Case No: 6013225/2024

EMPLOYMENT TRIBUNALS

Claimant: Ms M Trzcinska

Respondent: East Sussex County Council

Heard at: **Croydon** **On:** **7, 8, 9, 10 September 2026, 11 September 2026 in chambers**

Before: **Employment Judge Leith**
Ms Leverton
Mr Khan

Representation
Claimant: In person
Respondent: Mr Withington KC

JUDGMENT

The complaints of discrimination arising from disability, indirect disability discrimination, and failure to make reasonable adjustments fail and are dismissed.

REASONS

Claims and issues

1. The Claimant claims discrimination arising from disability, indirect disability discrimination, and failure to make reasonable adjustments.

2. The issues were discussed at various preliminary hearings. The last of those took place before EJ Evans on 7 August 2026. Both parties agreed at the start of the hearing that the list of issues annexed to EJ Evans' Case Management Orders reflected the issues to be decided, as follows:

   "It is accepted that the Claimant is disabled by reason of her diagnosis of Attention Deficit Hyperactivity Disorder and autistic traits.

   Indirect Discrimination – s19 Equality Act 2010

   1. Did the Respondent apply a probation policy to all new employees?

2. Did the probation policy put persons with a disability at a particular disadvantage when compared with persons without a disability?

3. Did the probation policy put the Claimant at that particular disadvantage?

4. Can the Respondent show that the application of the probation policy was a proportionate means of achieving a legitimate aim?

5. The Respondent relies on the legitimate aim of a probationary period being to assess whether an employee is able to meet the required standard of their job. Reviews undertaken during that period were to help to identify, where standards are not being met, what actions might be taken to support the employee to get to the required standard before the end of their probationary period.

Discrimination arising from a disability – s15 Equality Act 2010

5. Did the Respondent treat the Claimant unfavourably by:

(a) On 20 November 2023, did Tracy Sampson and/or the Respondent deploy the Claimant to Milton Grange without transition paperwork, training, or proper introduction to that workplace?

(b) on 5 December 2023, Ms Kayleigh Anderson treating the Claimant (1) not remaining at work during her scheduled shift (unless a discussion had been had with a senior manager of staff) excluding break times, (2) failing to attend scheduled training sessions (3), failing to speak to staff in a courteous way, as misconduct and issuing a standard letter as a disciplinary warning;

(c) On 11 December 2023, did Tracy Sampson fail the Claimant at her 3-month ASR?

(d) on 5 April 2024, investigating the Claimant for alleged gross misconduct;

(e) On 8 July 2024, did Delia Miller fail the Claimant at her probationary / 10-month ASR?

(f) On 22 July 2024, did Paul Welch fail properly to consider the Claimant's arguments and concerns in relation to the Probation Investigation Report?

(g) On 8 August 2024, did Paul Welch dismiss the Claimant?

6. Did the following arise in consequence of the Claimant's disability, namely ADHD and autistic traits:

(a) the matters which Ms Anderson treated as misconduct as set out in paragraph 5b above?

(b) the issues identified in the ASRs?

(c) the matters relied upon by Mr Welch in deciding to dismiss the claimant?

7. Was the unfavourable treatment because of any of those things?

8. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aim of ensuring that only persons who can consistently provide support services to vulnerable persons and protect their health and safety are entrusted with this responsibility.

9. The Tribunal will decide in particular:
(a) Was the treatment an appropriate and reasonably necessary way to achieve those aims?
(b) Could something less discriminatory have been done instead?
(c) How should the needs of the Claimant and the Respondent be balanced out?

10. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

Failure to make reasonable adjustments – s.20 and 21 Equality Act 2010

11. From what date did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

12. A "PCP" is a provision, criteria or practice. Did the Respondent have the following PCP of not implementing, ignoring or under-utilising recommendations made in Referral Outcome Reports and Workplace Needs Assessment Reports.

14. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?

15. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

16. What steps could have been taken to avoid the disadvantage? The Claimant states that the Respondent should have complied with the recommendations within those reports. The parties agree that these included:

(1) To undertake a workplace needs assessment
(2) To contact Access to Work to see if there is any further equipment or software that may help aid Monika to carry out her role to enhance communication.

(3) To consider completing a Wellness Action Plan.

Purchasable recommendations

(4) Text-to-speech and speech-to-text software with appropriate training.
(5) Specialist spellchecker.
(6) A series of 10 x 1-hour sessions of coaching to cover the following topics:
    a. Develop supporting strategies to help Monika manage reported challenges in work.
    b. Enable her to explore and develop strategies to use her areas of strength.
    c. Help Monika understand neurodivergence and her own profile.
(7) A series of co-coaching sessions between Monika and her line manager, or potentially Claire Fitzgerald.
(8) 1 x Neurodivergence Awareness session for Claire's team.

In-work support recommendations

(9) Advanced 30-minute notice regarding any meetings with senior leadership, so Monika has the time to self-regulate and process the meeting. As such, a clear purpose for meetings is provided, and advance notice and any reassurance are given appropriately.
(10) If possible, try not to overburden with verbal instructions by offering to write the main points down or provide an audio recording.
(11) Ask colleagues to put questions in email/writing to help remember and give more consideration time.
(12) Providing concrete and non-ambiguous instructions and/or practical scenarios when introducing new tasks and processes.
(13) Use clean feedback techniques, such as 'This is what I have seen and heard' or 'This is what I want to see and hear'.
(14) Access to a peer mentor.
(15) Opportunities to shadow and to be observed by a more experienced

The claimant further contends that they included:

(16) Regular 1:1 management support and early intervention.
(17) Supportive ADHD-informed management approach.
(18) Management education / understanding ADHD as a long-term condition.
(19) Modification of work patterns or management systems.
(20) Modification of instructions and manuals.
(21) Task rotation / alternative work environment where operationally feasible.
(22) WAP content, not only "consider WAP": triggers, support, crisis contact, concerns, solutions.

(23) WAP regular review until action points are explored.
(24) Plenty of time to read, process and complete tasks.
(25) Discussion of training/material and summaries of key points.

(26) Alternative formats, including audio, video, drawings, diagrams and flowcharts.
(27) Additional training for new tasks / new areas.
(28) Time for coaching and adjustment strategies to embed before judging success.
(29) Pausing escalation until the recommended support measures had been implemented and given a fair opportunity to work.

17. Was it reasonable for the Respondent to have taken those steps and when?

18. Did the Respondent fail to take those steps?

Remedies

19. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant?

20. What financial losses has the discrimination caused the Claimant?

21. Has the Respondent proved that the Claimant has failed to take reasonable steps to replace any lost earnings, such as by failing to take reasonable steps to find another job?

22. For what period of loss should the Claimant be compensated?

23. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

24. Is there a chance that the Claimant's employment would have ended in any event? Should her compensation be reduced as a result?

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

26. Did the Respondent or the Claimant unreasonably fail to comply with it?

27. If so, is it just and equitable to increase or decrease any award payable to the Claimant?

28. By what proportion, up to 25%?

29. Should interest be awarded? How much?

Procedure, documents and evidence heard

3. The Claimant had the assistance of live captioning, as she has a hearing impairment. Live captioning support could not be sourced for the third day

of the hearing, so the parties did not attend on that day and the Tribunal used the time to continue reading the key documents.

4. We heard evidence from:

    4.1. The Claimant
    4.2. Claire Fitzgerald, who at the relevant times was employed by the Respondent as Deputy Manager for the Eastbourne JCR service;
    4.3. Tracy Sampson, who at the relevant times was employed by the Respondent as Intermediate Care Manager for the Eastbourne JCR service;
    4.4. Kayleigh Anderson, who at the relevant times was employed by the Respondent as Practice Manager at Milton Grange; and
    4.5. Paul Welch, who at the relevant times was employed by the Respondent as Head of Service for Directly Provided Services, Older People.

5. Each of the witnesses gave their evidence by way of a preprepared witness statement on which they were cross examined.

6. We had before us a bundle of 490 pages prepared by the Respondent, and a supplementary bundle of 688 pages prepared by the Claimant. There was some overlap between the two bundles.

7. At the conclusion of the evidence, we heard oral submissions from Mr Withington KC on behalf of the Respondent, and from the Claimant.

Factual findings

8. We make the following findings on balance of probabilities. We have not dealt with every area canvassed before us; rather, we have focused on those necessary to reach a conclusion on the issues in the claim.

9. The Respondent is a Local Authority. The Respondent operates a Joint Community Rehabilitation Service ("JCR"). The JCR provides care in the community to adults, particularly after discharge from hospital. Clients of the service are often elderly and vulnerable. The Respondent also operates a number of other social care provisions, including Milton Grange, which is a short stay bedded facility.

10. The Respondent had in force at the relevant times a probationary policy entitled the Supported Introduction to Employment Policy, or "SIEP". The version in evidence before us was dated April 2024, but it was not suggested to us that the previous version was materially different [R227]. The policy provided for a twelve month probationary period with formal reviews at three, six and ten months, which were referred to as "ASRs". The policy also provided that dismissal could take place before the end of the probationary period. An Appendix to the policy dealt with the process for conducting a probationary dismissal. Paragraph 10.8 of the policy said this:

> "10.8. The probationary review procedure set out in this policy takes precedence over the County Council's corporate employment policies and procedures during an employee's first year with the County Council. The procedure is the appropriate mechanism for the management of attendance, unacceptable performance and disciplinary issues should they arise in an employee's probationary year, whilst having regard to the spirit and principles expressed in the corporate policies for management of these issues."

11. The Respondent's disciplinary policy was not in evidence before us. There was in evidence before us flowcharts which set out the principles from the policy [C75]. Those suggested that the level of disciplinary investigation required would depend on the impact of the alleged misconduct and the probability of it recurring. Where the impact was low and/or the probability of recurrence was not high, the flowcharts set out that the investigation would be an informal one, and the only potential sanction would be a "standard setting" letter. The Respondent had a template "standard setting" letter within its suite of template disciplinary letters.

12. The JCR had in force at the relevant times a Staff Handbook, which set out information and rules for staff regarding the operation of the JCR [R49]. Among other things, it said this (regarding how staff could fill "deficit time", which was time during working hours when they were not scheduled to be with a client) [R54]:

> "Arrange extra support visits to clients – extra support visits should be only carried out when there is specific support required that will benefit the client and should be agreed with the Duty Senior Support Worker."

13. Under the heading "Professional behaviour" it said this [R56]:

> "You must always act with honesty, be reliable, punctual, patient, polite, kind and sensitive. You must not do anything which may affect our reputation. We expect you to support our philosophy and values, which include respecting the dignity, individuality and diversity of clients and staff. You must take responsibility for the consequences of your actions and work individually and with others to provide and develop high service standards that satisfy our clients.
>
> You must maintain your professional boundaries at all times.
>
> You must not:
> • Visit clients or their carers outside your scheduled working hours.
>
> […]
>
> • Take unauthorised people, such as children or members of your family or animals with you to a client's home."

14. Under the heading “Code of Conduct, it said this [R58]:

> “If you are in any doubt as to what is expected of you, please contact a JCR Team Leader. You can also refer to the JCR Conflict of Interest guidance. You are required to make a declaration on an annual basis even if ‘nil’ return.
>
> […]
>
> You should always act in a way which:
> • Promotes and protects the wellbeing and interests of the client.
> • Maintains the privacy of clients, and keeps information about them confidential.
> • Respects the dignity and value of each client.
> • Allows the client to make choices and maintain or regain as much independence as possible.”

15. Under the heading “Conflict of Interest Policy” is said this [R60]:

> “You must:
>
> [….]
>
> • Declare if you have another job alongside your post with East Sussex County Council. On your declaration, you will be asked to include the number of hours you work in each post, as working time directives will need to be considered.”

16. The Claimant has worked in the care sector since 2004, and holds an NVQ Level 2 in Adult Social Care. She has ADHD and autistic traits. It is common ground that she has (and had at all material times) a disability within the meaning of the Equality Act 2010 by reason of both of those conditions.

17. The Claimant’s evidence was that her conditions mean that she requires clear instructions or training. Her evidence was that she is also prone to erratic decision-making and impulsivity.

18. The Claimant applied to the Respondent for a role as a Support Worker in the JCR. As part of the application process she declared the existence of a medical condition which she considered may impact her effectively performing the duties of her post. She was referred to Occupational Health. Occupational Health produced a Certificate of Fitness to work, dated 6 April 2023. The certificate noted that the Claimant was fit for contracted duties, and said this:

> “Fit for the proposed role. Has declare a Spectrum disorder but no adjustments are indicated.”

19. The Respondent has a generic job description for the post of Support Worker. The introductory part of the job description is then tailored to the specific role (e.g. working for the JCR or at Milton Grange).

20. The Claimant commenced employment on 30 August 2023. She was given a copy of the JCR Staff Handbook, and signed a declaration that she had read it that day. Her evidence was that she had not, in fact, read it as she did not have time to do so on her first day. Given the length of the handbook and the amount of information which would be presented to a new employee on their first day in work, that is unsurprising. The evidence of the Respondent's witnesses was that support workers would carry their copy of the handbook around with them in their kit bag.

21. The Claimant's line manager was Dee Miller. The Claimant completed an induction checklist with Ms Miller [R62]. The Claimant's evidence was that she told Ms Miller that she had ADHD. We did not hear evidence from Ms Miller.

22. On 20 November 2023, the Claimant was loaned temporarily to work at Milton Grange. This was because Milton Grange was short of staff. Support workers at Milton Grange work three 12.5 hour shifts per week. The Claimant remained substantively employed to work for the JCR, and her contracted hours with the JCR continued to be paid from the JCR's budget. Her line management remained with the JCR.

23. No separate induction checklist was carried out for the Claimant's loan to Milton Grange, although the Claimant was briefed about the work that was carried out there [C67].

24. We find that the arrangements to induct and train the Claimant into Milton Grange were not as robust as they ought to have been. Another employee from the JCR was also loaned to Milton Grange at around the same time as the Claimant. The evidence from the Respondent's witnesses, which was not gainsaid by the Claimant and which we accept, is that the arrangements made for that employee's loan to Milton Grange were broadly the same as for the Claimant.

25. On Friday 1 December 2023, the Claimant was scheduled to work a 12.5 hour shift on Unit 2 at Milton Grange. During the shift she was booked to attend a four-hour CareVision training session.

26. Shortly before the training was due to start, the Claimant informed the trainer, Ms Butler-Noll, that she did not want to attend the training that day and that she would do it on her day off. The Claimant's evidence to the Tribunal was that that was because she wanted to get some fresh air, because she felt like she was in prison working at Milton Grange. Her evidence was that she could not recall exactly what she said to Ms Butler-Noll, but she accepted that she had not told her that she intended to leave Milton Grange during the training.

27. The Claimant's evidence was that she did not know who was in charge of Unit 2 at the time, so she did not ask anyone from the unit for approval.

28. During the four hours when the training was taking place, the Claimant's evidence was that she went for a dog walk. In the course of doing so, she came across an injured hedgehog. She contacted a hedgehog rescue charity. She placed the hedgehog in a box and took it back to Milton Grange. She attempted to leave it in the resident's lounge/dining room until the hedgehog rescue charity could collect it. She was told by another Support Worker that she could not leave it there, so she took it outside. The Claimant's evidence was that dogs were allowed in Milton Grange, and there was no specific rule about hedgehogs.

29. The Claimant's evidence was that her decision to leave Milton Grange on 1 December 2023, and to bring the hedgehog back to Milton Grange with her, were because of her ADHD, which causes erratic decision-making and impulsivity. Her evidence was that with the benefit of hindsight, she agreed that she had broken the rules by leaving Milton Grange during her shift on 1 December 2023.

30. On 4 December 2023, Ms Anderson had a discussion with the Claimant about the events of 1 December 2023. Ms Andersons' evidence was that the Claimant told her that she thought that the training was taking place online, and that she had gone home to join the training session. In her evidence to the Tribunal, the Claimant was somewhat ambivalent about whether she had said that to Ms Anderson. We find that the Claimant did tell Ms Anderson on 4 December that she had gone home because she thought the training was online. That is consistent with what was written in the contemporaneous correspondence (which we deal with below). That explanation plainly cannot have been correct; the Claimant had spoken to Ms Butler-Knoll at Milton Grange shortly before the training was due to start. Furthermore, even on her own evidence to the Tribunal she became aware shortly before the training started that it would be conducted in person.

31. Ms Anderson's evidence was that in the meeting of 4 December, the Claimant did not demonstrate any acknowledgement that she had done anything wrong. Her evidence was that the Claimant raised her voice at her during that meeting. The Claimant denied raising her voice in the meeting on 4 December 2023. Her evidence was that she was apologetic.

32. We find that the Claimant was not apologetic; that is inconsistent with her having told Ms Anderson an untruth about the reason why she had left Milton Grange. We also prefer Ms Anderson's evidence regarding the Claimant raising her voice in that meeting. That is consistent with Ms Anderson asking Ms Butler-Noll to accompany her to the next meeting between them. We accept that the Claimant may not have appreciated that she was raising her voice; but we find that objectively speaking, she was.

33. Ms Anderson then spoke to Johanna Hart, her counterpart in the JCR. Her evidence was that she wanted to update Ms Hart, as the Claimant's

substantive role was in the JCR, and also wanted to understand whether the Claimant would have been permitted to attend training from home while working for the JCR. Her evidence is that Ms Hart told her that the Claimant would not have been permitted to do so.

34. On 5 December 2023, the Claimant attended the CareVision training, which was led by Ms Anderson and Ms Butler-Noll. Following the training, Ms Anderson asked the Claimant to stay behind. Her evidence was that she also asked Ms Butler-Noll to stay behind, as she was shocked by the way that the Claimant had spoken to her at the meeting on 4 December so did not want to meet with the Claimant alone.

35. Ms Anderson informed the Claimant that she would be giving her a "standard setting" letter in respect of the events of 1 December 2023. Her evidence was that the Claimant then shouted at her in a high pitched and angry tone. The Claimant's evidence was that she had some sort of out of body experience. She did not deny shouting at Ms Anderson. Her evidence was that she had a "mental health crisis". It is common ground therefore that the Claimant was shouting in that meeting.

36. On 6 December 2023, Ms Anderson sent the Claimant a letter following up on those discussions [R131]. She reiterated what had occurred on 1 December 2023, and referred to what she said in their subsequent meeting on 4 December 2023. She referred to the Claimant having told her that she thought the training was online and having therefore gone home to attend it. She referred to the Claimant having responded to her in a "rude and unprofessional manner". She then concluded by saying this:

> "I would like to take this opportunity to reiterate some standards and expectations for conduct:
> • Remain at work during your scheduled shift unless a discussion has been had with a senior member of staff, excluding your break times.
> • Attend scheduled training sessions you are booked in for.
> • Speak to staff in a professional and courteous manner."

37. Shortly after that, the Claimant stopped working at Milton Grange and returned to her substantive role with the JCR.

38. The Claimant's first probationary review (or ASR) was carried out by Tracy Sampson on 11 December 2023 [R136].

39. The Respondent's SEIP process has a standard review form for use in ASRs. Employees are scored as either meeting or not meeting the required standards against the competencies on the form. The standard form has two sets of competencies which apply to all staff across the Respondent (working with others, and delivering in role). There is then space on the form for role-specific competencies.

40. Ms Sampson recorded the Claimant as not meeting the standards for three of the four competencies under the heading "working with others". In her

comments, she referred to the interaction with Ms Anderson on 5 December 2023. She also recorded that the Claimant was lone working and had had 3 observations where she had "demonstrated a kind caring nature, working in a person-centred way and engaging with the client throughout".

41. Under the heading "Delivering in role", Ms Sampson again recorded the Claimant as not meeting the standards for three of the four competencies. In the comments, she referred to the incident on 1 December 2023, as well as another incident where the Claimant had arrived late to work.

42. Under the heading "role specific competencies" there were only three competencies on the form completed by Ms Sampson, which were the three matters bullet pointed in Ms Anderson's letter of 6 December. Ms Sampson recorded the Claimant as not meeting the standards for each of those.

43. At the bottom of the form there is a statement "I have cause for concern that the employee is not meeting the required standards", which has a tick-box. Ms Samson had ticked that box.

44. Ms Sampson's evidence was that that did not constitute "failing" the ASR.

45. On 14 December 2023, the Claimant had a supervision meeting with Ms Miller. Ms Miller ended the meeting because she perceived that the Claimant wasn't listening and was laughing at her. She spoke to Ms Sampson, who then met the Claimant [R141]. The Claimant told Ms Sampson about her ADHD. She explained that she had reacted in the way she did because people kept coming into the room during the supervision meeting and she found it difficult because of her ADHD. There was some discussion of an Occupational Health referral. The Claimant initially said she could not see the point, but then agreed to discuss it.

46. The Claimant was then referred to Occupational Health. She was assessed by an Occupational Health Nurse on 14 February 2024 [R160]. The report noted that the Claimant's symptoms include tiredness, impulsiveness, difficulty with time management and coping with stress, communication challenges, and difficulty sleeping at night.

47. The report recommended the following adjustments be put in place:

    47.1. Regular 1:1 meetings with management;
    47.2. Alternative work/task rotation (if operationally feasible);
    47.3. A Workplace Needs Assessment;
    47.4. Verbal as well as written instructions;
    47.5. Important points in documents to be highlighted;
    47.6. Screen reading software or a Reading Pen;
    47.7. Plenty of time to read and complete a task
    47.8. Discuss training material with the Claimant providing her with a summary of key points;
    47.9. Contact with Access to Work;
    47.10. A Wellness action plan

48. The Respondent already had speech to text and text to speech software available for employees. The Claimant was provided with written guidance on how to use it. The Respondent also had specialist spellchecking software for all staff to use, which the Claimant had access to.

49. In February 2024, the Claimant sent a message directly to the granddaughter of a service user. In the message, she explained that the service user's toenails were really long, and asked if the granddaughter could organise a chiropodist [R165]. Ms Sampson spoke to the Claimant about the message when she became aware of it. She explained to the Claimant that she should not contact a family member directly, and should not report any concerns about the service user's condition to a family member. She explained that any issue of that type should be raised with the Duty team.

50. On 12 March 2024, Ms Fitzgerald emailed the Claimant attaching the completed Wellness Plan [R196] [R205]. The action plan noted that it was to be reviewed at each supervision. The Claimant's evidence was that it was not. We accept her evidence in that regard.

51. On 17 March 2024, another Support Worker emailed Ms Sampson alleging that the Claimant had massaged a client's hand, and also given him advice on using a dumb bell [R209]. This related to an entry the Claimant had made in the service user's "Summary of Support" sheet on 17 March 2024 at 10:20, which said this [R208]:

> "Please incorporate any movements – any exercise [REDACTED] can show how to do: dumbells maybe, it really helps to rise his spirit"

52. The "Summary of Support" sheet is used to record changes to the service user's needs, health and safety issues, and other information required by the next Support Worker. The Claimant's evidence on that was that the service user was showing her exercises he had been shown in hospital.

53. On 17 March 2024 at 12:09, the Claimant emailed the JCR Duty Hub regarding the service user [C203]. In that email she recorded that the service user would benefit from exercises he could perform while the Support Worker was present, and that his exercise program should progress. She explained that his mood had been down when she visited, but lifted when he did a few simple activities like stretching and the exercises he had done while in hospital.

54. On 18 March 2024 Ms Sampson met the Claimant to discuss the events of 17 March 2024 [R210]. Ms Sampson referred to the allegation that the Claimant had given the service user advice about using a dumbbell and given him a hand massage. The notes of that meeting recorded that Ms Sampson reminded the Claimant that Support Workers should not prescribe exercise, and could only do exercises with clients after they had completed REAP training. Ms Samson also recorded this in the notes:

> "I said if you want to support a client with anything other than what is in the visit plan or feel a client needs exercises or additional call please call duty to organise this for you."

55. The Claimant wrote on the notes "I didn't advice client to do anything he showed me exercise he was doing at hospital. I did report to duty and key worker my concerns." She signed the notes. She did not refer to the hand massage.

56. We find that the Claimant did act outside the scope of her role by writing what she did in the service user's Summary of Support sheet. That gave the impression that she was instructing future carers to carry out physical therapy with the service user (which was well outside the role of a Support Worker). She did, of course, do the right thing by raising the matter with the Duty Hub; but she only did that after she had written it on the Summary of Support sheet.

57. We find also that the Claimant did give the service user a hand massage. If she had not done so, we consider she would have mentioned that in the comment she wrote on the notes.

58. On 20 March 2024, the Claimant attended another service user. She wrote this in the service user's summary sheet [R212]:

> "Please put sudocream in the groin and under tummy after gently wash and dry."

59. On 22 March 2024, Kate Sayers, Duty Senior Support Officer, emailed Ms Sampson and Ms Fitzerald to update her following a monitoring visit to a client undertaken by the client's Key Worker, Michelle [R221]. The email said this:

> "[REDACTED] c.o sore under her belly and around her vagina. She told Michelle that DNs had advised her to use a cream called Sorbaderm. Monica SW has visited recently and insisted that she used Sudocrem, even though the area was very sore, and some areas appeared to be open wounds. Due to [REDACTED] size, she is unable to see the area or apply the cream herself. Michelle offered to look at the area today. It was thick with cream and Michelle had to thoroughly wash the area; Michelle described it as thick like porridge. [REDACTED] told Michelle that Monica has said she was good at dealing with open wounds and put the cream on [REDACTED].
>
> Michelle has spoken to the GP surgery and taken photos of the affected area; she will send these to Duty later today."

60. The logs of visits to the service user were in evidence before the Tribunal [C223]. They showed that another carer had visited the service user on 21 March 2024 and applied cream (at the service user's request). Another

carer visited the service user on 22 March 2024, although the record of that visit did not refer to applying cream. On 23 March 2024, the record showed that the service user was prescribed Daktarin, which was applied that day.

61. The Claimant's evidence was that there was no wound when she visited the patient on 20 March 2023, and that the advice about which cream to use came later. Her evidence to the Tribunal was that that was what the service user had asked her to do. She did not give that explanation to the Respondent at the time. Her evidence to the Tribunal was that she now accepts that she should not have applied Sudocream, as it had a PL label, which meant that she should not have applied it since she had not had medication training.

62. On 25 March 2024, Ms Fitzgerald met the Claimant to discuss visiting service users when not allocated to do so [R223]. The Claimant agreed that she had visited a client, as she had discussed with the client that she would pop in to see them to check if they were OK. Ms Fitzgerald reminded the Claimant that she should contact Duty before visiting a client that was not booked to her.

63. During that meeting, Ms Fitzgerald also raised the issue of applying cream. The notes of that meeting recorded that the Claimant informed Ms Fitzgerald that the wound was already how Michelle had described it when she arrived. Ms Fitzgerald reminded the Claimant that she had not completed her medication training so should not be dealing with any medication. The notes concluded by saying this:

> "Monika is aware that she is not to deal with any medication issues this includes cream or give advice to client and re-direct them to the appropriate service."

64. The Claimant signed the notes on 2 April 2024.

65. We find that the service user the Claimant visited on 20 March 2024 did have an open wound when the Claimant applied Sudocream. That is consistent with what the service user said, and it is also consistent with what was recorded in Ms Fitzgerald's notes of the meeting with the Claimant, which the Claimant signed. We consider that if that had not been accurate, the Claimant would have amended the minutes, as she did on other occasions.

66. On 26 March 2024, another Support Worker emailed Ms Fitzgerald and Ms Miller raising a concern about the Claimant [R225]. This related to two matters:

    66.1. A visit the Claimant had undertaken on 7 March 2026. It was reported that the Claimant had made the service user stand in the middle of the room with her eyes closed.

    66.2. The dumb bell incident.

67. On 5 April 2024, Ms Fitzgerald met the Claimant to discuss what had occurred on 7 March 2026. The meeting was a formal fact-finding meeting under the Respondent's Supported Introduction to Employment Policy [R237]. There was no suggestion in the evidence before us that the incident was being treated as an allegation of gross misconduct. Ms Fitzgerald asked the Claimant a number of questions about the incident [R239]. She then adjourned the meeting to allow her to speak to the service user, which she did on 9 April 2026 [R243]. The service user explained that no one had ever asked her to stand up, that she had practiced yoga for 30 years, and that she did not want anyone to get "pulled over the coals".

68. The meeting reconvened on 15 April 2024. Ms Fitzgerald explained that her decision was not to take any formal action. Ms Fitzgerald wrote to the Claimant on 23 April 2024 [R303]. She confirmed that she was taking no formal action, then said this:

> "However, I would like to take this opportunity to reiterate some standards and expectations for conduct which we had previously discussed and will continue to be monitored during the remainder of your probationary period under the Supported Induction of Employment Policy:
>
> □ Contact the office when booking extra care calls
> □ Contact duty when you are not sure if a certain task should be completed.
> □ Contact Duty when tasks need to be completed that are not in the care plan to ensure the appropriate professional is involved.
> □ Record clearly that a client has completed tasks or if you have completed the task.
> □ Do not complete tasks where you have not had training
>
> Should another similar incident come to my attention I may have no option but to refer the matter to a formal hearing to consider your continued employment."

69. In the interim, the Claimant's six month ASP took place on 2 April 2024 [R244]. It was conducted by Ms Fitzgerald.

70. Under the heading "working with others", the Claimant was again marked as not meeting the standards for three of the four competencies. This was supported by a narrative that referred to coming across as rude (which the Claimant in evidence attributed to her ADHD), and to feedback that had been given not being followed. There was also reference to Ms Fitzgerald observing the Claimant complete two visits to clients where she built a good rapport with the clients.

71. Under the heading "Delivering in role", the Claimant was marked as meeting the standards for two of the four competencies (and not meeting the standards for the other two). The narrative referred to the Claimant having been given a fifteen minute grace time for arriving for visits, as she had

difficulties with time management because of her ADHD. The narrative recorded that with that leeway, there had been an improvement in the Claimant's time management. The narrative referred also to issues with the Claimant recording information for other care workers to follow which did not follow the Respondent's procedures.

72. The form used by Ms Fitzgerald had a different set of role specific competencies to that used in the first review – thirteen in total. Ms Fitzgerald's evidence was that she used the standard competencies in use within the JCR, which should be used for all Support Workers. Ms Fitzgerald recorded the Claimant as "not met" for each of those as at the three month review. At the six month review, she was recorded as meeting the standards for five of those competencies, and not meeting the standards for the remaining eight.

73. Ms Fitzgerald recorded in the summary that she was concerned that the Claimant was not meeting the required standards. The Claimant referred to requiring further training in how to record matters in the care plan. Ms Fitzgerald recorded the following actions arising from the review:

> "Claire to have a one to one training session on how to record in care plans. During this time Monika can ask any questions that she is not certain of.
>
> Monika to speak to Line Manager/Team Leader on Duty is she does not know a procedure or paperwork.
>
> Monia not to give advance, any different information recorded in the care plan and report any concerns so the appropriate professionals can be contacted for advice."

74. The Claimant signed the form on 9 April 2024, but noted on it that she was seeking advice on it and that she considered that the Respondent had not made reasonable adjustments.

75. A Workplace Needs Assessment was carried out by Genius Within. The report was dated 15 April 2024 [R252]. It recommended the following adjustments:

    75.1. Text-to-speech and speech-to-text software with appropriate training.
    75.2. Specialist spellchecker.
    75.3. A series of 10 x 1-hour sessions of coaching to cover the following topics:
        75.3.1. Develop supporting strategies to help Monika manage reported challenges in work.
        75.3.2. Enable her to explore and develop strategies to use her areas of strength.
        75.3.3. Help Monika understand neurodivergence and her own profile.

75.4. A series of co-coaching sessions between Monika and her line manager, or potentially Claire Fitzgerald.

75.5. 1 x Neurodivergence Awareness session for Claire's team.

75.6. Advanced 30-minute notice regarding any meetings with senior leadership, so Monika has the time to self-regulate and process the meeting. As such, a clear purpose for meetings is provided, and advance notice and any reassurance are given appropriately.

75.7. If possible, try not to overburden with verbal instructions by offering to write the main points down or provide an audio recording.

75.8. Ask colleagues to put questions in email/writing to help remember and give more consideration time.

75.9. Providing concrete and non-ambiguous instructions and/or practical scenarios when introducing new tasks and processes.

75.10. Use clean feedback techniques, such as 'This is what I have seen and heard' or 'This is what I want to see and hear'.

75.11. Access to a peer mentor.

75.12. Opportunities to shadow and to be observed by a more experienced colleague.

75.13. Schedule regular breaks and an opportunity to take a full lunch break.

76. On 17 April 2024, a Lead Support Worker attended a monitoring visit with a service user. The service user explained that the Claimant had told her that the JCR would take over administering her medication, contact the GP and collect repeat prescriptions, and that the Claimant had additionally told her that she should take morphine at the same time as her other pain relief [R274].

77. The notes of the Lead Support Worker's visit were sent to the Claimant. On the same day, the Claimant emailed Ms Miller and others saying that she had not given the service user advice about medication, although she had told the client that "we will collect her medications" [R279].

78. We find that the Claimant did tell the service user that the JCR would collect the mediation. We find that this was a breach of the very clear instruction the Claimant had been given to have nothing to do with medication. We accept that it was well-intentioned, in that it was motivated by a desire on the Claimant's part to do the best she could for the service users. But it was nonetheless in breach of a very clear instruction. We find that the Claimant did not give the service user advice on taking morphine.

79. Ms Fitzgerald's evidence was that on 19 April 2024, a neurodiversity awareness session was presented to the Team Leaders in her team. We accept her evidence in that regard.

80. On 22 April 2024, Ms Fitzgerald met with the Claimant to discuss the Workplace Needs Assessment [R300]. The notes of that meeting recorded, among other things, that:

80.1. Where possible, the Claimant would be given 30 minutes notice of meetings, although that may not always be possible where Duty or Mangers needed to speak to her about an urgent issue.

80.2. While the Claimant would sometimes need to be contacted over the telephone, if she had difficulty understanding what was being requested she could ask for the request to be put in an email.

80.3. The Claimant explained that the training she had completed with the Respondent was “very good and clear”. Ms Fitzgerald explained that if the Claimant found information in a training session ambiguous, she could ask her line manager to explain what was meant.

80.4. The Claimant stated that her line manger used clean feedback techniques, which she was happy with.

80.5. The Claimant could not have a lunch break due to the length of her shift, but she could take a break if she was attending a meeting with her line manager and stay late to make up the time.

81. We consider that it was reasonable for the Respondent to leave it to the Claimant to explain if she would benefit from specific instructions being put in writing. It would not be feasible or proportionate for every single instruction to be put in writing, and the Claimant was well able to indicate where she would benefit from an instruction being explained in writing.

82. On 24 April 2024, Ms Fitzgerald emailed the team leaders to explain that the Claimant may sometimes ask for instructions or information to be put in an email for her, and that if it was not possible to do so, the instructions need to be provided in a clear and non-ambiguous way [R310].

83. Also on 24 April 2024, Ms Fitzgerald emailed the Claimant following up their discussion [R309]. She explained that the Claimant’s chosen mentor had agreed to mentor the Claimant, and she asked the Claimant to contact the mentor when required. She also explained that shadowing had been arranged for the Claimant.

84. On 28 April 2024, the Claimant visited another service user. In the notes, she recorded that the service user’s wife would call the surgery on the following day and ask the pharmacist about his foot [R316].

85. On 9 May 2024, a Lead Support Worker emailed Ms Fitzgerald following a monitoring visit to that service user. She explained in her email that the service user had informed her that the Claimant had told him that he had athletes foot and advised him to purchase some athletes foot cream (which he had done) [R318]. The Claimant’s evidence to the Tribunal was that she had directed the service user to the GP or pharmacist.

86. On 17 May 2024, Ms Fitzgerald attended neurodiversity awareness training organised by Genius Within.

87. The Claimant attended a supervision meeting with Ms Miller on 20 May 2024 [R331]. The notes of that meeting, which were signed by the Claimant, said this:

> "Dee has addressed the client TG and the feedback that Monika has stated he had athletes foot both the client and his wife have stated Monika advised of this and to buy cream for it which the client had done.
>
> Dee has again explained that Monika is not medically trained and should have reported this to duty ,contacted the GP and update the body map and document in the summary of support. Also explained that Monika can only guide a client when applying cream that has been prescribed but not to apply the cream herself until she is medication trained and the client is being supported with the medication."

88. In her evidence to the Tribunal, the Claimant denied telling the service user that he had athletes foot or suggesting that he buy cream.

89. We find that the Claimant did inform the service user that he had athletes foot, and suggest that he purchase cream. Had she not done so, we consider that she would have amended the supervision notes before signing them (which as we have already noted, she had not been slow to do on other occasions).

90. On 30 May 2024, Ms Miller spoke to the Claimant about an incident where the Claimant had been asked by the Duty team to collect some medication on behalf of a service user. She had collected the medication and taken it to the Duty office. Ms Miller reminded the Claimant that she had not been trained in medication, so should not be carrying out any medication related tasks, and if she was asked to do a medication related task by the Duty team she should proactively advise them that she was unable to complete it.

91. Ms Fitzgerald's evidence to the Tribunal was that the Duty team have a list of all support workers, and those who have not been trained in medication will have an asterisk beside their name. Her evidence was that if the Duty team were busy, they may not check the list properly and may therefore not notice that a particular support worker did not have medication before assigning a task to them.

92. We find that the Claimant did go and collect medication when instructed to do so by the Duty team. But we consider that it was harsh to hold that against the Claimant. The onus should have been on the Duty team to ensure that the Claimant was signed off to do medication tasks before asking her to collect the prescription – it was asking too much of the Claimant (or any probationary employee) to proactively tell a supervisor that they were unable to complete a task the supervisor had instructed them to carry out.

93. The Respondent arranged coaching for the Claimant with an in-house coach, Lisa Burroughes. Ms Burroughes met with Ms Miller, and suggested that rather than co-coaching she should provide Ms Miller with one to one coaching on strategies to help her with managing the Claimant's performance [R338].

94. On 11 June 2024, Ms Miller sent a draft of the Claimant's ten month review paperwork to Ms Fitzgerald to review. The ten month probationary review meeting took place on 8 July 2024 [R397].

95. Under the heading "Working with others", the Claimant was again marked as not meeting the standards for three of the four competencies. This was supported by a narrative that referred to issues in respect of tone of communication with colleagues, and to the Claimant not responding well to feedback. The narrative also referred to the Claimant building a good rapport with clients.

96. Under the heading "Delivering in role", the Claimant was marked as meeting the standards for three of the four competencies (and not meeting the standards for the remaining one). The competency which was not met was "Delivering quality and quantity of work to the required standards". The narrative referred to an incident where the Claimant had not attended a call at the required time, and also to the allegation that the Claimant had given medical advice.

97. In respect of the role specific competencies the form recorded the Claimant as meeting the standards for five of those competencies, and not meeting the standards for the remaining eight. The narrative referred to the Claimant having made some improvements since the six month review, but not meeting the standards required at that stage.

98. On the same day, the Claimant was suspended from duty pending a probationary hearing [R404]. She was then invited to a probationary hearing on 22 July 2024 [R407]. At that point that she was suspended, the Claimant had not completed the full course of coaching sessions with Ms Burroughes.

99. Johanna Hart, Practice Manager, prepared a Probation Investigation Report [R409]. Within the report, Ms Hart dealt with the recommendations made by Occupational Health and in the Workplace Needs Assessment. She then went on to set out the reason for concern, split into three themes:

    99.1. Communication and Professional Conduct, under which she referred to the following incidents/allegations:

        99.1.1. The Claimant's conduct towards Ms Anderson on 4 and 5 December 2023.

        99.1.2. The Claimant laughing and not listening during the supervision meeting on 14 December 2023.

        99.1.3. The Claimant being rude to a Team Leader during a telephone call on 24 January 2024.

99.1.4. The Claimant ordering and eating a takeaway during an online training session on 25 January 2024.

99.1.5. The Claimant emailing a family member directly on 21 February 2024.

99.1.6. The Claimant raising her voice while speaking to Ms Miller on the telephone on 17 April 2024.

99.1.7. The Claimant being rude to her line manager on 10 June 2024.

99.1.8. The Claimant communicating with the son of a client via text message on 3 July 2024.

99.2. Health and safety, under which she referred to the following incidents/allegations which were said to relate to the Claimant overstepping the boundaries of her role in a way which had the potential to put the health and wellbeing of service users at risk:

99.2.1. The Claimant advising a service user to stand with their eyes closed to help improve balance on 7 March 2024.

99.2.2. The Claimant giving a service user a hand massage and giving advice on dumbbell exercises on 18 March 2024.

99.2.3. "25th March 2024. [The Claimant] attended an additional visit to a client without updating duty. During this visit the client reported that they were made to feel uncomfortable because of [the Claimant] looking at a wound and giving advice to stop using a prescribed cream and use talc instead. At this time [the Claimant] had not completed Medication Competencies."

99.2.4. "17th April 2024. Feedback received that [the Claimant] gave a client advice in relation to which medication they should be taking. At this time [the Claimant] had not completed Medication Competencies."

99.2.5. "9th May 2024. Feedback received that [the Claimant] had 'diagnosed' a foot condition and given advice of what treatment to take."

99.2.6. "14th May 2024. Feedback received that [the Claimant] gave a client advice in relation to which painkillers they should be taking. At this time [the Claimant] had not completed Medication Competencies."

99.2.7. "20th May 2024 Feedback received that [the Claimant] had collected medication from a pharmacy. At this time [the Claimant] had not completed Medication Competencies"

99.3. Not following reasonable management instructions, under which she referred to the following incidents/allegations:

99.3.1. An incident on 15 May 2024, when the Claimant had been instructed to tidy the computer room, but had contacted IT and prepared equipment for them to collect without speaking to management.

99.3.2. An incident on 22 May 2024, when management became aware that the Claimant had not updated her conflict of interest form in relation to additional employment.

100. The probation hearing took place on 22 July 2024. It was chaired by Paul Welch. Ms Hart attended to present the management case, and Ms Fitzgerald attended as a witness. After hearing from the Claimant, Ms Hart and Ms Fitzgerald, Mr Welch adjourned the meeting to consider. During the meeting, the Claimant had explained that she thought that the coaching would have helped her to overcome the issues identified. When Mr Welch reconvened the meeting, he explained that he wanted to understand how the Claimant said that coaching would have helped. He asked her to set that out in writing by 26 July 2024, after which he would make his final decision [R446].

101. The Claimant did so on 25 July 2024 [R449].

102. Ms Barham, who was providing HR supporting to Mr Welch, also emailed Ms Burroughes, the Counsellor, to ask her opinion on whether coaching would have helped with the issues identified. She said this [R447]:

> "I believe you have been involved with the coaching of Monika, just to give you some context Monika is suspended from work and on Monday the service held a hearing to determine her continuation of employment with ESCC.
>
> I am aware she has had one session with you, her main mitigation in the hearing is that if she completed the six coaching sessions then all of the concerns that the service have with her will go.
>
> The concerns are - when she is asked not to get involved in client medication she persists, contacting clients without authorisation, refusing to complete a conflict-of-interest form and not following management instruction in matters of importance.
>
> At the moment we have adjourned the hearing and asked Monika to get more information about how coaching will be able to mitigate the risk to clients and the service, she will submit this on Friday.
>
> I wanted to contact you to understand how coaching would help with the services concerns with clients and her communication with management requests".

103. Ms Burroughes said this [R448]:

> "I have only had one session with Monika, and I also had a session with her line manager.
>
> Strictly in confidence, my initial impression on meeting Monika is that the coaching will not help to resolve the issues. I think that her line manager Dee is contributing to the break down in the relationship, as she certainly seems to hold quite a hostile attitude towards Monika, however, Monika seems quite set in a victim mentality.

> Six sessions of coaching could help her to manage her emotions more effectively, and help her express herself better with Dee, it could also help her identify steps that would help with her time blindness. None of that is guaranteed though."

104. On 5 August, Ms Barham asked Ms Burroughes to explain if coaching could help with errors of judgment, and what difference there was between the coaching that Genius Within advise and the ESCC Coaching. Ms Burroughes advised as follows [R473]:

> "Coaching neurodiversity is not aimed at changing the person but equipping them with the tools to influence their environment while also developing their self-awareness and self-control over patterns of thought, emotion, behaviour and social interaction that they currently hold. As coaching is client led the degree to which a person successfully changes these patterns will depend on their openness to feedback and critical reflection.
>
> Judgment relies on executive functioning which includes memory, but also involves emotional aspects and social conventions. An error of judgement may occur if the person has a number of biases that are distorting their appraisal of the situation, or if they lack clarity on the processes. If the error has occurred due to the latter reason then they need to be able to follow instruction more closely, however, if it is the former there is substantial unpicking of the biases that may need to be done for the person to build enough self-awareness in order to change. The starting point for that would be for them to acknowledge that they made an error in judgement and therefore be open to explore what contributed to that. This can be quite deep work that is most likely beyond the scope of what can be achieved in coaching psychology, as it would need psychoanalytical therapeutic input to address the schemas that scaffold those biases.
>
> This is not something that is likely to be achieved through Genius Wtihin either. In our experience people who have had Genius Wtihin coaching have reported that the style is more 'mentoring' and offering 'guidance' rather than person-centred coaching. This style of coaching will provide the coachee with practical tips that may help them deal with specific difficulties they have but it is unlikely to achieve any lasting changes at a deeper psychological level. This is one of the reasons we offer coaching through our coaching pool in the first instance as we have members of staff who have the skills and qualifications to work at a person-centred level with the neurodiverse client. While the initial offer is for six hours of coaching, if a coachee and cllient believe that further sessions would be useful they are free to re-contract for further sessions and in some cases people have been offered more than ten sessions. In my experience of coaching neurodiverse clients I have rarely needed to re-contract because I have been able to work with them on the deeper

psychological level and they have reported significant changes in their cognitive, emotional, behaviour and social patterns after six sessions.

105. As part of his decision-making process, Mr Welch produced a table where he summarised each of the Health and Safety allegations and the evidence [R461]. That table recorded that the first allegation was "not fully evidenced".

106. One of the matters to which Mr Welch had regard was the fact that the Claimant had been the subject of five "minor concerns" raised about her. On the Respondent's evidence, which we accept, no other Support Worker on probation had had more than one minor concern raised (and only two other probationers had even been the subject of one minor concern).

107. Mr Welch decided to dismiss the Claimant. He wrote to the Claimant on 8 August 2024 to set out his decision [R477]. He explained his conclusions in some detail. In summary:

107.1. In respect of Communication and Professional Conduct, he accepted that the recommended coaching could have helped to improve the Claimant's communication, and may therefore have mitigated the concerns. He therefore discounted that area from his decision-making.

107.2. In respect of not following reasonable management instructions, he concluded that he did not have sufficient information to understand whether any further adjustments might have mitigated that area of concern, so he discounted it from his decision-making.

107.3. In respect of Health and Safety, the letter suggested that he had proceeded on the basis that each of the allegations was made out on balance of probabilities. He concluded that they related to errors of judgment which posed a significant risk to the service users and to the reputation of the Respondent. He concluded that completing the course of coaching would not have alleviated the concerns. He therefore concluded that the risk to client safety and to the reputation of the JCR and the Respondent as a whole was too great to allow the Claimant to continue as a support worker, and that there were no further adjustments which would mitigate that risk. He therefore decided to dismiss the Claimant.

108. Mr Welch's evidence to the Tribunal was that he had not found the first Health and Safety allegation to be made out (although he accepted that the letter suggested that it was).

Law

109. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee:

109.1. In the terms of employment;

109.2. In the provision of opportunities for promotion, training, or other benefits;

109.3. By dismissing the employee;

109.4. By subjecting the employee to any other detriment.

110. In order to be subjected to a detriment, an employee must reasonably understand that they had been disadvantaged. An unjustified sense of grievance will not constitute a detriment (*Shamoon v Royal Ulster Constabulary* [2003] UKHL 11).

Protected characteristics

111. Disability is a protected characteristic. The definition is set out in section 6 of the Equality Act 2010:

> "(1) A person (P) has a disability if—
> a. P has a physical or mental impairment, and
> b. the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.
>
> (3) In relation to the protected characteristic of disability –
>
> a. A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
> b. A reference to persons who share a protected characteristic is a reference to persons who have the same disability
>
> (4) This Act …applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly …
> a. a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability…
> b. a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability
>
> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

Discrimination arising from disability

112. The definition of discrimination arising from disability is set out in s.15 of the Equality Act 2010:

"(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."

113. "Unfavourable" is not defined in the statute. The EHRC Statutory Code of Practice provides that it means that the disabled person "must have been put at a disadvantage".

114. The Respondent does not need to have knowledge that the "something" leading to the unfavourable treatment was a consequence of the claimant's disability (*City of York Council v Grosset* [2018] ICR 1492).

115. The burden of establishing objective justification rests on the Respondent. There is a two-stage test:

115.1. First, the respondent must be pursuing a legitimate aim.
115.2. Secondly, the unfavourable treatment must be a proportionate means of achieving that legitimate aim.

116. The proportionality limb involves assessing whether the treatment was "reasonably necessary" (*Homer v Chief Constable of West Yorkshire Police* [2012] ICR 704)

<u>Indirect discrimination</u>

117. The definition of Indirect Discrimination is set out in section 19 of the Equality Act 2010:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) It puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

118. The ECHR Code of Practice provides that the phrase "provision, criterion or practice" should be construed widely.

119. When considering the pool for comparison, there must be no material difference between the circumstances relating to each case (s.23(1)).

120. The phrase "particular disadvantage" means essentially the same thing as "detriment" (ECHR Code para 4.9). The word "particular" does not refer to any serious, obvious or particularly significant disadvantage, but rather denotes that it is persons of a particular protected characteristics who are disadvantaged.

121. The requirement for group disadvantage may be satisfied by means of a hypothetical group, rather than a group of actual comparators within the Respondent's workforce. That is inherent within the wording of section 19(2)(b). See the words of Sedley LJ in *Eweida v British Airways plc* [2010] EWCA Civ 80 (para 19):

> "It is also possible that the meaning and effect of the formula differ depending on the form of discrimination alleged: it may be relatively simple, and within the legislative purpose, to aggregate a single female employee with a hypothetical group of other female staff in order to gauge adverse impact, but forensically difficult, even impossible, to do the same for a solitary believer whose fellow-believers elsewhere in society may accord different degrees of importance to the same manifestation of faith."

122. Group disadvantage may be demonstrated by means of statistics, although that is not the only means by which it may be established (ECHR Code paras 4.12 and 4.21 – 4.22). It may also be established by means of either lay or expert evidence. It may even be established by the evidence of the claimant (and anyone else in the group) alone (*Games v University of Kent* [2015] IRLR 202). The position was summarised by the EAT in the case of *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699:

> "a. There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected *in limine* ;
> b. Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared;
> c. The disadvantage may be inherent in the PCP in question; and/or

d. The disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken."

123. The Tribunal may also take judicial notice of group disadvantage. The EAT in *Dobson* summarised the principles relevant to drawing judicial notice:

"a. There are two broad categories of matters of which judicial notice may be taken: (i) facts that "are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry"; and (ii) other matters that "may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources".
b. The Court *must* take judicial notice of matters directed by statute and of matters that have been "so noticed by the well-established practice or precedents of the courts":
c. However, beyond that, the Court has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence;
d. The party seeking judicial notice of a fact has the burden of convincing a judge that the matter is one capable of being accepted without further inquiry."

<u>Failure to make reasonable adjustments</u>

124. The duty to make reasonable adjustments is set out in section 20 of the Equality Act 2010. Insofar as relevant:

Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

125. Paragraph 8 of Schedule 20 of the Act provides that an employer is not subject to the duty to make reasonable adjustments if he or she does not know, and could not be reasonably be expected to know that the claimant:
a. Has a disability; and

b. Is likely to be placed at a disadvantage by the employer's provision, criterion or practice, the physical features of the workplace or a failure to provide an auxiliary aid.

126. The Tribunal must therefore ask itself two questions:

c. Did the employer both know that the employee was disabled and that the disability was liable to put the employee at a substantial disadvantage?
d. If not, ought the employee to have known both of those thing?

127. If the answer to both questions is "no", the duty to make reasonable adjustments is not triggered.

128. The EHRC Code provides that employers must "do all they can reasonably be expected to do" to find out whether an employee has a disability. If an employer's agent or employee knows in that capacity that an employee is disabled, the employer will have imputed knowledge of that disability.

129. The ECHR Code of Practice provides that the phrase "provision, criterion or practice" should be construed widely.

130. When considering whether the duty to make reasonable adjustments is engaged, the Tribunal must consider the PCP identified by the claimant. The PCP must be properly identified (*Secretary of State for Justice v Prospere* [2015] 3 WLUK 676).

131. In order to find that an employer has breached the duty to make reasonable adjustments, the tribunal must identify the step or steps that it would have been reasonable for the employer to take. The adjustment must be a practical step or action as opposed to a mental process (*General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169).

132. In considering whether a step would have been reasonable, one factor the Tribunal must consider is whether it would have been effective in alleviating the disadvantage to the employee. An adjustment may still be reasonable even there is no guarantee that it would have been successful (*Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160).

Burden of proof

133. Section 136 of the Equality Act deals with the burden of proof:

> "(2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene that provision"

134. The section prescribes a two-stage process. At the first stage, there must be primary facts from which the tribunal could decide, in the absence of any other explanation, the discrimination took place. All that is required to shift the burden of proof is at primary facts from which "a reasonable tribunal could properly conclude" on balance of probabilities that there was discrimination. It must, however, be something more than merely a difference in protected characteristic and the difference in treatment (*Madarassy v Nomura International PLC* [2007] EWCA Civ 33.

135. The burden of proof at that stage is on the Claimant (*Royal Mail Group v Efobi* [2021] UKSC 22). The employer's explanation is disregarded.

136. If the claimant satisfies that initial burden, the burden shifts to the employer at stage 2 to prove one balance of probabilities that the treatment was not for the prescribed reason.

137. In respect of indirect discrimination, the burden is on the claimant to show that there was a PCP, that it disadvantaged the protected class generally, and that the general disadvantage also created a particular disadvantage to the claimant. If the claimant satisfies that burden, the burden is then on the Respondent to show that the PCP was a proportionate means of achieving a legitimate aim (*Dziedziak v Future Electronics Ltd* EAT 0271/11).

138. In respect of a reasonable adjustments claims, the burden of proof shifts only once the Claimant has established that the duty to make reasonable adjustments had arisen, and that there were facts from which it could reasonably be inferred (absent explanation) that it had been breached (*Project Management Institute v Latif* [2007] 5 WLUK 216*)*. In the same case, the EAT noted that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

Conclusions

Knowledge

139. We start with the Respondent's knowledge of disability. We conclude that the Respondent had at the very least constructive knowledge of disability from receipt of the Occupational Health certificate in April 2023. That certificate said that the Claimant had a spectrum condition. That implies a life-long condition, so the long-term test would be met. The fact that the Claimant referred to it in her recruitment paperwork would have implied, at least, that the functional criteria may be met. An employee would not lightly record a condition which did not have some effect on their ability to carry out ordinary day-to-day activities. While the report noted that no adjustments were required, that does not imply that the condition did not meet the functional criteria – merely that it was not anticipated that it would prevent the Claimant from carrying out the role of support worker. We

consider that that was sufficient at the very least to put the Respondent on notice that further investigation would be required.

140. We therefore conclude that the Respondent had knowledge of the Claimant's disability at all relevant times.

Indirect discrimination

141. The PCP that is relied upon was the probation policy. It is of course common ground that the Respondent had a probation policy which it applied to all new employees – the SEIP.

142. We have seen no evidence at all of any group disadvantage to people who shared the Claimant's disability caused by the policy. Nor was there any evidence of disadvantage to the Claimant herself. When the Claimant was asked about it in cross-examination, her evidence related to ways that she considered the policy had been misapplied in her case, rather than any disadvantage she was put to by the terms of the policy itself.

143. So it follows that the claim of indirect disability discrimination fails, and is dismissed.

144. For the avoidance of doubt, on the evidence before us we would in any event have concluded that:

144.1. The aim being pursued by the Respondent was a legitimate one.

144.2. The policy was a proportionate way of achieving that aim, in that it gave a structured process by which the Respondent could test that new employees met the standards required of them in order to undertake their role.

Failure to make reasonable adjustments

145. The Claimant relies on the provision, criterion or practice of "not implementing, ignoring or under-utilising recommendations made in Referral Outcome Reports and Workplace Needs Assessment Reports."

146. We do not consider that that is capable of constituting a PCP for the purposes of the duty to make reasonable adjustments. That is because it attempts to short-cut the steps set out in the legislation to establish the duty to make reasonable adjustments. Such a PCP would self-evidently put employees who required adjustments at a particular disadvantage; and the obvious answer to what adjustments would overcome that disadvantage would be "the adjustments set out in the Reports". But that would mean that the Tribunal would be engaging with the question of whether those adjustments were made without having first considered whether the Respondent was under a duty to make them. It would elevate a recommendation made in such a report to the standard of a binding requirement. That simply cannot be right. So we conclude that the PCP

relied upon by the Claimant is incapable of constituting a PCP for the purposes of section 20 of the Equality Act 2010.

147. Even if it were capable of being a PCP, on the evidence before us we cannot say that it is a PCP which the Respondent applied. That is because, while we had no direct evidence before us about how the Respondent approached recommendations made in reports generally:

147.1. It is, we consider, wholly implausible that a large public-sector employer like the Respondent, with in-house legal and HR teams, would have a wholesale practice of paying to obtain reports then ignoring them. That would amount to having a general practice of paying to gather evidence that adjustments may be needed then failing to put them in place.

147.2. In any event, and more importantly, it is also inconsistent with how the Respondent approached the adjustments recommended for the Claimant. As we have set out above, the Respondent sought to make the recommended adjustments. It could not be said they had a blanket policy of not implementing, ignoring or utilising recommendations, because that is simply not how they approached the recommendations made in respect of the Claimant.

148. We therefore find that the Respondent did not, in any event, apply the PCP contended for by the Claimant. It follows that the reasonable adjustments claim fails and is dismissed.

149. For the reasons we have set out above in our factual findings, we would in any event have concluded that the adjustments recommended in the reports and set out in the list of issues had been substantially made, for the following reasons:

149.1. Adjustments 1 – 5 and 8 were put in place

149.2. Arrangements for adjustment 6, counselling, were put in place. Although it had not been completed prior to dismissal, it was not suggested that the Respondent was slow to organise it. Mr Welch carefully considered whether it would be likely to have had any benefit or prevented the health and safety allegations from occurring or rather recurring, and reasonably concluded that it would not have done.

149.3. In respect of adjustment 7, which related to co-coaching, preparatory work was put in place, and the counsellor advised that a different approach would be more appropriate. We do not consider it was unreasonable for the Respondent to follow that advice.

149.4. In respect of adjustment 9, advance notice of meetings, arrangements for that were put in place, and we were not referred to any specific example of it not happening (although it was made clear to the Claimant that it wouldn’t always be possible, which we consider was not an unreasonable caveat).

149.5. In respect of adjustments 10 and 11, these were put in place.

149.6. In respect of adjustment 12, the Claimant's own evidence was that the training the Respondent provided was good and clear.

149.7. In respect of adjustment 13, the Claimant agreed in evidence that she got clean feedback from her manager,

149.8. In respect of adjustment 14, a peer mentor, this was put in place for the Claimant. The Claimant suggested that the onus should not have been on her to make contact with the mentor. Given that the Respondent contacted the Claimant's chosen mentor, and then informed the Claimant that that person had been agreed to mentor her, we do not consider it was unreasonable to then ask the Claimant to make contact with the mentor as required.

149.9. In respect of adjustment 15, the Claimant was offered shadowing opportunities.

149.10. In respect of adjustment 16, regular 1:1 management support, the Claimant received significant management support and input.

149.11. In respect of adjustments 17 and 18, the managers were provided with training to assist them to engage productively with the Claimant – Ms Fitzgerald attended training organised by Genius Within, and the other managers within her team had a neurodiversity awareness session during a management meeting.

149.12. In respect of adjustment 19, the Claimant was given a 15 minute time allowance for attending calls. We consider that that was reasonable given the nature of the service, the length of the Claimant's shift, and the need to see clients at particular times. The ASR recorded that it had improved the Claimant's punctuality such that it was no longer a problem.

149.13. In respect of adjustment 20, it was not clear what was meant, and the Claimant did not suggest in terms that the manual should be adjusted.

149.14. In respect of adjustment 21, the Claimant's role involved constantly going to visit different clients. The Genius Within report noted that the Claimant did not want an office based job, and she described Milton Grange in evidence as being like "prison", so it is hard to see what more the Respondent could have done to rotate the Claimant's tasks or work environment .

149.15. Adjustments 22 and 23 were not contained in any of the reports.

149.16. In respect of adjustment 24, it was not suggested to us that the Claimant required additional reading or processing time in her role.

149.17. In respect of adjustment 25, 26 and 27, the Claimant was told she could follow up with her line manager if training was unclear. She did not suggest in her evidence to us that she required it in different formats.

149.18. In respect of allegations 28 and 29, this was not mentioned in either of the reports. But with the exception of the counselling, all of the adjustments had been put in place and embedded. The Respondent was entitled to conclude, as Mr Welch did, that the health and safety risks to vulnerable service users outweighed the possibility of improvement if further time was given.

Discrimination arising from disability

150. We take the factual allegations in the order they are set out in the list of issues.

(a) On 20 November 2023, did Tracy Sampson and/or the Respondent deploy the Claimant to Milton Grange without transition paperwork, training, or proper introduction to that workplace?

151. For the reasons we have set out above, the allegation is made out on the facts.

152. The matters the Claimant relies upon as arising in consequence of her disability were as follows, from the list of issues:

(a) the matters which Ms Anderson treated as misconduct as set out in paragraph 5b above?
(b) the issues identified in the ASRs?
(c) the matters relied upon by Mr Welch in deciding to dismiss the claimant?

153. None of those things were the reason for the Claimant moving to Milton Grange without transition paperwork, adequate training or a proper introduction. They all post-dated the Claimant's move to Milton Grange. The reason the Claimant did not have those things was because resources at Milton Grange were stretched, and because the Respondent did not generally give employees loaned from the JCR those things (on the basis that they would have already had an induction to the JCR).

154. So the allegation fails.

(b) on 5 December 2023, Ms Kayleigh Anderson treating the Claimant (1) not remaining at work during her scheduled shift (unless a discussion had been had with a senior manager of staff) excluding break times, (2) failing to attend scheduled training sessions (3), failing to speak to staff in a courteous way, as misconduct and issuing a standard letter as a disciplinary warning;

155. We find that the matter was not dealt with under the Respondent's disciplinary policy. It was treated as a failure to meet the required standards during the probationary period, rather than an act of misconduct which required formal investigation. We do not consider that the letter of 6 December could properly be described as a "disciplinary warning" – it was simply a reminder about behavioural expectation.

156. So the allegation is not made out on the facts and fails.

(c) On 11 December 2023, did Tracy Sampson fail the Claimant at her 3-month ASR?

157. The Claimant did not "fail" in the sense that her probation period was prematurely terminated. It was not. However we consider that when read as a whole, the ASR form completed by Ms Sampson made it clear that the Claimant was assessed as failing to meet the targets, and likely to fail her probationary period absent any improvement. So we consider that the allegation is made out in substance. We are satisfied also that being marked in that way at the three month ASR was objectively unfavourable treatment.

158. The issues identified in the ASR as falling below the required standard related to the Claimant's communication skills, the way she had spoken to Ms Anderson, and the Milton Grange AWOL incident.

159. Taking the AWOL incident first, the Claimant's case was that it was caused by impulsivity, which is a feature of her ADHD. We find that it was not an impulsive decision. The decision not to attend the training was plainly pre-planned. We therefore find that it did not arise in consequence of the Claimant's disability.

160. We accept the Claimant's evidence that the other issues identified did arise in consequence of the Claimant's disability. We therefore turn to consider whether Ms Sampson marking the Claimant in the way that she did in the three month ASR was a proportionate means of achieving a legitimate aim.

161. The aim the Respondent was pursuing was ensuring that only persons who can consistently provide support services to vulnerable persons and protect their health and safety are entrusted with this responsibility. We are satisfied that that is a legitimate aim. Support Workers perform a vital role looking after vulnerable members of society in their own homes, working alone with no immediate supervision. Ensuring that the individuals providing that work are capable of consistently working to the required standard is plainly reasonable.

162. Turning then to proportionality, the way the Claimant's performance was marked at the three month ASR was balanced, in that it highlighted areas of good performance as well as areas where improvement was required. It was improvement-focused, in the sense that it showed the Claimant where she was not meeting the required standards (as well as where she was doing so). At the time of her three month ASR the Claimant had not suggested that any adjustments were required. She was an experienced carer. Weighing those factors up, we conclude that the scoring of the Claimant's three-month ASR was proportionate.

163. So the allegation fails

(d) on 5 April 2024, investigating the Claimant for alleged gross misconduct;

164. We have found that this allegation is simply not made out on the facts. The Claimant was not investigated for alleged gross misconduct.

165. It follows that the allegation fails.

(e) On 8 July 2024, did Delia Miller fail the Claimant at her probationary / 10-month ASR?

166. This is made out on the facts; the Claimant failed her ten month ASR, which is what led to her being invited to a probationary hearing. For the reasons we set out in more detail under allegation (g) below, we accept that this was because of something arising in consequence of the Claimant's disability, in that some of the matters which led to her failing the ASR were causally linked to the Claimant's disability.

167. It would be artificial to consider the question of proportionality in isolation given the overlap with the Claimant's dismissal, so we consider it alongside allegation (g) below.

(f) On 22 July 2024, did Paul Welch fail properly to consider the Claimant's arguments and concerns in relation to the Probation Investigation Report?

168. The allegation here was that Mr Welch failed to consider the issues the Claimant raised regarding the report – specifically about allegations that were duplicated or overlapped. We find that this was made out on the facts, in that the allegations in question remained in the same format in the outcome letter (as Mr Welch appeared to accept in his evidence). That is not to say that Mr Welch entirely disregarded points the Claimant raised – he did not. But there were certainly points that he failed to properly consider, as had he done so he would no doubt have reflected the allegations differently in his outcome letter (as he appeared to accept in his evidence in respect of allegation 1).

169. The failure to do so was not, however, because of any of the things said to arise in consequence of the Claimant's disability. It was simply because of the volume of evidence before Mr Welch. The argument is a circular one (and in reality is an attempt to criticise the process, in circumstances where the Claimant lacks the service to bring an unfair dismissal claim). It follows that it fails.

(g) On 8 August 2024, did Paul Welch dismiss the Claimant?

170. It is, of course, common ground that the Claimant was dismissed. Dismissal is self-evidently objectively unfavourable. The reason for the Claimant's dismissal was the health and safety allegations (which was one thread of the matters considered at the probation hearing). There were seven allegations. Taking each in turn

Allegation 1 - the Claimant advising a service user to stand with their eyes closed to help improve balance on 7 March 2024

170.1. For the reasons set out above, we have found that this did not happen. Mr Welch agreed with this in his evidence to the Tribunal, although his outcome letter suggested that he had found the allegation to be substantiated. It follows that, because the Claimant did not do what she was accused of, the allegation did not arise in consequence of her disability.

Allegation 2 - the Claimant giving a service user a hand massage and giving advice on dumbbell exercises on 18 March 2024.

170.2. We find that the Claimant did act outside the scope of her role by writing what she did in the service user's Summary of Support sheet. That gave the impression that she was instructing future carers to carry out physical therapy with the service user (which was well outside the ambit of the Support Worker role). She did, of course, do the right thing by raising the matter with the Duty Hub; but she only did that after she had written it on the Summary of Support sheet. We find that the Claimant also gave the service user a hand massage, which again was outside her scope of practice.

170.3. We find that those things did arise in consequence of the Claimant's disability. We consider that writing what she did in the service user's Summary of Support sheet was an impulsive act, having seen that the Service User's mood improved when he demonstrated the exercises for her. We find also that the hand massage was an impulsive act borne out of a desire to help the Service User.

Allegation 3 - 25th March 2024. [The Claimant] attended an additional visit to a client without updating duty. During this visit the client reported that they were made to feel uncomfortable because of Ms Trzcinska looking at a wound and giving advice to stop using a prescribed cream and use talc instead. At this time Ms Trzcinska had not completed Medication Competencies.

170.4. Allegation 3 concatenated two different incidents, involving different service users. The first part of the allegation is that the Claimant attended an additional visit to a client without updating duty. The Claimant accepted she did so. The Claimant told Ms Fitzgerald that she had agreed with the client that she would "pop in". The actual occasion when she visited may have been impulsive in the sense that she decided to do it while she was passing the client's house; but the decision to visit the client at some point (without contacting the Duty team first) was not an impulsive one because she had planned it in advance with the client. That is not impulsive. So did not arise in consequence of the Claimant's disability.

170.5. The second part of Allegation 3 related to the Sudocream incident. The allegation was muddled in that it suggested that it was

the Claimant who had used Talcum powder, whereas in actual fact the Claimant had (on her own admission) applied Sudocream after (as she said) a previous support worker had applied talcum powder. Although the wording of the allegation was muddled, Mr Welch clearly understood what had occurred, as his table referred to the application of cream. We have found that the allegation against the Claimant was made out, in that she applied Sudocream to an open wound when she should not have done.

170.6. We consider that it did not arise in consequence of the Claimant's ADHD. Applying the cream required the Claimant to first have cleaned the wound, then inspected the wound (which on the service user's account she spent an inordinate amount of time doing), then have fetched and applied the Sudocream. On the evidence before us, we find that it was not an impulsive act, but rather a considered activity.

Allegation 4 – 17th April 2024. Feedback received that Ms Trzcinska gave a client advice in relation to which medication they should be taking. At this time Ms Trzcinska had not completed Medication Competencies."

170.7. The allegation is that the Claimant gave the client advice regarding which medication they should take, We have found that this was not made out (although Mr Welch concluded that it was).

170.8. Because we have found that the Claimant did not give the advice which she was alleged to have given, it cannot have arisen in consequence of her disability.

Allegation 5 – 9th May 2024. Feedback received that Ms Trzcinska had 'diagnosed' a foot condition and given advice of what treatment to take.

170.9. We have found that the Claimant did inform the service user that he had athletes foot, and suggest that he purchase cream.

170.10. We find that arose in consequence of the Claimant's disability. We consider that that was an impulsive reaction to seeing what she believed to be athletes foot, and to wishing to assist the service user.

Allegation 6 – 14th May 2024. Feedback received that Ms Trzcinska gave a client advice in relation to which painkillers they should be taking. At this time Ms Trzcinska had not completed Medication Competencies."

170.11. This is a duplicate of allegation 4.

Allegation 7 – 20th May 2024 Feedback received that Ms Trzcinska had collected medication from a pharmacy. At this time Ms Trzcinska had not completed Medication Competencies"

170.12. We have found that this happened; although for the reason we have already explained we have some sympathy for the Claimant as she was given an instruction by the Duty team.

170.13. We find that this arose in consequence of the Claimant's disability, in that she was given an instruction which she followed. On the evidence before us, we are satisfied that the Claimant's ADHD and autism would have made it harder to challenge the instructions she received from the Duty team.

171. Stepping back then, three of the seven allegations for which the Claimant was dismissed arose in consequence of her disability. So the Claimant's dismissal was by reason, at least in part, of matters which arose in consequence of her disability.

172. For the reasons we have already explained, we are satisfied that the Respondent was pursuing a legitimate aim. We then turn to consider proportionality. In that regard, we consider that the following factors are particularly relevant:

172.1. Although the Claimant was new to the Respondent's employment, she was a very experienced carer.

172.2. The Claimant demonstrated a lack of insight in to her conduct. Even before the Tribunal, she could not always see what she had done wrong; and that was more stark in terms of the way she presented during her employment.

172.3. The Claimant was a lone worker. Her role involved working with minimal supervision, alone in service users' houses. Her role was also a safety-critical one, and involved working with vulnerable service users.

172.4. The number of concerns raised about the Claimant far outweighed those that had ever been raised about any other Support Worker during their probationary period. So whether the issues were properly regarded as conduct or capability, she fell a very long way short of what the Respondent required and expected.

172.5. The Respondent had made significant adjustments to support the Claimant.

172.6. The nature of care work is that it involves unexpected situations and scenarios. No employer can legislate in advance for every circumstance that may arise for a lone-working carer. The Claimant suggested that each of the incidents was of a different character, and that once she had been told that a particular course of action was wrong then she would not repeat it. We do not consider that that was quite right. There was a theme around overstepping boundaries in respect of medication, which featured in allegation 3 and allegation 5, as well as the incident where she told a service user that the JCR would collect medication on their behalf. But more broadly, all of the allegations could have been avoided by the Claimant simply contacting the Duty team before acting if she was unsure. The Respondent had to be confident that the Claimant would

exercise judgment in line with its policies and handbook, and (significantly) contact the Duty team **before** taking action if she was unsure of the correct course of action. The repeated incidents demonstrated that they could not have that confidence.

173. We bear in mind the seriousness of dismissal. But weighing up all of those factors, we find that the decision to dismiss the Claimant was a proportionate one. There was no lesser option which could satisfy the Respondent that the Claimant would be able to provide a safe and compliant service. And having concluded that dismissing the Claimant was proportionate, it follows also that failing her ten month ASR was also proportionate.

174. It follows therefore that allegations (e) and (g) both fail, and that the complaint of discrimination arising from disability therefore fails and is dismissed.

Approved by:

Employment Judge Leith

Date: 22 October 2026

JUDGMENT & REASONS SENT TO THE PARTIES ON
27 October 2026

FOR THE TRIBUNAL OFFICE

P Wing

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