenged the Occupational Health conclusions then this may have been needed. Likewise, further evidence may have been appropriate if the claimant said in September that her condition was improving and she wanted to return to work. The claimant did neither. In circumstances where the claimant's stated position is consistent with the other evidence it would be reasonable to decide no further investigation was required.

129. On this basis we accept that Ms Eyers genuinely concluded that the claimant was not fit to return to work and there was no evidence that the situation was likely to change in the foreseeable future. That was a

reasonable conclusion based on the information Ms Eyers had on 14 September 2023.

130. The question was then whether within it was reasonable to dismiss the claimant in these circumstances. We are not deciding what we would have done in the same circumstances. Our consideration is whether dismissal was within the range of reasonable responses in the circumstances.

131. Given the claimant's position, as confirmed on 1 September 2023 and in the meeting on 14 September 2023, we accept that dismissal was reasonable. It was not a foregone conclusion that the outcome of the meeting on 14 September 2023 would be dismissal. On the contrary was the evidence from Ms Wan was expressly that was not the intention. The decision was made then because the claimant, with the assistance of her trade union representative, asked for a decision that day. In these circumstances, given the claimant's stated position and request, it was reasonable to decide to dismiss the claimant. Effectively Ms Eyers was acceding to the claimant's apparently genuine request.

132. In terms of procedure, we had some concerns about the decision to arrange a meeting under stage 3 of the respondent's absence management procedure in September 2023. Before this there had been no prior meetings, either formal or informal. There had only been telephone calls and emails. We found Ms Eyer's explanation of why she decided to move directly to stage 3 limited. However, there was already a very real doubt that the claimant would be fit to return to work in the foreseeable future. Ms Eyers had already spoken to the claimant on 1 September 2023 and the claimant had received the Occupational Health report on 11 August 2023. The claimant knew the position and was not disadvantaged by the decision to move directly to stage 3. If on 14 September 2023 the claimant felt that her health was improving and she may be able to return in due course, or if she wished to challenge the medical advice, she still could have done so at the meeting. On this basis, we do not find any potential procedural flaws significant.

133. For these reasons we find that the dismissal was fair and the claimant's claim for unfair dismissal does not succeed.

Approved by:
Employment Judge Park
Date: 3 March 2026