



EMPLOYMENT TRIBUNALS

Claimant: E

Respondent: D

Heard at: Cardiff **On: 8, 9, 10, 11 and 12 November 2021**

Before: Employment Judge Harfield
Mrs L Bishop
Mr P Charles

Representation:

Claimant: In person
Respondent: Mr Edwards (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that the Claimant's complaints of unfair dismissal, wrongful dismissal, discrimination arising from disability, failure to make reasonable adjustment and victimisation are not well founded and are dismissed.

REASONS

Introduction and the issues in the case

1. This case has a lengthy procedural history. The claim form was presented on 18 April 2018. The boxes were ticked for complaints of unfair dismissal, sex discrimination, disability discrimination, notice pay, holiday pay and "other payments." The claim form was accompanied by a narrative rider. The respondent filed an ET3 response form and a case management hearing took place on 6 August 2018. Employment Judge Cadney directed the claimant to file further and better particulars of her claim. He made other directions mainly relating to the

- question whether the claimant was a disabled person. He directed there be a public preliminary hearing to decide whether the claimant was a disabled person, whether any of the claims were out of time, and whether any of the claims should be struck out on the basis of having no reasonable prospect of success or whether the claimant should be ordered to pay a deposit in respect of any claims found to have little reasonable prospect of success.
2. The preliminary hearing came before EJ Powell on 23 October 2018 and in fact become a case management hearing. Some time was spent with the claimant, as a litigant in person, clarifying the issues in the case and EJ Powell produced a list of issues. The types of claim identified were unfair dismissal, direct sex discrimination, harassment related to sex, discrimination arising from disability, failure to make reasonable adjustments, breach of contract in relation to notice pay, failure to pay accrued holiday pay and possibly an unauthorised deduction from wages claim that was unclear. The claimant was given the opportunity to apply to amend her claim to include any assertion she was a disabled person by reason of depression as well as fibromyalgia. No such application was made. The respondent was to provide particulars in respect of any argument any complaints were outside the tribunal's jurisdiction or should be struck out or subject to a deposit order.
 3. A further case management hearing came before EJ Brace on 31 May 2019. EJ Brace permitted an amendment to the list of issues prepared by EJ Powell to add a direct disability discrimination complaint, to expand the discrimination arising from disability claim and the direct sex discrimination claim. Further directions were made to prepare for the public preliminary hearing. It came before EJ Beard on 20 June 2019. He directed that the title of the claim be anonymised with the claimant recorded as E and the respondent as D. EJ Beard dismissed the claimant's sex discrimination complaints on the basis they were presented out of time and it was not just and equitable to extend time. The position was the same for the claimant's disability discrimination claim relating to the provision of a lumbar cushion. A complaint about replacing a lumbar cushion that had gone missing and about the respondent failing to carry out a desktop assessment were struck out as having no reasonable prospect of success.
 4. A case management hearing came before EJ Beard on 31 July 2019 but was postponed because the claimant indicated she was seeking reconsideration of EJ Beard's earlier Judgment and an appeal. The claimant's reconsideration application was refused by EJ Beard on 27 August 2019 on the basis he considered the claimant was seeking to repeat arguments previously resolved against her at the preliminary hearing. The claimant appealed to the Employment Appeal Tribunal. In January 2020 the Employment Appeal Tribunal found the appeal did not have a reasonable prospect of success. The case therefore came back before EJ P Davies for case management on 20 May 2020. He noted that

the claims left to be determined were unfair dismissal, wrongful dismissal, discrimination arising from disability, a failure to make reasonable adjustments, and a claim for unpaid annual leave (but on the basis if the claimant had been given a notice period she would have accrued more holiday). Case management orders were made including that the respondent should disclose some documents relating to two comparators the claimant was seeking to rely upon for her unfair dismissal complaint. The parties were to seek to agree a list of issues.

5. The parties were unable to agree a list of issues. A further case management hearing came before EJ Moore on 8 October 2020. EJ Moore did not have access to the full tribunal file but it became apparent there was a fundamental dispute between the parties as to whether the claimant's claim included a victimisation claim. EJ Sharp considered that the claimant would need to apply to amend her claim to include a victimisation claim. The claimant disagreed.
6. The case was listed for a further case management hearing to decide any application to amend, and to decide an outstanding application made by the claimant for specific disclosure. The case came before EJ Jenkins on 11 January 2011. EJ Jenkins concluded that the claimant's claim as originally presented did include a claim of victimisation and it was a complaint to be determined at the final hearing. EJ Jenkins dealt with the claimant's specific disclosure application. There were 15 requests to consider. EJ Jenkins granted disclosure of the staff handbook, and the re-sending of files previously sent to the claimant on 5 and 6 December 2018. He concluded that the request for documents relating to referrals of the claimant to panels or third parties, and the documents requested by the claimant relating to other alleged comparators had not been shown to have the necessary quality of relevance. EJ Jenkins said those issues could be dealt with in cross examination of the respondent's witnesses and in submissions.
7. The final hearing was due to commence on 15 February 2021. EJ Sharp postponed the final hearing on the morning of the 15 February 2021 due to the last minute non availability of the respondent's counsel for personal reasons. EJ Sharp directed the parties attend for case management purposes, particularly because it had come to her attention there remained a significant dispute between the parties about the list of issues. EJ Sharp directed the relisted hearing would deal with liability issues alone and she clarified the claims and the issues to be decided in the case as set out in an appendix to her case management order. The list of issues as prepared by EJ Sharp is set out in a later part of this reserved Judgment, but includes complaints of unfair dismissal, wrongful dismissal (which includes a claim for holiday pay the claimant says she should have accrued in her notice period), failure to make reasonable adjustments, discrimination arising from disability and victimisation.

8. There is a pattern on the file of the claimant (as no doubt a litigant in person doing her best) seeking to include complaints about matters which on the face of it are not within the jurisdiction of the employment tribunal or had previously been dismissed in the proceedings. EJ Sharp's case management order identifies she had explained to the claimant that the tribunal did not have jurisdiction to hear a freestanding complaint of breach of the right to privacy under Article 8, confidentiality and breach of the Data Protection Act and she recorded the claimant accepting this and confirming the issue of privacy (in relation to post office receipts) was within the unfair dismissal claim. The case management order also records EJ Sharp explaining the tribunal could not hear freestanding complaints of breach of duty of care and that the claimant confirmed her complaint was more about a failure to make reasonable adjustments and unfair dismissal. EJ Sharp further recorded the claimant accepting she was not bringing a breach of contract claim (other than the notice pay claim) as her complaint was about breach of policies which she accepted may not be contractual and the substance of her point could be made as part of the unfair dismissal claim. EJ Sharp also recorded that EJ Beard had refused to extend time for any claim under the Equality Act after the time limit had expired, which included the direct disability discrimination claim about flexi-time/study leave/time off previously added by EJ Brace. EJ Sharp noted EJ Beard had dismissed the harassment complaints. EJ Sharp stated that the claimant's complaint of "bullying, harassment, bias and that there was a hostile & derogatory environment" was therefore not before the tribunal other than the complaints of bias that were part of the unfair dismissal claim. EJ Sharp noted that part of the claimant's discrimination arising from disability claim included the claimant's suspension which needed to be added to the list of issues. EJ Sharp declined the claimant's application for updated policies (since the material events in question) to be included in the hearing bundle.
9. The claimant wrote in seeking further amendment to the list of issues. She stated she had a direct disability discrimination claim. She said she wanted to include a wrongful suspension claim and complaint about failures to adhere to policies and the Acas Code. She said there were complaints about other breaches of express and implied terms of her contract, including breach of duty of care. EJ Sharp responded on 15 April 2021 to state she did not understand the claim to include direct disability discrimination. EJ Sharp stated the claimant's wrongful suspension claim formed part of the unfair dismissal and the discrimination arising from disability complaints. She stated that the complaint about failure to adhere to policies and the Acas Code could not as a matter of law apply to the whole claim and was more relevant to any remedy stage.
10. The claimant wrote in again to say complaints of direct disability discrimination, wrongful suspension, and breaches of express and implied terms of contract and harassment were in her claim form from the start. She said if that was not agreed then she would need to appeal. EJ Sharp's position remained that the direct

discrimination and harassment complaints had already been struck out and that the suspension complaint was already covered in the list of issues. The claimant was told that EJ Sharp's position was that the claimant had not actually made any fresh application to amend her claim and informed the parties that the final hearing would consider the list of issues set out in the list of issues attached to the order of 15 February 2021.

11. The claimant made a fresh application to amend her claim to bring a sex discrimination complaint and also indicated she was appealing. EJ Sharp responded to state there was no application to amend before the tribunal for the reasons previously given and the claim would proceed on the basis outlined at the last preliminary hearing. The claimant indicated she was appealing the refusal of her amendment application. On 18 October 2021 the Employment Appeal Tribunal determined the appeal had no reasonable grounds. Judge J Keith held that there did not appear to be a judicial decision, direction order or judgment that was capable of challenge. It was said "*There is instead a chain of correspondence relating to repeated case management hearings, which having reviewed them, do not appear to contain any discernible errors of law, and are instead standard attempts to identify the claims. To the extent that she seeks to rely on a wider scope of claims, there is nothing to prevent the appellant from applying to amend her claim, whilst continuing to rely on her assertion that elements of any new claims were in fact in her Claim Form.*"
12. The claimant made no further application to amend her claim. We set out this lengthy summary of the procedural history because it is important in explaining why the issues before us to determine at the liability hearing are the issues set out by EJ Sharp in her case management order.
13. The hearing was conducted entirely by video. The first day of the hearing was listed as a reading day but the parties attended and the tribunal therefore undertook some housekeeping of the claim. The claimant informed the tribunal shortly before the first day of the hearing that she was only able to join from a mobile phone. The claimant was informed that the tribunal would have to see whether that was going to be workable and, if not, she may have to make arrangements to attend a building. At the hearing the claimant was content to proceed using her mobile phone and she physically had a copy of the file of documents before her. We discussed adjustments with the claimant who identified that regular breaks would be of assistance and this was accommodated during the hearing. The remainder of day one was taken up with tribunal reading time.
14. On day two, the morning was spent dealing with an application by the claimant to add an additional 125 pages to the bundle. The respondent agreed to one document being inserted but disputed the rest. The claimant had not explained the relevance of each document and we therefore went through the documents with

her page by page so that she could explain the relevance. On doing so the claimant withdrew her requests for some of the documents. We deliberated and delivered an oral decision in respect of the remaining documents where some were allowed in and some were not. It then transpired that the claimant had muted the tribunal on her phone and had not heard the decision (we did not know why she could not see us). We reconvened after lunch and redelivered our decision on the admissibility of the documents, together again with our reasons. As reasons were given orally we have not set them out in writing here. 14 additional pages were added which the respondent pulled together into a small supplementary bundle. The dispute about disclosure ate into the tribunal's time and we discussed with the parties, particularly the claimant, the need to re-evaluate the time spent with each witness. We then started the claimant's evidence.

15. On the morning of day 3 the respondent applied to add two additional documents to the bundle. The claimant did not ultimately object and they were admitted. We completed the claimant's evidence and heard evidence from ER for the respondent. In the afternoon we heard evidence from GY. On day four we heard evidence from TB and then RC. We heard closing submissions from the respondent. On day five we heard closing submissions from the claimant and then there was tribunal deliberation time. We had insufficient time to deliver an oral judgment and the parties were passed a message to say judgment would be delivered in writing at a later date. We have not set out the parties' closing submissions here but we took them fully into account in our deliberations and they are referenced below in our discussions and conclusions.
16. We had before us written witness statements from the claimant, ER, GY, TB and RC. We had the bundle of documents and the additional documents added to the bundle. Mr Edwards also provided the claimant with a short written summary of the law relating to unfair dismissal and discrimination arising from disability. The tribunal discussed with the parties how individuals in the written judgment should be identified, so as to limit the risk of the unpicking of the anonymity order. Neither party objected to the tribunal using the initials for each individual identified in the narrative or who gave evidence to us. That is therefore the system this Judgment adopts.

The relevant legal principles – Unfair Dismissal

The legislation

17. Section 94 Employment Rights Act 1996 ("ERA") gives an employee the right not to be unfairly dismissed by their employer. Section 98 ERA provides, in so far as it is applicable:

“(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--

...

(b) relates to the conduct of the employee...

(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.

18. Under section 98(1)(a) of ERA it is for the employer to show the reason (or the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee.

Conduct Dismissals

19. The reason or principal reason for a dismissal is to be derived by considering the factors that operate on the employer's mind so as to cause the employer to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, it was said:

“A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.”

20. In considering whether or not the employer has made out a reason related to conduct, the tribunal must have regard to the test in British Home Stores v Burchell

[1980] ICR 303. In particular, the employer must show that the employer believed that the employee was guilty of the conduct. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances.

21. The tribunal must have regard to the guidance set out in the case of Iceland Frozen Foods v Jones [1982] IRLR 439. The starting point should be the wording of section 98(4) of ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct; not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

22. The band of reasonable responses test also applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23). As part of the investigation an employer must consider any defences advanced by an employee but there is no fundamental obligation to investigate each line of defence. Whether it is necessary for an employer to carry out a specific line of enquiry will depend on the circumstances as a whole and the investigation must be looked at as a whole when assessing the question of reasonableness (Shrestha v Genesis Housing Association Ltd [2015] IRLR 399). It was said in Adeshina v St George's University Hospitals NHS Foundation Trust [2015] IRLR 707¹ that the strict rules regarding apparent bias applicable to judicial processes are not applicable to internal disciplinary processes although actual bias giving rise to a breach of natural justice may have fundamental relevance to the question of fairness. The Employment Appeal Tribunal said:

“whether there is an appearance of bias may be a relevant factor in an unfair dismissal case; it will be something that will go into the mix for the Employment Tribunal to consider as part of fairness as a whole, as will the question whether the panel did in fact carry out the job before it fairly and properly, ... the only thing that really matters is whether the disciplinary tribunal acted fairly and justly...”

¹ The case went on appeal to the Court of Appeal but not on this point

23. The band of reasonable responses analysis also applies to the assessment of any other procedural or substantive aspects of the decision to dismiss an employee for a conduct reason. Any defect in disciplinary procedure has to be analysed in the context of what occurred. Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal may be rendered unfair where there is a defect of such seriousness that the procedure itself was unfair or where the results of defects taken overall were unfair (Fuller v Lloyds Bank plc [1991] IRLR 336.) Procedural defects in the initial stages of a disciplinary process may also be remedied on appeal provided that in all the circumstances the later stages of the process (including potentially at appeal stage) are sufficient to cure any deficiencies at the earlier stage; Taylor v OCS Group Ltd [2006] EWCA Civ 702.
24. That case also importantly reminds us ultimately the task for the tribunal as an industrial jury is a broad one. We have to ultimately consider together any procedural issues together with the reason for dismissal. It was said:
- “The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, an ET might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the ET might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.”*
25. Disparity in treatment by an employer between how it deals with employees in comparable situations can be a relevant consideration. However, whilst an employer should consider truly comparable cases of which it is known or ought reasonably to have known, the employer must also consider the case of each employee on its own merits which includes taking into account any mitigating factors. The tribunal should ask itself whether the distinction made by the employer was within the band of reasonable responses open to the employer or so irrational that no reasonable employer could have made it. Again here the tribunal should not substitute its own views for that of the employer (London Borough of Harrow v Cunningham [1998] IRLR 256 and Walpole v Vauxhall Motors Ltd [1998] EWCA Civ 706 CA).

Findings of Gross Misconduct

26. A finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Generally to be gross misconduct the misconduct should so undermine trust and confidence that the employer should no longer be required to retain the employee in employment. Thus, in the context of section 98(4) it is for the tribunal to consider:

- (a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and
- (b) Was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, matters such as the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

The relevant legal principles – wrongful dismissal

27. Wrongful dismissal claims are breach of contract claims. The claimant was summarily dismissed without notice. A dismissal in breach of the contractual term as to notice will be wrongful unless it was in itself a response to the claimant's own repudiation of the contract. The burden therefore falls on to the respondent to show that there was a repudiatory breach of contract by the claimant prior to the date of dismissal in order to avoid liability for what would otherwise be a breach of contract.

28. The necessary conduct entitling the employer to dismiss summarily is usually restricted to conduct said to amount to gross misconduct. The classic statement of what constitutes gross misconduct is in Neary v Dean of Westminster [1999] IRLR 288 that the conduct:

“must so undermine the trust and confidence that is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.”

29. It is therefore a matter for us to assess whether the allegations against the claimant are made out in fact on the balance of probabilities. If they are made out, we have to assess whether their nature and gravity is such as to fall within the ambit and meaning of gross misconduct.

The relevant legal principles – Duty to make reasonable adjustments

30. The duty to make reasonable adjustments appears in Section 20 Equality Act 2010 as having three requirements. In this case we are concerned with the first requirement in Section 20(3):

“(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.”

31. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.
32. In Environment Agency v Rowan [2008] ICR 218 it was emphasised that an employment tribunal must first identify the “provision, criterion or practice” applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.
33. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.
34. Substantial disadvantage is such disadvantage as is more than minor or trivial; Section 212.
35. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the

proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

36. Consulting an employee or arranging for an occupational health or other assessment of her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; Tarback v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.
37. In County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the Employment Appeal Tribunal helpfully summarised the key elements of a reasonable adjustments claim as:
- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which they rely and to demonstrate the substantial disadvantage to which she was put by it;
 - It is also for the disabled person to identify at least in broad terms by the time of the final hearing, the nature of the adjustment that would have avoided the disadvantage; they need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;
 - The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
 - Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s)
 - The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:
 - The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
 - The extent to which it is practicable to take the step;
 - The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;
 - The extent of its financial and other resources;

- The availability to it of financial or other assistance with respect to taking the step;
- The nature of its activities and size of its undertaking;
- If the tribunal finds that there has been a breach of the duty; it should identify clearly the “provision, criterion, or practice” the disadvantage suffered as a consequence of the “provision, criterion or practice” and the step(s) the respondent should have taken.

The relevant legal principles - Discrimination arising from disability

38. Section 15 of the Equality Act states:

“15 Discrimination arising from disability

*(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B’s disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim*

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

39. The approach to determining a section 15 claim were summarised by the Employment Appeal Tribunal in Pnaiser v NHS England and Another [2016] IRLR 170. This includes:

- In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;
- The “something” that causes the unfavourable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it;
- Motives are not relevant;

- The tribunal must determine whether the reason or the cause is “something arising in consequence of B’s disability”;
 - The expression “arising in consequence of” can describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link;
 - Knowledge is only required of the disability. Knowledge is not required that the “something” leading to the unfavourable treatment is a consequence of the disability.
40. The respondent will successfully defend a claim if it can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. Legitimate aims are not limited to what was in the mind of the employer at the time it carried out the unfavourable treatment. Considering the justification defence requires an objective assessment which the tribunal must make for itself following a critical evaluation of the position. It is not simply a question of asking whether the employer’s actions fell within the band of reasonable responses. The Equality and Human Rights Commission Code of Practice suggests the question should be approached in two stages:
- Is the aim legal and non discriminatory and one that represents a real, objective consideration?
 - If so, is the means of achieving it proportionate – that is appropriate and necessary in all the circumstances? The Code goes on to say that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. “Necessary” here does not mean that the treatment is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means (see Hampson v Department of Education and Science [1989 ICR 179 and Hardys & Hansons plc v Lax [2005] ICR 1565.)
41. Justification therefore requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (Hensman v Ministry of Defence UKEAT/0067/14). The Tribunal has to take into account the reasonable needs of the employer, but it has to make its own judgment, upon a fair and detailed analysis of the working practices and

business considerations involved, as to whether the treatment is reasonably necessary.

The relevant legal principles – victimisation

42. Section 27 of the Equality Act provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act. Section 27(2) defines a protected act as:
- (a) bringing proceedings under the Equality Act;
 - (b) giving evidence or information in connection with proceedings under the Equality Act;
 - (c) doing any other thing for the purposes of or in connection with the Equality Act;
 - (d) making an allegation (whether or not express) that the respondent or another person has contravened the Equality Act.

Equality Act - Burden of Proof

43. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides:

“(2) if there are facts from which the Court (which includes a Tribunal) could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

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

Consequently, it is for a claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

44. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provisions should apply. That guidance appears in Igen

Limited v Wong [2005] ICR 931 as supplemented in Madarassy v Nomura International Plc [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence. Furthermore, in practice if the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

The issues to be decided

45. The list of issues (on liability) were set out by EJ Sharp as follows:

Unfair Dismissal

- *What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of ERA?*
- *The respondent asserts it was a reason relating to the claimant's conduct which the claimant denies;*
- *She asserts that the respondent was aware of her disability and that conduct, of walking for 5 to 10 minutes away from her work without "signing out" was an acceptable reasonable adjustment, and, in the alternative, that other staff took breaks from their work and failed to "sign out" but were not disciplined for failing to do so;*
- *Did the respondent hold that belief in misconduct on reasonable grounds, following a reasonable investigation? The burden of proof is neutral but it helps to know the challenges to fairness. The claimant identifies:*
 - *A breach of her right to privacy by the removal of personal receipts (upon which the respondent relied to establish the number of occasions on which she had visited the on site post office during working time);*
 - *Bias in the investigation process;*
 - *Conflicts of interest in respect of:*
 - *HR advisors in the disciplinary process and separately*
 - *The decision making at the disciplinary hearing and the appeal;*
 - *That other staff in similar circumstances to the claimant were either (a) not investigated or (b) not disciplined at all;*
- *Was the dismissal fair or unfair in accordance with section 98(4) ERA? Was the decision to dismiss a sanction within the "band of reasonable responses" for a reasonable employer?*

Wrongful dismissal

- *The claimant asserts she was entitled to contractual notice and her summary dismissal amounted to a breach of contract;*
- *The respondent denies the claim and asserts that the claimant's conduct amounted to gross misconduct which amounted to a repudiatory breach and as such the claimant was not entitled to notice pay.*

Disability

- *The respondent admits that the claimant's impairment of fibromyalgia amounted to a disability from 14 September 2014 onwards*

Equality Act, section 15 discrimination arising from disability

- *Did the respondent treat the claimant unfavourably as follows:*
 - *Suspending the claimant on 24 November 2017?*
 - *Dismissing the claimant on 5 April 2018?*
- *Did the following thing arise in consequence of the claimant's disability?*
 - *The claimant's need to take exercise during working hours?*
- *Did the respondent treat the claimant unfavourably because of her periods of exercise?*
- *If so, has the respondent shown that dismissing /suspending the claimant was a proportionate means of achieving a legitimate aim?*

Equality Act, sections 20 and 21: reasonable adjustments

- *Did the respondent know or could it reasonably have been expected to know the claimant was a person with a disability?*
- *Did the respondent have/ or apply the following provision criterion or practice:*

- *Requiring the claimant to “key out” from work when she stopped working during the working day in order for her to exercise the reasonable adjustments afforded to her;*
- *Did any PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that the claimant suffered pain by reason of sitting at her office chair for sustained periods?*
- *If so, did the respondent know or could reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?*
- *If so, were there steps that were not taken that could have been taken by the respondent to avoid the disadvantage? The burden of proof does not lie on the claimant; however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:*
 - *Failing to follow up a desk risk assessment;*
 - *Allowing the claimant to take short breaks away from her desk to mobilise her posture through exercise;*
- *If so would it have been reasonable for the respondent to have to take those steps at any relevant time?*

Victimisation

- *Did the claimant’s grievance dated 26/6/2014 amount to a protected act?*
- *Was the disciplining and dismissing of the claimant on 19/2/2018 a detriment due to the claimant making that protected act?*

The relevant background /findings of fact

46. The claimant was employed by the respondent from 4 December 2000 to 6 April 2018. Until the events in question she had a clean disciplinary record and had worked her way up from being an Administrative Officer to being a Higher Executive Officer [HEO]. From June 2011 the claimant worked in the Information Technology Department. She says that in 2003 she worked in the contact centre in a training team and that the team had to be disbanded due to bullying and a hostile environment which she says was created by her line manager, AP. AP later moved to work in HR.

47. In 2014 the claimant was diagnosed with fibromyalgia. The respondent accepts the claimant is and was a disabled person by reason of that condition.
48. On 29 May 2014 the claimant raised a grievance against her then line manager, PW. The respondent accepts that this grievance was a protected act for the purposes of the claimant's victimisation claim, as being a complaint about discrimination on grounds of sex and harassment. The grievance is at [108] and includes, in short form, complaints about alleged derogatory and offensive comments, the grading of the claimant's work and the handling of the claimant's annual appraisal. The claimant says the grievance took about 18 months to conclude and was not upheld. The claimant says she had about 6 months off work during this time due to psychological ill health. It is the claimant's belief that raising the grievance with HR, and the then CEO [184], was a reason why she was later disciplined and dismissed and that they were looking for a reason to get rid of her. We return to this issue below.
49. An occupational health physiotherapy report was obtained on 4 February 2015 addressed to the claimant's then manager, RR. The report said the claimant and just returned from a four and a half month sickness absence. It recommended the claimant have a posturite lumbar support cushion and said the claimant "would benefit from having the opportunity to have occasional short breaks during the day to allow her to stand up, stretch and move around to help her ease her symptoms when they are at their worst." In May 2015 the claimant's the line manager received a further occupational health report. The occupational health doctor suggested that the claimant may benefit from an additional 5-10 minute break once or twice a day, as and when required. The doctor said if any adjustments were agreed they should be reviewed after 4 weeks as they may not be required in the longer term [879]. The doctor advised the claimant's fibromyalgia would be likely to qualify as a disability.
50. On 9 February 2016 ER, completed a risk assessment for the claimant [183]. ER later became the claimant's line manager. ER received an occupational health recommendation for the claimant dated 24 August 2016 [186] which said that the claimant would benefit from regular short DSE breaks away from her computer of at least 5 minutes in each 40 – 60 minute period, to give the claimant the opportunity to stretch and mobilise thus helping to alleviate stiffness and discomfort. The adjustment was recommended for a 12 month period. The report also said that sitting or standing in one position for more than 15 – 20 minutes should be minimised and regular postural breaks of 30 – 60 seconds should be incorporated into the claimant's work routine. It was said "These can be productive breaks bringing something to a different part of the workplace, changing to a different task that uses the body in a different way. Comfort breaks, doing some basic stretches at the workstation and getting a drink of water also count. I

- recommend this for the foreseeable future.” ER’s evidence, which we accept, was that she understood this to mean that this was a short period of time for the claimant to get up and stretch near her desk, or get a drink of water, or move around the floor. She says she did not understand it to mean the claimant would need a break of 10 minutes every hour or that it included the claimant leaving the floor or the building to mobilise.
51. KR became the claimant’s new line manager. ER sent KR an email with the occupational health recommendations on 14 September 2016 [189]. ER said that the claimant had seen the report herself and was aware of the recommendations and “I wanted you to be aware of these to ensure that she is not challenged on any of these behaviours as we try to support her health.”
 52. In or around late 2016 the claimant raised a second grievance about a colleague, KC, who she said shouted at her in front of work colleagues. This grievance was partially upheld. The claimant says that GY was aware of this grievance about KC as he sat next to her and was seen going into quiet rooms with her every morning while the grievance was ongoing. She says that she then did not have a good working relationship with GY. GY disputes this, saying he was unaware of any grievance between the claimant and KC. We return to this point below.
 53. The IT department was reorganised in 2016/2017. The claimant was given the role of Associate Business Analyst which was the least preferred role she had identified in the restructure.
 54. In August 2017 the claimant moved to sit on the same floor as rest of the business analysts, D14. On 31 August 2017 GY, then Head of Business Analysis, told the claimant she was being mentored by EF, a Senior Business Analyst. He says he also told her that EF was her line manager. The claimant disputes she was told this at the time and says that her former line manager, KR initially remained her line manager. In any event, the claimant accepts it did subsequently change to EF.
 55. There was a breakdown in the relationship between the claimant and EF. The claimant’s account is that:
 - (A) In September 2017 EF spoke to her in a derogatory way demanding to know where the claimant had been the day before. The claimant says she felt forced to tell EF she had been at an internal interview, which had been authorised by KR. The claimant says that EF told her that she did not have the leave or flexi and, when the claimant said she could have time work credit for an internal interview, that EF incorrectly said that was not viable. The claimant says she felt that EF was insinuating that she was lying, and she told EF she thought she was only her mentor not her line manager and that EF walked off annoyed;

- (B) In October 2017 EF demanded that the claimant move desks to sit by the team despite there being no desks available and the claimant had to make arrangements to free up a desk for herself;
- (C) One morning EF asked the claimant how the course was going and was she doing work and when the claimant said she was, EF pointed at her screen and said “yeah it looks like it.” The claimant felt EF was inferring she was lying when she was reading a coursework book;
- (D) On 30 October 2017, the claimant told EF that she did not want to do exams for the business analyst role because of her fibromyalgia which made her tired and she did not want the added stress of coursework and exams or to have to travel to London. EF escalated it to GY, her second line manager, who sent an email on 17 November 2017 advising that if the claimant did not complete the qualifications she would have to be displaced in the organisation. The email was copied to LA the acting IT Directorate Manager and SH, the HR business partner. The claimant felt this was unnecessary escalation. GY stated in evidence it was his usual practice to notify his line manager and the HR business partner of these kinds of potential issues. We accept this.
- (E) The claimant responded on the qualification point to protest that a requirement to complete exams was not within her job offer and there were other employees of the same grade in different departments that did not have to do qualifications that were paid the same as her. The claimant also said she considered she could be assessed through the appraisal process. SH emailed the claimant to say she understood the claimant knew from the outset she would have to do the exams. The claimant responded to say again it was not in the job offer. The claimant says she was also told by SH that if she ended up displaced she would have to go on the transfer list which the claimant believed meant she could potentially end up without a job. The claimant then asked GY if they could meet rather than passing emails, and again stated her reasons for not wanting to do the exams. GY did not change his position. The claimant also asked if she could be mentored by a different colleague DR. GY said that would be highly unusual as DR was two grades above the claimant. He encouraged the claimant to try to resolve her differences with EF. The claimant ultimately said she would do the exams. She says she felt like she had no other option;
- (F) EF spoke to the claimant about her flexi hours being outside the bandwidth allowed for hours in debit. The claimant says she offered to work 3 hours a week back and said that in December 2017 a new leave year would start when she could anticipate leave to reduce the hours deficit. She says EF told her this was not viable and that the claimant had to prepare a plan as to how to make the time back. The claimant says that others were not treated in the same way as her. She says that she told EF she was being singled out to do such a plan, there was bias against her, and that EF was looking for things to find fault with.

GY said in evidence that others had also been asked to do similar plans. We accept this;

- (G) The claimant alleges that EF did not spend time mentoring her but instead criticised her and did not allow her to go to meetings. She says that EF gave her an assignment when other new business analysts were not. GY said in evidence other new analysts were also given assignments as it was part of the training plan;
- (H) On 23 November 2017 the claimant had another catch up meeting with EF at her desk. The claimant says that EF unfairly criticised her work and returned again to the claimant's flexi deficit. The claimant says she told EF that she felt EF only spoke with her to find fault and that she did not like the way EF had spoken to her in front of colleagues, or in asking her to prepare the flexi plan and that she did not consider EF was supportive, or was providing mentoring, that she felt alienated, that EF did not respect her privacy and she felt bullied. The claimant says she told EF she had been a mentor and a trainer and had mentored EF when they were both Administrative Officers and had spent time with her helping her to learn how to do the job. She says she told EF that her treatment had been commented on by two different colleagues. The claimant says EF said she would arrange a meeting to discuss work but did not address the other issues so she asked EF if she could not see that EF's behaviour was unreasonable and inappropriate. The claimant said that EF did not acknowledge how she had behaved and stated she did not have time for this. The claimant says EF responded "you clearly have" and that EF told her she was cruel and walked off to see GY.
56. EF went to see GY in tears saying she felt threatened and intimidated by the claimant. EF was facing a difficult pregnancy at the time and GY said, and we accept, he was worried about her health and the potential impact on her pregnancy. He told us this was the only time in his 35 year career that he had come across a situation that severe. He considered that there was a case to be considered for formal disciplinary action under the harassment and bullying policy. He also decided the claimant should be suspended.
57. On 24 November 2017 the claimant received a letter from GY stating an allegation of misconduct had been made and due to the seriousness of the alleged offence, the claimant was suspended on pay pending investigation. The letter said it was not an assumption of guilt and that GY would review it at regular intervals. The claimant complains that the letter gave no details of the allegation, although she accepts she guessed it was to do with the incident with EF. On 27 November the claimant asked if she could have her personal items from her desk.

58. The claimant complains that GY made no effort to contact her or to obtain her version of events. GY states he did try to contact the claimant but her contact details on the system were not up to date and when SH in HR contacted the claimant to ask if she could pass her contact details on, the claimant refused to give permission. We accept that is what GY was told.
59. The claimant telephoned SH the following Monday and says that SH did not give her a reason for her suspension. The claimant said she would be raising a grievance. On 28 November the investigation commenced [214]. TW was asked to conduct the investigation, probably by someone in HR. At some point either GY or EF had a briefing with TW to summarise the complaint. It would appear there are no records of that briefing process.
60. On 5 December 2017 the claimant emailed SH to say she wanted to appeal her suspension and that she was waiting for the information and evidence as to why GY had suspended her. She also asked if she could pick up her personal possessions. SH said she had the claimant's personal belongings and she could meet the claimant in reception.
61. On 7 December 2017 the claimant received a letter from TW, Head of Service Creation, informing her he had been appointed to investigate an alleged incident and that it was alleged the claimant had been involved in an act of bullying and harassment [828]. The claimant says that SH handed her that letter when the claimant met up with her that day to collect her belongings.
62. The claimant was invited to an investigatory interview on 14 December 2017. On 8 December 2017 the claimant emailed SH asking for her email to be forwarded to TW. She denied any wrongdoing and said that if he applied the definition of bullying and harassment and the evidence (if any) he had at his disposal he could very quickly conclude that she was not guilty. She asked for sight of the allegations made against her, details of whom they were made by, when they were made, and any evidence and witness statements. The claimant said she needed time to prepare her defence and would attend on the 14 December provided she received this information and if they believed she had reasonable time, as determined by a judge, to read the claims against her. SH responded to say under policy the claimant would have sight of all the information that the decision maker makes his decision on, and it would be sent to her by the decision manager and was not available to the claimant at that point in time. The claimant was also told there was no avenue to appeal her suspension.
63. On 13 December 2017 the claimant then received an email asking her not to attend the meeting as allegations of fraud had been made against her. She says she telephoned SH who would not tell her what the allegations were but sounded

stressed. The claimant emailed SH to confirm receipt of the correspondence and said she denied any wrongdoing [905]. She asked for the fraud policy.

64. The claimant was unaware of this at the time but on accessing the claimant's desk on 29 November to return the claimant's personal belongings SH found a large paper folder of post office receipts in the claimant's pedestal. SH checked what they were and became concerned about the volume. HR raised a query with the flexi team to check the claimant's clocking in and out times. SH then sought advice from the fraud team who investigated and formed a fraud panel who advised there was a case to answer. According to the subsequent investigation report HR were involved together with 3 other senior individuals in the fraud panel process.
65. On 8 January 2018 TW wrote to the claimant confirming that the fraud element of the case related to an alleged breach of the personal errands policy specifically relating to the need to key out to go to the post office [830]. (There is a post office within the respondent's building where the claimant worked).
66. On 9 January 2018 the claimant emailed SH seeking an update on the timescales for the process. It was forwarded to TW. That same day TW wrote to the claimant saying he wished to interview her about the allegations of fraud and bullying and harassment and invited the claimant to an investigation meeting on 18 January 2018 [832].
67. The investigation meeting took place on 18 January 2018 [214-223]. It started with questions about the claimant and EF. The claimant explained matters from her perspective. The claimant referred to having raised two grievances previously and the individuals complained about had not been suspended. She said that she had never got on with GY who she said helped KC with her counter grievance.
68. The claimant was then asked about the post office receipts found in her pedestal. The claimant confirmed the receipts were hers. She said did not know how often she visited the post office. She said that she came into work early sometimes to wrap parcels and she keyed out to do so. She said people used the photocopier for personal reasons. She said it was a last ditch attempt to get rid of her because they could not do so on the bullying and harassment allegation and that it was because of the complaints against AP in 2002. She said her actions were on a par with people selling Avon in work or photocopying in work.
69. It was put to the claimant that on checking the receipts there had been 174 visits to the post office between 24/1/17 and 08/11/17. The claimant said she could not remember them. The personal errands policy was read out to the claimant. She said she had seen consultants and they had said she was allowed to walk for at least 10 minutes of every hour due to her conditions and it did not stipulate where she could go. She said it had been permitted by two previous managers. She said

- EF should have asked her and not just accuse her of fraud. The claimant was told that the time of the visits had been checked against the claimant's flexi time statements and that on one occasion the claimant had keyed out. The claimant said it happened that she went in her lunch hour. She said again she was allowed 10 minutes every hour to take a walk and she would walk to alleviate her problems and it fell on her lunch hour time. The claimant was told that from the flexi print outs it appeared that for a further 173 visits to the post office she did not key out. The claimant said there had been a similar case to this where the individual thought she could do something she couldn't and that person was not suspended. She said there was no case to answer. She said she had no work to do anyway so work was not influenced. She said she was allowed to go 10 minutes a day and it was not stipulated where she could go. She asked how long she was at the post office and TW said they did not have that information currently. The claimant said ER had written to KR about the decision that had been made. The claimant asked if it was a personal errand if she was walking, went to the post office, dropped a parcel off, went to the toilet and then collected the receipts and TW said it was. The claimant did not agree that it was the same as a visit to the shop and said it was no different to going to C1 for a walk around or someone texting when walking or going on the internet at their desk. She said she would not be surprised if it was AP who had alleged fraud against her. She protested that the respondent had been through her belongings and had "stolen" the receipts.
70. TW interviewed EW and SH on 23 January 2018 [257-264]. SH said that when she was clearing the claimant's desk, individuals based around there said the claimant would come in every morning and sit there wrapping boxes and then post them via the post office. SH said in the bottom drawer of the pedestal there was a wallet of receipts that fell out as she opened the drawer. She said she could not say if they were the claimant's or not, so she took them back to HR to check. SH said the claimant's line manager had also commented "she's always over the post office." SH said there were 174 receipts in total and they checked a couple of receipts which she said gave her reasonable cause to look further into it. She said she had an initial conversation with the fraud team as she was concerned about how the receipts were found, but they had advised that as the claimant had given SH permission to empty her desk then it was within process. SH raised a query with the flexi team to check the claimant's clocking in and out times and on 14 December 2018 sent an email to the fraud team to investigate. She said the fraud team convened a fraud panel on which HR were involved plus 3 other senior individuals. She said the fraud team felt there was a case to answer.
71. In interview with TW, EF gave her own account of her interactions with the claimant. She said she felt intimidated and threatened by the claimant's behaviour. She said she never saw the claimant use the post office but had suspicions about the claimant's work as people would say the claimant was sat by her desk doing her hair, applying make-up and wrapping parcels. She said she only saw the

claimant wrapping boxes on one occasion and did see the claimant on one occasion go out with a shopping bag. She said nothing had been brought to her attention about an occupational health report.

72. On 24 January 2018 TW asked the claimant to consent to release a copy of her occupational health reports. The claimant refused permission. She said this was because the respondent had already been through her personal items, had stolen from her and had breached her right to privacy and there was no trust left.
73. The claimant had the post office receipts returned to her on 25 January 2018. She says this was only because she had asked for them to be returned. The respondent says they were returned once the claimant confirmed they were hers.
74. TB, Head of Service Creation, was appointed as Decision Maker. He was GY's line manager. He had only joined the respondent in November 2017. TB told us he had various briefings with TW about the progress of the investigation. There are no written records of these. On 29 January 2018 TW emailed TB saying he concluded there was no case to answer regarding the bullying and harassment allegation but he did believe there was a case to answer on the fraud element [268]. The same is said in an investigation report [233]. There is no rationale given in the written reports for not pursuing the bullying and harassment allegation. TB told us that TW had said he had not seen any evidence to suggest bullying and harassment had gone on and it seemed like there was back and forth between the two which was difficult to prove either way. GY told us he was disappointed with the conclusion as he thought there was evidence.
75. On 30 January the claimant emailed LW asking how much longer she was going to be suspended and when a decision would be made. She said she was aware of a precedent being created in another case where the individual remained in work. TB responded to say he had received the case from the investigating officer and would be considering the contents of the report and would be in contact again, which he anticipated would be the next two to three weeks.
76. On 5 February the claimant said she did not comprehend how it could take two or three weeks for a decision to be made when she was clearly not culpable of any wrongdoing. She said she had not received the investigating officer's report even though it had been agreed it would be made available in order that she could make changes if necessary. She said she also had not received witness statements. TB responded to state that the investigation report and witness statements would be sent shortly with the invitation to a formal meeting. On 7 February TB told the claimant he was awaiting the appointment of a casework manager to ensure they were compliant with all relevant processes and he would then be in touch. He explained to us that on receipt of the investigation report he had requested a Ministry of Justice caseworker to act as an impartial observer and advisor and it

took a while for an individual to be appointed. He said one was appointed on 9 February and it took a while after that for them to be able to speak. Once they had done so he invited the claimant to the disciplinary hearing.

77. On 9 February TB asked for further investigations about whether the claimant had documented agreements with line managers. TW responded to say that ER had said *"I can confirm that I completed an OH referral for [the claimant] which resulted in advice that we make an adjustment for a 12 month period from 24 August to allow her 5 minutes each 40-60 minute period to allow her to stretch and mobilise. My understanding if this is that she could stand/stretch at her desk in the immediate area by walking to the cupboard for example. It's worth noting that this was the point where I transferred line management responsibility to ... [KR] ... In addition it was recommended that [the claimant] have postural breaks of 30-60 seconds every 15-20 minutes which I read as moving position or changing the task she was doing."* TW questioned whether this information could be used as the claimant had refused consent to access her OH records. TB commented that the decision could only be made on the evidence available, and he questioned how far staff confidentiality went as an agreement between a manager and a member of staff must be something the manager had capacity to share. He also commented that the adjustment was between August 2016 and 2017 and some receipts post dated that. TW said he agreed and that even if they looked post August 2017 there was enough evidence. He said ER was the manager between March and September, KR between September and October and then EF. TB asked if the claimant had an arrangement for 10 minute breaks every hour with each of them. TW said *"With [ER], OH recommended her take 5 minutes each 40 – 60 minute period to allow her to stretch and mobilise (no personal errands during these breaks) With [KR] [the claimant] spoke about having a back issue and was "entitled" to a change of activity break ([KR] did not authorise personal errands during these breaks) (nothing in writing). With [EF] nothing agreed."* [269].
78. On 15 February 2018 the claimant wrote to TB saying she wanted all the case notes and witness statements and notes of the meeting the claimant attended with TW [274]. In a letter dated 19 February 2018 the claimant was invited to a disciplinary meeting. The allegation was said to be that the claimant had breached the respondent's fraud and personal errand policy when she visited the post office on 173 occasions between 24 January 2017 and 8 November 2017. The letter said the investigation report was attached. The claimant commenced Acas early conciliation that day. TB says, and we accept, that the letter was accompanied by the investigation report and the accounts taken from SH and EF. An additional document added to the bundle shows TB sending to another member of staff the statements of EF and SH and the investigation report for printing, and we therefore accept it is likely they were sent to the claimant at that time.

79. On 22 February LW contacted TB to say she had a grievance from the claimant she was passing him to handle alongside the disciplinary case. On 9 March the claimant was sent copies of her flexi time statements.
80. The disciplinary hearing took place on 13 March 2018. The notes are at [323 – 327]. The claimant said that SH had stolen from her, and that TB had not considered ACAS, criminal law, common law or employment law. The notes say TB responded “there is an appeals process and can say this in your appeal. We had a member of staff check the pedestal”. The notes show the claimant saying there were only 166 working days between the dates and she had holidays and bank holidays too, so the number did not add up. TB said he would request a recount of the receipts. The notes say that TB referred to an OH referral made by ER and the claimant said RR made the initial referral. TB said, according to the note, that the claimant had said she was unwilling to show the OH report. They record the claimant responding she would make the OH report available in tribunal and that people had stolen from her and she was not happy with people going through her medical report. The claimant said she was told she could have a 10 minute walk every hour. TB said it was a 5 minute comfort break every 40 – 50 minutes to stretch at the desk. The claimant disputed this and accepted the arrangement was not agreed in writing with a line manager. She said she did not understand that the report only ran for a year from August to August and that her disability would not go away. The notes record TB saying her understood this and that reasonable adjustments could be ongoing. He said they would check the dates and times of the receipts. The HR caseworker told the claimant she needed to provide them with everything she had now to enable TB to make a decision. The notes record the claimant saying she was keeping it for tribunal. The claimant said that other staff were allowed to work from home for a furniture delivery or they would text in work or do their hair in the toilet and yet she cannot go to drop something off at the post office. She said she was taking parcels on her way to the toilet and did not wait in the queue. The notes record the claimant raised a wide variety of matters she took issue with and that she was asked at the end if there was anything else she wished to cover. She was told the meeting notes would be shared so she could make any changes necessary.
81. The claimant says that TB refused to allow her to show him how long it took her to do her walking/exercising/toilet break. She says he would not answer her complaint about theft. She says that TB was aggressive in his questioning and she was not given an opportunity to explain what happened. She says TB told her he was “in control” and he had a set of questions he did not deviate from. She says they were accusatory questions. She says she felt rushed. She says she was not given the opportunity to explain the amount of times they had accused her of going to the post office was incorrect. She says she gave TB an example of another time in work when she said she had prevented a fraud. She says she told him about her earlier grievance and what had happened. She says she was not being

treated the same as other colleagues who might have a discussion on the floor about going to the gym or about a lunch. The claimant says that when she raised RR getting an occupation health report and not ER, TB got angry saying “who am I to believe?” The claimant says she started crying because TB was insinuating she was lying and she had to ask for time to compose herself. She says after the meeting she went into the toilets with TB’s PA as she was still crying and said that TB had been bullying and aggressive. She says the PA told her to be quiet. We return to some of these allegations below. [373] is a log of materials the respondent says was sent to the claimant which says the meeting minutes were sent to her on 23 March by email and 26 March in the post.

82. On 13 March, the claimant emailed TB complaining she had not had all the statements before the hearing, referring to ER’s comments. TB apologised and pasted it into an email reply seeking the claimant’s comments [322].
83. On 16 March TB wrote to the claimant to say there would be a delay due to additional information from the claimant he had decided to carry out further investigations.
84. On 3 April 2018 the claimant was sent the grievance result saying there was no evidence to support any wrongdoing and all processes had been followed consistently and correctly.
85. On 5 April 2018 the claimant was sent notice of her dismissal [336]. The letter said TB had taken into account the recommendation from OH that the claimant be given time to stretch and mobilise, the conversations and agreements with managers and that the claimant said she visited the post office on the way to the toilet. The letter said the claimant was in breach of the personal errand policy and the fraud policies and there was no agreed arrangement in place with the claimant’s line managers that would explain the 173 occasions where she visited the post office while claiming working time. The letter said that in light of this and the volume of breaches over a sustained period, it had been decided to terminate the claimant’s employment without notice.
86. TB said in evidence that his understanding was (based on the information TW obtained from ER) that the claimant was permitted an adjustment whereby she could move /mobilise herself on the floor where she worked but did not extend to the claimant moving around for 10 minutes every hour or leaving the floor. He said that as there had been no discussion between the claimant and EF about adjustments, he had approached the situation on the basis that the arrangements in place with ER had carried forward. He said his knowledge of the building was such that for some of the time the claimant was on the 14th floor and the post office on the ground floor. He said the lifts were busy and that a visit to the post office (depending on how busy it was) would be likely to take on average 15 minutes

- from start to finish. He said he himself was based on the 14th floor of block D and a visit to the coffee shop next door to the post office would take 15 minutes. He said that when claimant was based in A2, the closest to the post office, the claimant still was leaving her place of work, leaving her floor and going down a flight of stairs. He said that the claimant was also based for a time in C block which was a different building with a link bridge which again involved the claimant leaving her place of work. TB also said in evidence his understanding was that there was a policy in place stipulating that if you were leaving your floor for a non work reason then you had to clock out and clock back in. He said he was also aware there was a personal errands policy which stated that employees could not carry out personal errands during work time. He said there were 173 transactions carried out by the claimant at the post office where the claimant had not signed out.
87. TB said in evidence that the claimant had not denied visiting the post office but claimed doing so was a reasonable adjustment she had in place. He said he did not believe that the claimant was visiting the post office as part of the claimant exercising an agreed adjustment or as part of the claimant visiting the toilet. He said there were toilets available to the claimant on her own floor. He said he did not consider that the claimant's reasonable adjustments extended to visiting the post office. He said the issue was that the claimant had not clocked out, and so she was essentially being paid by the respondent to run personal errands. TB said in evidence it was his belief the claimant had been conducting personal errands during work time on a large number of occasions and that she knew this was in breach of the policies. He said he believed this was in the definition of fraud and, in his view, amounted to gross misconduct. He said in deciding to dismiss he took into account the claimant's length of service and disciplinary record but that given the volume of breaches in his view dismissal was the appropriate sanction.
88. TB said that he did see the claimant's earlier grievances as part of the investigation process because they had been raised by the claimant. He said that having read them he did not consider them relevant to the outcome of the disciplinary and that he made his decision to dismiss the claimant on the basis he believed she had repeatedly and knowingly breached the personal errand and flexitime policies over a sustained period of time.
89. The claimant exercised her right of appeal. The appeals officer was RC, who at the time was a finance director in a different management chain to the claimant. RC met with the claimant on 18 May 2018. The notes are at [364-367]. The notes say that the claimant mentioned a colleague who had not clocked out for cigarette breaks but had only been demoted not dismissed. She said other staff were on the internet or going for coffee without clocking out. The claimant complained items had been stolen from her and the investigation had not been undertaken in a reasonable timescale. She said when she asked to look at the staff handbook she was told she needed to be escorted. She said she was suspended without a

reason. She complained that SH had been involved when she should not have been and that TB was not neutral. The notes say that RC asked the claimant why she thought she had not committed fraud and the claimant said there was no intention or act. She was asked why she disagreed she had misused the flexi system. The claimant said when using the post office she had used no time as she was going to the toilet anyway, that it was a different toilet but it only added a few yards, and was just dropping the parcel off so no time was taken. RC asked the claimant if she was going to a toilet further away because it meant walking past the post office. The notes say the claimant said she could choose whichever toilet she wanted to go to. The claimant said although she did have a disability and needed to exercise there was no need for mitigating circumstances as it was quite reasonable for her to go past the post office.

90. The claimant says she asked RC did she understand how serious it was to say a person was guilty of fraud and that RC laughed and said "I don't think they've accused you of fraud." The claimant says that RC thought it funny or did not care and did not know the full facts of her case. The claimant says that she said she had not committed fraud or abused the flexi system and that RC then asked her "why do you think you have not committed fraud?". The claimant says she went on to explain there was no act or intention and she was just walking and exercising that she was allowed to do. She says she told RC of a recent case where a member of staff had not keyed out for cigarette breaks and had not been suspended or lost their job and there was also a similar case in the IT directorate where there had been no case to answer. The claimant says she asked RC whether they had looked at other people's flexi statements as that would show the claimant was being victimised. She says she told RC the staff survey showed a bullying culture in the business and that she was being targeted because she had spoken about such matters previously. The claimant says that RC did not ask her what her disability was or how it affected her and that RC did not engage with the substantive issues raised. The claimant says that the appeal outcome letter was only 6 sentences long. The claimant also says that RC was biased against her because RC is friends with LW (HR director) and AP (SH's line manager).
91. By way of a letter dated 24 May 2018 [369], RC rejected the claimant's appeal. RC said in the letter she had considered that the claimant had not brought forward new evidence and she did not consider there were any procedural errors or deficiencies in the investigation. RC said in evidence she could not recall being aware of the claimant's previous grievance at the time she conducted the appeal.
92. The claimant relies on two specific comparators. Comparator 1 is an individual who was given a written warning for failing to recognise and manage risk from an instruction to goods receipt on partial receipt of items, not fully understanding financial procedures, and not challenging instructions outside of the agreed process. As the tribunal understands it, it related to payment for printers and the

company went into administration before they were delivered. The records state there was mitigation as the individual was acting on instruction from another. The claimant says that in his case proper consideration was given to all the factors such as his length of service and clean disciplinary record, when hers was not.

93. Comparator 2 was disciplined and demoted for repeated and inappropriate usage of pool cars and a company phone for non-work related matters. The claimant again says that this comparator had a proper consideration of his case with a 7 page outcome letter when hers was only 2 pages long. She says these comparators also did not have a disability like her and they were not exercising reasonable adjustments like her. TB said he did not know the individuals or the facts relating to them and it was not something raised in detail with him in the disciplinary meeting. RC said in evidence that she was vaguely aware of comparator 1 but do not know the details about his disciplinary proceedings. RC said in evidence that she was aware of the respondent disciplining and dismissing a number of staff every year for flexi-time fraud and she had asked HR to produce a list of staff disciplined around the time of the claimant. That can be found at [536 – 539].
94. The claimant says she was prevented from applying for internal roles as she could not access the internet portal as her login had expired and she was unable to reactivate it. She complains that SH made no effort to rectify it. The claimant says she was also unable to obtain skills and experience in her business analyst role or sit the exam.

Discussion and Conclusions

Unfair dismissal

The reason for dismissal

95. The focus in an unfair dismissal case is primarily on what was operating in the mind of whomever made the decision to dismiss; here TB. Having considered all the documents and the evidence before us we find that TB genuinely believed that the claimant had, over the period in question, left her workstation and her work area/ floor and travelled to the post office in paid worktime, without clocking out, and had conducted 173 transactions at the post office. He believed that this was in breach of the personal errands policy and the fraud policy. He did not believe the claimant's actions were part of her exercising reasonable adjustments that were in place, and he did not believe there was an agreement in place that the claimant could leave the floor/work area for the purpose of exercising her adjustments. He did not believe the claimant's actions amounted to the reasonable exercise of a trip to the toilet. He believed that the claimant had deliberately gone to the post office on repeated occasions outside the bounds of her adjustments that were in

place. This is all reasoning that relates to the conduct of the claimant. Conduct was therefore a potentially fair reason for the claimant's dismissal.

Were TB's beliefs based on reasonable grounds?

96. It is important to bear in mind here that we have to primarily look at what information was before TB at the time he made the decision. We cannot therefore decide these issues for ourselves on the basis of the evidence presented before us afresh at the tribunal hearing.
97. We find that TB's beliefs were based on reasonable grounds. The respondent had the timed receipts and had checked them against the claimant's clocking in records. They checked them a second time at the request of the claimant. They showed that the claimant was clocked in and being paid to work at the time of the post office transactions. By the time of the disciplinary hearing the claimant had the receipts and she had the clocking in and out requests. In the disciplinary process she did not dispute that the transaction times were at a time when she was clocked in. She accepted the receipts were hers. On the face of it this was clear evidence that TB could rely upon to conclude the claimant had conducted the transactions during working time.
98. At the employment tribunal hearing the claimant argued that the transaction timings did not equate to actual time spent at the post office on her part (or time spent traveling there and back). She said that she would take an exercise break, travel to the post office, drop the parcels off, go on to the toilet, and if there was no queue pick up the receipts and pay for the parcels on her way back. She said otherwise she would make a second trip to pick up the receipts. She said that the post office staff would take the parcels and process them at times when the post office was quiet, hence why there may be transactions at different times of the day on any one particular day but she said the transactions times were not the times when she was actually engaged in dropping off and picking up parcels. This is not, however, an account that the claimant gave during the disciplinary process. The claimant had the opportunity to give such an account to TB. The claimant also had the opportunity to assess the receipts against her clocking in records and put forward an alternative account of likely time spent at the post office/travelling to the post office to TB if she wished to do so (albeit it would still have involved trips to the post office in working time, sometimes twice a day). The claimant did not put such a case forward. It was therefore not possible for the respondent to take it into account at the time of the disciplinary process.
99. The most the claimant said to TB was that there were only 166 working days in the period and she had taken holidays too so that the number of 173 transactions did not add up. She also said she would drop the parcels on the way to the toilet, and not wait in the queue. But she did not give the much fuller account she gave to the tribunal. It was in response to the claimant's question about the number of working days that TB said they would recount the receipt before he reached a decision. That was a reasonable step to take in response to what the claimant said. The claimant did not say to him what she said

to the tribunal. TB was left with reasonable grounds to believe the transactions had been conducted during working time.

100. TB had reasonable grounds for believing such action was contrary to the personal errands policy. It was introduced in 2011 and the introduction stated:

“From next Monday, 11 April; staff will have to key out to make a personal errand; such as going to the shop or cashpoint.

HR has today published a revised Pay & Conditions of Service Circular giving more details of the change; explaining what this means in practical terms.

Occasional personal errands have; to date; been a concession which... staff have been allowed to make during their working hours. But a recent review has revealed that these concessions have not been applied consistently across the [respondent’s business].

[The respondent] is keen to continue to offer these services to staff however; in a time when we are focussing on efficiencies and maximising productivity; from Monday this concession will no longer be provided.

Personal errands do not include working at your workstation; attending business meetings; taking a comfort break; buying items from the trolley or getting a drink in your rest area or kitchen.

Existing rules relating to smoking breaks remain the same and this change will bring making a personal errand in line with the current smoking policy.

Staff will have to use the terminal on the floor where they work to key out to make a personal errand and key in at the same terminal on their return.

It is important that staff make their manager aware of their intention to go out on a personal errand to allow their manager to monitor and manage their team. Today’s circular emphasises that any member of staff or manager who fails to comply with these new procedures; could face disciplinary action.”

101. There is a personal errand FAQ which includes:

“Q5: If I am moving between buildings on the... site to attend a business meeting: can I stop off at the A1 café or D Ground shop to get a coffee on the way?

A5: No. It is the same as the way staff are required to clock out for a smoking break. You must clock out for personal errands. This also applies to staff moving between buildings on the [other location] site...

Q7 I go to the shop to get coffee for a number of colleagues on my team, do I still need to clock out?

A7 Yes, any visit to the A1 café, shop, restaurant, Sports and Social shop, cash point and Post Office should be done whilst clocked out....

Q13: Do staff who have a medical condition have to clock out to take their medication?

A13: For staff who have a medical condition; there may be circumstances when they need to take time away from their workstation to take medication or other activities associated with their medical condition.

As part of a reasonable adjustment; for any activity which is directly related to a medical condition; staff are not expected to clock out. For all other personal errands; staff must clock out in line with the procedures in the circular.

Managers are encouraged to discuss and review any reasonable adjustments with their staff that have medical conditions following the introduction of the new procedures.”

102. The personal errands policy gave TB reasonable grounds to believe that a trip to the post office should be undertaken when clocked out and that making such a trip would be breach of that policy. The claimant did not suggest in the disciplinary process that the personal errands policy was something that she could not reasonably have been aware of. Instead, her position was that as she was exercising reasonable adjustments and/or as she was going to the toilet she was not in breach. That of itself shows a fundamental understanding on the claimant's part as to what the errands policy did and did not allow.
103. TB had reasonable grounds for believing it was not permissible under the personal errands policy to visit the post office on route to the toilet without clocking out. Taking a comfort break does not require clocking out under the personal errands policy but visiting the post office does. The answer to Q5 in the FAQs shows that the respondent's stance was that adding in a personal errand on route to a permitted work activity requires the individual to be clocked out.
104. TB also had reasonable grounds for believing that the claimant's actions fell outside of the medical condition exemption. The claimant said she was permitted under occupational health reports to walk for 10 minutes in every hour. However, she refused TB access to her occupational health records. She said that ER was aware of this and had written to KR about it. TB had ER's recollection of what adjustments were in place, which was a 5 minute period every 40-60 minutes to stretch and mobilise which she understood to be stretching and mobilising in the vicinity of the claimant's workstation. She also recalled the claimant being entitled to micro postural breaks to change activity or move position. She said she had not authorised personal errand in those breaks. The claimant said to TB that she did not know where ER had got that from. Nonetheless the claimant continued

to decline access to her occupational health records. It was in the reasonable range in those circumstances for TB to decide to rely on the information that ER had given. He had reasonable grounds for believing that the adjustments were for stretching and mobilising in the claimant's work area and not for walks around the building. He also had reasonable grounds for believing that there had been no agreement between the claimant and a line manager that she could use stretching and mobilisation breaks to run personal errands. He had reasonable grounds for believing the claimant fell outside the medical condition exemption to the personal errands policy on the basis that a trip to the post office was not an activity directly related to the claimant's medical condition. Instead he had reasonable grounds to believe the claimant's activities fell within the requirement that "for all other personal errands; staff must clock out in line with the procedures in the circular."

105. TB also had reasonable grounds to believe that the claimant knew that her activities were not permitted under the personal errands policy. He also had reasonable grounds to believe it was conduct that breached the fraud policy. The policy says:

"This Policy covers all instances of actual or suspected fraud or bribery involving staff and/or suppliers.

The [respondent] requires all staff at all times to act honestly and with integrity and to safeguard the public resources for which they are responsible and expects the same of any persons or organisations which have a business relationship with the [respondent]. [The respondent] will not accept any level of fraud and has a zero tolerance attitude to fraud and bribery; therefore any case will be thoroughly investigated and dealt with appropriately....

There is always an intentional dimension to fraud – it is a deliberate act committed to secure an unfair or unlawful gain, to avoid an obligation or to cause loss to another party."

106. TB believed that the claimant had deliberately not clocked out so that the trips to the post office happened in paid working time. If the claimant had clocked out, she would have had to work additional time back. He believed the claimant was securing an unlawful gain, avoiding the obligation of clocking out and causing loss to the respondent in lost working time. That the claimant told TB that there had been a time earlier in her career when she says she declined to participate in a potential fraud does not mean TB was duty bound to find that the claimant had not, in relation to the post office trips, knowingly conferred a time/money advantage on herself by not clocking out. TB had reasonable grounds for that belief and for believing it was intentional. As already stated, the claimant did not say she was unaware of the personal errands policy, instead she sought to exempt herself from it. TB had reasonable grounds for believing the claimant was not exempt and that she knew her post office trips were not exempt, given what ER had said about the adjustments that were in place, given the line managers were saying they had not granted the claimant permission to go on personal errands in mobilisation/stretching breaks and given it was difficult to see how it could be said a trip to the post office was an activity directly related

to the claimant's medical condition. Moreover, that the claimant did not approach her line managers and ask permission to visit the post office on a mobilisation/stretching break, in itself, could reasonably be seen as telling.

Belief based upon reasonable investigation? / procedural fairness

107. We turn next to whether the belief in the conduct was reaching having conducted a reasonable investigation (in the sense of being within the reasonable range). That overlaps with issues raised by the claimant of procedural fairness.

Suspension

108. The Acas Code of Practice on Disciplinary Procedures says that where a period of suspension with pay is considered necessary, the period should be as brief as possible, should be kept under review, and it should be made clear that suspension is not considered a disciplinary action. The respondent's own suspension policy says that suspension should not normally be necessary, however, exceptionally and in serious cases of misconduct suspension may be necessary whilst the alleged misconduct is investigated. It says the circumstances where it may be appropriate could include where there is a risk to other employees, property or customers, a risk that evidence may be tampered with, or there has been a serious breakdown in the relationship between the employee and the department. The policy says that alternatives to suspension should always be considered first. The policy says that the suspension period must be kept as brief as possible and kept under regular review (as a minimum monthly) by the decision maker in consultation with the HR business partner. It says that suspension may be appropriate immediately following an incident or later in the process. The decision maker is responsible for staying in touch with the employee during the period of suspension to keep them up to date with progress, explain any delays, signpost them to sources of support and keep them updated as to departmental developments.
109. The claimant says her suspension was improper because she was suspended for bullying and harassment when she had not committed bullying and harassment and the allegations were dropped against her. We find that the initial decision to suspend the claimant was within the reasonable range open to the respondent at the time. We accept that GY was seriously concerned about what EF had reported to him and was seriously concerned for her wellbeing. EF was in a vulnerable personal situation. GY talked about it being the only situation of that magnitude that he had encountered in his career. We find that his concerns were genuine from his perspective and were not, for example, born of some desire to disadvantage the claimant because she had brought grievances in the past. At that point in time, we therefore consider that it was within the reasonable range for GY to decide to suspend the claimant whilst the allegations were investigated as opposed to taking alternative lesser actions. It was in the reasonable range to consider that there was a risk to EF's wellbeing if the claimant were not suspended and also in the reasonable range to consider that there had been a serious breakdown in the relationship between the claimant

and the department that necessitated suspension from the workplace while it was investigated. The complaint, on the face of it, was a serious allegation. We have to assess the decision at the point in time it was taken. That TW and TB, following investigation, later concluded that they did not consider there was sufficient evidence to take the claimant to a disciplinary hearing for bullying and harassment does not of itself retrospectively make the original suspension improper. They are different stages in the disciplinary process. The claimant also says that KC and PW were not suspended but she was and therefore she was being singled out. We are satisfied, however, that GY made a genuine, individualised decision to suspend the claimant on the information that he before him at the time and that decision was within the reasonable range.

110. The claimant says that she was suspended without having the chance to explain her side of things. As the suspension policy says, a suspension can take place immediately following an incident, and in the tribunal's industrial experience that is often the case because it gives the employer space to investigate the incident whilst the individual facing the allegations is off site. It is therefore not outside the reasonable range for the claimant to have been suspended before an investigatory interview with her was undertaken. It is, however, reasonable for the suspension to be explained to the individual. We accept here that GY attempted to do so but was unable to because the claimant's contact details were not up to date and, when requested by SH, the claimant refused to share her contact details with GY. The claimant says that she should have been allowed to attend work when she was next due in and that GY should have spoken to her then. We do not consider the claimant's stance to be reasonable; it was open to her to have agreed to allow GY to contact her. Moreover, for the claimant to have attended her place of work would have flown in the face of the concerns GY had that lay behind the suspension. We therefore consider that reasonable efforts had been made to discuss the suspension with the claimant in the circumstances.
111. The claimant says that her suspension letter was deficient as it simply used the phrase "alleged misconduct." Whilst accepting that it was an early stage of the investigation, we do consider that any reasonable employer would have given greater detail than simply "alleged misconduct." That really was no explanation at all bearing in mind suspensions usually are because of alleged misconduct. The failing's impact was, however, mitigated by the fact that the claimant guessed that her suspension was because of her interactions with EF. She also later knew the position as the investigation progressed.
112. The claimant complains that she was suspended for one thing and dismissed for another and therefore that also means her suspension was improper. The claimant was suspended due to the bullying and harassment allegation. The claimant asked for her personal effects from her desk. The receipts were found whilst clearing her desk. The claimant then faced a second disciplinary allegation relating to trips to the post office when not clocked out. After investigation the bullying and harassment allegation did not progress to a disciplinary hearing but the allegation relating to the post office trips did. The claimant was then dismissed in respect of that allegation. That the claimant was initially suspended for one

allegation and dismissed for another does not mean her suspension was improper; it was simply due to the particular way in which events unfolded in the circumstances.

113. The claimant says her suspension was not reviewed. GY said that he did review it monthly but that he could no longer access the records as they were on a broken laptop. We did not accept GY's account on this point. We consider that if the claimant's suspension had been subject to a formal monthly review that would have generated paperwork such as emails (which have not been disclosed in this case). Moreover, as the suspension is conducted in conjunction with HR, HR would hold records. We consider it more likely that GY largely dropped out the picture in relation to the claimant's case as he was not acting as a point of contact for her (and the claimant did not want him to), and the suspension reviews did not happen. We would, however, observe we consider it likely that if the reviews had taken place the claimant would have remained suspended whilst the investigation was ongoing, and that it would have been within the reasonable range to do so. Once the claimant faced the allegation of fraud, we also consider it likely that her continued suspension would have been inevitable given the serious nature of the allegation and bearing in mind the flexi system operated on trust.
114. The claimant complains that her suspension prevented her from working flexi time and she was unable to sit the exam she had been due to sit for her role. The inability to accrue flexi time is correct as it is an inevitable consequence of being suspended. She was, however, suspended on full pay. It would be the respondent's responsibility to rebook the exam in due course. The claimant says she could not apply for vacancies as her account was deactivated. The respondent gave the claimant details of where vacancies were publicly accessible and also offered alternative ways for the claimant to activate her account [856].

The investigation

115. The claimant complains that GY was involved in her case. She says he was not impartial because of his previous involvement in the grievance of KC. We are satisfied that GY had limited involvement in the claimant's case. He made the initial decision to suspend. Either he or EF gave an initial briefing to TW. We do not find that any of these things were motivated by an ill will towards the claimant as a result of the claimant having previously brought a grievance against KC. We find that GY was simply genuinely concerned about EF and thereafter the second allegation about breach of the personal errand policy (which did not involve him) needed to take its course. We are also satisfied that GY was not involved in the decision making of TB at the disciplinary hearing or the decision making of RC on appeal. His separation from the process is demonstrated by the fact that he was unhappy with the decision not to progress the bullying and harassment allegations after the initial investigation of them and that the decision not to progress that allegation was actually made.
116. The claimant complains that TW's letter of 7 December 2017, inviting her to an investigation meeting, simply referred to an allegation of bullying and harassment with no further detail.

It is the tribunal's experience that often employer's will give a minimal amount of information to a member of staff before an investigation meeting, because of a wish to obtain an unsullied first account from the employee's perspective. The requirement to provide detail of the precise allegation, and the evidence relied on in support of the allegation, lies at the stage of the disciplinary hearing, not at investigation stage. That said, the tribunal does consider that a reasonable employer would have made it clearer to the claimant in the specific what the allegation was about (i.e. that it related to her interaction with EF). The impact was, however, mitigated by the fact that the claimant fundamentally had guessed that was what it was about. Once she had attended the investigation meeting with TW in due course and was asked about her interactions with EF she also again knew this. The bullying and harassment allegation was then ultimately not pursued further through the disciplinary process.

117. The claimant says that the bullying and harassment claim should not have progressed against her because EF did not commence a formal grievance against her. She says without a formal grievance a disciplinary process cannot be started. We do not agree. A grievance process and a disciplinary process are two separate processes. If an employer is in receipt of a complaint or information comes to an employer's attention about potential wrongdoing, an employer is at liberty to start a disciplinary investigation process. There is no requirement for there to be a formal grievance first.
118. The claimant says that the disciplinary investigation was unfair as the respondent went through her possessions. The respondent did not go through her possessions as part of the disciplinary investigation. As already stated, the receipts were found by SH as part of the claimant's own request that her property be returned to her. They were then examined as to what they were/ who they belonged to, and it was that which then led to the concerns about potential misuse of the flexi system and the potential disciplinary concern. In any event the respondent's actions in this regard were within the reasonable range open to an employer in such circumstances faced with what SH found.
119. The claimant says that the fraud panel did not have the full evidential picture before them. She says the fraud panel did not know that the receipts had been stolen from her. She says the fraud panel did not know she was exercising a reasonable adjustment or the true number of trips. She says that HR deliberately falsely presented the case to the fraud panel. She says she did not get to put her version of events to the fraud panel.
120. We do not consider that the receipts were "stolen" from the claimant. They were found in her work pedestal. The respondent investigated what they were, which then gave rise to disciplinary concerns and they were further investigated. They were returned to the claimant when she asked them to be returned. Further, SH's account was that the fraud team did know about how the receipts were found because she sought some advice from them when she initially found them and they said that to continue to investigate it was within process. Moreover, fundamentally the fraud panel were not determining the disciplinary case against the claimant. Their involvement was to consider if there was a potential case

of fraud. They did so by looking at the transaction times on the receipts against the clocking in records. It was in the reasonable range to reach the view that this was potential abuse of the flexi system in a sustained way and therefore potential fraud that required further investigation. It was within the reasonable range for the claimant not to be involved at that stage. Her opportunity to give her version of events and to put forward any mitigating factors lay with TW's investigation, TB's disciplinary process and the appeal to RC. It was in the reasonable range to follow such a process.

121. The claimant says that the fraud panel was biased against her because it contained representatives from HR, and HR were biased against her because of her previous grievances. We had no evidence before us that HR were biased against the claimant or manipulated the fraud panel. Indeed, SH had enquired of the fraud panel whether it was legitimate to proceed given how the receipts were found. But in any event, the claimant's point again misstates the involvement of the fraud panel. The fraud panel did not conclude a disciplinary case against the claimant, but instead held there was a potential fraud case that needed investigation through the disciplinary process. It seems to the tribunal that was probably an inevitable position once the receipts had been found and checked against the flexi records. But in any event, it was a decision and process that was in the reasonable range and is not indicative of bias.
122. The claimant says that her suspension was not kept to a bare minimum. The length of the claimant's suspension was linked to the length of the disciplinary process. In that regard the claimant says that the disciplinary process took too long. The claimant complains she was not interviewed until 18 January 2018, and then EF and SH were not interviewed until 23 January 2018. She says she was not given timetables as to how long things would take.
123. The claimant was initially invited for an investigatory interview reasonably promptly, due to take place on 14 December 2017 (having been suspended on 24 November 2017). It did not go ahead because of the additional fraud allegation coming to light. Steps were being taken to check the receipts against the clocking in records and to follow the fraud panel process. TB explained to us that Christmas leave absences also caused some delay, with the claimant then being invited for interview on 18 January 2018. Again, we have to consider the point from the perspective of whether the length of the process was within the reasonable range open to an employer in the circumstances. Whilst appreciating the impact on an individual such as the claimant facing suspension and facing a disciplinary process, the timetabling of each step in the process is not a counsel of perfection. Individuals involved in a disciplinary process will have other demands on their time. In the tribunal's industrial experience, the length of time in the stages of the disciplinary process in the claimant's case were actually fairly prompt. We do not consider that the times taken for each stage or the length of the process overall were unreasonable or outside the reasonable range. After the investigatory interviews finished on 23 January, TW had completed his investigation report by 29 January 2018. TB explained to us that there was then a short delay whilst he was waiting for a Ministry of Justice caseworker to be appointed and for them to be able to speak. On February 2018 TB asked for TW to conduct some

further investigations, with the claimant then on 19 February 2018 being sent an invitation for a disciplinary hearing, which took place on 13 March 2018. The claimant was told of the decision on 5 April, and she then exercised her right of appeal. The whole process including appeal took 6 months. As stated, we do not consider the timescales involved were outside the reasonable range.

124. The claimant complains that she was not told until 8 January 2018 that the allegation of fraud related to clocking in and out of the post office. She also complains that she was not given disclosure of documents and other evidence prior to the investigation meeting. The claimant further complains that she was not told before the investigation meeting that it was SH who had accused her of fraud or the reason why. The claimant knew the specific allegation she was facing by the time of the disciplinary hearing itself before TB. Bearing in mind the internal processes that were being followed with the fraud panel, we did not consider that it was outside the range of reasonable responses to wait until 8 January 2018 to give the claimant the additional information about the basis of the fraud allegation. As set out above in relation to the bullying and harassment allegation, there is no requirement on an employer to give an employee all the details of an allegation, or the evidence relied upon in advance of an investigation meeting. As commented above, often employers do not do so as they wish to get an unsullied first account from an employee. In the particular circumstances, we consider that the information the claimant was given in advance of the investigation meeting about the allegation was within the reasonable range.
125. The claimant says that no one was contacting her with updates and that she should have been given a new point of contact once SH had accused her of fraud. She says that SH was still emailing her even after SH had given a witness interview. We consider that, on balance, the claimant was given sufficient updates and did have sufficient individuals staying in contact with her during the process. The claimant had refused permission for her contact details to be passed to GY so he was unable to make contact. SH was then in regular contact with the claimant trying to answer her queries, as was TW. TB also sent the claimant updates once he was involved. The claimant was then given a specific point of contact in JT and a further point of contact when JT was on absent. We are satisfied that the respondent made reasonable efforts to answer the various queries and requests for documents and information that the claimant made and to keep her updated. We do consider that it would have been prudent to remove SH from the communication chain with the claimant as soon as the concerns about the potential fraud allegation came to light. This is as much to protect the position of SH as anything else, so that she did not feel she was in an awkward situation communicating with the claimant. As stated, however, JT was then appointed as a point of contact so the situation was remedied. We also do not consider that the involvement that SH had with communicating with the claimant in the window of time in question actually prejudiced the claimant's position in the disciplinary process.
126. The claimant complains she did not have the post office receipts in advance of the investigation meeting with TW. She further says that as she had to ask for the receipts to

be returned to her, it shows that the respondent was not being transparent or interested in the truth and were just accumulating evidence to get the claimant. We do not consider that it was outside the reasonable range to not give the claimant the post office receipts in advance of the investigation meeting with TW. We have set out already above the observation that there is no absolute requirement on an employment to provide evidence in advance of an investigation meeting (as opposed to a disciplinary hearing where decisions are being made). When the claimant asked for the receipts after the investigation meeting they were returned to her. We do not consider that the situation infers that the respondent was not being transparent or was not interested in the truth or was out to get the claimant. The claimant had the receipts long in advance of the disciplinary hearing. She had time to prepare whatever defence she wished in relation to them.

127. The claimant says that she told TW that the allegation of 174 visits to the post office did not add up as she was only in work 4 days a week and had taken leave and she knew that she did not visit the post office that much but TW carried on with the process regardless. We do not consider it is likely that the claimant said this to TW (as opposed to TB at the disciplinary hearing) as it is not recorded in the records of the investigation meeting. The claimant did not during the disciplinary process say that the records of the investigation meeting were inaccurate. The records show the claimant telling TW that the visits were part of, in effect, her exercising her reasonable adjustments, that a precedent had been set in a similar case to hers and that individual had not been suspended, that she was dropping off the parcels/picking up receipts on the way to and from the toilet and that it was no different to the types of activity carried on by other colleagues in working time. The position with the assertion the claimant was exercising reasonable adjustments went on to be investigated. TW had reasonable grounds on which to believe that dropping parcels to the post office/picking up receipts on the way to and from the toilet was a personal errand and was in breach of the personal errands policy. He was also faced with an allegation of potentially offending conduct on a mass scale over an extensive time period. That other staff may not get caught in other activities was not of itself a reason not to proceed on the particular facts of the claimant's situation. Nor was the claimant's assertion that there were other cases where different action was taken. It was in the reasonable range to consider the claimant's particular situation was of sufficient seriousness that it should progress to a disciplinary hearing. The decision that there was a case to answer at a disciplinary hearing was within the reasonable range.
128. The claimant also complains that her private and confidential occupational health information was accessed by TW and others despite the fact she refused consent. We do not find that the respondent accessed the claimant's occupational health reports. ER provided management information about the adjustments she understood the claimant had in place at the respondent, and what she had in turn passed on to KR. It was in the reasonable range to do so. Furthermore, even if there was a breach of confidentiality it did not go to the heart of the fairness of the claimant's dismissal in this case as opposed to being a wider concern as to whether the respondent had or applied the correct procedures relating to medical information consents (see City and Council of Swansea v Gayle [2013])

IRLR 768). At the end of the day the claimant was actually seeking to rely upon these occupational health reports and recommended adjustments to say why she had not breached the personal errand policy. She therefore could not suffer prejudice, in itself, in the disciplinary process, by ER being asked for/giving the information that ER did. If the claimant disagreed with what ER said then it was in her own gift to remedy the situation by giving permission to access the relevant records/ providing copies herself. She was also able to give her own account of any agreement she said was reached with ER or any other line manager if she chose to do so. The claimant refused to do so because she felt she could not trust respondent because of what happened with the receipts. That may well have been subjectively what she was feeling, but ultimately the respondent could only reach a decision based on the information actually before it, or information the respondent could reasonably obtain at the time. If the claimant was not providing them with information that she controlled access to then there was no more the respondent could reasonably do. In the tribunal hearing the claimant said she did not give access to the occupational health reports because they were not necessary as she had a visible disability as she had posturite cushions on her chair. This was not something she, however, said at the time. Moreover, it misses the point as the request to access the occupational health records were about the specifics what they said about exercise breaks.

The disciplinary hearing before TB

129. The claimant complains that TB should not have been the hearing officer because he could not be impartial because he was GY's line manager and would take GY's side. We do not find that he had a bias towards GY simply as a result of being GY's line manager. We also do not consider that it was outside the reasonable range to appoint him as the decision maker because of any risk of a sense on the claimant's part of an appearance of impartiality simply due to the line management chain. TB had only shortly joined the respondent at the time he was appointed to be the decision maker and we accept it was reasonable to view him as being sufficiently independent to take on the role. TB was also supported by a caseworker from the Ministry of Justice, outside of the respondent's organisation. Moreover, we do not see how GY would have any influence to give bearing in mind the allegation that went to the disciplinary hearing was the allegation about the post office trips which GY had nothing to do with. We also do not find that GY set out, behind the scenes, to influence TB in some way to make a decision against the claimant. We are satisfied the decision to dismiss was made independently by TB, supported by the Ministry of Justice caseworker.
130. The claimant complains that she asked to see all the information before the disciplinary hearing but was not given it. She alleges, in particular, that she did not see TW's investigation report. We have already made a finding of fact we are satisfied that the claimant was sent TW's investigation report and the witness summaries from SH and EF. She was also separately sent the receipts and copies of the clocking in and out records. This was all in advance of the disciplinary hearing before TB. What the claimant did not have was the information provided by ER. The claimant complained about this after the

disciplinary hearing and TB apologised and sent it to the claimant inviting further comment. We are satisfied it was an oversight. It would have been reasonable to have provided ER's statement to the claimant in advance of the disciplinary hearing as it was relevant to the decision that TB was making. It was, however, remedied in that TB gave the claimant the opportunity to make further comments before he reached his decision. The claimant also had the right of appeal thereafter to RC where she again would have had an opportunity to comment upon it.

131. The claimant complains that the minutes of the disciplinary meeting are not a true reflection of what was said. We are satisfied that the claimant was sent the minutes after the meeting and that she did not ever revert and say where any inaccuracies were said to be. She said in the past in other processes when she had tried to amend minutes her amendments were not accepted and so it was a pointless exercise. The point, is however, that the claimant did not set out what her alternative account was. We are therefore satisfied that the minutes are a fair reflection of what was said.
132. The claimant says that TB would not let her demonstrate how long it would take her to do her walking/exercises/ take a toilet break. She said to travel from D14 would take 5 minutes not 15. We were satisfied that it was within the reasonable range for TB to decline the request. The claimant was able to explain what she was doing to TB and RC if she wished to do so. It was also legitimate for TB (and RC on appeal) to use their own knowledge of the building and the time they considered it would take to move around the building. Further, as TB said in evidence, the point for him was also fundamentally that the claimant was not clocked out, however much time each trip took.
133. The claimant alleges that TB was aggressive in his questioning of her, said he was in control and would not deviate from the questions he had to ask. She says his questions were accusatory and she was not given the opportunity to explain what had happened. She says she did not have the opportunity to explain that the amount of times it was said she had visited the post office was incorrect. On the evidence before us we do not find that TB was aggressive or accusatory in his questioning of the claimant. The claimant found the whole situation and the hearing acutely upsetting. But that does not, in itself, mean that TB was acting inappropriately. There were questions that he had to put to the claimant about her conduct in order that he could fairly decide the case. They may well have been questions the claimant found upsetting but that does not make them inappropriate. It was not outside the reasonable range for a disciplinary manager to have an agenda that they wish to cover, and a structure to follow, and to seek to follow that structure, provided that by the end of the meeting the individual has been given the opportunity to say what they want to say. The minutes show the claimant diverting the discussion on to matters that she wanted to talk about. It was not unreasonable for TB to seek to focus back on to the core matters he wanted to address, provided overall the claimant had the opportunity to say what she wished to. We are satisfied that she did have that opportunity. The minutes show that the disciplinary hearing was a difficult one and that TB was trying to keep it on track.

134. The claimant did have the opportunity to explain that she thought the amount of times it was said she had visited the post office was incorrect. As set out above, she mentioned the number of working days and holidays she had and TB then said they would get the receipts recounted. What the claimant did not do was give TB the account that she gave this tribunal about her practices about leaving the parcels in bulk on the post office counter (with a key written on them as to which postal service should be used for which parcel), that the post office member of staff would then administer the parcels when their own time allowed, and that she would pay/pick up receipts on her way back from the toilet or make a second trip to do so. She did therefore not make it clear to TB in a way he could reasonably understand that the timings of the post office transactions may not have much bearing to her clocking in and out times. She also did not put forward (which she could have done bearing in mind she had the receipts and the clocking in records) her own analysis of what she believed she had done, timewise, on each occasion in question.
135. The claimant says that when she told TB about the earlier occupational health referral made by RR he got angry and said “who am I to believe” insinuating he thought the claimant was lying. She says she found that particularly upsetting. We do not accept that this is what happened. We find that TB was attempting to understand what occupational health reports were available and what evidence the claimant was seeking to rely upon to show she had agreed adjustments in place that covered her post office trips. The claimant was hampering this by refusing to give permission and saying that she would keep the records for the tribunal. It meant that TB could not take them into account, and the point that TB and the caseworker were seeking to make to the claimant was that if she wanted the information to be taken into account then she needed to provide access/ give them copies. At the tribunal hearing the claimant asserted that she had only refused access to one occupational health report and not the other reports. We do not agree. We consider that the meeting minutes clearly show the claimant being encouraged to provide any relevant information that would enable TB to reach a decision, and the claimant declining to do so.
136. The claimant complains that when she said that SH had stolen from her and they had not considered Acas, criminal law, common law or employment law TB responded to say that “there is an appeals process and can say this in your appeal. We had a member of staff check the pedestal.” The claimant says that this shows the outcome of her disciplinary was prejudged as TB was talking about an appeal before a decision had even been made. We do not consider that TB had prejudged the outcome. He was explaining that the receipts had come from the checking of the claimant’s pedestal and was moving the conversation on to the matters he considered he needed to consider that were directly relevant to the allegation before him relating to the visits to the post office in working time. He was saying that if the claimant remained unhappy with how the receipts were obtained then she could pursue an appeal about that. It was within the reasonable range for TB to seek to concentrate on the task in hand before him in that way.

137. The claimant says that there was inconsistent evidence before TB. In particular, that EF said she had seen the claimant with a bag once, compared to SH saying EF had said the claimant was always at the post office. She says it was unfair to proceed on the basis of such inconsistent evidence, particularly when the inconsistencies had not been tested with the witnesses in question. TB said to us that he was aware of the inconsistencies but that he had reached this decision without taking that line of evidence into account. He said he and TW had been reluctant to ask those on the floor with the claimant about what they had observed about her activities as it would bring a lot of attention on to the claimant amongst colleagues and create hearsay evidence. He said they did not consider it was a fair way to proceed. He said he considered it was not of great evidential value bearing in mind the claimant was clocked in to work at the time of the 173 transactions.
138. There are further investigations that could have been undertaken in relation to what others had observed about the claimant's habits, such as how frequently she would take trips to the post office in a day, and also what the post office staff observed about the frequency of the claimant's visits, how long she would spend there, whether she would take a trip to the toilet and return etc. Such investigations would deal with the discrepancy the claimant identified between SH and EF. We do not, however, ultimately find that the absence of such further investigations took the investigation outside the reasonable range. It is really important to consider this issue from the perspective of what TB understood the position to be at the time, not what we as a tribunal know now. The claimant had not given him the same level of information she gave the tribunal about her habits on her trips to the post office. She did not tell him that she, for example, made a trip with a number of parcels and then left them for the post office staff to administer when the post office staff were able to do so before making a return trip. In the circumstances it was within the reasonable range for TB make the decision on the information before him without having to pursue these additional lines of enquiry.
139. Likewise the claimant gave TB little information to work with in relation to her argument that she was visiting the post office as part of her exercise of a reasonable adjustment. As already stated, she declined access to her occupational health records. She did not set out a clear statement of any alternative agreement she said she had in place with ER or any other manager that expressly permitted her to visit the post office whilst on a mobilisation/stretching break. In her submissions at the tribunal the claimant said that KR did not have a problem with what she was doing, and that a witness statement should have been taken from him. She did not, however, clearly say that to the respondent during the disciplinary process. TB was therefore acting in the reasonable range to proceed on the basis of KR's statement to TB that he had not granted permission for personal errands.
140. At the tribunal the claimant also argued that she could aggregate the 10 minutes mobilisation she was allowed every working hour, and then add on top of that the time for micro-postural breaks to in effect create a pot of working time she could draw down on. She said it meant she had hardly used any of the time she was entitled to. That is not, however, a point she made to TB. It is in any event wholly unsupported by the medical

evidence, which is about taking short regular breaks for stretching and mobilisation then and there, not aggregating time into some kind of pot of entitlement. But in any event TB could not consider information that was not put before him.

141. The claimant says that there was no restriction on where she could go when walking to exercise her reasonable adjustments. It was, however, in the reasonable range, on what was before him, for TB to rely upon what he was told by ER.
142. The claimant says that she also told TB about the fact that she was suspended when others in the past, such as KC and PW were not. We do not, however, consider that it was outside the reasonable range for TB to wish to assess the circumstances of the claimant's particular position on their own merits. Moreover, it was not the issue of suspension that was before TB, but the substance of the disciplinary case against the claimant.
143. The claimant, in her evidence to the tribunal, said that her trips to the post office were part of a trip to the toilet. She said she used the toilet past the post office because it was a long enough distance that allowed her to mobilise, as toilets nearer her desk were too near. She said that she also visited those toilets because there was a wall in them she could use for stretching in private. She said other toilets were not as accessible. She said that she would stretch waiting for the lift and in the lift as well. Indeed, she even said the act of tapping her card to pay in the post office, was a form of stretching. This information was not, however, given to TB at the time.
144. The claimant also says that the decision to dismiss her was biased because HR were seeking to find a way to get her because she raised her previous grievances. She says the fact that the respondent was out to get her is shown by the fact she was suspended for one thing and then dismissed for another. As already stated, however, we are satisfied that TB made his decision, supported by the Ministry of Justice caseworker, independently. We accept his evidence in that regard and do not find that he was influenced in any way by HR or by the fact the claimant had brought grievances in the past. The claimant was suspended for one thing and dismissed for another, simply due to the fact that the receipts were found when clearing out her pedestal, with events in relation to the post office allegation then unfolding from there. We do not find that the claimant was "set up" in this regard by HR. It was the claimant that had requested her personal property be returned to her (which SH had tried to convince her was an unnecessary step) which led to the finding of the receipts. The fact that TW and TB decided not to pursue the bullying and harassment allegation is also evidence to suggest that they were not party to a conspiracy to dismiss the claimant.

The appeal

145. The claimant alleges that RC did not properly consider her appeal. She says that RC did not know the full facts and had laughed at the outset saying "I don't think they have accused you of fraud." RC denied this. We do not find that RC made this comment. It is not

recorded in the minutes (which we accept the claimant would have been sent for checking). Furthermore, we did not consider likely that RC would be so ill prepared to hear the claimant's appeal that she did not know what the fraud allegation was.

146. The claimant complains that RC told her that she was not there to look at the claimant's complaint she had been falsely accused of bullying and harassment. It was, however, correct for RC to say that. She was hearing the claimant's appeal against dismissal which related to not clocking out on the post office trips.
147. The claimant also asserts that RC was biased against her, and that a different manager from a different directorate should have been assigned to hear the appeal. She refers to the fact that RC is Facebook friends with LW and AP in HR. RC did not deny they were Facebook friends. She told us that she was friends on Facebook with a lot of her then colleagues at the respondent. She told us they did not socialise outside of work situations. Having heard from RC we were satisfied that she dealt with the claimant's appeal independently on its own merits and was not influenced by anyone else, particularly by individuals within HR. We therefore do not find that she displayed any actual bias against the claimant. We also do not consider that it was outside the reasonable range for RC to deal with the claimant's appeal or that there was any sufficient appearance of the risk of bias that would reasonably require another manager to be appointed. In the tribunal's industrial experience, it is very common for colleagues to work each other to be social media contacts, include on Facebook. We do not consider that such a connection, of itself, would be sufficient to render RC unsuitable to deal with the appeal.
148. The claimant says that RC did not properly consider her appeal and did not ask the claimant about her disability. We are satisfied that RC did consider the appeal grounds before her. We are also satisfied that the claimant had the opportunity to say to RC what she wanted to say. The claimant was specifically asked if there were any mitigating circumstances. The claimant's stance at the time was that there was no need for mitigating circumstances as it was reasonable for her to walk past the post office, on her way to the toilet as she was simply dropping parcels off which took no time at all. Again, the claimant did not share with RC the type of information that she said during the employment tribunal hearing. We further do not consider that the fact that the appeal outcome letter was short meant that there was not a fair hearing of the claimant's appeal. It simply summarised RC's views that there was no new evidence presented that would affect the original decision and she felt there were no procedural errors during the disciplinary process. That was the approach she was tasked to follow when dealing with the appeal.

Sanction of Dismissal

149. It was not outside the range of reasonable responses to consider the claimant's conduct as found as amounting to gross misconduct. The respondent's disciplinary policy identifies potential grounds for gross misconduct as including fraud, falsification of records and deliberate and gross misuse of departmental property. The fraud policy reinforced how

seriously such allegations are treated. In our judgement it was in the reasonable range for the respondent to characterise the claimant's actions as gross misconduct. The respondent had concluded that the claimant had knowingly on a repeated scale over a long period of time failed to clock out whilst making personal errands to the post office. The claimant acknowledged that the flexi-system was built on trust. The respondent had concluded that the claimant knew it was not permitted under the personal errands policy. Given the respondent's understanding of the scale of the conduct, and the importance of the flexi system being able to run on trust, it was a serious matter and could reasonably be classed as gross misconduct.

150. We then have to consider whether the sanction of dismissal itself was a reasonable sanction. It is not an automatic consequence of any act of gross misconduct and a fair employer must still consider whether that is the appropriate sanction even once gross misconduct has been established. We are satisfied that the respondent, and in particular TB, did weigh into the equation the points made in the claimant's mitigation: including her long service, clean disciplinary record, disability and that she said she had herself tried to expose fraud in the past. We are satisfied that TB weighed this into the equation and conscientiously, using the Ministry of Justice caseworker as a sounding board, deliberated as to what sanction to apply. He was ultimately particularly troubled about the likely scale of the claimant's activity and the period of time concerned. These were legitimate considerations.
151. The claimant says that dismissal was not an appropriate sanction because she was treated disproportionately compared to others. She referred to two recent cases where she said a staff had not keyed out for a cigarette break and one had not been suspended or lost their job but had instead been demoted, and another had no case to answer. She says she brought this disparity in treatment to the attention of TB and RC. The claimant's application at the case management stage to have this comparator information disclosed was rejected. We therefore did not have the individuals' actual records before us. The claimant herself said that for one individual, it was not her fault as she did not know she was not allowed to go outside. The claimant herself acknowledged she personally knew she was not allowed to go outside. The claimant herself therefore drew a distinction between her case and that of the comparator in question, as in the claimant's case TB had concluded that the claimant would have known she was acting in breach of the personal errands policy. The claimant was a long standing employee. As RC said, there was a large scale information campaign in 2011 when the personal errands policy was changed to ensure it was brought to employee's attention.
152. TB focused on considering the claimant's situation on its own merits, rather than looking at what happened in other cases. RC, however, on appeal took steps to confirm with HR that there were other instances in which employees had been dismissed for flexi-fraud at around the same time as the claimant. Those statistics in fact show that dismissal was the most prevalent sanction compared with the administration of a final written warning. We were ultimately satisfied ultimately in this regard that the respondent properly considered

the facts of the claimant's own case on its own merits and its on mitigating factors when deciding to dismiss. We did not consider that the sanction of dismissal was irrationally disproportionate when compared with other cases. It appears consistent with the other cases in the table that HR prepared to assist RC.

153. The claimant also relied upon the two comparators where their circumstances was the subject of a disclosure order. She said such individuals were not dismissed and yet did not have disabilities when the claimant did. We did not consider that these individuals were in truly comparable situations to the claimant or that the analysis helped us assess the claimant's case. Comparator 1's situation was very different to the claimant. Whilst it involved a large sum of money, it was not an allegation of fraud, or breach of the flexi-policy and there was mitigation relating to the fact the individual was acting on the direction of another. Comparator 2's decision appears to be highly tailored to his own individual circumstances (as one would expect the decision to be). It also dates from a long time ago and before the current errands policy was introduced. Again we therefore did not consider that it was of assistance in showing that the claimant was treated disproportionately in similar circumstances. Instead, we are satisfied that the claimant received an evaluation of her situation on its own individual merits, as indeed did comparator 2. The claimant also said she was treated differently to comparator 2 as he had a 7 page outcome letter whereas hers was only 2 pages long. She says this shows there was not a proper consideration of her case. We do not agree. The letters were again tailored to the individual circumstances and will also reflect the personal style of managers involved. It certainly appears that comparator 2's personal circumstances were complicated and he had provided extensive detail of that. Such mitigation will always be particular to the individuals concerned.
154. The claimant also sought to draw an analogy with an individual in the IT directorate who she said had brought the organisation into disrepute but was not dismissed. This concerned an incident that was nothing to do with alleged abuse of the flexi system and we did not consider it to be of assistance, or that the individual was in a truly comparable situation. The claimant also said she was treated disproportionately to SH who she says stole from her but faced no disciplinary action. We do not find that SH stole from the claimant.
155. The claimant also referred to the fact that all employees on the face of it would breach the personal errands policy with chats in work, taking personal calls, answering texts, photocopying personal items, and using the internet without being keyed out. She said that TB had said to her such activity would amount to a personal errand but that in reality there needed to be a common sense approach, as otherwise all staff would be dismissed. She said she was no different to anyone else, or indeed was in a more advantageous situation as she had a disability and reasonable adjustments. She said it was therefore disproportionate to single her out and dismiss her. We do not consider the point assists the claimant. Firstly, the fact that not everyone is caught in a workplace, does not mean that an employer cannot take action against cases which are brought to their attention. Secondly, on the facts as the respondent understood them, these were not comparable

situations. The claimant was not taking an odd short personal call on a mobile phone, or asking a colleague if they were going to the gym. As the respondent understood it, she was deliberately, regularly, making repeated trips to the post office in working time over a long period of time and in their viewpoint, seriously and systematically abusing the trust placed in staff to key out when taking personal errands of that nature.

156. The claimant also says that dismissal was a disproportionate sanction as if there was a problem with her actions her managers should just have spoken to her, and they would have resolved it. The flexi system, however, worked on trust. It was the claimant's responsibility to clock in and out and not for her managers to double check the claimant's every move. There was on the face of it no reason for managers to suppose the claimant had not clocked out. She was not prohibited from making personal errands to the post office, she simply needed to clock out. When the claimant's actions did come to light, they appeared to the respondent to have been on a large scale, and the referral to the fraud panel was made. In such circumstances it was within the reasonable range to have dealt with the situation under the formal disciplinary procedures and upon their conclusion it was not disproportionate or outside the reasonable range for dismissal to have been the sanction.
157. We should add that in her evidence to the tribunal the claimant spoke about the pressures in her personal life at the time. She said more again about this in closing submissions. What she said in closing submissions was not evidence given under oath, but Mr Edwards confirmed he was not seeking to further cross examine the claimant about it. Furthermore, what the claimant said in closing submissions was really just confirming what the tribunal had supposed from what the claimant had said in evidence. In short, she told us that she had been struggling with her personal wellbeing for some time and that, as a way of making herself feel a bit better, she had got into the habit of going shopping and buying an excess of items such as, for example, make up. She said she had reached the point where she realised that she needed to sort this out and so she had been selling the excess items on eBay. We suspect it is also likely that the claimant was facing financial pressures as well which in turned meant the claimant was working lots of hours. She had compressed her full time hours into work 4 long days a week, and was working other days of the week in retail work. The trips to the post office were therefore to post the items the claimant had sold on eBay. The claimant quite understandably values her own privacy and it clearly took a significant effort on her part to tell the tribunal about her situation. However, she did not tell the respondent about it at the time. The respondent was therefore unable to take it into account in mitigation or to consider the claimant's case from a welfare perspective because she did not equip them to do so.

Overall conclusion on fairness

158. We therefore have to take step back and look at matters in the round (including considerations of procedural fairness) and assess whether the claimant's dismissal was fair or unfair, having regard to the reason shown by the respondent, and depending on

whether in the circumstances (including the size and administrative resources of the respondent) the respondent acted reasonably or not in treating it as sufficient reason for dismissing the claimant. It is to be determined in accordance with equity and the substantial merits of the case. In reaching our decision we were particularly mindful of the guidance in Taylor v OCS Group Limited.

159. We found conduct was a fair reason for dismissal and that the respondent formed a belief in the claimant's misconduct based on reasonable grounds. We have found some procedural shortcomings in relation to the lack of reasoning in the suspension letter and the letter stating the claimant was facing an allegation of bullying and harassment and the absence of formal reviews of the claimant's suspension. We have also found that the claimant should have been given a copy of the evidence obtained from her line managers. Such a failure was, however, remedied by the fact that it was subsequently sent to the claimant with the opportunity to comment before a final decision was reached. The claimant would also have had the opportunity to comment at appeal stage. In relation to the errors in respect of the bullying and harassment allegation we are particularly mindful of the fact that the claimant ultimately knew in herself what the allegation related to. Moreover, they were shortcomings that did not affect the fairness of the claimant's dismissal as the bullying and harassment allegation did not progress to a disciplinary hearing. The lack of formal suspension reviews also did not fundamentally prejudice the case as it ended up before the disciplinary hearing, and we have found it likely the claimant would have continued to be suspended if they had been undertaken. We also found that it was in the reasonable range for the respondent to consider the claimant's conduct to amount to gross misconduct, that it was serious conduct, and within the reasonable range to apply a sanction of dismissal. In all the circumstances of the case, including equity, and the substantial merits of the case, notwithstanding the procedural imperfections identified we do consider that the respondent acted reasonably in treating the conduct reason as sufficient reason to dismiss the claimant. The unfair dismissal complaint is therefore not well founded and is dismissed.

Wrongful dismissal

160. For the wrongful dismissal claim we have to consider for ourselves whether, applying the balance of probabilities, the claimant, in effect, committed gross misconduct.
161. We are satisfied that the claimant made numerous trips to the post office during the period in question without clocking out. We are satisfied that the claimant knew of the personal errands policy and that she made deliberate decisions not to clock out. We consider it likely that the claimant decided herself she would be justified in doing so if she called it her exercising a reasonable adjustment. We consider that she, in effect, granted that benefit to herself without discussing and agreeing that with any line manager. We consider it likely that the claimant thought if challenged she would be able to say it was a reasonable adjustment and/or that she was only dropping the parcels off on a visit to the toilet. We consider that the claimant's actions were calculated actions, and a calculated risk, as a means to try to get around the personal errands policy, if challenged, in circumstances in

which in reality she ultimately was aware that neither the exercise of a mobilisation/stretching break or a visit to the toilet necessitated or justified trips to the post office and that these were not the type of activity recommended in the most recent occupational health report.

161. We find that the claimant's conduct was gross misconduct and was conduct that so undermined trust and confidence such as to amount to a repudiatory breach of contract by the claimant. That there may ultimately have been some welfare issues in the background to the poor choices the claimant was making does not affect our analysis in that regard. The claimant was in repudiatory breach and the respondent was at liberty to accept that breach and summarily bring the contract to an end. The wrongful dismissal claim therefore does not succeed and is dismissed.

Disability discrimination – discrimination arising from disability

162. It is not in dispute that suspending the claimant on 2 November 2017 and dismissing the claimant on 5 April 2018 amounted to unfavourable treatment. We do not find, however, that the respondent subjected the claimant to such unfavourable treatment because of something arising in consequence of her disability in that the claimant needed to take exercise during working hours.
163. In relation to the decision to suspend the claimant, this was because of the allegation of bullying and harassment. It had nothing to do with the claimant needing to take exercise. The post office receipts had not come to light by this time. It is therefore simply unsustainable to say that the respondent decided to suspend the claimant on 24 November 2017 because of the claimant's need to take exercise in working hours.
164. In relation to the decision to dismiss the claimant, the essential point remains what was operating in the mind of the decision maker. We have found that TB dismissed the claimant because he believed that the claimant made repeated visits to the post office without clocking out, and he did not consider that such trips were part of the claimant's permitted adjustments for mobilisation and stretching breaks. He considered this was in breach of the personal errands policy. Trips to the post office in working time, or trips to the post office as a particular way of mobilising, as a matter of fact were not part of the claimant's recommended or required adjustments. The claimant breached the personal errands policy not because of her disability, or something arising from it, but because she visited the post office without clocking out, and without securing permission from her managers to make such trips outside of the personal errands policy. Her fibromyalgia did not cause the claimant to behave that way.
165. TB therefore did not dismiss the claimant because of her need to take exercise during working hours. The necessary causative link is not made out. The complaint of discrimination arising from disability is not well founded and is dismissed.

Disability discrimination – reasonable adjustments

166. The respondent knew that the claimant had a disability. The respondent did not apply a provision, criterion, or practice of requiring the claimant to key out in order for the claimant to exercise her reasonable adjustments. If the claimant had been taking a permitted mobilisation/stretching break, then she would not have been required to key out.
167. The provision, criterion or practice that the respondent actually applied was that activities such as trips to the post office required keying out and that such activities could not be done as a side activity to the exercise of a reasonable adjustment. The application of such a provision, criterion or practice did not put the claimant at a substantial disadvantage compared to persons who were not disabled in that she suffered pain by reason of having to sit in her office chair for such periods. The restriction on trips to the post office did not cause the claimant to have to suffer substantial disadvantage by being in pain by sitting in her office chair. The claimant was able to take mobilisation/stretching breaks that did not involve trips to the post office. She was also able to key out if she wanted to take a trip to the post office, in the same way as any other member of staff was required do. The need to visit the post office was not caused in anyway by the disability in question. The restrictions on post office visits therefore did not place the claimant at a substantial disadvantage that actually related to her disability. The duty to make reasonable adjustments was therefore not triggered. The complaint is not well founded and is dismissed.

Victimisation

168. It is not in dispute that the claimant's grievance of 26 June 2014 was a protected act. We do not, however, find that the claimant was disciplined and dismissed because of her making that protected act. As set out above, we are satisfied that GY commenced the suspension process being of genuine concern about EF. Thereafter we have found that TW conducted the investigation and TB made the decision to dismiss, acting independently and because of the concerns genuinely held about the claimant's conduct. We accept that TB only knew about the claimant's grievance because she told him about it herself. We also find that TB was not influenced in his decision making by his own knowledge of the claimant's grievance or by, in some way, HR influencing him because of the 2014 grievance. Indeed, TB had an independent caseworker from outside the organisation assisting him. The fact the bullying and harassment complaint was not pursued to a disciplinary hearing is also illustrative of the fact that TW and TB were acting independently. The victimisation complaint is therefore not upheld and is dismissed.
169. The claimant's complaints are therefore not successful and the claim is dismissed.

Case Number: 16000581/2018

Employment Judge Harfield
Dated: 15 February 2022

JUDGMENT SENT TO THE PARTIES ON 16 February 2022

FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS
Mr N Roche