EMPLOYMENT TRIBUNALS

Claimants: **Miss C Crabb**

Respondent: **Dr Ebenezer Timeyin t/a Thanet Road Surgery**

Heard at: **London South (Ashford)** **On:** **1 & 2 July 2019**

Before: **Employment Judge John Crosfill**

Mr Adkins
Mr Anderson

Representation

Claimant: In person.

Respondent: Initially Mr N Onyekwelu, latterly in person.

JUDGMENT

1. The Claimant's claim for unfair dismissal is well founded.

2. The Claimant's basic award and compensatory awards will be reduced by 50% to reflect her conduct that contributed to the dismissal.

3. The Claimant's compensatory award will be reduced by 75% and calculated only to a date 6 months after the actual dismissal to reflect the possibility that she could have been fairly dismissed or that the employment would have terminated fairly.

4. The Claimant's claim for wrongful dismissal brought under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 succeeds. The Claimant is entitled to damages to be assessed.

5. The Claimant's claims of direct age discrimination brought under the Equality Act 2010 are dismissed.

REASONS

1. The Respondent is a General Practitioner and at all material times worked from the Thanet Road Surgery in Plumstead. The Claimant worked for the Respondent as a Receptionist/Secretary on a part time basis from January 2015 until her summary dismissal on 17 November 2011. She has brought claims for unfair dismissal and direct discrimination because of age.

The hearing

2. At the outset of the hearing the parties agreed that the draft list of issues produced by the tribunal at the case management hearing that took place on 17 May 2017 properly encapsulated the issues that the Tribunal needed to decide. The agreed issues were:

Unfair Dismissal

1. The Respondent admits that the Claimant has sufficient continuity of service to present a claim of unfair dismissal.

2. The Respondent accepts that he dismissed the Claimant.

3. The Tribunal will have to decide whether the Respondent has established that he dismissed the Claimant for a potentially fair reason falling within Sub-section 98(2) of the Employment Rights Act 1996 or some other substantial reason. The Respondent relies upon "conduct" as a potentially fair reason.

4. If the Respondent dismissed the Claimant for a potentially fair reason the tribunal must determine whether the dismissal was fair or unfair applying the test set out in Sub-section 98(4) of the Employment Rights Act 1996. In particular having regard to:

4.1. Whether the Respondent has carried out a reasonable investigation into the alleged misconduct and

4.2. that any belief that the Claimant was guilty of misconduct was formed upon reasonable grounds and

4.3. that the decision to dismiss the Claimant was one which was open to a reasonable employer.

5. If the dismissal was unfair then the Tribunal will need to consider, when assessing whether to make any award of compensation:

5.1. Whether any basic award or compensatory award should be reduced under sections 122(2) and/or 123(6) of the Employment Rights Act 1996 on the grounds that the Claimant caused or contributed to her dismissal; and

5.2. Whether the Claimant might have been or would have been fairly dismissed by the Respondent in any event and if so whether it is just and equitable to reduce any compensatory award to reflect that.

6. Should any compensation be adjusted to reflect any failure, by either party, to comply with a relevant code of practice (here the ACAS Code of Practice on Discipline and Grievances at Work)? If so by how much?

Wrongful dismissal

7. The Respondent accepts that the Claimant was dismissed without notice.

8. The Tribunal will need to determine what notice period the Claimant was entitled to under her contract of employment (subject to the statutory minimum that the Respondent was required to give).

9. Can the Respondent establish as a matter of fact that the Claimant's conduct amounted to a serious breach of contract that entitled him to dismiss the Claimant without notice?

10. If the Claimant was wrongfully dismissed what loss has the Claimant suffered as a consequence?

Direct discrimination because of age.

11. The Claimant defines herself as falling into a younger age group than all other employees of the Respondent.

12. The Claimant's complaints are of direct discrimination because of age contrary to sections 13 and 39 of the Equality Act 2010.

13. The Claimant complains of the following as amounting to less favourable treatment:

13.1. the issue of the Claimant taking time off work to collect her child from school was raised as a disciplinary matter; and

13.2. raising and subsequently relying upon the Claimant signing an insurance form as a reason for dismissing her (essentially she complains of her dismissal); and

13.3. offering the Claimant a series of fixed term contracts rather than permanent employment.

14. The Claimant relies upon the other members of staff as real comparators in respect of the third allegation of less favourable treatment but in respect of the other allegations relies upon hypothetical comparators in the same circumstances but of an older age group.

15. If the Claimant is able to establish any less favourable treatment, applying the burden of proof sat out at section 136 of the Equality Act 2010, was that treatment because of the Claimant's age?

16. *If any less favourable treatment was because of the Claimant's age can the Respondent establish that any such treatment was a proportionate means of achieving a legitimate aim?*

Time limits – equality act claims

17. *Were the claims presented within primary time limit imposed by S123 of the Equality Act 2010 (including considering whether any act 'extends over a period'), and*

18. *If not would it be just and equitable to extend time?*

3. At the outset of the hearing it transpired that the Respondent had failed to comply with the order of the Tribunal to prepare sufficient bundles and witness statements for the use of the Tribunal and witnesses. It seemed that the Respondent had sent a single copy of the bundle to Croydon hearing centre (despite there being no order for this) and had assumed that the matter would be heard by a judge alone. In fact the order specifies how many bundles were required and stated that the matter would be heard by a full tribunal. Mr Onyekwelu apologised for this. We decided that we would have the statements copied by the Tribunal staff but, given the limited resources of the Tribunal, directed that the Respondent have the bundle copied commercially. There were facilities in the vicinity of the tribunal which is located in the town centre in Ashford.

4. Before we broke for the purposes of obtaining sufficient copies of the bundle we explained how the Tribunal would normally receive evidence and the process of making submissions. We explained the normal sitting day and told the parties they could ask for breaks as and when they needed to. Neither party brought any special needs to our attention although the Claimant explained that she had no legal knowledge or experience. As a part of those explanations we put the parties on notice that any judgment would be published.

5. We noted that in the copy of the bundle we had been provided with there was some without prejudice correspondence or communications with ACAS. We informed the parties that we should have no regard to those documents. The parties agreed that we could simply ignore those documents and we did not read them in any detail. Just before we sent the parties out in order that we could read the witness statements the Employment Judge reminded them that it was never too late to resolve their differences if they chose to do so.

6. We informed the parties that we would deal with all issues except for the calculation of remedy and issues of mitigation. We would expect to deal with any issues of contributory fault or whether it would be just and equitable to reduce any compensation as part of our initial decision.

7. We completed our introductions and explanations by 10:27. To our surprise it took Mr Onyekwelu until shortly before 13:00 to accomplish the job of making copies of the bundle. He did not contact the Tribunal during this time and we had begun to be concerned about his whereabouts. We asked our clerk to telephone his offices shortly before he returned. We decided that we would take a break for lunch before starting to hear the evidence rather than start and then shortly thereafter take a lunchbreak. Given the latter applications that were made we record that we did not criticise either Mr Onyekwelu or the Respondent for the delay caused to the proceedings despite the

fact that no explanation was proffered for why it had taken over 2 hours to copy the bundles. We took the view that what was done was done and that as we could still complete the hearing within the allotted time it was pointless to engage in an enquiry as to what had gone wrong.

8. At 14:00 Mr Onyekwulu said that he wanted to argue that some of the allegations of discrimination were out of time. He had previously made an application to the same effect and a decision had been taken by EJ Spencer that the issue would be dealt with at the final hearing. The Employment Judge explained that the question of whether the Claimant's discrimination claims were in time turned on whether she could establish that there was an act extending over a period. That was a question that could best be dealt with after hearing the evidence. He pointed out that the issue had been recorded in the list of issues and was one the tribunal was alive to.

9. We proceeded to hear from the Respondent who had prepared a written statement of his evidence. He was then asked questions by the Claimant. The Respondent was then asked some questions by Mr Anderson and then some questions by the Employment Judge (who had also asked some questions during the evidence or clarified questions asked by the Claimant). There was some brief re-examination. The Respondent answered questions between 14:18 and shortly before 15:45. Mr Onyekwelu told us he anticipated asking the Claimant questions for an hour. The Claimant was tired and had been emotional during the afternoon. We decided that the Claimant should not start her evidence until the following morning. It still looked as if we would have plenty of time to complete the hearing and give a judgment.

10. On the second day of the hearing we were able to start promptly at 10:00. The Claimant was ready to give her evidence and had adopted her witness statement. Just before the Claimant was to be cross examined the Respondent indicated that he had two matters to bring to our attention. He told us that an answer he has given to Mr Anderson the following day had been inaccurate. He had said that he had asked the Claimant to complete time sheets only for two weeks. He then proceeded to say that he believed that 'you' (which we understood to mean the Employment Judge) were biased against him.

11. We asked Mr Onyekwelu whether he had been made aware of this concern. He indicated that he was not and so we put the matter back for 10 minutes in order that Mr Onyekwelu could take instructions about any application his client wanted to make. The Claimant was extremely distressed and wanted to proceed with the hearing.

12. At 10:22 the parties returned and the Employment Judge asked Mr Onyekwelu whether anything arose from what his client had said and whether there was any application that he wanted to make. Mr Onyekwelu said that he needed to ask his client what he wanted to so. The Employment Judge pointed out that that had been the purpose of putting the matter back for 10 minutes and asked how much further time was required to take instructions and to see whether any formal application for recusal would be made. Mr Onyekwelu suggested that he could not take those instructions 'within the walls of the Tribunal'. It appeared that he was asking that the matter should not proceed on that day. We directed Mr Onyekwulu to take instructions as to what, if any, application he wanted to make and to return in 30 minutes with a clear position. We then broke for 30 minutes to permit Mr Onyekwulu to take instructions.

13. At 11:03 Mr Onyekwulu told us that he would not represent the Respondent in respect of any recusal application alleging bias. He said that he needed to take further instructions about carrying on with the substantive case. We then asked the Respondent whether he wanted to pursue an application that the tribunal recuse itself and he said that he did. Mr Onyekwulu asked whether he could be excused and he was told that it was a matter for him.

14. The Respondent was then asked to explain why he was saying the Tribunal was biased. He told us that he had not discussed the matter with Mr Onyekwulu. He then referred to a question asked by the Employment Judge. He said that he had been asked whether there had been any alternative to a dismissal. Our notes and recollection were that he had been asked whether the notes of the dismissal meeting which recorded the Respondent as saying that the possible outcomes of the disciplinary meeting were a final warning or a dismissal were accurate and that he had confirmed that they were.

15. The Respondent said that he believed that we had formed an opinion about the outcome of the case. He went on to complain about being asked whether, when the Claimant had completed an insurance form the Employment judge had asked whether there was any suggestion of the Claimant obtaining a benefit from making good the omission in the insurance form. That question was asked as it was a matter raised by the Practice Manager in the disciplinary meeting notes. He complained that he had also been asked whether as a matter of fact the what the Claimant had written was accurate. He said that that trivialised his concerns. In respect of that latter point the Respondent said that it was irrelevant that the Claimant had completed the form with the correct information she had a 50% chance of doing so if she had put in a random answer.

16. The Respondent referred to the fact that during the explanations the Employment Judge had referred to the outcome of the proceedings being placed on the Internet. He said that this amounted to a threat.

17. The Respondent then referred to the Preliminary Hearing which had been conducted by EJ Crosfill. He said that EJ Crosfill had ‘told the Claimant what to do to carry on with her case’. He suggested that EJ Crosfill had become a prosecutor and legal advisor for the Claimant. He later complained of the fact that EJ Crosfill had drawn up the list of issues in the Case Management Order.

18. Finally, the Respondent said that it demonstrated bias when the tribunal had asked his solicitor to make sufficient copies of the bundles. He said that that had taken 2 hours in a strange town and amounted to a punishment.

19. In considering the application we reminded ourselves of the test we should apply by referring to the following passage of the IDS Handbook on Practice and Procedure:

> *“The leading case on the test for bias is the House of Lords’ judgment in Porter v Magill 2002 2 AC 357, HL. Lord Hope reviewed the case law on impartiality of courts and tribunals and considered the influence of Article 6 of the European Convention on Human Rights, which is incorporated into domestic law by the Human Rights Act 1998. His Lordship noted that the concept of impartiality required not only that the court or tribunal be truly independent and free from actual bias — which is likely to be very difficult to prove — but also that it must not appear in the objective sense to lack these essential qualities, i.e. it must*

also be free from apparent bias. In order to establish whether there was apparent bias in any case, the court or tribunal must consider whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased. This hypothetical observer would be apprised of all the relevant circumstances, including matters not necessarily known to the parties at the time of the hearing, as well as the employment judge's or member's explanations. Furthermore, the hypothetical observer need not apprehend that bias actually existed, nor even that it was 'likely' or 'probable', only that there was a risk that was more than minimal"

20. Applying that test we decided that a hypothetical observer would not conclude that there was any risk of bias. The Employment Judge had informed the members that to his best recollection the preliminary hearing had been unremarkable. The Claimant had attended in person and he had spent time explaining the process and steps needed to progress the matter to a full hearing. The claims had been unclear and he had had to explore these with the Claimant. Having heard that explanation the members agreed with the Employment Judge that the process described was entirely typical of such preliminary hearings. As such there was nothing to suggest to a fair minded observer that the Employment Judge was biased against the Respondent. Ensuring a level playing field, when one side is represented and the other side is not, will often require an Employment Judge to explain practice and procedure to the unrepresented party.

21. The tribunal did not consider that its directions that the Respondent should make copies of the bundle on the first day of the hearing gave rise to any risk of apparent bias. The case management order that had been made was in standard terms and placed the responsibility for the preparation of the bundle on the Respondent. That is not unusual. The Respondent's solicitor had failed to comply with the order in that insufficient copies had been brought to the Tribunal. There was some explanation that a copy had been sent to the Croydon hearing Centre but that was not what had been ordered and in any event more copies had been ordered. The Tribunal noted that when the issue had arisen it had been dealt with calmly and no criticism was made of the Respondent or his solicitor despite the obvious inconvenience to the parties and tribunal. The direction made to obtain copies had appeared a pragmatic one which avoided the need for an adjournment. It had not been envisaged that the task would take over 2 hours. The Tribunal reminded itself that despite the Respondent's failure to explain why it had taken that long to make copies on the Respondent's return no adverse comment was made. The tribunal were not in any sense 'punishing' the Respondent. We consider that the directions made were fair and proportionate. Nothing in this regard gave rise to a risk of apparent bias.

22. We rejected the suggestion that the reference by the Employment Judge to matters being publicly available on the internet gave rise to any risk of apparent bias. We noted that many case management orders now place the parties on notice of this fact and consider that it was entirely appropriate to remind the parties of this. We consider that as this was directed to both parties a fair-minded observer would not assume that the Tribunal were favouring one side or the other. The Tribunal had reminded the parties that it was never too late to reach a compromise but again that was directed to both parties. Rule 3 of the tribunal rules of procedure requires the Tribunal, wherever practical and appropriate, to encourage the parties to resolve their disputes by agreement. We do not consider that any inappropriate pressure was put on either party to settle the case.

23. We did not consider that any of the questions asked by the Employment Judge demonstrated any risk of apparent bias. The notes of the disciplinary meeting suggested, on their face, that a decision had been made to impose some disciplinary sanction at the outset of the meeting. That might go to the question of fairness and the question was relevant. The Employment Judge asked if the note was accurate and the Respondent confirmed that it was. A question about whether the Claimant had stood to gain from completing the form were relevant as it went to the gravity of the allegation and was referred to in the disciplinary hearing. Asking whether the information completed by the Claimant was in fact accurate was at least potentially material when considering the gravity of her error. We certainly did not suggest it was in any way determinative. The Tribunal was dealing with a wrongful dismissal claim as well as an unfair dismissal claim and needed to assess for itself whether the Claimant's conduct amounted to a serious breach of contract. The questions that were asked were all open questions, they were short and there was nothing about how the questions were asked that would suggest that the Employment Judge had taken an adverse view of the Claimant's case.

24. Even taking all of these things together we did not conclude that a fair-minded observer would consider that there was any risk of apparent bias. We would go as far as to say that we believe that at this stage in the proceedings the Tribunal had been patient and respectful to both parties. In particular, we had made no fuss whatsoever when the failure by the Respondent to make copies of bundles had wasted the entire morning of the first day.

25. Once we had dismissed The Respondent's application he asked us if there was a mechanism for appealing that decision. We explained that the decision could be appealed to the Employment Appeal Tribunal and that the time limit for doing so was 42 days. The Employment Judge indicated that the appeal would not be heard straight away. The Respondent then suggested that, if his bias appeal succeeded, then any decision we would make would be irrelevant. The Employment Judge understood The Respondent to be asking for an adjournment of the proceedings in order that any appeal could be dealt with. The Respondent confirmed that that was what he was seeking. When asked the basis for this and The Respondent said that he remained convinced that the Tribunal (or perhaps the Judge) was biased against him. By this time it was 11:55. We again sent the parties out whilst we briefly discussed the application.

26. We informed the Respondent that we would not adjourn the hearing in order to permit him to appeal our decision. We considered that we were mid-hearing and the Claimant was sworn in and about to start her evidence. She was becoming more distressed as the morning went on. We were still able to complete the case and give a decision to the parties. We did not consider that the application for us to recuse ourselves had any real merit and it follows that we do not believe that an appeal would succeed. We were alive to the fact that an appeal on any question of bias might take some months to resolved. The interests of justice did not favour granting an adjournment for the purposes of an appeal.

27. We then enquired whether Mr Onyekwelu intended to represent the Respondent for the remainder of the hearing. Before Mr Onyekwelu gave us a full response the Respondent interjected and said that he did not want Mr Onyekwelu to represent him. No explanation was given for this and we can only assume that the failure of Mr Onyekwelu to support the recusal application had caused difficulties. Mr Onyekwelu then left the hearing room at 12:09.

28. The Respondent then made a further application to adjourn the proceedings He repeated his concerns about bias but was prevented from developing that by the Employment Judge as that matter had already been dealt with. He then argued that he needed an adjournment because he had no legal representation. We adjourned to consider that application at 12:16. We were unanimous in our view that the matter should proceed. We held that the the Respondent had decided to make an application for us to recuse ourselves which his solicitor was not prepared to make on his behalf. Thereafter it was entirely his decision to dispense with the services of his solicitor. The claim was not a high value claim and the dismissal had taken place approximately 18 months before the hearing. The case had already been adjourned. The Claimant was poised to give evidence and has become distressed on a number of occasions whilst the Respondent pressed for an adjournment. We accepted that the Respondent had not anticipated questioning the Claimant himself but noted that the decision to dismiss was his and that he was the only witness for the Respondent. We could be confident that he was aware of all material facts and would know what matters he needed to challenge. We considered that any difficulties he might be in in preparing to ask questions could be mitigated by commencing the Claimant's evidence at 14:30. That would give him 2 hours to prepare. Balancing the various matters we considered that it was not in the interests of justice to allow an adjournment to permit the Respondent to seek alternative representation. It is to be noted that at that stage Mr Onyekwelu had not left the building and it was possible for the Respondent to reconsider his decision to dispense with his services.

29. We record that when we indicated that the parties should withdraw the Respondent did not do so immediately but remained in his seat for more than a few moments. After a short while he was reminded that he needed to leave the room. That reminder was given calmly by the Employment Judge. The Respondent then left the room.

30. We reconvened at 14:30 and were anticipating hearing the Claimant's evidence. She returned to the witness box. The Respondent then sought to renew his application for an adjournment suggesting that it would take him days to prepare to ask the Claimant questions. He referred to Article 6 of the European Convention on Human Rights and Freedoms and suggested that that gave him an absolute right to choose his own legal representative.

31. We once again asked the parties to leave the room whilst we considered this latest application. Having discussed the matter between ourselves we then refused the application. We found as a fact that the Respondent was deliberately attempting to disrupt the proceedings by making repeated applications in order to obtain by filibustering what the tribunal would not grant on the merits (namely an adjournment of the proceedings). We took the view that the Respondent was a well educated professional and that he was quite capable of understanding the decisions that we had made. He was just not prepared to accept them. We found that he acted with the intention of 'forum shopping' for a tribunal he viewed as more sympathetic to his case. We reached those robust conclusions in the knowledge that the Respondent had access to legal advice and that Mr Onyekwelu had declined to support his application for recusal. We viewed the application for the Tribunal to recuse itself as being totally without merit.

32. We rejected the submission made by the Respondent that his right to legal representation entitled him to an adjournment. The Respondent was wrong to say that Article 6 provides for a 'right to legal representation' in tribunal proceedings. That is may be the case in criminal proceedings but not in the tribunal. We accepted that a

person has a right in tribunal proceedings to be represented by 'any person' but that does not mean that they are entitled to an adjournment if, as here, they change their minds about who they want as their representative mid hearing. If that is the case the tribunal would only permit an adjournment to instruct a fresh representative if it was in the interests of justice to do so. That would involve looking at the prejudice to both parties and indeed the interests of tribunal users as a whole.

33. We again considered whether the suggestion that the Respondent was unprepared to cross examine the Claimant was a sufficient reason to grant him an adjournment in the circumstances that had arisen. We considered that the time that we had given the Respondent was sufficient for his preparation given his intimate knowledge of the facts. The Claimant's witness statement was less than 3 pages. It may be that the Respondent had not used the time we had given him time well, apparently spending some time preparing to renew an application we had rejected, but that was his decision.

34. We were conscious that the Claimant had been anticipating giving evidence all day. She had sat in the witness box awaiting cross examination off and on throughout the day. She had complained of the stress of this upon her and stressed that she was very anxious that the proceedings were competed. There was no 'inequality of arms' caused by refusing an adjournment as the Claimant was unrepresented.

35. We had no difficulty in concluding that it was not in the interests of justice to grant the Respondent an adjournment for the purposes of instructing a new legal representative. We had found that the application was tactical but even if we were wrong about that the interests of justice did not favour granting the application. We therefore refused it and invited the Respondent to proceed to ask the Claimant any questions he wished.

36. The Respondent did not ask the Claimant any questions at that stage but asked the Tribunal to explain what rights of appeal there were from a decision of the Tribunal. The Employment Judge pointed out that this was matter that had already been explained. The Respondent responded by saying that he had a 'right' to have this explained to him. The Employment Judge informed the Respondent that he had no right to disrupt the proceedings or to waste the tribunal time. The Employment Judge briefly repeated the fact that there was a right of appeal from the decision of a tribunal but that that this would not interrupt this hearing. He invited The Respondent to ask any questions that he wished.

37. The Respondent responded by saying that he would not ask questions because he believed that the Tribunal would view them as a 'waste of time' (a reference back to the Employment Judge's response to his suggestion he had a right to have matters explained more than once). The Employment Judge explained that asking the Claimant any material questions would not be regarded as a waste of time by the Tribunal and encouraged the Respondent to avail himself of the opportunity to do so. The Respondent repeated that he would not 'want to waste the tribunals time'. He declined to ask any questions.

38. The Employment Judge, with the agreement of the members, proceeded to ask the Claimant about the matters set out in her witness statement. Given the Respondent's stance the Tribunal considered it appropriate to go through the Claimant's statement and to put to her the points raised by the Respondent in his statement. The questioning was open but all obvious material points were covered. The Respondent

was then asked if he had anything further he wanted to ask the Claimant but once again refused to ask any questions.

39. The Claimant then presented her closing submissions. She did not refer to any law but argued that her dismissal was not justified by the facts. We then asked the Respondent whether he wanted to make any closing submissions. He said that he did not wish to do so as anything he said might be 'misconstrued'.

40. We should record that we have really no idea why the Respondent reacted as he did. We consider that there was absolutely nothing said or done in the course of the hearing that justified the suspicion the Respondent had of the Tribunal. It is only fair to record that whilst the Respondent made repeated applications with little or no merit he did so politely. The Tribunal reciprocated and, whilst the hearing was tense, it never became heated.

Findings of fact

41. The Respondent is a General Practitioner who was at all material times in sole practice offering medical services from a surgery referred to as the Thanet Road Surgery. The Claimant has for some years worked as a receptionist or secretary in various GP practices. She took some time off work following the birth of her child but then decided to go back to work.

42. In January 2015 the Respondent was looking for a Practice Receptionist and the Claimant applied for the role. The Claimant was appointed and she was presented with and signed an employment contract that was for a fixed term of 1 year subject to earlier termination by either party upon 1 month's notice in writing. There was an issue before us as to the reason why a fixed term contract was given at that time. The Respondent says that during the recruitment process the Claimant acknowledged that she had been dismissed from her last job as a receptionist for the Welling Medical Practice for poor attendance. The Respondent told us that he had spoken to one of the Doctors at the Welling Medical Centre who confirmed that was the case. He says that a fixed term was decided upon effectively as a probation period. The Claimant denied this and said that she had worked at the Welling Medical Practice when she first decided to return to work after her child was born. She says that she had soon realised that she had come back to work too soon. She had reached an agreement with the HR Manager that she would leave immediately. It seemed to us that that what The Respondent and the Claimant were saying about her leaving the Welling Practice were similar. It may well be the case that The Respondent was told that the employment had been 'terminated' leading him to believe that there was a dismissal. He had no evidence that that was the case. That said, we found the Claimant to be a credible witness who was prepared to acknowledge that that employment had not worked out and accept what she said that namely she left of her own accord.

43. If the Respondent was concerned about performance then providing a fixed term contract was a clumsy way of addressing such concerns. The contract the Claimant was given, and signed, could be terminated upon 1 month's notice within the year and was subject to a probationary period of 6 months when the appointment would be reviewed. Any concerns about performance could just have easily been addressed by an ordinary open-ended contract with the same terms or by a contract with an extended probationary period. We note that the contract is a standard precedent and that some amendments show little understanding of the law. For instance, the contract states that no sick pay at all will be paid. Nevertheless, we accept the Respondent's

evidence that he did have some concerns about whether the Claimant's employment would work out and that his reasons for offering her this form of contract (however misguided) were a reflection of those concerns.

44. Thanet Road Surgery is a small practice. The Respondent is the only doctor. There was a nurse practitioner, Sharon (50s). The administrative team was headed by Charlotte Mears, the Practice Manager (43). The Claimant was expected to carry out both secretarial and receptionist duties (30) there were three part time receptionists (70, 60 and 68-10). In the preceding sentences the references in brackets reflect the Claimant's uncontradicted evidence of the age of each employee.

45. The Claimant worked part time, 20 hours per week spread over 3 days. In fact, the Claimant was generally flexible and would, if necessary, cover the shifts of the other receptionists and staff. Such changes were generally informal.

46. The Claimant's contract of employment contained the following clause that is material to the matters we need to decide:

> *"You may take a reasonable period of unpaid leave to deal with an emergency involving a dependant, This would not normally be a period of more than one or two days."*

47. The contract referred to a disciplinary and grievance procedure but none was shown to us or relied upon by the Respondent. The contract does say that disciplinary matters would be dealt with by the Practice Manage in the first instance.

48. The Claimant started work and, in the early stages, there were no significant performance concerns. The Respondent says that only 5 months in to her contract the Claimant had a period of 6 weeks absence. Contrary to what is said in her contract the Claimant was paid in full for this period. The Claimant told the Employment Judge that she was surprised and grateful for this and understood that payment had been made at the request of Charlotte Mead. The Claimant had an operation and followed medical advice as to the period during which she should stay off work. Whilst the Respondent suggested to us that this was a significant disruption he appears to have been benevolent towards the Claimant at the time and raised no issues at the time. The Claimant had two further periods of sick leave during the year. One of those absences was not the Claimant's own sickness but that of her child.

49. The Claimant was offered and signed a further 1 year fixed term contract which she signed on 20 January 2016. That contract was, in all material respects, the same as the first one with the same reference to a probation period and notice. The provision permitting time off for emergencies remained the same. The Respondent says that the decision to offer a fixed term contract was because he remained concerned about the amount of absence the Claimant had had in her first year of employment. We accept that that is the explanation despite the fact that there had been no formal absence management process during the first year. We consider that the Claimant at that time being treated very well by the practice and would be entirely unaware of any concerns.

50. In April 2016 the Claimant sent the Respondent a text message in which she explained that she was in financial difficulties and, as a last resort, wondered whether he would give her a loan. To his immense credit the Respondent agreed to make an interest free loan to the Claimant recouping £100 per month from her wages. We find that at

the time there were no significant concerns about the Claimant or her work. It is sad that the Respondent in the course of these proceedings catagorised the Claimant's financial situation as being driven by 'addictions' to cigarettes and gambling. Whilst the Claimant did smoke and did take a holiday in Las Vegas these comments were unfair and ill founded.

51. In 2016 the Claimant had just 4 days off work. These were for a mixture of reasons. Some days off were follow up appointments following her operation and one was an occasion when her daughter was sick. That was on 25 January 2016. The Claimant had contacted Charlotte Mead early in the morning to inform her of her daughter's sickness and the fact that she was struggling to make arrangements. At Charlotte Mead's suggestion she came in only to open up the surgery before leaving to take her daughter to the Doctor. The Claimant kept Charlotte Mead informed via text during the day.

52. The Respondent in his witness statement complains that the Claimant had no medical reports to cover these absences and describes them as 'unauthorised'. We find that that is a reflection of the soured relationship since these proceedings were intimated. The Respondent ought to know that an employee is not generally required to get a medical certificate to support absences of less than 7 days to obtain statutory sick pay and there was nothing in the Claimant's contract that required her to do so. In any event there was no evidence that the Claimant was ever asked to prove the reasons for these absences. We find that the Respondent's complaints about a lack of medical reports are an indication of how the relationship has soured before and during these proceedings. We find that during this period there was nothing about the 4 days that the Claimant took off that would reasonably have caused any concern.

53. In October 2016 the Respondent wrote to the Claimant expressing the view that she was not working for the full 18 hours that she was contracted to do. We find that the reality was that the Claimant was not always working the days and hours that she had agreed to do but instead she, together with the other receptionists, were used to swopping and changing around and occasionally making up time when she was late. This we find was common practice and was referred to by the Claimant in her text exchange with Charlotte Mead on 25 January 2016. Whist we accept that the Claimant was not falling short of her contracted hours The Respondent might reasonably have thought she was. He decided that she should be asked to sign time sheets. However, when the Claimant asked whether she was being singled out, he informed her that she need not continue with the practice. There was some disagreement whether that was after just one day or a fortnight but that was immaterial. The reality was that the Respondent's concerns at that stage were not sufficiently serious to justify continuing with this practice. What is clear is that he expected a slightly more formal approach to working than had hitherto been the case. The Claimant told us, and we accept because they were included in the bundle, that she continued to complete time sheets for a period after the requirement was dropped. These demonstrate that that the Claimant was working her contracted hours but also that the system of swopping shifts still continued. The Claimant told us, and we accept, that this was convenient for all of the receptionists and was not just an indulgence for her. That said it was not a practice approved of by the Respondent but must have been tolerated by Charlotte Mead.

54. The Respondent says that in January 2017 the Claimant was offered a further fixed term contract but declined to sign it. Whilst the Respondent says that he was not prepared to provide the Claimant with a permanent contract he did not insist that the

Claimant sign any new contract and from then on the employment was effectively open ended.

55. The Claimant had 5 days off in the first 6 months of 2017. Again, that has been catagorised as ‘unauthorised absence’ by the Respondent. The Claimant told us and we accept, that these absences were for a variety of reasons but included occasions when her daughter was off sick. The Claimant very frankly accepted that any absence from the surgery would cause some disruption. She told us, and we accept that whenever she was absent she would take steps to quickly catch up with any urgent secretarial work and in particular referrals to other medical professionals.

56. During this period the Claimant asked the Respondent for a further loan of £700. Once again the Respondent agreed to help. The Claimant was very grateful and thanked Dr Timyin in a text message. We conclude that at this stage the relationship remained good despite any concerns about the Claimant’s attendance.

57. The Claimant did not attend work on 25 August 2017. She had been in hospital with her sister who had gone into labour. She sent the Respondent a text message apologising for this at the end of the day. On 29 August 2017 the Claimant was at work and Charlotte Mead was on holiday. At about lunchtime the Claimant left in order to assist her sister who’s (we assume) elder child was also in hospital and needed a lumbar puncture. The Claimant had attended work that day having spent the night in hospital with her sister. The Claimant did not ask the Respondent’s permission before she went. The Claimant was at pains to stress that she did not abandon the reception and that there was a receptionist present so the patients could still be seen. We accept the Claimant’s evidence in this regard.

58. On the same day the Respondent wrote to the Claimant asking her to explain the reasons for leaving early. It seems that that letter may not have arrived in the post as the Claimant had not received it before the Respondent asked her to attend a meeting at the surgery on 12 September 2017. The purpose of the meeting was to discuss that absence. Notes of the meeting were included in the bundle. Those notes are sparse but record a discussion about whether the Claimant had received a copy of the Respondent’s letter. She was then given a copy. She was then asked whether she wanted to increase her hours to 20 per week. She agreed to do so. The Respondent is recorded as saying that she must work to the set hours agreed. It seems that the issue of the absence on 29 August 2017 was left until the Claimant responded to The Respondent’s letter. During this meeting the Claimant raised the question of why her contract stated that she was not entitled to sick pay. She also complained that her pay was the same as the cleaner. We find that raising these issues at this point did nothing to improve the relationship.

59. Following the meeting the Claimant responded to the Respondent’s letter. She explained the circumstances that caused her to leave work. She apologised and said that she recognised that a text message was not a proper manner in which to communicate an issue like this. She did explain the difficulty she had faced and the treatment her sister and niece were having at that time. She said that she liked her job and thought that she and the Respondent had a good working relationship. She thanked the Respondent for his help as her ‘boss’. The Respondent did not respond immediately.

60. On 5 September 2017 the Claimant took a day of sick leave. Unfortunately, that meant that she missed a pre-booked training course and as such the Respondent was out of pocket in respect of the training fee of £200.

61. On 19 September 2017 the Claimant left work at 12.45. Her reasons for doing so were that she was in receipt of benefits that were awarded on the basis that she lived alone. The benefits agency had received an anonymous report that she was co-habiting and demanded an explanation threatening to cut of the benefit. The Claimant made an appointment to sort it out immediately. The Respondent has alleged that the Claimant was instructed to always ask him if she needed time off. The Claimant denies that there was any such instruction. She accepted that she needed to ask her line manager or somebody senior to her but not specifically the Respondent. She accepts that on this occasion she did not ask permission before leaving. She did thereafter communicate with Charlotte Mead by text message. We find that on this particular occasion the Charlotte Mead did suggest to the Claimant that she should not leave without talking to the Respondent. That is supported by a document in the bundle compiled and signed by Charlotte Mead that records that instruction. However, we note that there is no other occasion where such an instruction is recorded. We have regard to what was said later in the disciplinary meeting and the contract of employment and conclude that generally it was acceptable for the Claimant to inform Charlotte Mead of any absences and there was no clear instruction to the contrary.

62. We accept that the Claimant was under considerable financial pressure at this time and in general and that the threat of losing her benefits would greatly increase that pressure. That said we consider that it would have been possible for the Claimant to have explained to the benefits agency that she needed to work on that day and to have made any necessary appointment outside working hours.

63. The Claimant did not attend work on 10 October 2017. She had arranged to swop her shift with another member of staff and had offered to work on 11 October 2019. Charlotte Mead told her that she should not do this and she did not work that day. On 11 October 2017 the Respondent sent the Claimant a letter with the heading "Warning Letter". He said this:

> *"On 29th August 2017, you came to work at 9:03 AM and left at 11:03 AM without permission. You left without telling any member of staff. I have read your response to my letter of 29/8/17. We have held meetings with you in the past regarding your attendance and hours of work you do*
>
> *On Tuesday 10th of October 2017, you did not come to work but offered to come on Wednesday, 11th October 2017. This was rightly rejected by the practice manager.*
>
> *As you are aware, this is a GP practice and we are all here to care for patients who are unwell. Your attitude to work is putting patients' lives at risk.*
>
> *It is impossible to live to come to work when you like and leave when you like.*
>
> *You will be required to work on the days and hours that had been agreed. You will not be able to choose when to come to work and when to leave.*
>
> *Any further deviation from the agreed days and hours will be followed by disciplinary action and this may include a dismissal."*

64. On 3 November 2017 a patient of the practice dropped off at the surgery a handwritten note addressed to the Claimant. The patient explained that they had asked the Respondent to complete a form provided by their insurance company. The patient had booked a holiday but, because they had been scheduled to have a knee operation, needed to cancel the holiday and wished to claim from their travel insurance. In the note to the Claimant the patient said that the insurance company had returned the form because the Respondent had omitted to complete one question which involved ticking a yes or no box in answer to the question *"at any time during the 12 months before the trip was booked or the insurance policy was taken out with us (date shown above), has your patient been prescribed any medication for this Condition or any directly related condition (as above)"*. At the top of the form in block capitals were the words "IMPORTANT: THIS FORM IS TO BE COMPLETED BY THE PATIENT'S MEDICAL PRACTITIONER IN BLOCK CAPITALS". The patients note did not come to the Claimant's attention until the morning of 6 November 2017 when she saw it on the reception desk. At that stage other than noting the request she did not do anything with it.

65. During the morning of 6 November 2017 the Claimant received a call from the school that her child attended. The school informed her that her daughter needed to be collected as she had a stomach upset and had soiled herself. Charlotte Mead was in attendance on that day and was aware that the Claimant needed to leave. We accept the Claimant's evidence that Charlotte Mead understood that the Claimant needed to go to pick up her daughter and that she made no objection whatsoever. We accept the Claimant's evidence that she was not told that she needed to ask the Respondent before she went. When the Claimant left she did not know whether she would be able to come back in to work later. Having tried to make arrangements for her daughter she sent a text confirming that she would not be returning. The Claimant did not attend work following day 7 November 2017 either. She told us, and we accept, she honestly believed that working in a healthcare setting and caring for somebody with a stomach upset and diarrhoea she should not return to work for 24 hours. She kept her child off school for the same reasons. We accept the Claimant's evidence because she was generally a credible witness and because it accords with common sense.

66. On 8 November 2017 the Respondent sent a letter to the Claimant inviting her to a disciplinary meeting to take place on Thursday, 16 November 2017. He said this:

> *"I am inviting you to meeting to discuss your absence at work. You left at 1130 on Monday, 6 November 2017 and did not return to work. You failed to turn up for work the following day. We did not call the surgery to explain what you are going be absent from work. I understand you sent a text message to the practice manager……*
>
> *I will strongly advise you to come to this meeting with somebody. The outcome of this meeting may result in dismissal."*

67. On 9 November 2017 the Claimant returned to work as normal. The letter from the patient and the accompanying insurance form had been placed on the Claimant's desk. The Claimant told us and we accept that she was told by Charlotte Mead that the patient had been chasing for a response. Claimant was anxious to assist. She completed the form herself indicating that the patient had not been given any medication for the same condition. She initialled the form, sent a copy to the patient and placed a further copy in the Respondent's postal tray.

68. On Monday, 13 November 2017 the Claimant was asked to attend a meeting with the Respondent and Charlotte Mead. Charlotte Mead took notes of that meeting although they are very brief. In short, the Claimant was asked whether she had signed the form and said that she had done so. The Respondent had noted that she had initialled it. The Respondent told her it is unacceptable that only he could sign or amend medical insurance forms he went on to inform her that she was suspended on full pay until the situation had been investigated. On the same day the Respondent wrote to the Claimant informing her that she was suspended on full pay and that the further allegation of misconduct would be investigated at the disciplinary meeting on 16 November 2017. He stated: *"further to the meeting practice manager and I had with you today, signing a medical document when you shouldn't constitutes a case of gross misconduct".*

69. On 16 November 2017 the Claimant attended a disciplinary meeting. The Respondent conducted this meeting and Charlotte Mead took notes. The Claimant was asked whether she was intending to bring anyone with and confirmed that she was not. Before there was any discussion of the allegations against the Claimant the notes of the meeting record that The Respondent said: *"that this meeting has 2 outcomes a final warning or dismissal"*. The Employment Judge asked the Respondent during his evidence whether that record was correct and he confirmed that it was. We therefore find that at the outset of the disciplinary meeting the Respondent had already decided that there would be disciplinary action against the Claimant and was simply debating what that action should be. At that stage there had been no exploration as to whether the Claimant had any good cause for signing the document or whether there were any mitigating circumstances.

70. After that, the first matter discussed at the meeting was the Claimant absence from work on the 6 and 7 November 2017. The Claimant explained that she had left work in circumstances where a child had fallen sick she had initially thought that she would be able to return to work and had left in circumstances where both Charlotte Mead and the nurse practitioner were present. When she had taken her child home she had nobody to care for her and could not return to work she had sent the practice manager a text to say that and, when her child was still unwell the following day had sent a further message to share she would not be coming in.

71. We consider that the Respondent's response was inconsistent with the action that he subsequently took. The Tribunal find that the Claimant could have reasonably believed that the Respondent had accepted her explanations for her recent absence. The notes say the following:

> *"[The Respondent] said that he accepts that no child should suffer if they are unwell then they need collecting from school. Re the absence Tuesday 7th we ideally need more notice either call [Charlotte Mead] or myself by phone not text to say you will be absence [sic] in the practice opening times call the surgery to inform [Charlotte Mead] or [The Respondent]….*
>
> *[The Respondent] asked Charlotte Crabb if she was able to work 20 hours per week. Charlotte Crabb replied, yes she can."*

72. The Respondent then raised the issue of the insurance form and asked the Claimant why she thought it was okay for her to complete and initial it. The Claimant from the notes appears to have said that she never thought it was not okay to initial it. She is recorded as saying that she left a copy so that the Respondent knew that it had been completed. She said that she had any doubt that it was wrong should never have done that. She said she was purely helping the patient at all times as this is what had been requested in the

patient's letter. She is recorded as apologising and saying that she will never sign any document again. Neither party disputed that that was the gist of the discussion between them. The Claimant did not place any emphasis during the disciplinary meeting on the fact that the form and letter had been placed on her desk, with the implication that she should deal with it. This was a matter that she raised before us but not at any earlier stage.

73. At this stage the Respondent is recorded as asking Charlotte Mead her opinion (wrongly recorded as 'option'). Charlotte Mead has noted that she said *"I generally believe that the Claimant signed this was an accident[al] error and was a mistake to just help the patient. She has not gained anything from this. We as a practice will use this [as a] learning point for all and will remind people that it [is] not acceptable. I have no problem with CC work she works well and gets jobs done that I ask her I have no issue with her work"*.

74. The meeting concluded with the Respondent saying that he would have a meeting with Charlotte Mead following week and outcome decision will be made then. The Claimant was suspended on full pay pending a decision. As a matter of fact, the Respondent reached an almost immediate decision (apparently without a meeting with Charlotte Mead taking place). On 17 November 2017 he wrote to the Claimant and dismissed her with immediate effect. He said this:

> *"As you are aware, we have had meetings with you regarding your unauthorised absence from duty with a view to helping you. Despite the warning and a fair chance to mend your ways, there has been no change in your habit of taking leaves [sic] without prior approval. I have come to conclusion this will not change.*
>
> *I have taken the view that signing a medico-legal document which you are not supposed to sign was a case of gross misconduct.*
>
> *I have been left with no choice but to terminate your appointment with the practice with immediate effect.*
>
> *You have a right to appeal against this decision if you have any new evidence."*

75. In his witness statement the Respondent confirmed that his reasons for dismissing the Claimant included the Claimant's absences from work including those on 6 and 7 November 2017 as well as the fact that she had completed and initialled the insurance form. We find that whilst the Respondent considered that amending the insurance form was more serious a matter than the Claimant's absences from work he nevertheless dismissed for both reasons taken cumulatively. That is the natural reading of his dismissal letter and is consistent with the evidence he gave the tribunal.

76. The Claimant did not appeal her dismissal but instigated the present proceedings having first contacted ACAS.

<u>The law to be applied</u>

<u>The burden and standard of proof</u>

77. The standard of proof that we must apply in all of the claims is the civil standard, that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

78. The burden of proof in claims brought under the Equality Act 2010 is governed by

section 136 of that act and provides that, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the Respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**.

79. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said *'the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, 'there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race''*. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim.

Unfair dismissal

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

> *98 General.*
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*
>
> *(2) A reason falls within this subsection if it—*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee*
>
> *(c) is that the employee was redundant, or*

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

(3) …..

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

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

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

81. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': ***Thomson v Alloa Motor Co Ltd*** **[1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable ***JP Morgan Securities plc v Ktorza*** **UKEAT/0311/16**.

82. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129.**

83. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

84. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**.

85. In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee ***A v B*** **[2003] IRLR 405**. ***A v B*** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not.

However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions ***CRO Ports London Ltd v Mr P Wiltshire*** **UKEAT/0344/14/DM**.

86. Where an employer dismisses an employee for more than one act of misconduct the Tribunal need to consider whether the employer had composite or separate reasons for the dismissal. In ***Barchester Healthcare Limited v Tayeh*** **UKEAT/0281/11/LA** the EAT explained the position (the decision being upheld on appeal) as follows:

> 34. Where, as here, there was more than one charge, a Tribunal should keep in mind the question whether the charges were regarded by the employer as cumulative or stood on their own.
>
> 35. If the charges were cumulative, in the sense that all of them together formed the principal reason for dismissal, it would be fatal to the fairness of the dismissal if any significant charge were found to have been taken into account without reasonable grounds: see Smith v City of Glasgow DC (1987) IRLR 326. In that case an employee was dismissed for unsatisfactory performance of his duties. Three main allegations were relied on cumulatively when reaching the decision to dismiss. One of those was not established. The Tribunal nevertheless held the dismissal to be fair. The employee's appeal was allowed. Giving the leading speech in the House of Lords, Lord Mackay said –
>
> "To accept as a reasonably sufficient reason for dismissal a reason which, at least, in respect of an important part was neither established in fact nor believed to be true on reasonable grounds is, in my opinion, an error of law. The Industrial Tribunal fell into this error in this case."
>
> 36. If, however, each charge stood on its own, for example independent instances of gross misconduct such that the employer would have dismissed for any of them without the other, then they would require separate consideration in determining whether it was reasonable to dismiss.
>
> 37. Take an example. Suppose that an employer dismissed an employee for two charges of theft, committed on different occasions, and each independently considered by the employer to amount to gross misconduct. The Tribunal would have to consider each separately. It might be reasonable (applying section 98(4)) to dismiss for one of the charges of theft even if it were not reasonable to dismiss for the other (if for example one had been properly investigated but not the other).

87. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

88. Unless the employee seeks reinstatement or re-engagement the Tribunal must consider making both a basic and compensatory award. ***Polkey v A E Dayton Services Ltd*** **[1987] IRLR 503** is authority for the proposition that in assessing what compensation is 'just and equitable' an employment tribunal are entitled to have regard to the possibility that had the employer acted fairly there might or would have been a dismissal in any event.The proper approach to hypothetical as opposed to real events is that set out in ***Software 2000 Ltd v Andrews*** **[2007] IRLR 569** although that now needs to be understood in the light of the repeal of the statutory dismissal procedures (see the references to Section 98A(2)). Elias J (P) (as he then was) gave the following guidance:

"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the tribunal may determine:

(a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely."

89. Following the repeal of the statutory dismissal procedure in ***Ministry of Justice v Parry*** **[2013] ICR 311** it was said (by Langstaff J (P)):

> *"We should add that some of the way in which this subject is dealt with in Harvey has the capacity to be misleading. At para 2558 (Vol 1, D1) it cites Software 2000 Ltd v Andrews [2007] IRLR 568, [2007] ICR 825, and accurately quotes a lengthy passage from the judgment of the EAT given by Elias P. Under para 54, at point (7) under in his distillation of the effect of the authorities he says:*
>
> *"(7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the employer has satisfied it-the onus being firmly on the employer-that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2); (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly . . . ."*
>
> *Unfortunately, it is not made clear in the text of Harvey that this part of the decision is no longer appropriate guidance, since s 98A(2) was in force at the time it was delivered, and has been repealed since. When it was in force the range of chance of dismissal met a watershed at 50% above which – by however little or however much – a completely fair hypothetical dismissal was to be assumed for the purposes of compensation to be awarded for an actual one already held unfair. It is not in force any more. Chance of dismissal now runs across the whole spectrum from zero to 100%, as assessed by the tribunal. It would therefore be best if this part of the otherwise very helpful guidance were no longer put forward as if it might be relied upon.*

Wrongful dismissal

90. An employee is wrongfully dismissed when the employer terminates the contract of employment in a manner which amounts to a breach of its terms. Contracts of employment generally, and in this case do, provide that either party may terminate the contract upon notice. Section 86 of the Employment Rights Act 1996 provides for minimum periods of notice in certain circumstances.

91. In addition to any right to give notice a contract of employment, in common with any

other contract, may be terminated by the "innocent party" if the "guilty party" acts in a manner which amounts to a serious or repudiatory breach of contract. In the employment context this is usually referred to as "gross misconduct".

92. To amount to "gross misconduct" the conduct must be such that it *'must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment'* ***Neary v Dean of Westminster*** **[1999] IRLR 288**. Gross misconduct may be established without proving dishonesty or wilful conduct. Gross negligence that undermines trust and confidence will suffice. Whether it does so in any particular circumstances is a question of fact and judgment for the Tribunal ***Adesokan v Sainsbury's Supermarkets Ltd*** **[2017] EWCA Civ 22**.

93. The question of whether there was or was not any conduct that could be categorised as "gross-misconduct" is an objective one for the employment tribunal which must make its own findings of fact and is not bound by any conclusion or belief of the employer although the reaction of the Employer may be a relevant matter to take into account.

Direct Discrimination

94. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

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

    (2) If the protected characteristic is age then A does not discriminate against B if A can show that A's treatment of B is a proportionate means of achieving a legitimate aim."

95. In order to establish less favourable treatment it is necessary to show that the claimant has been treated less favourably than a comparator not sharing her protected characteristic. Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by 'circumstances' for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances.

96. The proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572**.

97. Section 39(2)(d) of the Equality Act 2010 makes it unlawful to discriminate against an employee by subjecting her to a 'detriment'.

98. Given the conclusions of the Tribunal below it is unnecessary to set out our understanding of the defence afforded by Section 13(2).

Discussion and Conclusions – Unfair dismissal

99. As set out above, where it is accepted by the employer that the employee has sufficient continuity of service to present a claim of unfair dismissal, and where it is accepted that there was a dismissal, the employer bears the burden of showing that the principal reason for the dismissal was for a potentially fair reason. In the present case The Respondent says that his reasons for the dismissal were those set out in his letter of dismissal.

100. We are satisfied that the principal reason for dismissal were those set out in the letter of dismissal. Namely, the fact that the Claimant had taken time off work on 6 and 7 November 2017 against a background of previous absences and that she had completed and initialled an insurance form that the Respondent reasonably believed should have been completed by him. The Claimant really could not point towards any evidence which showed there was another reason for her dismissal. She suggested tentatively that she was dismissed as soon as she had repaid her loans to the Respondent. We do not accept that either the taking of the loans or the fact they were repaid provided the reason for dismissal. At its highest the Claimant's argument might support the proposition that the repayment of the loan informed the timing of the dismissal but does nothing to explain the reasons. We explain below that we do not find that the Claimant age played any part in her dismissal either.

101. We would accept that the Claimant's amendment to the insurance form could be categorised as 'Conduct' within the meaning of Section 98(2)(b) of the Employment Rights Act 1996. The Claimant herself accepted that her actions could be the subject of a reasonable complaint when she apologised for her error and promised that it would not be repeated. As such the conduct impinges upon the employment relationship see ***Thomson v Alloa Motor Co Ltd***.

102. Absence from work through ill health does not easily fall into the category of 'conduct' and is generally considered to be a capability issue. That said, capability is a further potentially fair reason for dismissal. However, we accept that the may be circumstances surrounding absences which give rise to questions of conduct. These could include taking absences on a false basis, failing to notify the employer of any absences or, as has been suggested here, leaving the place employment without asking permission. Whilst we conclude below that certain of the Claimants absences fell squarely within the terms of her employment contract we are satisfied that there were some aspects of the Claimant's attendance record which could properly be described as conduct. The Claimant has accepted one occasion when she left the workplace without notifying a senior manager (see above 19 September 2017). Given that the Respondent took into account the whole attendance record we consider that as a whole to be capable of amounting to Conduct even if some parts of it and in particular the final absence could not properly be categorised as misconduct.

103. As we have set out above in our findings of fact the Respondent dismissed the Claimant for a composite reason. That reason included matters which could properly fall within the definition of 'conduct'. We are satisfied that that composite reason was the sole reason for the dismissal. The dismissal was therefore for a potentially fair reason.

104. We therefore turn to the question of whether the dismissal was fair or unfair applying the test set out in Section 98(4) of the Employment Rights Act 1996. We remind ourselves that it is not for the tribunal to substitute its view in relation to any

procedural or substantive matter. The question is always whether or not the employer's actions fell within a band of reasonable responses. We must have regard to the fact that the Respondent is a sole practitioner and his business has limited resources to deal with disciplinary matters. We must look at matters in the round as well as individually. The following matters were those that we considered the most important but we considered all of the evidence and submissions presented to us and regret that the Respondent chose not to participate in the later parts of the hearing.

105. As set out above where conduct is the reason for the dismissal fairness will generally demand a reasonable investigation. The ACAS statutory code of practice says:

> *5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*
>
> *6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*

106. As set out above there was no separate investigatory meeting to discuss the Claimant's absence from work on 6 & 7 November 2017 although the was an investigatory meeting in relation to the Claimant signing the insurance form. The Respondent conducted both that investigatory meeting and the disciplinary meeting.

107. We considered whether the investigation into the Claimant's absences was reasonable. The Respondent categorised all of the Claimants absences as "unauthorised". It is unusual to categorise sickness absences as equating to unauthorised absences. A reasonable employer would recognise that on occasions employees will fall ill and be unable to work. The Claimants contract of employment recognises this and she was required to let the Charlotte Mead know if she was not going to be at work. We consider that a reasonable employer would recognise a distinction between taking action because of a poor absence record and taking action because of a failure to properly report absences or ask permission to leave work. Investigating the former might simply be a matter of checking that the absences were as recorded and the reasons for them. Investigating the latter would require the employer to establish whether or not the employee had properly followed any absence reporting instructions.

108. The dismissal letter makes it clear that a matter that has been taken into account in reaching the decision to dismiss was that the Claimant had taken leave 'without prior approval'. The Respondent's witness statement at paragraph 35 records what he says is an admission by the Claimant that she did not telephone the practice on 6 or 7 November 2017 to inform the practice of her absence. It is therefore clear that the extent to which the Claimant complied with the requirement to report or seek permission to be away from work was an issue.

109. On 6 November 2017 the Claimant had in fact been at work. When she left it was with the knowledge of Charlotte Mead. She had sent a text when she knew that she was not returning to work and a further text saying that she would not be working the following day. The question of whether this absence was "unauthorised" whilst

highlighted in the invitation to a disciplinary meeting and raised by the Claimant at the disciplinary meeting does not appear to have been explored in any way. This was an important step in the investigation if, as he did, he was going to come to the conclusion that *"Despite the warning and a fair chance to mend your ways, there's been no change in your habit of taking leaves without prior approval*". Quite clearly the Claimant was saying that she had asked approval before she left and had been given it by Charlotte Mead. Charlotte Mead's account does not appear to have been taken separately and it is not at all clear that her account differed in any way from the Claimant's. We find that a reasonable employer would have made it clear precisely what wrongdoing was being investigated and if it was suggested that a employee had not properly followed a procedure the failing would have been identified and the explanation if any investigated. We conclude that did not happen here. In that respect we consider that there was unfairness to the Claimant.

110. In respect of both the allegations faced by the Claimant we have considered whether the investigation was improper because The Respondent formed a concluded view at too early a stage. The ACAS code and the general requirement for fairness suggest that a reasonable employer would be expected to keep an open mind about whether or not to impose any disciplinary action until it had heard from the employee at a disciplinary meeting. We consider that that is so even where the employee admits to misconduct because the disciplinary meeting is also the opportunity to put forward matters of mitigation. On his own account the Respondent opened the meeting with an announcement that the Claimant would either be dismissed or given a final written warning. His invitation letter dated 13 November 2017 suggests that he had already concluded that the actions of the Claimant were gross misconduct. We find that that is the case. At that stage the Claimant had not been asked to explain why she had signed the insurance form or her understanding of what she could or should not do on behalf of the Respondent. She had not had an opportunity to put forward any mitigation. Whilst we appreciate that this is a very small business, the risks inherent in one individual both investigating and determining any disciplinary charge could have been avoided by asking Charlotte Mead or the nurse practitioner to undertake the investigation. Even if that were considered to be inappropriate it was unfair to determine and announce in advance of hearing from the Claimant that a disciplinary sanction was inevitable.

111. We consider that the Respondent was entitled to accept the Claimant's admission that she had amended the insurance form at face value. During the disciplinary meeting the Claimant said that she did not know that she ought not to have done that. There does not appear to have been any discussion about whether or not that should have been obvious to the Claimant. The Respondent considered that it went without saying that a secretary should not sign or initial any form that conveyed any medical information to a third party.

112. Whilst we consider that some employers might have explored the matter further we believe we would be falling into the trap of substitution if we were to criticise The Respondent for failing to investigate the extent to which the Claimant understood the boundaries of what she was or was not entitled to do. In the Respondent's favour the insurance form itself says it should be completed by a medical practitioner and from that he could ordinarily expect the matter to be referred back to him. In addition, the patient's request was that the matter be referred back to The Respondent. He also reasonably understood that the Claimant had worked as a GP's receptionist or secretary for some time. Whilst we reach different conclusions when considering the

matter for ourselves in the wrongful dismissal claim that does not affect our finding that this particular matter was adequately investigated in the sense that the steps taken fell within a band of reasonable responses.

113. We conclude that the Respondent had reasonable grounds to consider that the Claimant had exceeded her authority and signed a document that should have been signed by a doctor. That said the evidence before the Respondent was that the Claimant had done so openly and had not concealed her actions in any way. She had acted with good, if misguided intentions and had not stood to gain in any way from her actions. These were matters that any reasonable employer would need to take into account in deciding what sanction was appropriate.

114. Had this been the only matter for which the Claimant been dismissed then we would have had to consider whether the decision to dismiss on this ground alone fell within the band of reasonable responses. On our findings above however, this was not the only reason for the dismissal. We have found that the Respondent's reasons were composite rather than individual reasons and therefore we need to consider whether the dismissal for that that composite reason was fair or unfair.

115. We have looked at the events leading up to the Respondent giving the Claimant a warning in October in respect of her attendance. There were mixed reasons why the Claimant had taken time off work. Some but few recent incidents were due to her own ill-health. Some were due to her daughter's ill-health. The significant incident on 25 August 2017 was because of her sister's health and that of her child. Finally, the Claimant's financial circumstances caused her to have time off on 19 September 2017. The Claimant accepts that in respect of some of these absences her method and timing of contacting the Respondent was less than ideal. We consider that the Respondent could quite properly have considered that the Claimant's absence on 19 September 2017 was avoidable and that she should have asked his permission before leaving the workplace. We consider overall that it would have been reasonable for the Respondent to issue the Claimant with a written warning on 11 October 2017 had he avoided criticising the Claimant for any reasonable time off to deal with family emergencies permitted by her contract.

116. We have gone on to consider whether or not it was reasonable for the Respondent to instigate disciplinary action following the Claimants absences on 6 & 7 October 2017. We find that in doing so the Respondent has failed to have regard to the fact that the Claimant's contract of employment expressly permits her to take time off for family emergencies. This contractual provision in many respects mirrors the statutory right afforded by section 57A of the Employment Rights Act 1996. The Claimant did not expressly refer to that right but did rely on the terms in her contract to suggest that the Respondent had behaved unfairly in relying upon the last of her absences as a ground for her dismissal.

117. We agree with the Claimant. Whilst the Claimant did not rely upon the terms of her contract of employment in the course of the disciplinary meeting a reasonable employer would have been aware of the terms upon which the Claimant worked and ought to have taken the contractual terms into account in deciding whether there was any misconduct. It seems to us that the circumstances that arose on 6 November 2017 were exactly those envisaged by the contractual provision allowing time off for family emergencies. The Claimant's child was ill, being sent home from school, and needed somebody to care for her. The Claimant explained that there was nobody else to do so. The evidence before the disciplinary hearing was that Charlotte Mead knew

why the Claimant was going to leave work and thereafter the Claimant corresponded by text message keeping her updated.

118. We find that the Respondent's conclusion that this particular absence demonstrated that the Claimant had 'failed to mend her ways' was unfair because it failed to take into account a material matter namely that the Claimant was contractually entitled to take this time off in the circumstances that had arisen. The facts did not support any conclusion that the Claimant was taking absences without 'prior approval' the Claimant had obtained the approval of Charlotte Mead.

119. Had we been specifically addressed on it we might have reached the similar conclusions in respect of some other absences. It seems to us that it was arguable that the absence on 25 and 29 August 2017 may well have been absences covered by section 57A of the Employment Rights Act 1996 but in the absence of argument we reach no firm conclusion in that regard.

120. A further matter which the tribunal consider to add to the unfairness is that, whilst the Claimant was offered an appeal, the right to appeal was limited to one where she could provide 'new evidence'. There was no indication that the appeal would be to anybody other than the Respondent. We consider that that was a very limited right of appeal although we accept that the Claimant did not take up the limited offer of an appeal and we cannot be certain that the Respondent would have heard the appeal if she had. On our findings this was a case where a reasonable employer would recognise proper review of the decision, whether based on new evidence or not, was a necessary procedural safeguard. Whilst this is a very small business there was a Nurse Practitioner, a Practice Manager and the Respondent. The contract suggests that the Practice Manager would be the person who would take any disciplinary decisions. There is no good reason in our view why the Respondent needed to investigate and take the disciplinary decision and offer only a limited right of appeal even given the size of the business.

121. We directed ourselves that we should consider the entire disciplinary process in the round. We consider that had the Respondent dismissed the Claimant only for signing the insurance form the decision, whilst harsh, would by a narrow margin not be a decision we consider we could have interfered with. We consider the Respondent could quite properly have considered that he would risk damage to his professional reputation is the error had not come to light. He could quite properly have found that the Claimant ought to have recognised this and that whilst she had not been dishonest she had acted in a hasty way. He could also have reasonably taken into account some of the Claimant's absence record particularly the absence on 19 September 2017.

122. However, we have found that the Respondent's reasons for the dismissal were not restricted to the insurance form issue nor did he consider each allegation separately. His reasons for dismissal were composite and included the conclusion that the Claimant had failed to show that she would mend her ways after his warning given on 10 October 2017. His reasons for dismissal therefore included the Claimant's absence on 6 and 7 November 2017. We consider that in relying upon that the Respondent acted unfairly. He overlooked an important material matter. In addition, his investigation was unfair for the reasons given above.

123. Taking all these matters in the round we have concluded that the decision to dismiss the Claimant was unfair.

124. It follows that we need to consider if there could or would have been a fair dismissal had the Respondent acted fairly. We have set out the proper approach to that question above.

125. In our findings above we have concluded that had the Respondent simply relied upon the Claimant's actions in relation to the insurance form he could have reached a decision to dismiss her which fell within the band of reasonable responses. In reaching that decision he could have fairly had regard to some aspects of the Claimant's absence record. We have to evaluate the chances of whether he would have dismissed the Claimant if he had acted fairly. We do not think it is inevitable that the Claimant would have been dismissed. In reaching that conclusion we place weight on the fact that the Claimant's line manager Charlotte Mead had expressed a view that the matter was a learning point. We consider there is at least a possibility that had the Respondent not fallen into the errors we have identified above he would have paid more heed to that more moderate opinion. We consider that the chances of the Claimant being dismissed fairly were high. We find that there was at least a 75% chance that this employer would have taken the view that the conduct overall was so serious that a dismissal was merited. Accordingly, any compensatory award must be reduced by 75% to reflect the possibility of a fair dismissal taking place.

126. We have gone on to ask ourselves what would have happened had the Claimant been given a further opportunity. In other words what would have happened if the respondent had decided not to dismiss her at that stage. We think it inevitable that the Claimant would have been given a final written warning. We therefore need to evaluate the possibility that the Claimant might have committed a further act of misconduct within its currency. We find that the Claimant, for reasons which we understand, occasionally put her own family and needs above that of the Respondent. A good example of this was her actions on 19 September 2017. At that time she knew that the Respondent had become exasperated with her attendance record. On that occasion she could have avoided any inconvenience to the Respondent but put her own needs first. We have noted that section 57A of the Employment Rights Act 1996 gives some rights to time off but it is not an unlimited license to put family needs over the requirements of the workplace. We consider that there is a reasonably high chance that had the Claimant continued to work for the Respondent under a final written warning she would have behaved in a manner which the Respondent could and we find would treat as a further act of misconduct. At that point she could have been fairly dismissed. We consider that there is a further possibility in that the Claimant may simply have resigned even with no job to go to. The relationship was damaged and any further employment would have been uncomfortable. We accept that the Claimant may have been constrained by her financial circumstances but consider the possibility too great to discount entirely. Doing the best that we can we do not think that the employment would have lasted any longer than six months beyond the date it was actually terminated. Again, any compensatory award must be reduced to reflect that long stop.

127. We are required to ask ourselves whether the actions of the Claimant caused or contributed to the dismissal such as to make it just and equitable to reduce the Basic Award and/or the Compensatory Award. We find as a matter of fact that the Claimant's actions in completing the insurance form were culpable and/or blameworthy. The Claimant ought to have recognised that the question that was being asked required medical expertise. The form itself made it clear it should have been completed by a Medical Practitioner. Whilst the Claimant acted in good faith and for proper motives

her actions were foolish. Had she got the answer wrong then the Respondent would have had to answer to the insurer. He might have had to answer to his professional body as to his arrangements for supervision of the Claimant. We also take into account the fact that the Claimant had on 19 September 2017 put her needs above those of the Respondent. We do not think the Claimants other absences were significantly culpable or blameworthy. On the other hand, we consider that the Respondent handled the dismissal badly. We cannot ignore our own findings as to the Respondent's failings. Doing the best that we can we believe that it is just and equitable to reduce both the basic and compensatory awards by 50% to reflect contributory conduct by the Claimant.

128. To assist the parties, the order in which the reductions to the Compensatory Award are as follows. The tribunal will calculate any loss of wages and other benefits for a period of 6 months (after which on our findings there would have been a fair dismissal or a resignation). That will then be reduced by 75% to reflect the possibility of a fair dismissal at the time of the original dismissal. Then that figure will be further reduced by 50% to reflect the Claimant's contributory conduct as found above. The Claimant may elect to have her damages for wrongful dismissal calculated separately in which case any period of loss would run from the end of the notice period (1 month) and the assumed date of dismissal would be 5 months later.

129. We received no submissions on whether it is open to us to increase or decrease any award by reason of any failure to follow the ACAS code. We shall invite further submissions at the remedy hearing.

Wrongful dismissal

130. It was common ground before us that the Claimant's contract of employment provided that she should be given one months' notice in writing. As we have set out above that is subject to the common law rule that an employer shall be entitled to dismiss an employee summarily if the employee is in serious breach of contract. An employer is entitled to rely on an accumulation of matters provided that the totality is such that there is a serious breach of contract. In short, the test is almost exactly the same as applies to an employee in a constructive dismissal case. As set out above we are the primary fact finders in such a claim and are not bound by the views of the Respondent although we may take them into account.

131. We make the following findings of fact specific to this claim.

132. We find that on a number of occasions the Claimant did not comply with the expected standards for reporting absence. We find that on 19 September 2017 she left the workplace without permission for reasons which put her own needs above that of the Respondent. We find that on that occasion there were some mitigating matters as the Claimant was in a dire financial situation.

133. In respect of signing the insurance form we find that Claimant was careless rather than acting deliberately. She acted openly and honestly and readily accepted her error and apologised for it. We accept her account that she was anxious to assist the patient who had been waiting a long time for the form to be returned. The original error was that of the Respondent who had negligently failed to complete the form in the first place. We accept the Claimant's account that she was misled to some extent into believing that she had responsibility for completing the form by the fact that it had been placed on her desk.

134. We find that the Claimant had no specific training by the Respondent and whilst she had a track record of working in GP surgeries she had had a long period of absence after the birth of her child. We consider that an absence of training is a matter to be taken into account but does not in itself provide a complete excuse for her behaviour. That said the present case can be contrasted with the facts (we accept that the principles identified above are binding upon us) of ***Adesokan v Sainsbury's Supermarkets Ltd*** where the employer has placed heavy emphasis on compliance with a particular policy. We agree with the Respondent that had the Claimant given the matter any thought she ought to have recognised the demarcation between an administrative task and a medical declaration. She ought to have recognised that there were potentially serious consequences for her completing the form.

135. Whilst we agree with the Respondent that the Claimant made an error we differ when assessing the degree of culpability. We consider that even taking all matters proven in the round, when assessed objectively, the Claimant's conduct did not amount to a serious breach of contract sufficient to seriously damage the trust and confidence inherent in the relationship. We agree with the Claimant's line manager in her views expressed during the disciplinary meeting that there had been an error but one which the parties could learn from and move on. It was not so grave as to merit summary dismissal whether alone or together with any previous failing.

136. We have therefore concluded that the Claimant was dismissed in breach of contract. She is entitled to any loss of wages within the notice period of one month but must give credit for any sums received by way of mitigation of loss. That loss will be assessed at a further remedy hearing.

Direct Discrimination – Age

137. The Claimant relies upon three acts she says amount to a detriment these are:

137.1. the issue of the Claimant taking time off work to collect her child from school was raised as a disciplinary matter; and

137.2. raising and subsequently relying upon the Claimant signing an insurance form as a reason for dismissing her (essentially she complains of her dismissal); and

137.3. offering the Claimant a series of fixed term contracts rather than permanent employment.

138. There was no dispute that the Respondent acted in the manner suggested and accordingly the focus of the tribunal was on whether these matters amounted to a 'detriment' for the purposes of Section 39 of the Equality Act 2010 and if so whether there was less favourable treatment because of age.

139. Consistently with our findings above we consider that raising the Claimant's absence on 6 & 7 November 2017 as a disciplinary matter was something the Claimant could reasonably consider was to her disadvantage. As such the Claimant has established that she was subjected to a detriment.

140. There was no dispute that the Claimant was dismissed. In those circumstances the focus of the Tribunal will always be whether the Claimant can establish less favourable treatment and whether age was the reason for that treatment.

141. We consider that the Claimant could reasonably consider that been placed on fixed term contracts was a detriment. She had no contractual security beyond each of the fixed terms that she was given.

142. It is for the Claimant to show us that there has been less favourable treatment. The Claimant relies upon the other employees of the Respondent as being comparators in all three of her claims. Section 23 of the Equality Act 2010 requires a comparator to be in the same material circumstances as the Claimant save for the protected characteristic relied upon.

143. We find that the material circumstances in respect of the first allegation made by the Claimant require any comparator to have been absent from work in circumstances that are not materially different to the circumstances that the Claimant took time off and to have a similar absence record. The Claimant was unable to show that any of the other employees had taken time off to care for any dependent or indeed taken any time off in respect of any other emergency. As such we do not consider that those individuals are proper comparators. The characteristics of a hypothetical comparator would have to include taking time off to deal with a similar emergency.

144. In respect of the second allegation the proper comparator would have to be a person who had amended an insurance form in the same way as the Claimant. None of the other employees had done that and therefore the Claimant needs to rely on a hypothetical comparator for that allegation as well.

145. In respect of the final allegation the Tribunal consider that it was a material circumstance that the Respondent believed rightly or wrongly that the Claimant had lost her previous employment with the Welling Practice because she had been unreliable. In those circumstances the Claimant cannot compare herself to the other receptionists all of whom had open-ended contracts of employment as none were believed to be unreliable at the time the contracts were issued.

146. We turn to the question of whether the Claimant can show unfavourable treatment. She must show that her treatment was less favourable than the treatment which was or would have been meted out to a comparator not sharing the same protected characteristic. We reached the following conclusions:

146.1. we conclude that the Respondent was almost certainly unaware of the contractual obligation to permit time off for family emergencies. His reasons for disciplining the Claimant in respect of her final absence were that he was exasperated by the amount of time the Claimant had off and the fact that her family responsibilities meant that she could not be relied upon. If any other employee had had the same track record as the Claimant fairly or unfairly lawfully or unlawfully we conclude that the Respondent would have acted in exactly the same manner. He was not prepared to tolerate unreliability. As such we conclude that in relation to the first allegation the Claimant is unable to show that a hypothetical comparator would have been treated any differently. She is unable to show less favourable treatment.

146.2. In respect of the second allegation we reach similar conclusions. We have no reason to doubt that the Respondent took the amendment of the insurance form very seriously indeed. We conclude he would have taken exactly the same view had the form been signed by a person of any age

group. Once again we conclude the Claimant has been unable to show less favourable treatment compared to an appropriate comparator.

146.3. Finally we deal with the question of whether the Respondent would have given a hypothetical comparator in the same circumstances as the Claimant fixed term contracts. We conclude that he would. Rightly or wrongly the Respondent was genuinely concerned about the reliability of the Claimant. He had information before she started that her last employment had been terminated. If he misinterpreted what he was told then we accept that he genuinely believed that the Claimant had been dismissed because of unreliability. In the first year of the Claimant's employment she had a relatively high number of absences. Had there been a person in the same circumstances other than age we find that the Respondent would have behaved in exactly the same way. We do not find that the Claimant has established less favourable treatment than a comparator the same material circumstances.

147. Identifying the characteristics of the proper comparators and assessing what treatment would have been afforded is a similar if not identical exercise to asking what the reason for the treatment was. We are able to make clear findings of fact as to what the reason for the treatment was in respect of each detriment complained of. In those circumstances we can and must assume that the Respondent bears the burden of proof in showing that the reason for the treatment was in no sense whatsoever the Claimant's age. We consider that the Respondent has discharged that burden.

148. The reason for the Claimant being disciplined for her absence was because the Respondent considered rightly or wrongly that her absence record and method of reporting her absences had become unacceptable. Whilst we have criticised the Respondent for this and it forms part of our reasons for finding the dismissal unfair we do not accept that this was in any sense because of the age of the Claimant. The Claimant had alluded to the fact that she was of 'childbearing age'. A lack of tolerance of the unreliability that is sometimes caused by caring for children cannot be directly equated with a lack of tolerance of an age group. The Claimant might have been able to argue that the treatment was indirect discrimination but the Tribunal did not consider it appropriate to re-formulate the case for the Claimant. To do so would have been to impermissibly act as the Claimant's representative.

149. The reason that Claimant was disciplined and dismissed for amending the insurance form was quite simply because the Respondent regarded it as a very serious error of judgement. We are quite satisfied that the Claimant age played no part in that decision. Whilst we disagree with the Respondents categorisation of that conduct as gross misconduct we are satisfied that he genuinely believed that it was and that it was the only reason he acted as he did.

150. We are satisfied that reason that the Respondent offered the Claimant to fixed term contracts was because he had genuine concerns about her unreliability and somewhat misguidedly believed that fixed term contracts provided him with more options to deal with that issue. We are entirely satisfied the Claimant age played no part in that decision.

151. For the reasons above the Claimants complaints of discrimination because of age do not succeed and it is unnecessary for us to consider whether the tribunal had any

jurisdiction to deal with the final complaint by reason of the time limits contained in section 123 of the Equality Act 2010.

152. The matter will now be listed for a remedy hearing to deal with all outstanding matters although the parties are encouraged to see whether they can resolve matters between themselves.

Employment Judge John Crosfill

Date: 3 October 2019