EMPLOYMENT TRIBUNALS

Claimant **Mrs Sahrish Elahi-Alvi**

Respondent **Little Jannah Daycare Nursery**

Heard at Croydon (by video) **On** 21-24 September 2026

Before Employment Judge Cox

Tribunal Member H Bharadia

Tribunal Member S Khawaja

Representation:

Claimant In Person

Respondent Ms Bukola Omotosho (solicitor) of Citation Limited

Written Reasons

Written Reasons for the Tribunal's judgment dated 24 September 2026 are provided pursuant to the oral requests of both parties made at the hearing.

These Written Reasons reflect the unanimous view of the Tribunal

AI was used solely to proof-read and highlight typographical errors

Hearing and evidence

1. The hearing was conducted remotely. The claimant had reported that she experiences a number of medical conditions. Achalasia cardia (a rare disorder that affects the muscles in the oesophagus, making it difficult to swallow); arthritis; anxiety; panic attacks; insomnia; diabetes; high blood pressure and cholesterol; and "multi degenerative" - a reference to multilevel degenerative disc disease, a degeneration of intervertebral discs of the spine. At the start of the hearing the tribunal inquired as to reasonable adjustments necessary for her to conduct her case and to give evidence. She told the tribunal that these conditions make it more difficult for her to talk for long periods, that her focus might become lost if she became overwhelmed. She asked for reasonable adjustments in the form of being

able to ask for clarifications or for things to be slowed down, and for regular and perhaps urgent breaks. These were adopted during the hearing.

2. Although on one or two occasions the claimant became distressed, she recovered herself well after pauses. The claimant confirmed and we were satisfied that the claimant was able to conduct her claim and to give her best evidence. Indeed she gave her oral evidence clearly, and planned for and conducted a concise, measured and effective cross-examination of the respondent's witnesses which focused on the issues and also delivered written submissions at the conclusion of the hearing.

3. We received bundles of 288 pages shortly before the hearing began. We record that the bundles and witness statements had been served late. It emerged during the hearing that medical records which the claimant had provided in 2025 to the tribunal had been omitted in error from the bundles. Without objection from the respondent, we admitted those documents into evidence. Both parties accepted that they had had sufficient time to consider all of the materials including new materials to be able to conduct their cases.

4. We had witness statements and heard oral testimony from:

   a) the claimant on her own behalf; and

   b) on behalf of the respondent (whose witness statements were provided unsigned but signed at the tribunal's direction before being admitted into evidence) from:

   c) Natasha Butt, who was the Director and manager of the nursery and

   d) Natalie Butt, her sister who was the nursery's HR manager.

5. For convenience in the hearing and to avoid confusion, with their consent, we referred to Natasha and Natalie Butt by their first names. We adopt that practice in this judgment.

6. Whilst we tested and weighed answers individually, we formed the view that all of the witnesses gave their evidence honestly to the best of their recollection and belief and tried to assist the tribunal.

7. The tribunal directed that cross-examination and submissions as to liability should also deal with issues of any Polkey deductions in the event that the tribunal were to find that the process leading to the claimant's dismissal was unfair (i.e. how much should compensation for unfair dismissal be reduced if it was likely that the claimant would have been dismissed anyway if a fair procedure had been adopted). On day two, in light of the claimant feeling tired by the end of the day we directed that the hearing this week would not determine remedy and that if necessary remedy would be considered at a later hearing. In light of our conclusions no further remedy hearing is necessary.

Claims and Issues

8. A CMO was conducted by EJ Fowell on 13 January 2025. The Case Summary noted that Mrs Elahi-Alvi worked as a Nursery Practitioner from October 2021. After a year she went off sick and did not return to work. During her absence she felt that the nursery was harassing her about a return to work and in September 2023 she was treated by the respondent as having raised a grievance. Then, on 31 January 2024 she submitted this claim, for harassment related to disability and for unlawful deduction from wages. Shortly afterwards she was dismissed. Given her medical difficulties there was no final meeting and she was dismissed by letter dated 14 February 2024. She was given notice and so her contract came to an end 2 weeks later, on 28 February 2024.

9. EJ Fowell permitted the claimant to bring additional claims of unfair dismissal and discrimination arising from disability (EQA s 15) in regard to absence arising from anxiety and depression.

10. EJ Fowell settled a List of Issues. These were reviewed by the tribunal with the parties at the start of the hearing and updated and clarified. The final List of Issues is set out below.

11. At the start of the hearing the claimant indicated that she had been confused about the claim she had brought for unlawful deduction from wages and sought to withdraw it. She also clarified that she did not seek re-engagement or reemployment. The respondent confirmed that it was not alleging any contributory fault on the part of the claimant and, at the end of the hearing, in a change from her initial position, Ms Omotosho for the respondent confirmed that the respondent was not pursuing challenges to any of the claims based on time limits.

12. Accordingly the claimant was bringing the following claims:

    a) unfair dismissal (ERA s 98)

    b) harassment on grounds of her disability (EQA s 26)

    c) discrimination arising from a disability (EQA s 15).

13. The List of Issues considered by the tribunal were therefore as follows:

Unfair dismissal (ERA s98)

a) What was the reason for Mrs Elahi-Alvi's dismissal? The company says that it was on grounds of capability, i.e. her long absence.

b) Did the company act reasonably in all the circumstances in treating that as a sufficient reason to dismiss Mrs Elahi-Alvi? The Tribunal will usually decide, in particular, whether the company

(1) genuinely believed that she was no longer capable of performing her duties

(2) adequately consulted her

(3) carried out a reasonable investigation, including finding out about the up-to-date medical position, and

(4) could reasonably be expected to have waited longer before dismissing her.

c) If the procedure was unfair, what difference would a fair procedure have made to the outcome?

Remedy for Unfair Dismissal

[Not considered in light of our conclusions on liability]

Disability (EQA s6)

d) Did Mrs Elahi-Alvi have a physical or mental impairment at the material time?

The respondent accepts that the claimant was disabled within the meaning of section 6 of the Equality Act 2010 from 2022 by reason of Achalasia/achalasia cardia and that it had knowledge of this disability and that that disability had a substantial long-term adverse effect on her day-to-day activities from 2022 when the claimant began her absence from work. The respondent does not accept, and therefore the claimant has to prove, that the claimant was disabled within the meaning of s 6 of the EQA by reason of the impairments of diabetes, multiple degenerative disk condition, high blood pressure/cholesterol or anxiety/depression. We record that the main discussion during the hearing related to the claimant's claimed impairment of anxiety/sensory anxiety and whether that amounted to a disability (and whether the respondent had knowledge of it).

e) If so, did the impairment have a substantial adverse effect on her ability to carry out normal day-to-day activities?

f) If so,

(1) was that effect long term? In particular, when did it start and, at the material time (her absence from work)

(2) had it lasted for at least 12 months, or

(3) was it likely to last at least 12 months?

Harassment on grounds of disability (EQA s 26)

g) Did the company or any of its employees engage in unwanted conduct, Mrs Elahi-Alvi gave further clarification of her harassment claim in an email and responses to Scott Schedule as follows:

(1) Sending an email on 13 September 2023 relating to updating her DBS certification;

(2) Email from Natalie on 18 September 2023 concerning her DBS renewal;

(3) Email of 26 September 2023 in which the respondent initiated a grievance procedure after receiving an email from the claimant on 22 September 2023;

(4) Email of 29 September 2023 in which Natalie invited the claimant to a grievance meeting;

(5) 24 October 2023 an email from Natalie asking the claimant if she would agree to an OH assessment;

(6) Emails from the respondent on 6, 13, 28 and 30 November 2023 regarding making an arrangement for an OH assessment;

(7) 21 December 2023 – email from Natalie stating that the claimant was at risk of losing her job.

h) Was the conduct related to her disability?

i) Did it have the purpose or effect of violating Mrs Elahi-Alvi's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Discrimination arising from disability (EQA s15)

j) This involves unfavourable treatment (dismissal) because of something arising in consequence of Mrs Elahi-Alvi's anxiety and depression.

k) Firstly, did the company know that Mrs Elahi-Alvi had a disability, or could it reasonably have been expected to know? The respondent accepts that it knew that the claimant was disabled by reason of Achalasia from late 2022 when the claimant was off work. It denies that it knew or ought to have known that the claimant was disabled by reason of the impairments of diabetes, multiple degenerative, high blood pressure/cholesterol or anxiety.

l) Did the company dismiss her because of "something arising" in consequence of her anxiety and depression, namely her absence and / or the likely length of time before she would be able to return to work?

m) Can the company show that this treatment was a proportionate means of achieving a legitimate aim?

The company's aim and its case on proportionality were stated to be:

Statutory and regulatory compliance - ensuring that it had the required ratio of staff to children;

Operational needs of the nursery – the need to cover absences by the use of agency staff and covering by diverting other staff/overtime;

Financial impacts - the cost of agency workers being relatively high compared to employed staff.

Remedy for discrimination, including harassment

[Not considered in light of our findings on liability]

Findings of Fact

14. We make our findings of fact on the balance of probabilities based on the totality of the documentary evidence we were taken to and the written and oral witness evidence.

15. The claimant commenced employment at the respondent nursery as a Nursery Practitioner on 4 October 2021. Her employment was terminated on 28 February 2024. Her job description [112] emphasised the expectation that she would need to work as part of a team, to build and maintain strong partnership working relationships with parents, to deliver effectively Early Years Foundation Stage framework elements to children and ensure their needs and interests are met, and to keep records of the childrens' learning and development. In summary this was a hands-on job which envisaged the employee's presence at the nursery and the establishment and maintenance over time of relationships with parents and children.

16. The respondent, Little Jannah Daycare Nursery, is a small family owned and operated nursery school for ages 3- 5. It was owned and managed by Natasha. Her sister Natalie was the HR manager. There was another relative who acted as a deputy manager and a further family staff member. The respondent was responsible for up to 24 children per day, though the precise number was variable. It usually maintained a staff of 7 employees: 3 in the adventures room, 2 in pre-school and 2 in the baby room. We find that when there were employee absences or ad hoc shortfalls which were covered by other staff doing extra hours, by Natalie and/or Natasha undertaking child-facing duties themselves, and on occasion by agency staff. Natasha told us that the use of agency staff was kept to an absolute minimum because agency staff cost approximately £20 per hour and so were far more expensive than in-house cover. However, whilst we accepted Natasha's evidence in general on this point, we were not provided with documentary evidence of the scale or frequency of use of agency staff. Natasha gave the explanation for the lack of such evidence as being that she was not able to prove that any particular use of an agency staff person was directly attributable to the claimant's

absence and she did not think it was relevant. We find that the use of agency staff, while it likely occurred on occasion, was minimal and infrequent.

17. The nursery was subject to OFSTED oversight. It was required by the statutory framework for the Early Years Foundation Stage from September 2023 to maintain minimum child:staff ratios of 1:5 (previously 1:4).

18. The claimant's terms of employment were contained in a contract of employment dated 4 October 2021 and signed by the parties and an employee handbook. The contract provided relevantly as follows:

    a) Pay £8.91 per hour (the then National Minimum Wage later increased in line with NMW increases to £9.50 per hour).

    b) Hours of work were 'variable each week as rostered to meet the needs of the nursery". There were no guaranteed hours per week.

    c) The claimant was required to maintain a DBS certificate as a condition of employment.

    d) The nursery was required to pay Statutory Sick Pay for up to 28 weeks in one period of incapacity for work.

    e) There was a grievance procedure which envisaged raising issues with a line manager and doing so in writing if it was sought to be dealt with formally. The Handbook did not detail the grievance procedure any further.

    f) Two weeks' notice of termination of employment.

19. The employee Handbook provided relevantly:

    a) in connection with absence from work:

    The nursery is committed to ensuring you are supported during any absence from work. You must notify the director of any absence from work using the notification procedures [high]lighted. Once we are aware of your circumstances, we will take all reasonable steps to provide you with the necessary support.

    …..

    'During the first 7 days of any sickness absence, you must notify the Nursery Manager by 3pm each day to confirm whether you will be returning to work the following day'. Any unauthorised absence must be properly explained during the initial contact and, if the absence continues, you must keep us fully informed. This applies to both short and long-term absences and you will be expected to contact us on a daily basis during the first week and weekly thereafter' [page 82.

Period of absence: if your sickness is for more than 7 calendar days then you must provide the nursery with a medical certificate from your doctor or other authorised healthcare professional you must continue to provide medical certificates to cover [whole] of the absence. Please note that the nursery will review the attendance level of all employees on a regular basis. In deciding whether to take further action in respect of sickness absence, the evidence of a medical certificate may not be sufficient, and a nursery may seek alternative medical information.

Management of sickness absence: how we deal with long-term sickness absence: if you are sick for more than four weeks in a rolling 12 month period, the nursery views this as long term absence. The nursery will arrange a meeting at which you may be accompanied by a trade union representative or a work colleague. The meeting may take place at home or a neutral location close to your home the deputy manager/ team leader in attendance may be accompanied by a member of the HR Team. The nursery may ask for a report from your GP and any other specialists you are seeking advice about your illness or medical condition to obtain an indication of your likely return date. Under the medical reports act 1988, your consent must be obtained before the nursery can ask for a report from your GP. Of course, all reports will be treated confidentially. The deputy manager/team leader needs this report to decide how to proceed. If you do not agree to consent to being given for a medical report to being obtained, your absence will have to be managed without the benefit of this information. When the report has been received, the deputy manager/team leader will invite you to attend another meeting (you will get at least three days notice of the meeting).You may be accompanied if you wish by a trade union representative or work colleague if the meeting is held at work. If the GP or doctor expects you to recover fully then the deputy manager may suggest a phased return and or project work to help ease your way back into work and we will take any relevant advice from your doctor should this be available. However, if it seems unlikely that you will be able to return to work in the near future the deputy manager will have to make a decision based on the needs of the nursery regarding whether the nursery can continue to employ you.

Intermittent sickness absence: due to the nature of the job and the requirement to have specified staffing levels in the nursery, high levels of absence can cause considerable disruption. This can also place a burden on other team members. The deputy manager will investigate non attendance in the following instances four weeks continuous absence …..

20. Prior to the events in issue there were no complaints about the claimant's work. The claimant made clear that she found the work fulfilling. The respondent described her as a valued employee. The claimant was a member of an employee WhatsApp group.

21. On 16 October 2022, and again on 23 October 2022 the claimant was admitted to hospital. Referral letters in November and December 2022 indicate that she had been complaining of breathlessness and symptoms diagnosed as achalasia.

22. Under the terms of her employment the claimant was entitled to be paid statutory sick pay from 16 October 2022 until 11 May 2023. She in fact received SSP until 11 May 2023 when her period of entitlement to SSP ended. When her SSP ended the respondent provided her with an SSP1 form [125] to enable her to claim continuing benefits during her continued absence from work.

23. On 24 October 2022 after her hospital admission there was a welfare meeting (of which there was an unsigned Note) [99] at which the claimant requested and Natasha for the respondent discussed flexible working and a reduction in working days. The respondent made an alternative flexible working suggestion which would address the operating needs of the nursery. The Note refers to achalasia and to 'random breathing attacks' which were worse in the evenings the more she does during the day. The claimant gave permission for the respondent to contact her GP so that a health questionnaire could later be filled in by the claimant and a risk assessment carried out to properly plan for her return to work, which would be on lighter duties temporarily. Natasha referred the claimant to the employee assistance programme.

24. On 26 October 2022 the claimant emailed the respondent a form formally requesting flexible working and to reduce her working days from four, down to two days per week [102]. The form stated that she thought this would have no effect on the respondent or colleagues. On the same day Natalie formally agreed a three day per week pattern with weekly alternating days [106] to be reviewed every 3 months starting on 31 October 2022. Natasha's response explained the arrangements that were agreed and how the request could not be fully accommodated due to 'the needs of the Nursery.

25. On 25 October 2022 [101] Natasha sent a follow up letter stating the purpose of the welfare meeting as being the claimant's absences, informing the claimant of the respondent's intention to consult her GP and of her rights in that regard and on 26 October 2022 confirming the revised working arrangements [106].

26. The respondent requested the GP report including information on the claimant's conditions, ability to work and reasonable adjustments on 1 November 2022 [108]. That letter discloses that the claimant had had 13 days of absence in the previous 12 months and that she had been signed off work for three weeks at that point. In the event this request was not further pursued at that time because the claimant's health and attendance prospects changed so that there was no immediate prospect of her returning to work.

27. The claimant called Natasha on 3 and again on 9 January 2023 to advise her of a forthcoming hospital procedure for her achalasia condition which was booked for 20 January 2023 and which would require an estimated 2-month recovery time. At

that stage the claimant told Natasha that she was feeling optimistic about a return to normality after recovery from the procedure. Natasha wished her well [113].

28. However, on 13 January 2023 the claimant told Natasha that the procedure had had to be cancelled. On 23 January 2023 the claimant called Natasha to explain why the procedure could not go ahead – this was because the consultant surgeon judged that the claimant needed a gastric-band fitted before the procedure to address the achalasia condition could be safely attempted - and that she was back on the waiting list as an emergency case for the gastric band procedure. The claimant later messaged to describe her position as "a waiting game''. The claimant made contact with Natasha again on 30 January 2023 to say she was still awaiting an appointment. Natasha reminded her that she had access to a talking therapy service if she needed it. These file notes reference achalasia.

29. The claimant contacted Natasha on 13 March 2023 with a further update explaining that her pain had worsened and she had sought medical advice about that. She advised that she was taking holiday from 9 to 20 April 2023 and would update Natasha about her anticipated surgery after 25 April 2023.

30. On 20 March 2023 there was a further update. Amongst the matters discussed, Natasha reminded the claimant that her SSP would be coming to an end and suggested a meeting to discuss that after her holiday.

31. On 12 April 2023 [119] Natasha wrote to remind the claimant formally of the end of her SSP, providing a form SSP1 and suggesting a welfare meeting on 24 April 2023.

32. On 24 April 2023 the claimant attended a welfare meeting at the Respondent's premises with Natasha (manager) and Natalie (HR) to discuss the ending of the claimant's SSP (on 11 May 2024). The respondent mentioned the medical report consent form and asked about her expectations as to recovery time and what reasonable adjustments she would require to support her return to work. The claimant told the respondent that she was awaiting for the first of two procedures and that could take 18 months. The note records that "I explained to Sahrish to continue to contact me every Monday". The claimant says that at that meeting she said was finding it difficult due to her health to deal with follow up calls every Monday but that she could do once per month. Natasha's evidence was that no such agreement was made at that meeting, and that the expectation remained that the claimant would contact the respondent weekly. The file note records this. But Natasha accepted and we find that a monthly welfare contact arrangement was made later in May or June. We find that it is most likely that the welfare contact arrangements was agreed to be varied to monthly after the SSP period had ended. This would be consistent with the respondent having a reduced financial incentive to liaise with the claimant, and with her indifferent health by that stage. Thereafter the welfare contacts changed to a monthly basis.

33. On the following day the claimant provided a signed consent form for a GP medical examination.

34. The GP provided a medical report to the respondent on 7 July 2023 [284] including a list of medications and significant medical history. The medical record did not reference anxiety or depression. The letter referred to the claimant as having 'a lot of medical problems' but that 'she has been off work due to achalasia'. Her reported symptoms included difficulty swallowing, dizzy spells, chest pains and blackouts. These were worse than 12 months before and occurred daily. The GP recorded that she did not feel able to return to work until she successfully completes her planned treatment, and explained that she had been referred to a specialist unit for her combined procedures. He provided a list of current medications and suggested that the respondent refer to Occupational Health regarding reasonable adjustments to accommodate any disability and facilitate a return to work.

35. There was a welfare contact on 25 July 2023. Amongst other things the claimant told the respondent about her symptoms (as described in the GP letter). The claimant told the respondent that her recovery period from procedures could be 17-24 months, and she said that she would not be fit to return to work until she had had both procedures and fully recovered which could take 'at least three years'.

36. The claimant went into hospital again on 31 July 2023 because her potassium levels had fallen and she had concerns with her medication.

37. On 4 August 2023 while she was at the hospital she received a WhatsApp message from Natasha on the nursery staff WhatsApp group. The WhatsApp message itself contained only 40th birthday greetings, to which the claimant responded positively, but went on to describe some symptoms which necessitated a visit to hospital. Natasha responded expressing concern and good wishes and the claimant acknowledged those with thanks. The claimant said that the mere receipt of the WhatsApp from Natasha caused a panic attack. She did not tell the respondent that the sending of this message caused a panic attack.

38. On 6th September 2023 [131] Natasha called the claimant. The purpose of the call was to inform the claimant that the respondent would like to refer her for an Occupational Health assessment as suggested by her GP. The File Note records that 'Sahrish is OK with receiving this phone call'. We infer from this that the claimant had probably told Natasha at some point after 4 August 2023 that she did not in general want to receive unexpected phone calls. The claimant described her symptoms and said that she had become dependent on her husband and sister for care. There was a discussion about benefits and state support. The claimant said she was aware there was a risk that the procedure would not work.

39. As part of their preparation to instruct an Occupational Health consultant – KML Occupational Health - the respondent uploaded a copy of the claimant's GP

report provided on 7 July 2023. We were told by Natasha and accept that the Occupational Health provider could not themselves access the claimant's medical records until the claimant provided her consent. This is consistent with what we would expect to be the case and is consistent also with the respondent's later letter of 24 October 2023 [142] when Natalie was reiterating the need for the claimant to provide her consent to an Occupational Health assessment, and with the electronic portal confirmation which noted that it had been given [142].

40. During August the claimant complained to her GP of having a heavy head feeling with numbness and tingling and chest pains. She had blood tests and referral to a neurologist.

41. On 13 September 2023 Natalie called the claimant at around 10am. The call had not been pre-arranged. The claimant did not take the call. She told us and we accept that she was asleep at that time. At about 13:30 Natalie sent an email to the claimant. The purpose of both contacts was to address the imminent expiry of the claimant's DBS certificate and the fact that she was not included in the respondent's auto renewal system. This was the first contact relied upon as constituting an act of harassment.

42. The claimant responded by email on the same day explaining that she had tried unsuccessfully to renew her DBS but could not do so because her certificate was linked with a previous employer. She said she would renew it when she was back working again.

43. On 18 September 2023 Natalie responded by email and told the claimant that change of bank rather than employer was likely the problem and that if she set up a direct debit with the DBS her certification would likely be able to roll over for another year. Natalie noted that she would update the nursery's records to show the claimant was not enrolled in their auto renewal system. This email was the second act of harassment relied upon.

44. The claimant told us that at that stage she was suffering musculoskeletal pain and ongoing health conditions and the communication from the respondent exacerbated her stress level such that she did not take steps to renew her DBS certification.

45. On 21 September 2023 Natasha sent round to the employee WhatsApp group a short email informing staff that the nursery had achieved a 'Good' rating following an unannounced OFSTED visit. The claimant received this message because she was still in the group. Staff members responded positively.

46. Natasha sent a follow up WhatsApp to the claimant on 22 September asking if she was ok. We infer this was because she had not responded to the news. Natasha told us and we accept that her purpose in circulating the staff was to pass on positiveness, and that she believed the claimant would be interested as she had shown an interest in OFSTED reports in the past. The claimant did not

rely on this contact in particular as an act of harassment but we have taken it into account as part of the context of her complaints.

47. On 22 September 2023 [134] the claimant sent an email to Natalie stating that she felt overwhelmed and pressured by the respondent. She said she had received no support from the Respondent, that the Respondent had no right to 'do what it was doing with her DBS, releasing medical records to an Occupational Therapist and contacting her each month', and that she was only going to contact the Respondent on the 11th of each month. The claimant deleted herself from the staff WhatsApp group on or about 23 September 2023.

48. Although there was in place an arrangement for welfare contacts monthly, and a preference expressed by the claimant for email as the preferred method of communication, in our judgment the claimant's email, and its emphatic and challenging tone, would likely have struck the respondent as coming somewhat out of the blue.

49. On 26 September 2023 [135] Natalie treated the claimant's email as a grievance and invited the claimant to a meeting at which a Ms Campbell – another relative of the Butt sisters – would be in attendance as a note taker. The claimant was advised of her right to be accompanied. This was relied upon as an act of harassment.

50. On 29 September [138] the claimant emailed the respondent saying that her condition was getting worse, that she had not worked for over a year and had not been offered redundancy or paid as an employee during her SSP period. She felt undervalued as an employee and that "All the stress of the situation has given me anxiety and high blood pressure I don't need this additional pressure as it worsens my condition. From now on, we will be corresponding through emails only." She declined to attend a grievance meeting.

51. On 29 September 2023 [137] Natalie replied by email. She reassured the claimant that she remained an employee of the business. She offered the claimant the opportunity by 6 October 2023 to participate in the grievance procedure by other means including by written submissions or by sending a representative. The claimant relied on this email as an act of harassment.

52. The claimant emailed on 6 October 2023 [137] setting out the matters she wished to be investigated as a grievance. In summary her grievances were:-

    a) She believed she was being harassed with phone calls and emails which were causing her stress. She said contacts were occurring more than one per month. She said "I don't think you realise what you are doing to my health";

    b) Her GP medical report had been shared with the Occupational Health Therapist, and she did not realise the information would go to a third-party and she would not sign any documents relating to OH.

53. The claimant's grievance was considered by Natalie and on 13 October 2023 Natalie wrote to and emailed the claimant with an outcome letter relating to her grievance. The respondent rejected the grievance . The reasons given were:

    a) The nursery had adhered to the contractual absence policy, until end of May 2023 when it was agreed with Natasha to make monthly contact. The DBS letter arose from an audit of DBS updates; the WhatsApp contacts were to wish a happy birthday and inform about the OFSTED outcome as the claimant had expressed an interest in this in the past. Therefore, the harassment complaint was rejected.

    b) The medical information was not accessible by [KML] the OH contractor until the claimant gives consent on the portal. This complaint was rejected.

54. On 24 October 2023 [142] Natalie sent an emailed letter to the claimant explaining again the purpose of the Occupational Health Assessment and asking the claimant to provide her consent to undergo an Occupational Health assessment. The claimant relied upon this email as an act of harassment.

55. The claimant replied on 31 October [171] consenting to the OH consultant contacting her by email. concerning the meeting with the OH provider.

56. Natalie sent an email to the claimant on 6 November 2023 [171] again seeking consent for the OH consultant to access the claimant's medical records so they would have a holistic view of her medical condition. The claimant relied on this email as an act of harassment.

57. On 13 November Natalie sent a further email concerning the OH assessment and seeking the claimant's consent to uploading her medical information [170]. She explained it would be in the claimant's best interests to consent to this and to the assessment in order for the respondent to get informed advice about reasonable adjustments and returning to work but she recognised she was free not to do so. She explained the assessment could be done via Zoom. She included a warning about lengthy absence causes problems for the nursery and that without the assessment the nursery would have to make decisions without the benefit of medical input. She expressed sympathy for the claimant's circumstances. The claimant relied upon this as an act of harassment.

58. On 23 November 2023 Natalie sent a further chaser as the claimant had made no response [169]. On 27 November 2023 [169] the claimant provided her consent and agreed to an OH assessment by phone call.

59. On 23 November 2023 the claimant saw a neurologist. The clinic letter recorded that had no neurological conditions but that the claimant reported experiencing sensory symptom caused by anxiety.

60. On 28 November Natalie sent the claimant an email [168] confirming arrangements for the OH assessment call. The claimant complains of this email as an act of harassment.

61. Natalie sent a further email to the claimant on 30 November [168]. This emphasised the importance of attending to allow the respondent to determine whether a return to work could be arranged and asking the claimant to confirm when the call was scheduled. The claimant complains of this email as an act of harassment.

62. On 20 December 2023 KML conducted a telephone OH assessment of the claimant.

63. The OH report [145] was sent to the respondent on the same day. Among other things the report identified achalasia as the underlying health problem which had impacted other underlying health conditions. Her health conditions were described an ongoing and unstable, not improving despite support and she was stated to be unfit for work. It was said to be 'impossible to predict when her symptoms would improve". She was described as housebound and 'unfit for the foreseeable. The report noted that the claimant was 'happy for contact throughout her sickness absence but requested that this is by email, she has requested this is monthly where she can update you accordingly. I suggest you discuss this as a matter of operational procedure with her". The report suggested that the claimant might wish to seek mental health support herself through NHS or charitable programmes.

64. Natalie emailed the claimant on 21 December 2023 [159] asking her if she could attend a meeting via Zoom on 4 January 2024 to discuss the health issues arising from the OH report. In that email the respondent warned the claimant that there was a chance that her employment might be terminated. The claimant said that she interpreted this as a threat and began investigating her employment rights. The claimant complains that this email was a further act of harassment.

65. On 2 January 2024 the claimant responded to Natalie's email of 21 December 2023 [163] declining to attend a Zoom meeting or any other form of meeting but agreeing to respond to a health questionnaire. She said she lacked confidence that her employer understood that she was unfit for work and said that 'your continuous intimidation threats and targeting approach have aggravated my well-being. I have been seen by a neurologist who diagnosed me with anxiety.

66. Responding on the same day [162] Natalie apologised for any distress caused and emphasised that was not the intention. The intention was to discuss the report with the claimant section by section and consult with her to get her input and any suggestions she might have. Natalie offered her the options of responding in writing or sending a representative to speak on her behalf. The date was pushed back.

67. In the absence of a response from the claimant Natalie sent a chaser on 10 January 2024 [161]. The email mentioned that the claimant had the right to be accompanied by a colleague or union representative and warned that if her absence continued and she did not participate in the meeting the respondent would have to make decisions without her input.

68. On 18 January 2024 Natalie sent a letter by email [173] stating that the claimant had not responded and giving a date for a review meeting of 24 January 2024, and reminding the claimant she could attend in person, at home or at the nursery or a neutral venue, by Zoom or by telephone or by putting in written representations or appearing by a representative.

69. On 19 January 2024 the claimant called her GP complaining of anxiety because, she said, her manager was emailing every week for her to return to work and this had caused her stress and insomnia.

70. The claimant sought advice from ACAS on 23 September and presented her ET1 on 31 January 2024.

71. On 4 February 2024 the claimant emailed [175] to say she would not attend the meeting and complaining that her mental health had deteriorated and that she had said before she would only be in contact once per month. She said the respondent should go ahead and make their decision and email her the result.

72. The review meeting was held on 5 February 2024. On 14 February 2024 Natalie wrote to the claimant. She explained that the purpose of the meeting was to discuss and offer support and apologised if she was experiencing stress. The letter explained Natalie had considered the claimant's absence since October 2022, the KML OH report that said the claimant was unfit for work without any indication of when she would be fit to return, and that there had been no suggestion of anything that the respondent could do to assist a return to work. The letter indicated that covering the claimant's duties with temporary staff or through overtime was not feasible in the long term. There were no other posts that could be considered as suitable alternatives, and Natalie had considered the operational needs of the nursery and the impact of keeping her job open during long-term and indefinite future absence as well as the financial impact on the business. She concluded by dismissing her with two weeks' notice with effect from 28 February 2024. She advised the claimant of her right to appeal. The letter stated that the reason for her dismissal was ill-health and ended with an exhortation to contact the nursery of the claimant's health improved in the future.

73. On 23 February 2024 the respondent paid the claimant the sum of £1910.41 by way of notice pay and accrued but untaken holiday pay.

Applicable Law and Conclusions

74. Both parties made closing submissions. We have taken those submissions into account in reaching our conclusions whether we specifically reference them or not.

75. Neither party referred us to specific authorities. We indicated that we could be taken to understand the applicable law in general terms and would apply those principles as we understood them to the facts we found.

76. We address the law and our analysis in relation to each complaint separately below.

Discrimination Claims – Applicable Law : General

77. An employer must not discriminate against an employee in the terms of their employment, by dismissing the employee or by subjecting the employee to any other detriment: EQA s 39(1). Breach of this prohibition entitles an employee to bring a claim under Section 13 and Section 15 of the Equality Act 2010.

Burden of Proof

78. Section 136 applies to any proceedings relating to a contravention of the Equality Act and provides:

"(2) If there are facts from which the court could decide in the absence of any other explanation, that a person A contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection 2 does not apply if A shows that A did not contravene the provision".

79. There is therefore a two-stage analytical process. Stage 1 concerns the primary facts and Stage 2 the employers explanation. Guidelines on the application of the burden of proof provisions were provided in the Court of Appeal in Igen v Wong [2005] EWCA 142 and subsequently restated and explained in Hewage v Grampian Health Board [2012] ICR 1054 (SC); Efobi v Royal Mail Group Ltd [2021] UKSC 33 and Field v Pye & Co [2022] EAT.

80. The burden of proof is on the claimant at stage 1 to prove facts from which a tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an act of discrimination. The employer's explanation is disregarded. The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found, and the tribunal assumes that there is no adequate explanation for the facts. Inferences may be informed by evasive answers or failures to adduce evidence from relevant witnesses. The tribunal may also draw inferences from a failure to comply with applicable codes of practice. It is not sufficient at this stage for the employee merely to prove a

difference in protected characteristic and a difference in treatment. Something more is required: Madrassy v Nomura International [2007] ICR 867 (CA). At this stage ultimately the tribunal must stand back from the detail and look at the cumulative picture.

81. If the claimant proves such facts, the burden shifts to the employer to prove on the balance of probabilities that the dismissal or detrimental or less favourable treatment was in no sense whatsoever on the grounds of the protected characteristic. Since the employer is normally in possession of the facts necessary to make out an explanation, a tribunal will normally require cogent evidence to discharge the burden of proof. But the employer only has to prove that the reason for the treatment was not the forbidden reason. The employer does not need to prove that they acted reasonably or fairly (but in such cases the tribunal will be astute to test explanations that the employer was only acting unfairly and not for the discriminatory reason: Komeng v Sandwell Metropolitan Borough Council UKEAT/0592/10/SM).

Disability Status

82. The EQA defines a disabled person as a person who has a 'disability': section 6(2). A person has a disability if that person has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on [the person's] ability to carry out normal day-to-day activities': Section 6(1).

83. The burden of proof is on the claimant to show that he or she satisfies this definition.

84. Paragraphs 2(1) and (2) of Schedule 1 to the EQA provide, in relation to long-term effects that

"2 Long-term effects

(1) The effect of an impairment is long-term if— (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

85. Tribunals must take into account the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') issued under S.6(5) of the Act and any parts of the Equality and Human Rights Commission (EHRC) Code of Practice on Employment (2011) ('the EHRC Employment Code') where they consider it relevant (and must refer to those parts that they have taken into account when they do so) but the statutory definition takes precedence: Sch 1 para 12 of the EQA.

86. EQA Section 6(1) requires tribunals to look at the evidence by reference to four different questions (or 'conditions') to determine if a claimant is a disabled person. Goodwin v Patent Office [1999] ICR 302:

    a) did the claimant have a mental and/or physical impairment? (the 'impairment condition');

    b) did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition');

    c) was the adverse condition substantial? (the 'substantial condition'), and

    d) was the adverse condition long term? (the 'long-term condition').

87. These four questions should be posed sequentially and not together, but tribunals should not feel compelled to proceed by rigid consecutive stages. In cases where the existence of an impairment is disputed it would make sense for a tribunal to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings: J v DLA Piper UK LLP 2010 ICR 1052, EAT.

88. There is no onus on the claimant to adduce medical evidence to establish each of the four conditions, but in practical terms the claimant's own evidence may be insufficient to satisfy the tribunal of the existence of an impairment. Tribunals may sometimes be unable to make the findings necessary to determine whether a claimant is disabled — particularly in cases involving depression or similar mental impairment, where the tribunal has to assess the likelihood of the condition continuing long-term, the risk of recurrence and the severity of such recurrence in the absence of direct or expert medical evidence: Royal Bank of Scotland plc v Morris EAT 0436/10. Royal Borough of Greenwich v Syed EAT 0244/14 and Guinness Partnership v Szymoniak EAT 0065/17. Expert occupational health opinions carry significant evidential weight.

The Impairment Condition

89. We record that in this case the respondent has accepted that the claimant was a disabled person by reason of the physical impairment of achalasia/achalasia cardia. It disputes her disability status in relation to other impairments pleaded of diabetes, disk degeneration, high blood pressure and high cholesterol. In particular, it disputes whether the claimant has satisfied the burden of proving the long-term adverse impact conditions of the claimed anxiety/depression impairment.

90. The claimant is expected to give evidence about the impairment and the effects of it. This is typically in the form of a disability impact statement.

91. Where a claimant is seeking to rely on a number of potential conditions and it is unclear which conditions might have led to the various symptoms, it is important that the tribunal makes clear findings as to the nature of the disability and which symptoms were attributable to it: Morgan Stanley International v Posavec EAT 0209/13.

The Adverse Effect Condition

92. Day-to-day activities are things people do on a regular or daily basis eg: shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can also include general work-related activities such as interacting with colleagues, following instructions, using a computer, and keeping to a timetable or a shift pattern (see paragraph D3). In this context, 'normal' should be given its ordinary, everyday meaning (see Guidance paragraph D4).

93. When considering whether the elements of the test of disability in section 6 of the EQA apply to the claimant at the material time, the appellate courts have stressed the importance of analysing the effect of the claimant's condition rather than focusing too heavily on a medical diagnosis.

94. In relation to mental impairments, tribunals are not expected to be familiar with psychiatric classifications. Expert or GP evidence will usually be required to prove both the impairment, and when, over what periods of time and how the impairment can be expected to manifest itself.

The Substantial Condition

95. Substantial is defined in S.212(1) of the Act as meaning 'more than minor or trivial'.

96. The Guidance explains that the requirement for any adverse effects of an impairment on normal day-to-day activities to be 'substantial' reflects 'the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people'. But in assessing whether an impairment's effect on a claimant's ability to carry out normal day-to-day activities is substantial, a tribunal should not compare what the claimant can do with what the average person can do. The tribunal should consider, first and foremost, whether an adverse effect is 'substantial' in the light of the statutory definition: the Guidance and Code are supplementary. It is appropriate for a tribunal to take into account the effect on the claimant's ability to cope in his or her job. It is important to focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she can do (see Guidance para B9) so even though the claimant may be able to perform a lot of activities, the impairment may still have

a substantial adverse effect on other activities, with the result that the claimant could properly be regarded as meeting the statutory definition of disability. The tribunal must identify the day-to-day activities, including work activities, that the claimant could not do, or could only do with difficulty, to found a proper analysis: para B1 of the Guidance; Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522, especially at paragraphs 45 and 66 to 67.

97. A medical diagnosis is relevant not only to the question of whether there was an impairment but also to the determination of whether that impairment had a substantial adverse effect. A diagnosis reflects a clinical judgment that someone is significantly different from the norm as regards the area of functioning covered by the diagnosis, although a diagnosis does not necessarily mean the definition of disability is met. It is still necessary to make findings about the claimant's ability to carry out day to day activities. If the claimant is not a reliable narrator, this may undermine any clinical opinion that is based on the claimant's account. Stedman v Haven Leisure Ltd 2025 EAT 82.

98. In cases where it is not clear whether the effect of an impairment is substantial the Guidance suggests a number of factors to be considered (see paras B1–B17). These include the time taken by the person to carry out an activity (para B2) and the way in which it is carried out (para B3). A comparison is to be made with the time or manner that might be expected if the person did not have the impairment.

99. An impairment might not have a substantial adverse effect on a person in any one respect but its effects in more than one respect taken together could result in a cumulative substantial adverse effect on the person's ability to carry out normal day-to-day activities. The Guidance at paragraph B5 illustrates how the various effects of depression may lead to the impairment having a substantial adverse effect on carrying out normal day-to-day activities.

100. Where a person has more than one impairment but none of the impairments considered in isolation has a substantial adverse effect on normal day-to-day activities, account should be taken of whether the impairments together have such a substantial adverse effect (see paragraph B6 of the Guidance). The tribunal must 'add up the component parts and see whether the sum amounted to more than the individual parts taken separately'. In other words, it needs to form a view as to the deduced effect of two conditions, look at its conclusions about this holistically, and ask whether the combined effect meets the relevant definition of disability under S.6: see Meeful v Merton and Lambeth Citizens Advice Bureau EAT 0127/16

101. In considering how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities, the fact that a claimant has a condition that would not have developed to the same degree of

seriousness had the claimant adopted a healthier lifestyle should be ignored when determining whether the claimant is disabled, but it is relevant if a reasonable coping strategy could alleviate the current effects of the impairment: see paragraphs B7 and B9 of the Guidance.

102. Paragraph 5(1) of Schedule 1 to the EQA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means 'could well happen': Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL . This means that in assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored. The tribunal should set out clear findings as regards the medical and other evidence and address the part any medication plays in reducing the adverse impact of an impairment when making its assessment of substantial adverse impact. But tribunals require reliable evidence to make findings of deduced effects. A claimant's assertion as to what might happen if medication were to be stopped is unlikely to be sufficient. In relation to ongoing treatment, if the outcome of the treatment cannot be ascertained, or if it is known that the removal of the treatment would result in a relapse or deterioration, it would be reasonable to disregard that treatment: see paragraph B13 of the Guidance. But where current treatment has produced a permanent improvement, that improvement must be taken into account in determining the effects of the individual's impairment: see Paragraph 5 of Schedule 1 to the EQA and Abadeh v British Telecommunications plc 2001 ICR 156, EAT.

The Long-Term Condition

103. 'The question which the tribunal has to ask itself is not whether the (mental) health impairment was likely to last at least 12 months but whether the substantial adverse effect of the impairment was likely to last more than 12 months: Royal Borough of Greenwich v Syed EAT 0244/14. It should not simply assume that the adverse effects of an impairment are likely to be long term merely from the fact that a medical impairment has already existed for more than 12 months as at the date of the alleged discriminatory act: Guinness Partnership v Szymoniak EAT 0065/17.

104. The effect of an impairment does not have to remain the same during the 12-month period. Some activities may initially be very difficult but become easier. The main adverse effect may even disappear temporarily or disappear altogether, while another effect may develop into a substantial adverse effect: see paragraph C7 of the Guidance.

105. Para 2(2) of Schedule 1 to the EQA provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have that effect if the effect is 'likely to recur'. Likely to recur means that 'it could well happen' — see paragraph C3 of the Guidance and Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL. The question for the tribunal in these cases is, again, not whether the impairment itself is likely to recur but whether the substantial adverse effect of the impairment is likely to recur, so the substantial effect must be identified with precision. Medical evidence (or a lack of it) may be critical in establishing that a substantial adverse effect is likely to recur.

106. In assessing the likelihood of a claimant's impairment recurring — and thus qualifying as 'long-term' — an employment tribunal must disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing: McDougall v Richmond Adult Community College 2008 ICR 431, CA.

Employer's knowledge

107. The question whether the employer had actual, or ought to have had (constructive), knowledge of the disability relied upon in the ET1 is a question of fact for the tribunal.

108. When considering whether an employer is to be regarded as having constructive knowledge of a worker's disability so as to trigger the duty to make reasonable adjustments, it is irrelevant that a formal diagnosis has yet to be made so long as there are other circumstances from which a long term and substantial adverse effect of a mental or physical impairment can reasonably be deduced.

109. While knowledge of the disability places a burden on employers to make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry, particularly where there is little or no basis for doing so: Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT, and Peregrine (deceased) v Amazon.co.uk Ltd EAT 0075/13.

110. If an existing employee asks for an adjustment to be made because of a physical or mental impairment the effects of which are not obvious, the employer is entitled to ask for evidence that the impairment gives rise to a disability within the meaning of the Equality Act section 6.

111. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know, and could not reasonably be expected to know' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage — see para 20(1)(b), Sch 8 EQA: e.g. see Glasson v Insolvency Service 2024 EAT 5.

Disability Status and Employer's Knowledge: The Issues

Did Mrs Elahi-Alvi have a physical or mental impairment at the material time?

If so, did the impairment have a substantial adverse effect on her ability to carry out normal day-to-day activities?

If so, was that effect long term? In particular, when did it start and, at the material time (her absence from work)

had it lasted for at least 12 months, or

was it likely to last at least 12 months?

Analysis and conclusions – Disability Status

112. The respondent acknowledged that the claimant was a disabled person by reason of achalasia/achalasia cardia. They acknowledged also that from at least October 2022 they had knowledge of that disability. They acknowledge also that the claimant had impairments of diabetes. They denied that the claimant had proven that she had a disability of anxiety/depression. They point out that there is no evidence to support a finding that the effects of any anxiety impairment, which she initially reported to her GP in August 2023, themselves were significantly affecting her day-to-day activities nor that those effects were likely to be long term. A neurological referral found no neurological cause. When she again reported anxiety to her GP on 19 January 2024 this was just 10 days before she consulted ACAS and commenced her claim. That pattern of reporting does not suggest the condition was likely to be long term. The respondent did not know that she experienced effects of anxiety or depression such that it could amount to a disability.

113. It is unnecessary given the respondent's admission to set out the detail of the effects of the claimant's achalasia impairment. It is sufficient to record that it is clear from her impact statement that they were distressing and debilitating and plainly both such as to have a substantial adverse effect on her normal day-to-day activities of eating, preparing and digesting food and moving. It is clear from the medical reports we were shown that that condition and its effects were likely to continue in the long-term.

114. We find that the claimant also had impairments of diabetes, high blood pressure, high cholesterol and disk degeneration. These were all established (dating back to 2023 in some cases) and continuing impairments supported by medical diagnoses and connected with her high BMI. The effects of these impairments fall to be taken together with the effects of the achalasia impairment. Having regard to her impact statement and the record of her medication, and the content of her medical referrals we find as a fact that the effect of the totality of these impairments, in particular after October 2022 included breathlessness, body pains, muscle weakness dizziness, insomnia, blackouts and brain fog. She

described, and we accept, that the impact on her day-to-day activities included having difficulty taking stairs, leaving her flat (even accompanied), eating, preparing food, cleaning etc. She was dependent on family care and support. We are satisfied that together these impairments and their effect were long term.

115. The position as regards anxiety/depression as separate impairments is more nuanced. The claimant's impact statement dates her anxiety as from November 2023. That appears to reference her consultation with a neurology consultant who, whilst finding that she had no neurological condition, stated that she experienced "sensory symptoms caused by anxiety" and suggested talking therapies. The symptoms reported to the neurologist were broadly the same as those identified to her GP on 21 August 2023 when she first sought advice. At that stage she described pain free tingling in the face/cheek which started on 4 August 2023 and was intermittent. She experienced another episode of this on 31 August 2023 which included her face feeling heavy and numb and was referred to the neurologist for this. She did not at this time reference stress or work-related stress as a possible cause, although she said in her evidence that this was the immediate cause.

116. Her OH assessment in December 2023 suggested that the claimant might consider accessing mental health support.

117. When she went back to her GP on 19 January 2024, that contact recorded 'Stress at work' and 'anxiety disorder' . She reported to her GP that her manager was 'constantly sending email to turn for work [sic] every week now this has caused significant stress, anxiety unable to sleep". The GP prescribed Mirtazapine for sleep.

118. In her impact statement she describes that 'little issues I panic and my anxiety kicks in' , that 'every time [she goes] out [her] sensory anxiety starts and [she has] to return home'. She gave an example of her husband making a sudden plan to take her out for a change of atmosphere which resulted in her panicking, being unable to go out and having an argument about it and having to think about attending family events. She also described brain fog meaning she forgot to pay services charges and appointments, and insomnia. In her oral evidence she also referred to a reddening of her face.

119. We conclude that the claimant has failed to discharge the burden of proving on the balance of probabilities that the impairment of anxiety/depression was a disability within the meaning of s 6 of the EQA. We disregard, as we are required to do, events or development in her health after dismissal in February 2024.

120. Our reasons are as follows:

    a) Whilst none of the contemporaneous reports she made to medical professional addressed the severity of the impacts on her day-to-day living in the terms in which they are articulated in her impact statement, we are

satisfied on the basis of the evidence referred to above that she has satisfied the impairment, and (when taken together with her comorbidities) substantial adverse effect conditions.

b) However, most significantly we find that neither the reports of the claimant to her medical professionals, nor their diagnoses suggest that the effects would be long-term in the sense (being intermittent) being likely to recur within 12 months. On the contrary the specific symptoms of anxiety she reported arose much later after the timing of her achalasia diagnosis in October 2022, and were related, on her case to unplanned or unexpected contacts from the respondent. This supports a conclusion that in the absence of such contacts or stimulations the effects of the impairment or the impairment itself would not be likely to recur within 12 months.

121. We discount the fact that later medical evidence suggests her anxiety condition continued. We must address the position at the relevant time.

122. There was no reference in the medical records or the claimant's impact statement to depression.

Discrimination arising from disability

123. *This involves unfavourable treatment (dismissal) because of something arising in consequence of Mrs Elahi-Alvi's anxiety and depression.*

124. *Firstly, did the company know that Mrs Elahi-Alvi had a disability, or could it reasonably have been expected to know?*

125. *Did the company dismiss her because of "something arising" in consequence of her anxiety and depression, namely her absence and / or the likely length of time before she would be able to return to work?*

126. *Can the company show that this treatment was a proportionate means of achieving a legitimate aim?*

127. *The company's aim and its case on proportionality will need to be set out in its Amended Response.*

Applicable Law : Discrimination Arising from Disability

128. Section 15 of the Equality Act 2010 provides that it will be unlawful for an employer or other person to treat a disabled person unfavourably not because of that person's disability itself (which would amount to direct discrimination under S.13 EQA) but because of something arising from, or in consequence of, the person's disability. Claimants bringing a claim of discrimination arising from disability under S.15 are entitled to point to treatment that they allege is unfavourable in its own terms, they do not need to 'compare and contrast' the treatment with the treatment of other employees.

129. The word ‘unfavourably’ is broadly analogous with concepts such as ‘disadvantage’ or ‘detriment’ found in other provisions of the EQA. The EHRC Employment Code provides helpful advice as to the relatively low threshold of disadvantage required to engage section 15.

130. The phrase ‘something arising in consequence of’ the disability should be given its ordinary and natural meaning: T-Systems Ltd v Lewis EAT 0042/15 the EAT. The EHRC Employment Code at paragraph 5.9 states that the consequences of a disability ‘include anything which is the result, effect or outcome of a disabled person’s disability’. The claimant relies upon her periods of sickness absence as the ‘something’ arising from her disability of anxiety/depression.

131. It is necessary to identify two separate causative steps for a claim under S.15 EQA to be made out. These are that: (i) the disability had the consequence of ‘something’, and (ii) the claimant was treated unfavourably because of that ‘something’. It does not matter in which order those questions are asked. The tribunal must:

a) identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. Then:

b) establish whether the reason was ‘something arising in consequence of the claimant’s disability’, which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator: see Mrs Justice Simler in Pnaiser v NHS England and Anor 2016 IRLR 170, EAT.

c) An employer has a defence to a claim under s.15 of the EQA if it did not know that the claimant had a disability — S.15(2). This stipulates that subsection (1) does not apply if the employer shows that it ‘did not know and could not reasonably have been expected to know’, of the employee’s disability. However, the employer cannot simply ignore evidence of disability. The Equality and Human Rights Commission’s Code of Practice on Employment (2011) (‘the EHRC Employment Code’) states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). It suggests that ‘Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a “disabled person”’ — para 5.14. But failure to enquire into a possible disability is not by itself sufficient to vest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry.

An employee's reluctance to discuss an impairment or, if questioned, to provide full information about the impact of the impairment on the ability to carry out day-to-day activities may fairly lead to the conclusion that, even though the employee was disabled, the employer did not have actual or constructive knowledge of this at the relevant time.

132. An employer also has a defence to a claim under section 15 if it succeeds in showing that the unfavourable treatment to which the claimant has been subjected is a proportionate means of achieving a legitimate aim. The burden is on the employer to prove that the aim was legitimate and the means adopted proportionate. Legitimacy and proportionality, including the 'business need' justification if relied upon is to be objectively assessed by the tribunal itself. It need not have been in the mind of the employer at the time, although the burden remains on the employer and it will be more difficult to prove an objective justification that was not in the employer's mind, or if the employer does not lead evidence of how, as part of the process leading to dismissal, its decision-makers considered other, less discriminatory, alternatives. The procedure leading to a dismissal may be relevant to the balancing exercise, so long as the tribunal remains focused on the question of whether the outcome of the decision-making process was capable of justification.

133. To be proportionate, the employer's actions have to be both an appropriate and reasonably necessary means of achieving its legitimate aim and, for that purpose, it is relevant for the tribunal to consider whether any lesser measure might have served that aim. When considering that particular question, the tribunal should give a substantial degree of respect to the judgement of the employer's decision maker as to what was reasonably necessary to achieve the legitimate aim (provided the decision maker has acted rationally and responsibly), but the tribunal applies an objective test.

134. When assessing the proportionality of any dismissal pursuant to a sickness or absence management policy, the terms of the policy will be relevant to the assessment of whether any discretions or options short of dismissal allowed for by the policy have been considered by the employer before reaching the decision to dismiss: Department for Work and Pensions v Boyers 2022 EAT 76.

135. The EHRC Employment Code sets out guidance on objective justification which broadly reflects the case law. In summary:

a) the aim pursued should be legal, should not be discriminatory in itself, and should represent a real, objective consideration.

b) Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29).

136. As regards proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

Analysis and conclusions: Discrimination arising from disability (anxiety/depression)

137. The respondent submitted that the section 15 claim was not actively pursued by the claimant. Whilst we accept that she did not make focussed submissions on this complaint specifically, EJ Fowell had identified this as a claim encompassed within her complaint, the claimant was acting in person and the respondent had knowledge and notice of this head of claim. Accordingly, we considered that it was appropriate and fair for us to consider it.

138. In the alternative the respondent argued that it did not have knowledge of the claimant's anxiety or depression. She was not dismissed because of absence attributable to that impairment. The respondent only had knowledge of other impairments. In any event in the further alternative the respondent would have a defence of dismissal as a proportionate response to the pursuit of a legitimate aim: specifically, the need to maintain staff/child ratios and the operational needs and interests of other staff and financial interests of the nursery

139. The claimant was adamant that she was informing Natasha of all of her health details, that the respondent therefore knew of all of her impairments and not just achalasia. She referred to the other conditions being mentioned in her GP records which were provided to the respondent. She relied on her absence as arising in consequence of her disability.

140. We have found above that the claimant did not establish on the evidence that she was a disabled person because of anxiety/depression. However, if we are wrong in that conclusion, and if we adopt the widest possible view of the claimant's claim under section 15 and proceed on the basis, favourable to her, that she was a disabled person on the basis of any or all of her impairments and that the claimant knew about them and dismissed her because of her absence arising from those specific impairments, we would nevertheless conclude that in the circumstances the decision to dismiss was made in the pursuit of a legitimate aim and that that decision was a proportionate response so that the respondent has made out a justification defence.

141. We find that terminating the claimant's employment did constitute unfavourable treatment of the claimant by the respondent.

142. The decision to dismiss was taken by Natalie Butt. We are satisfied that the reasons in her mind at the time of the decision to dismiss were as set out in the dismissal letter which we have summarised above in our Findings of Fact.

143. In regard to the justification defence, in relation to the reasonableness of the decision:

a) As set out above we have found that the nursery was a regulated business subject to OFSTED supervision and regulatory minimum standards in terms of staff/child ratios. We found also that the job of nursery practitioner expressly expected involved an expectation of building relationships with parents and children.

b) We accept also the evidence of the respondent's witnesses, and as also being inherently likely, that shortages of staff would require cover by other staff by way of overtime or flexible working, the diversion of management time to child supervisory roles and the occasional use of agency staff. In reaching our conclusion we have taken into account the challenges that the claimant brought up in her cross-examination about the employment of other family members as Natasha's PA and as a deputy manager, and the dearth of hard evidence about the precise impacts and the cost and use of agency staff.

c) With those same caveats we accept that there would be some, albeit minor cost impacts on the respondent involved in maintaining the claimant as an employee on the books, mainly arising from monthly welfare contact and monitoring.

d) The addressing the operational needs of the nursery, a small business with fluctuating staff and child/parent numbers, and seeking to maximise the advantages of consistent staff/parent/child relationships, and for those reasons to employ staff able to work in person consistently we find are legitimate aims and were in fact relied upon by Natalie in reaching her decision. Her further expressed reliance on financial impacts was not substantiated on the evidence and objectively carried no weight in our conclusion that the respondent had a defence of justification.

144. As regards the proportionality of the decision to dismiss:

a) We have set out in connection with our analysis of the reasonableness of the decision to dismiss in connection with the unfair dismissal claim below the principal relevant factors in the mind of Natalie. In summary the respondent had contractual review mechanisms in place for absences (and 4 weeks absence was defined as long term) there had been a long absence previously and there was no foreseeable prospect of a return to work by the claimant. Furthermore, the respondent, acting through Natalie, and earlier through Natasha, had adhered to the contractual procedure of periodic review envisaged by the contract (and had adapted it in response to requests by the claimant) ahead of the decision to dismiss, and had taken steps to inform themselves of the claimant's up to date medical condition and sought her views about returning to work.

145. For this reason, we conclude that even if all assumptions were made in the claimant's favour and the widest possible view taken of her disability, the claim for discrimination arising from disability is not well founded and is dismissed.

146. However, in the interests of completeness we also briefly record our findings in relation to the respondent's knowledge of her claimed impairment of anxiety/depression:-

a) we find that the respondent had been alerted to concerns expressed by the claimant about anxiety and about stress responses arising from their communications. The fact that the claimant had mental health challenges was a matter specifically noted by the OH report on 20 December 2023.

b) However, the respondent was not provided with information about the detailed adverse effects, and they were not provided with information that the claimant was seeking a referral for anxiety nor of the outcome of the referral to a neurologist. We think there was enough material to put the respondent on enquiry such that they might be fixed with constructive knowledge if they failed to make further inquiries. They did not make specific inquiries about the impairment of anxiety but, we find, had they done so they would not likely have been provided with information such that they could reasonably be fixed with constructive knowledge that the impairment of anxiety at that stage would amount to a disability: in particular there was no medical prognosis expressed of how long the effects of the impairment would be likely to continue so it may be inferred that none would have been forthcoming if inquiry had been made.

Harassment on grounds of disability

Did the company or any of its employees engage in unwanted conduct. In particular did the respondent do the following:

c) Sending an email on 13 September 2023 relating to updating her DBS certification;

d) Email from Natalie on 18 September 2023 concerning her DBS renewal;

e) Email of 26 September 2023 in which the respondent initiated a grievance procedure after receiving an email from the claimant on 22 September 2023;

f) Email of 29 September 2023 in which Natalie invited the claimant to a grievance meeting;

g) 24 October 2023 an email from Natalie asking the claimant if she would agree to an OH assessment;

h) Emails from the respondent on 6, 13, 28 and 30 November 2023 regarding making an arrangement for an OH assessment;

i) 21 December 2023 – email from Natalie stating that the claimant was at risk of losing her job.

Was the conduct related to her disability?

Did it have the purpose or effect of violating Mrs Elahi-Alvi's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Applicable Law - Harassment

147. S 26 of the Equality Act provides relevantly as follows:

(1) A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (a) violating B's dignity, or (b) creating an intimidating hostile degrading humiliating or offensive environment for B [….]

(4) In deciding whether the conduct had the effect referred to in sub-section (1) (b) each of the following must be taken into account: (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for that conduct to have that effect.

148. The language of section 26 (1) b) is strong and looks for effects which are serious and marked. It is wrong to cheapen them. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment: Omooba v Michael Garret Associates [2024] IRLR 440 per Eady J at [103] citing Elias LJ in Grant v HM Land Registry [2011] EWCA Civ 769 (paragraph 47) and Langstaff P in Betsi Cadwaladr University v Hughes UKEAT/0179/13 (paragraph 12).

149. In determining whether the conduct is "related to" the protected characteristic in issue (a phrase which is broader than 'because of' in section 13) the tribunal must identify some feature of the factual matrix which has led it to the conclusion that the conduct is related to that protected characteristic: Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor [2020] IRLR 495. The focus of the Tribunal must be on the specific conduct complained of when assessing whether it is related to the protected characteristic: Worcestershire Health and Care NHS Trust v Allen [2024] EAT 40 at paragraph 9. The EHRC Code states that "the necessary connection with a protected characteristic can arise where 'the unwanted conduct is related to the protected characteristic but does not take place because of the protected characteristic'— para 7.10.

150. The word 'environment' signifies a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration. A comment made 'once or twice' might not cause real offence, but if used more often could lead to a finding that the remarks created an intimidating, hostile, degrading, humiliating or offensive environment. Some of the factors a tribunal might take into account in deciding whether an adverse environment had been created include the fact that the relevant conduct was not directed at the claimant, that the words objected to were used only occasionally and that the claimant made no immediate complaint (although tribunals should be cautious of placing

too much weight on the timing of an objection, given that it may not always be easy for an employee to make an immediate complaint.): Weeks v Newham College of Further Education EAT 0630/11 and Pemberton v Inwood 2017 ICR 929, EAT.

151. Where a claim is brought on the basis that the unwanted conduct had the purpose of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, the tribunal needs to examine the perpetrator's intentions and is likely to need to draw inferences from the surrounding circumstances. If it finds that the conduct had the purpose of violating a claimant's dignity – for example where conduct is repeated when a claimant has clearly objected to it - it is not necessary to establish that it also had the proscribed effect.

152. Where a claim depends on whether the conduct has had the proscribed effect, the focus is on the effect. The effect can be produced whether the perpetrator intends it or not, and regardless of whether the perpetrator knows that the claimant had the protected characteristic.

153. In deciding whether the conduct has the relevant effect, tribunals must take into account the claimant's perception, the other circumstances of the case, and 'whether it is reasonable for the conduct to have that effect' — S.26(4). The test therefore has both subjective and objective elements. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser had on the claimant, while the objective part requires the tribunal to ask itself whether it was reasonable for the claimant to feel the effect complained of. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so. The tribunal must also take into account all the other circumstances: Pemberton v Inwood 2018 ICR 1291, CA. The subjective element of the harassment definition means that conduct related to a protected characteristic that is not intentionally harmful can still have a damaging effect. The 'other circumstances' of the case to be taken into account under section 26(4) may be used to shed light both on the complainant's perception and on whether it was reasonable for the conduct to have the effect. The EHRC Code notes that relevant circumstances can include those of the complainant, such as the claimant's health, including mental health; mental capacity; cultural norms; and previous experience of harassment. It can also include the environment in which the conduct takes place: see para 7.18.

Harassment related to disability EQA s 26 – Analysis and Conclusions

154. The respondent submitted, in summary, that the tone of the emails relied upon the claimant were in all cases respectful and supportive. They related to matters such as a grievance and the need to obtain up to date medical information for a contractual review of the claimant's employment which followed a continuous absence of over a year. They were in a format requested by the claimant and the claimant was given alternative modes in which to respond and granted multiple adjournments to give her more time to do so. There was no purpose or intention to create the proscribed environment. As regards creating the proscribed effect, Ms Omotosho submitted that the claimant has not proven that she had the relevant perception. At the outset when the first contacts were made regarding the DBS renewal the claimant did not complain of harassment. At the end of the chain of correspondence on 21 December 2023, the claimant does not make reference to anxiety or depression arising from her work or the communication from the respondent. She did not mention this to her neurologist in November 2023. She did not report it to her GP as a cause of stress until 19 January 2024, 10 days before she issued her ET1. In any event, she submits, even if the claimant subjectively had that perception, it was not an objectively reasonable one. She submitted that the claimant's emails on 29 September and 6 October reveal the reality: namely that as she was no longer being paid, she was not required to deal with the respondent.

155. The claimant emphasised that the change from the previous arrangement where she would call once a month by arrangement, and said when she got the email on 6 September about her DBS check she panicked and experienced physical effects from that. That pattern of effects repeated itself whenever she got an email from the respondent. She referred to her Scott Schedule replies. She said that she did not mention this to her neurologist in November because he didn't ask about it, but when she got his letter in December 2023 she went to her GP in early January 2024 and reported to him about the stress and anxiety. The company's concern for her was only worsening her health issues; it was not helpful and was draining her.

156. We have made findings above about the communications which the claimant relies upon. Each of the messages relied upon as conduct amounting to harassment were in fact sent and received.

157. The messages were, in our judgment, perceived by the claimant as unwanted. Although each of them was, in our view, either justifiably sent for administrative reasons (e.g. the DBS exchange, and the initiation of a formal grievance process after a written complaint), or proper communications envisaged by the terms of employment and expected for the purposes of conducting a fair procedure for the review of the claimant's employment, we find that they in fact caused the claimant to experience a degree of mental and consequent physical discomfort. They were in that sense perceived by her as 'unwanted' because she did not want to deal with any matters relating to her employment at that time. This conclusion is

supported by the claimant's statements in her contemporaneous communications to the effect that the contacts were causing her stress, anxiety and raising of her blood pressure.

158. The communications complained of all 'related to' the claimant's protected characteristic of being a disabled person in the sense that they concerned matters arising from her absence from work which was plainly a consequence of her disability by reason (at least) of her impairment of achalasia. In that sense they were related to her protected characteristic of disability.

159. Given that they were repeated communications within the employment context, we find also that they created an environment within the meaning of s 26.

160. We are entirely satisfied that the communications did not have the purpose of creating the proscribed environment. The respondent's witnesses said they did not have any such intention. That position is supported by the fact that in each case the communication sought to be supportive in its tone and was respectful in content. The purpose of each communication was objectively justified and explained by matters of administrative or contractual concern both to the respondent and the claimant. The form of communication by email (aside from an early phone contact) was one that had been requested by the claimant. The respondent offered multiple alternative means of responding to requests for information or for. No communications contained threats or intimidatory language. The reference to reviewing the claimant's employment and the possibility of termination was a necessary and required inclusion consistent with the contractual framework and best practice, and requests for consent to medical information and assessments were similarly plainly justified. The claimant was given deadlines to respond, but none was enforced or accompanied by threats or intimidation. Only the last communication before the decision to terminate imposed a final deadline, and that was supported by options as to how to respond and had been preceded by multiple opportunities to respond earlier.

161. As regards whether they had the proscribed effect, the claimant has not persuaded us that they had that effect on her, but even if we are wrong about that, we find that any such perception on her part was not reasonable in all the circumstances.

162. The claimant did not prove on the balance of probabilities that at the time she perceived that the communications relied upon were related to her disability and had the effect of violating her dignity or creating an intimidating hostile degrading humiliating or offensive environment for her. She did not state that that was her perception at the time. Rather she complained that the fact of communications taking place at all were making her feel stressed. Furthermore, she did not complain to her GP in August or to her neurologist in November that the communications were the cause of her stress. Whilst we accept that she was in fact affected by them, there is no evidence to support a finding that she perceived

them to be related to her disability as distinct from being related to her potential to return to work. We so conclude whilst taking due account of the claimant's explanations for not reporting the causes of her stress to her neurologist, that she did make the suggestion to her GP in January 2024 that they were a source of stress for her and the reluctance that individuals may have towards articulating their concerns.

163. These considerations also inform our conclusion that the conduct did not in all the circumstances have the serious and marked effects which a finding of harassment requires.

164. Even if we are wrong about our conclusion that the claimant did not subjectively experience a proscribed environment, in our judgment it would not have been reasonable for the claimant to have had such a perception:-

a) The content of the communications was not hostile offensive or intimidating or such as to violate the claimant's dignity

b) The claimant had consented in her contract of employment to communications on the topics and in the circumstances in which they occurred; indeed the respondent substantially adapted its communication methods to the wishes expressed by the claimant.

c) As we read the documents, after the claimant received the DBS alert, later in September (and so far at least as the respondent was concerned, somewhat out of the blue) we find the claimant's communications indicate a wish to shut down all communication with the respondent because she was no longer being paid SSP, or any other sums by the respondent. In our view the tenor of her emails in September and early October were that the respondent had no right to be sending her communications when she was not working and not being paid. For the respondent's part they appear to us to have been trying to reassure her that she remained an employee and was following the procedures envisaged in the contract and seeking (at least in the period before September 2023) to keep her involved in the life of the nursery. We find the claimant interpreted the respondent's attempts to arrange for her to discuss her employment arrangements as pressure to come back to work when she physically could not. We emphasise that we were not persuaded by the suggestion put to the claimant in cross examination that her conduct was explicable as a strategy to extract a further payment. We found the claimant credible in her account that she was experiencing the stress responses she described from the communications. But objectively her interpretation of the respondent's conduct, having regard to its tone and content and the contractual and factual matrix including her long absence and non-prospect of return to work was not a reasonable one.

165. Accordingly, the complaint of harassment related to disability is not well found and is dismissed

Unfair dismissal

Unfair dismissal – Issues

What was the reason for Mrs Elahi-Alvi's dismissal? The company says that it was on grounds of capability, i.e. her long absence.

Did the company act reasonably in all the circumstances in treating that as a sufficient reason to dismiss Mrs Elahi-Alvi? The Tribunal will usually decide, in particular, whether the company

genuinely believed that she was no longer capable of performing her duties

adequately consulted her;

carried out a reasonable investigation, including finding out about the up-to-date medical position, and

could reasonably be expected to have waited longer before dismissing her.

If the procedure was unfair, what difference would a fair procedure have made to the outcome?

Applicable Law: Unfair dismissal – Capability / ill-health dismissals

166. The right not to be unfairly dismissed is contained within s.94 Employment Rights Act 1996. In the present case, it is agreed that the Claimant had in excess of two years continuous service and that she had been dismissed by the Respondent.

167. It is for the Respondent to prove that the reason or principal reason for the dismissal was one of the potentially fair reasons listed within s.92(b). In this case, the Respondent relies upon capability (due to ill health) as the reason for dismissal.

168. A reason for dismissal is a set of facts or belief held by the employer which caused them to dismiss the employee: Abernethy v Mott Hay and Anderson [1974] IRLR 213 per Cairns LJ. This has been subsequently affirmed on numerous occasions and has most recently been analysed by the Supreme Court in Jhuti v Royal Mail [2019] UKSC 55. 92.

169. If the Respondent does prove a potentially fair reason for dismissal, then reasonableness under s.98(4) ERA 1996 must be considered. The burden of proof for the purposes of s.98(4) is neutral.

170. In the classic formulation based on BHS v Burchell [1978] IRLR 379 (a conduct dismissal case) the Tribunal has to consider a) whether the Respondent formed a belief on reasonable grounds b) whether the Respondent had undertaken such investigation as was reasonable in the circumstances of the case and c) whether the decision to dismiss was within the range of reasonable responses a reasonable employer might have adopted: Sainsbury's Supermarkets Ltd v Hitt

[2003]. It is not for the Tribunal to substitute its own view for that of the employer. Rather the Tribunal must answer the questions posed from the perspective of whether or not the actions taken fall within the range of reasonable responses open to an employer, having regard to the size of the undertaking and the administrative resources available to it. Two reasonable employers could reach different conclusions and both might be fair.

171. It is also necessary to look at whether the employer followed a fair procedure in dismissing the employee.

172. The essential framework for considering whether dismissal on account of ill-health absence falls within the band of reasonable responses open to an employer was set out by the EAT in Monmouthshire County Council v Harris EAT 0332/14. The tribunal's reasoning needs to "demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice'.

173. In addition, where the employer operates a detailed attendance policy, it will be expected to adhere to its provisions to ensure procedural fairness, although inconsequential departures from the policy will not necessarily be fatal. If the employee's medical condition comprises a 'disability' for the purposes of the EqA, the employer may have to carefully consider whether it has a duty to make reasonable adjustments to its absence or attendance policy before dismissing the employee on account of his or her long-term ill-health absences — see S.20 EqA.

174. In the context of long-term sickness absence, consultation has a number of purposes, which include:

a) establishing the true medical position

b) keeping the employer abreast of the employee's progress, and

c) keeping the employee up to date with the employer's position, which is particularly important if the employer is considering dismissal.

175. In one way or another steps should be taken by the employer to discover the true medical position' prior to any dismissal: East Lindsey District Council v Daubney 1977 ICR 566, EAT. In most cases this will involve consultation with doctors or Occupational Health specialists. A failure to seek proper medical advice (where this is appropriate) could likely result in a finding of unfair dismissal. A decision to dismiss on medical grounds will not be reasonable unless the employer has all the relevant facts which are either known or could reasonably be discovered at the time the decision is made. Where there is any doubt, a specialist's report may be necessary and any decision to dismiss without one could be unfair, especially if a specialist report is pending or has been recommended.

176. As regards the sufficiency of the employer's belief in the grounds for dismissal in ill health dismissal cases the employer must genuinely believe in its stated reason for dismissal, having conducted a reasonable investigation which yields reasonable grounds for the employer's conclusion. The EAT in DB Schenker Rail (UK) Ltd v Doolan EATS 0053/09 emphasised that, while Daubney requires an employer to establish the 'true medical position' before deciding to dismiss, that should not be read as requiring a higher standard of enquiry than required for a misconduct dismissal. The Burchell approach, requiring that a reasonable investigation into the matter be carried out, still applies.

177. When deciding whether to dismiss an employee for lack of capability, an employer must take into account not only the employee's current level of fitness but also his or her likely future level of fitness.

178. If an employee refuses to cooperate in providing medical evidence the employer is entitled to base its decision on the relevant facts available, even if those facts are insufficient to give the full medical position. The ACAS Guide recommends that, in such circumstances, the employee should be informed in writing that a decision will be taken on the basis of the information available and that it could result in dismissal (see page 72). Dismissal may then be fair.

179. Where an employee has been absent from work for some time, it is essential to consider whether the employer can be expected to wait any longer for the employee to return — Spencer v Paragon Wallpapers Ltd 1977 ICR 301, EAT. The tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case. Such factors include:

    a) whether other staff are available to carry out the absent employee's work

    b) the nature of the employee's illness

    c) the likely length of his or her absence

    d) the cost of continuing to employ the employee

    e) the size of the employing organisation; and

    f) (balanced against those considerations), the unsatisfactory situation of having an employee on very lengthy sick leave.

180. In Daubney Mr Justice Phillips stated: 'Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one

thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done.' In Taylorplan Catering (Scotland) Ltd v McInally (above) the EAT added that consultation is also necessary to balance the employer's need for the work to be done against the employee's need for time to recover.

181. Proper consultation with the employee should include:

a) discussions at the start of the illness, and periodically throughout its duration, and informing the employee if the stage when dismissal may be considered is approaching

b) personal contact with the employee

c) consideration of the medical evidence

d) consideration of the employee's opinion on his or her condition and his or her own opinion as to their likely date of return and what work he or she will be capable of performing

e) consideration of what can be done to get the employee back to work

f) consideration of offering alternative employment, if any, in the employer's business — see 'Alternative employment' below, and

g) consideration of an employee's entitlement to enhanced ill-health benefits, if available — see 'Ill-health benefits and early retirement' below.

182. Discussions should be held periodically throughout the absence — from the onset of the illness up to and including the decision to dismiss. The ACAS guide recommends that where an employee is on long-term sick leave, the employee and the employer should keep in regular contact, and the employee should be kept fully informed if there is any risk to his or her employment (see page 70). Even if an employer has obtained medical evidence, it is important to consult the employee before any decision to dismiss is taken in order to keep the employee informed and to ensure that the medical report has not been misinterpreted.

183. When employees are on long-term sick leave, a certain amount of written correspondence will be inevitable. But employers should usually try to ensure personal contact with the employee to avoid any argument that there was no proper consultation prior to dismissal. At the same time, an employer should be sensitive to the employee's need for space to convalesce and should consider the employee's right to privacy. Where the employee's condition makes him or her effectively house-bound, an employer wishing to meet for the purposes of consultation will need to visit him or her at home. An employer should ideally gain the employee's consent, explaining the reason for the visit and who will be attending. An employer should also consider less intrusive options, such as contact by Skype (or similar), telephone or even email, since face-to-face meetings will not always be necessary. Much will depend on the circumstances

of the employee, and an employer would be well advised to establish the employee's preferred form of communication in the initial stages of consultation. An employer should not pressure an employee to attend meetings or respond to communications before he or she is ready to do so.

184. Under S.10 of the Employment Relations Act 1999 (ERA), where a worker 'reasonably requests' to be accompanied at a 'disciplinary hearing', the employer must permit the worker to be accompanied by a 'companion'. The companion — chosen by the worker — may be a trade union representative or a fellow worker — S.10(2A). A disciplinary hearing is defined in the ERelA as a hearing that could result in …the taking of some other action — S.13(4)(b). Therefore, even if the employer is holding what it terms a 'capability' meeting to discuss the employee's ill health, the statutory right to be accompanied would still apply if it is likely to result in dismissal. However, the general view is that the ACAS Code of Practice, with its in-built system of warnings, does not apply to long-term ill-health dismissals: see Taylorplan Catering (Scotland) Ltd v McInally 1980 IRLR 53, EAT.

185. Where long-term ill health is concerned it is likely that the underlying illness may amount to a disability under the EQA. In its guide, ACAS recommends that employers 'take a more sympathetic and considerate approach, particularly if the employee is disabled and where reasonable adjustments at the workplace might enable them to return to work'. If an employer fails to make a reasonable adjustment that would have avoided the need to dismiss an employee, the dismissal may well fall foul of the reasonableness test set out in S.98(4) ERA, although the reasonableness tests are not the same.

Unfair Dismissal : Analysis and conclusions

186. We find as a fact that the person responsible for the decision to dismiss was Natalie – the HR Manager. The dismissal letter was signed by Natalie, Natalie had also been responsible for corresponding with the claimant about her ill-health absences and the capability review meeting planned initially for January 2024. The language of the dismissal letter [178] is in the first person. Natasha's evidence was uncertain as to whether or not she had been consulted, she could not recall.

187. We find that the reason in the mind of Natalie for her decision was the potentially fair reason of capability. Our reasons are:

    a) She gave oral evidence to this effect.

    b) The dismissal letter [178] records that the claimant had been absent from 25 October 2022 and there was no indication from either from the claimant's GP or the 20 December 2023 OH report that the claimant would be fit to return at any time in the foreseeable future.

c) This reason is consistent with the information within the medical records from the GP and the up to date OH report of December 2023.

d) The conducting of a review because of long-term ill-health absence was consistent with (indeed very considerably beyond) the period set out in the contract of employment for when such a review would be expected;

e) The claimant had been warned in previous communications that such a review might result in termination of her employment for long term ill-health absence.

188. In our judgment the respondent acted reasonably in deciding to dismiss in all the circumstances. Our reasons are:

a) The medical advice, in particular in express terms from the OH practitioner, indicated no foreseeable date for the claimant's return;

b) The claimant herself accepted in oral evidence that she was not fit to return to work in any capacity. She was effectively housebound. She had no idea when she might be able to return to work at all. She was dependent upon unknown dates for medical procedures and was uncertain whether she would be fit to return to work even after those procedures had been completed;

c) By September 2023 and continuing the claimant's impairments in relation to achalasia alone were extremely debilitating and limiting for the claimant. The position was even more complex because she experienced multiple other impairments and she herself felt that her health was deteriorating rather than improving;

d) The respondent was a very small undertaking, a maximum of 7 employees and three people who carried out management tasks;

e) The nature of the work of a nursery practitioner involved an expectation of relationship building and maintenance with children and parents. Physical attendance was inherent in the work;

f) We accept Natalie's evidence as being inherently likely given the size of the respondent and the nature of its work that consideration had been given to the claimant performing other work but that no such alternative work was available. This was not a case in which the claimant could have been accommodated on shorter hours or a phased return to work: there was no foreseeable prospect of her being able to work at the nursery at all;

g) Against a decision to dismiss at that time is the fact that the nursery was no longer having to pay the claimant. However, the regulated nature of the work meant that at least some administration needed to be continually monitored such as DBS certification;

h) The nursery was subject to regulatory staff/child ratios. As a result, management staff were diverted to child supervisory tasks, other employees

were required to work overtime or different shifts and agency staff were, at least on occasion, needed to cover the claimant's absence. Although documentary evidence of the detail of these arrangements and of the cost and extent of agency usage was absent on the evidence before us, and Natasha's evidence was somewhat vague on the detail, we accepted the evidence of Natasha that these things occurred on the basis that, given the ratio requirement, it was inherently likely in a small family undertaking that such arrangements would have to be made in the absence of a front-line staff member. This conclusion is supported also by the fact that the contractual terms envisaged regular absence monitoring and a long-term absence review after 4 weeks of continuous absence;

i) The contractual job description of nursery practitioner highlighted that it was expected that staff were able to form and maintain consistent relationships. It may be inferred that it was in the interests of the nursery to employ and retain staff who were able to maintain these relationships over time. Dismissing an employee who was and would for the foreseeable future be unavailable for work and therefore unable to discharge this function in practice was clearly within the range of reasonable responses for a reasonable employer of the size and administrative resources of the respondent in the circumstances;

j) It would not be reasonable to require the employer in these circumstances to keep an employee on any longer, especially given the lengthy period of prior absence from front-line work with the children and parents attending the nursery. It was therefore within the range of reasonable responses in these circumstances to proceed to review and decide to terminate the claimant's employment without waiting further.

189. Having regard to the fairness of the procedure, we are satisfied that the overall procedure adopted leading to the dismissal was fair. We have taken into account all the circumstances, but in particular the following considerations:

a) The respondent initially maintained weekly contact with the claimant to monitor her health and fitness for work in accordance with the contractual procedure. The claimant produced fit notes explaining her unfitness due to achalasia;

b) After May 2023 when the claimant's SSP ended and she ceased to provide regular fit notes, the respondent maintained a practice of monthly welfare meetings, planned but flexed according to each party's availability. This is consistent with the expectations set out in the Guide;

c) The respondent sought and obtained consent for copies of GP records to inform itself about the claimant's medical condition and fitness to work (an initial plan to do so after the claimant's initial absence after hospitalisation in October 2022 was put on hold because there was no immediate prospect of the claimant returning to work pending her procedure). In late 2023 consent

for GP records to be provided to an OH was obtained in order to obtain a medically informed OH report. These were reasonable steps taken by the employer to inform itself as to the claimant's condition;

d) The respondent obtained consent for and took into account up do date medical advice in the form of an OH report informed by GP medical records as to the claimant's conditions, ability and work and likely date for return. That report which indicated no foreseeable date for return to work expressly informed the dismissal decision;

e) As stated above we are satisfied that consideration was given to alternative employment within the nursery and none was available;

f) Given the indication that the claimant was effectively housebound and unfit for work for the foreseeable future, reasonable adjustments to get the claimant back to work could not be practically explored. None was proposed by the claimant. None was suggested by the medical reports.

g) The respondent provided an SSP1 form to enable the claimant to claim alternative forms of government financial support after her Statutory Sick Pay period ended;

h) Attempts were made to obtain the claimant's own views about her ability to return to work, and in what capacity and with any adjustments. Those attempts were repeated. The respondent offered the claimant a number of alternative means of communicating her input including in person, by telephone, accompanied by or solely through a representative, by Zoom call or in writing. The claimant failed to engage with the process or to offer comments on her employment except to emphasise that she remained unfit and that work related contacts were making her worse and so the respondent should go ahead and make its decision. In the circumstances it was not unfair for Natalie to make her decision to dismiss without the claimant's input.

i) When the possibility of termination for ill-health absence was first considered, the claimant was warned of this possibility in the email letter of 21 December 2023, and the warning was repeated ahead of the final meeting at which the decision to dismiss was taken.

j) The letter inviting the claimant to the final (and prior) review meetings advised her of her right to be accompanied.

k) The dismissal letter informed the claimant of the reasons for her dismissal and advised her of her right to appeal and how to exercise it.

190. In the context of consideration of a fair procedure (and also in the context of the complaint of harassment relating to disability) a critical issue which was front and centre of argument before us concerns the methods and frequency of communication between the respondent and the claimant relating to her welfare

and, later, to her OH assessment consents and the review of her continued employment.

191. A relevant factor to consider is whether reasonable account was taken of preferences about the nature and timing of communications and meetings expressed by the claimant. In the context of a long-term absence in which, as the respondent accepts, it was aware that the claimant was a disabled person by reason (at least) of achalasia, that consideration has greater weight. In this context consideration of whether a procedure adopted was 'fair', even though the tests are different and the case was not argued in this way, may helpfully be looked a through the lens of 'reasonable adjustments' to the sickness absence procedure. The conclusion in each case should not be markedly different

192. In this context, in our judgment, the respondent did adopt a fair procedure.

a) As stated above the position had been that following the end of SSP payments the respondent carried out welfare checks on 11 of every month, but subject to variation to suit either party. These were on occasion initiated by the claimant. However, in her email of 22 September 2023 [134] the claimant sought to resile from any contact and complained about the stress of having contact with the respondent.

b) The respondent then sought to clarify the claimant's concerns by way of formal grievance and in response the claimant again complained about the frequency (more than 1x per month) of contact and said that thereafter all contact should be by email only. The reason she gave was that communicating with her in other ways gave her high blood pressure and to feel stress.

c) The respondent offered alternative means of communicating with them, such as by representatives, or written representations.

d) The claimant reiterated her wish for communications to be by email only on 6 October 2023 [137].

e) Thereafter the respondent communicated with the claimant solely by email.

193. The claimant's request for communication by email only therefore was substantially complied with.

194. Her demand only to be contacted once per month however was not strictly complied with. Her rationale in oral evidence for this request was that she was struggling with unplanned or unanticipated events, although she did not express this to the respondent as a way of mitigating her stress reaction. She also said, and this is borne out in the contemporaneous emails, that she found communicating about her employment at all stressful.

195. We considered whether in all the circumstances, if this were treated as a reasonable adjustment request for example, or as a request for an adjustment to

the long-term absence procedure set out in the employment contract, that request was a reasonable one.

196. Our conclusion is that in that form it was not a reasonable request. Whilst limiting a regular welfare catch up to a monthly email exchange would be a reasonable adjustment or request, a requirement only to be contacted once per month for any purpose whatever the circumstances was not reasonable.

197. It was not reasonable because the respondent was contractually entitled to undertake a properly informed review of the claimant's continued employment by Autumn 2023 after 12 months of absence. That task required communication with the claimant. First to seek and obtain consent to the disclosure of medical records and/or an assessment by an OH practitioner. Second, to inform the claimant that the respondent was intending to review her employment and that to warn her of the possible outcome of dismissal. Third it would be expected of a reasonable employer to inform the claimant of the results of the OH report on her health and to seek her comments on it, and on the employment review more generally. In practice it would be impractical and unreasonable (and possibly counterproductive for the claimant) to delay these communications or to send them en masse on a particular day.

198. The claimant did not suggest, for example, certain days or times for communications, she did not avail herself of alternative means of communication suggested by the respondent (such as using representatives), she did not ask for extra time to deal with matters. She in effect declined to engage with the process of employment review.

199. The respondent had offered a variety of channels of communication and had adhered to the one indicated by the claimant.

200. In all the circumstances we are satisfied that the procedure adopted for the review of the claimant's employment and health before termination was fair.

201. Accordingly, we consider that the decision to dismiss for capability on the grounds of ill-health absence was within the range of reasonable responses, was taken after a fair and proper procedure and was in all the circumstances fair.

202. The complaint of unfair dismissal is therefore not well founded and is dismissed.

Approved by Employment Judge Cox

26 October 2026