



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms. H Palmer

**Respondent:** Shiny Sky Ltd T/A “Arrow Cars”

**Heard by CVP on:** 9-11 September 2020. Deliberations 24 September 2020

**Before:** Employment Judge Rogerson  
Mr. D. Wilks OBE  
Mr. K Lannaman

## Representation

Claimant: in person

Respondent: Ms. L. Quigley (counsel)

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the complaints of unfair dismissal, disability discrimination, (failure to make reasonable adjustments, direct discrimination and discrimination arising from disability), harassment related to sex and unauthorised deductions from wages, fail and are dismissed

# REASONS

## Issues

1. The complaints and issues in this case were identified at a preliminary hearing before EJ Davies on 10 June 2020 and were confirmed and agreed at this hearing. The claimant brings complaints of unfair dismissal, disability discrimination, harassment related to sex and unlawful deductions from wages. The issues to be determined in relation to each complaint are as set out below.

## Unfair Dismissal

2. It is accepted that the claimant was dismissed by the respondent. The claimant says she was dismissed on a trumped-up basis for alleged

misconduct when she says the real reason for her dismissal was that she had rejected Mr. Richmond's romantic advances and/or her disability. The respondent says it dismissed the claimant for gross misconduct for increasing her salary and using the company taxi account without the company's knowledge or authorisation and concluding that as a result of those acts, trust and confidence in the claimant had been damaged. Conduct is a potentially fair reason for dismissal pursuant to section 98 (2) ERA 1996.

3. What was the reason or principal reason for dismissal? Was it a potentially fair reason (conduct) or was it her rejection of Mr. Richmond's advances or her disability?

3.1 If the reason is conduct related then the Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

3.2 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide whether:

- 3.2.1 there were reasonable grounds for that belief;
- 3.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
- 3.2.3 the respondent otherwise acted in a procedurally fair manner;
- 3.2.4 dismissal was within the range of reasonable responses.

4. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

### **Disability Discrimination**

5. It is accepted that the claimant was/is a disabled person by reason of her cancer which meets the requirements of section 6 of the Equality Act 2010.

### **Direct Disability Discrimination (Equality Act 2010 section 13)**

6. The claimant says that the respondent treated her less favourably by dismissing her because of her disability. She relies on the fact that as soon as she told Mr. Richmond on 3 March 2020, that she had trained up her colleague to do the monthly accounts, she was subjected to a disciplinary process and was dismissed. She asks the tribunal to infer that her health was an issue and the respondent had no room for her as soon as someone else could cover her work.

7. Was the claimant's dismissal less favourable treatment because of her disability? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between the comparator's circumstances and the claimant's. No named comparator has been advanced by the claimant. Was the claimant, by being dismissed, treated worse than someone else who was not disabled but was otherwise in the same material circumstances as the claimant?

### **Discrimination Arising from Disability (Equality Act 2010 section 15)**

8. Alternatively, the claimant says that her dismissal is unfavourable treatment because of something arising in consequence of her disability, namely the likelihood that she would stop working for the respondent in the near future and/or concerns about the impact of her health on her work.
9. Was the claimant's dismissal because of any of those things? The respondent says it was not and the only reason the claimant was dismissed was because of her conduct. The respondent will say it continued to support the claimant after her diagnosis of terminal cancer. The respondent confirmed that it would continue to pay the claimant full pay while allowing her to take time off as and when she needed it. It was assumed that the claimant would continue to work for the respondent for as long as she was able to. It is denied that the respondent tried to force the claimant out due to concerns about the impact of her health on her work.
10. The respondent does not seek to rely upon any legitimate aim to justify the dismissal, it's case is that the claimant's disability had nothing whatsoever to do with her dismissal.

**Failure to make reasonable adjustments for disability (Equality Act 2010 sections 20 & 21)**

11. The claimant says the respondent applied a provision, criterion or practice ("PCP") by deciding that she must attend a disciplinary hearing within a short timescale. That timescale put her at a substantial disadvantage because she did not have enough time to prepare for the hearing because she had hospital appointments and chemotherapy. Eventually a three-day extension was given but that included the weekend. She says the respondent ought reasonably to have allowed her a longer period before holding the disciplinary hearing.
12. Did the respondent apply a "PCP" of requiring the claimant to attend a disciplinary hearing within a short timescale?
13. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she did not have enough time to prepare for the hearing because she had hospital appointments and chemotherapy?
14. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
15. What steps could have been taken to avoid the disadvantage? The claimant suggests a longer delay would have been reasonable.
16. Was it reasonable for the respondent to have to take those steps (and if so when)?
17. Did the respondent fail to take those steps?

**Harassment related to sex (Equality Act 2010 section 26)**

18. The claimant alleges that Mr. Richmond made romantic advances to her on 3 March 2020 by saying to her: "*you have no idea nor can you comprehend*

*how much I feel for you*". The claimant says her response to that comment was *"Oh for heaven's sake David please keep our relationship professional"* She alleges that this was unwanted conduct related to her sex that had the purpose or effect of violating her dignity or creating an intimidating hostile degrading humiliating or offensive environment for her. She says that because she rejected that advance she was subjected to a disciplinary process and was dismissed.

19. Did Mr. Richmond say those words to the claimant on 3 March 2020?

19.1 If so, was that unwanted conduct?

19.2 Was it of a sexual nature/related to sex?

19.3 Did the conduct have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

19.4 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

19.5 Was there a rejection of the romantic advance by the claimant? If so because of the claimant's rejection of the romantic advance, did the respondent treat the claimant less favourably than she would have been treated had the claimant not rejected the advance?

### **Unauthorised deductions**

20. Did the respondent make unauthorised deductions from the claimant's wages in the sum of **£3,550.01**? The respondent says the claimant overpaid herself wages without authority and the respondent was entitled to make the deduction.

### **Evidence**

21. The Tribunal heard evidence on behalf of the respondent from:

21.1 Mr. David Richmond (Company Chairman) (R1).

21.2 Ms. Ruth Lawson(R2).

21.3 Mrs. Wendy Graham (R3).

21.4 Mrs. Lesley Harrison (R4).

21.5 Mr. Daniel Graham (Managing Director/Dismissing officer) (R5).

For the claimant the Tribunal heard evidence from

21.6 The claimant (C1).

21.7 Ms. Janet McBride(C2).

21.8 Mr. Rudi Arendse (claimant's son) (C3)

22. There were a few disputes of fact in this case which we have had to resolve (the wage properly payable to the claimant/what was said on 3 March 2020) but otherwise the material facts were not in dispute. The Tribunal were shown documents from an agreed bundle of documents. From the evidence the Tribunal saw and heard it made the following findings of fact:

### **Findings of Fact.**

23. The claimant was employed by the respondent from August 2014 until her dismissal on the 16 March 2020. The respondent is a private taxi company, specialising in airport operations. It is the official private hire partner of

Leeds Bradford, East Midlands, Bristol, Birmingham and Newcastle airports. It also provides general private hire operations in Leeds and Nottingham.

24. The claimant started working for the respondent as a bookkeeper. By February 2018, she was qualified to take up the role of financial controller. She was responsible for the whole of respondent's accountancy function. Her tasks included reconciling the bank, paying out all staff wages, paying VAT, and preparing management accounts.
25. The claimant reported directly to the Chairman and owner of the respondent company, David Richmond. Mr. Richmond 'depended' on the claimant. They worked closely over the years and she was a very highly valued and trusted employee. She was a senior member of the management team. She was also the Company Secretary. She had access to the company credit card. She had access to sensitive information and was a trusted employee. She was Mr. Richmond's "go to/right hand person". She had full authority in managing the accountancy function autonomously. Her actions would not be questioned by any other employee because of the close working relationship she had with Mr. Richmond and because of her seniority/position of trust within the company.
26. Prior to the events that led to the claimant's dismissal the claimant had never been subject to any disciplinary process or any performance concerns. She had an unblemished record of service.
27. When the claimant was appointed as the financial controller her salary was £40,000 per annum (gross) £3,333.33 per month. This was the agreed and appropriate level of salary for the full-time role.
28. In April 2019, the claimant married and moved to Sunderland. Mr. Richmond agreed the claimant could work for three days in the Leeds office and two days in the Newcastle office. Prior to this move, the claimant had been renting a property in Leeds at £475 per month which she gave up because of her relocation. Mr. Richmond was under the impression that the claimant would have to stay with friends 'sofa surfing' 3 days a week. He did not want to lose the claimant and thought that she might leave if she got fed up with that arrangement. To avoid this, he agreed that the company would pay the claimant's rent for a property in Leeds providing her with somewhere to stay during the week. The sole purpose of this arrangement was for the company to provide the claimant with accommodation for the days she worked for them in Leeds, because of her relocation to Sunderland.
29. Based on the claimant's previous rental costs, Mr. Richmond had not expected the claimant to choose a property costing as much as £800 a month, but he agreed to it and the company signed up to a six-month contract with the landlord from May 2019.
30. By July 2019 the claimant's marriage had broken down and she returned to live in Leeds permanently. Sadly, in August 2019, the claimant was diagnosed with cancer of the bile duct that had spread to her liver. At that time, she was given a prognosis of weeks/months to live. She moved out of the rental property and chose to move in with a friend. She gave notice on the rental property bringing the lease to an end.

**First Dispute of Fact; First Pay Rise in August 2019.**

31. In her ET1 claim form, the claimant states Mr. Richmond “*agreed that the rent that he was paying could be part of my salary. At this stage after the shocking news of my health David was very supportive and made all sorts of offers about me staying home for a year with full pay, looking after my son Rudi who also worked there and paying for my funeral.*”
32. In her witness statement (C1 page 2) she says she gave a handwritten letter to Mr. Richmond “*asking if she could have the £800 that the company had been paying my rent as part of my salary. The handwritten letter was given as I was too emotional to ask for this increase **as I needed this money to start making arrangements for my funeral.** In my letter I wrote that I could not justify asking for the £800 (which would replace the £800 the company was paying if I was not given the diagnosis of terminal cancer and did not move out of the flat). It was an emotional meeting and Mr. Richmond tore up the letter and said in his words “I don’t ever want to hear you say you need to **justify your increase** you have given the company a lot, if anything this company owes you. Just do it”. (highlighted text is our emphasis)*
33. The claimant says this was evidence of a verbal agreement she made with Mr. Richmond in August 2019 authorising an increase of her salary by £800 a month from September 2019. She says she told her colleague Lesley Harrison that Mr. Richmond had agreed the pay rise. She received £800 a month on top of her normal salary until the end of November 2019 receiving £2,400 in total.
34. Mr. Richmond denies agreeing to any pay-rise. He accepts pay increases were often agreed verbally and he would usually rely on the claimant to subsequently confirm any agreed pay rise in writing to the employee concerned. He says the claimant came to him after seeing a funeral director and she was visibly distressed and worried about how she was going to pay for her funeral costs. At that time, she believed she only had a matter of weeks/months to live. He recalls that she did have a piece of paper but he did not read it. She was very emotional and upset saying she had no money and her children had no money, to pay her funeral costs. He says he took the paper off the claimant, tore it up and told her he would ‘sort it’ and would pay the funeral costs. At no stage in the conversation did he agree to paying the claimant an additional £800 a month as a pay rise. The claimant’s only concern was about the funeral costs and he agreed to pay those to help her.
35. In cross examination the claimant accepted that in April 2019 (pre-diagnosis) the agreement that had been made for the company to pay her landlord rent of £800 a month was of mutual benefit to the company and to the claimant. It provided the claimant with a place to stay and it helped to keep her working for the business. The joint purpose/benefit came to an end when the claimant’s marriage ended and she returned to live and work in Leeds permanently. There was no reason why Mr. Richmond would agree to pay the claimant £800 per month
36. She agrees she cannot justify why she should receive a pay rise of £800 per month (representing a 24% pay rise). It was also odd that she had not

thanked Mr. Richmond for his generosity or acknowledged the pay rise in any messages/written communication after August 2019. Given her position of trust/financial control it was also surprising that the claimant did not make any record of the agreement. This would have ensured transparency and would protect her position if the arrangement was ever questioned. The claimant accepts it is something she should have done.

37. There was no other direct evidence of the discussion. Lesley Harrison (R4 statement at paragraph 20) says the claimant told her she had 'put her own salary up' to compensate her for the rent that was no longer being paid to the Landlord. Ms. Harrison did not question this at the time because the claimant was her 'boss' and assumed to be acting with authority. The claimant and Ms. Harrison were good friends. We agree with Ms. Quigley there was no reason for Ms. Harrison to lie or recall it in this way if that was not what had happened. This evidence undermines the claimant's credibility and her version of events.
38. On balance of probabilities we prefer Mr. Richmond's account to the claimant's account. He did not agree a pay increase of £800 from August 2019. The claimant's concern at this meeting was about money to pay for her funeral costs. She does not say she requested a pay-rise for any other purpose and agreed it was not justified. In those circumstances why would Mr. Richmond agree to pay the funeral costs and to also pay the claimant a 24% pay-rise? Mr. Richmond did not agree to pay the claimant an additional £800 per month and he had no knowledge that was being to the claimant from September 2019.
39. Furthermore, if he had increased the claimant's salary and agreed to pay her funeral costs, it would be reasonable to expect the claimant to acknowledge his generosity in some way by thanking him in an email/message or other written communication. This would have ensured there was a record and that the arrangement made was transparent so there could be no future misunderstanding about it (i.e. that it was being made in addition to his agreement to pay the funeral costs).
40. The claimant has without authority paid herself an extra £800 a month from September 2019 to December 2019. As a result, she received an overpayment of wages in the sum of £2,400 up to December 2019.

**Second Dispute of fact: Second Pay Rise.**

41. On 2 December 2019, the claimant alleges she was awarded a second pay rise by Mr. Richmond. She had returned to work after her holiday. She had agreed in November 2019, to rent a bungalow at £850 per month and was getting the keys. She says that Mr. Richmond called her into his office to tell her that she must reduce her annual salary by £7,000 and increase her salary by £3,200 per annum. She understood this figure was arrived at based on her rent for 12 months of £10,200 (£850×12 months) with only £7000 to be deducted from her salary to repay that rent, leaving a net increase of £3,200 per annum as a pay rise. The claimant says she was 'very appreciative' of the increase. Again, the claimant could not explain why for a second time, without justification Mr. Richmond would agree to increase her salary. If he was trying to reduce her salary by the rent, there was no reason to increase her pay. The company did not benefit and the

claimant accepts a pay rise was not justified based on her role/performance. At the time, because of her illness and the cancer treatment, the claimant was not able to work on occasions but she was still being paid her full salary.

42. Mr. Richmond recalls receiving messages while he was away on holiday in which the claimant suggested that her salary was reduced by her rent to save the company some tax suggesting the arrangement was of mutual benefit. He suggested they discuss it when they were both back at work. He had no idea at that time that the claimant had already increased her salary by £800 from September to December 2019 and had no knowledge that she had already set up a standing order for the company to pay her rent of £850 per month.
43. The claimant accepts that in December 2019, Mr. Richmond spotted a payment of £850 a month was being paid to a 'Mr. A Noble' (the claimant's landlord) and he queried this with her. She told him it was payment of her rent and he told her he had not agreed to pay her rent. She told him she assumed that he would pay. Mr. Richmond had not given the claimant prior authority to pay her landlord out of company funds. He could have taken disciplinary action against the claimant for making the payment without authority, but did not. Retrospectively he agreed to the company making the payment assuming the claimant would also reduce her wages by the rental value as she had suggested, so that the company was not out of pocket.
44. The claimant's account of the second pay rise was not credible. If Mr. Richmond intended to offer a pay rise why would he put it in such a convoluted way, increasing it by £10,200 (representing the claimant rent for 12 months) and then decreasing it by a random figure of £7000 to reach a net figure of £3200. Her evidence was illogical and completely implausible. It appears to be a made-up calculation to cover up the extra pay she was receiving without authority. Mr. Richmond did not increase the claimant's wages and award a second pay rise. The amount properly payable per month was £3,333.33 and the additional payment of £650.01 the claimant received from December 2019 to March 2020, is an overpayment of wages.

### **The claimant's relationship with Mr. Richmond**

45. Mr. Richmond describes developing a closer friendship with the claimant after her diagnosis of cancer. He was the first person the claimant told about her diagnosis. When the claimant next came into the office he and others had given her a hug. He accepts this was something he had not done before the claimant's diagnosis. The claimant now says she felt uncomfortable when Mr. Richmond hugged her in the office. Ms. Quigley took the claimant to a WhatsApp message in which the claimant offers to give Mr. Richmond a hug when she next sees him in the office. This was an unsolicited offer made by the claimant. The claimant could not explain why she would do this if she felt uncomfortable about the hugs.
46. In fact, the claimant and Mr. Richmond communicated daily and frequently by WhatsApp. The messages are supportive and friendly. Mr. Richmond enquired about the claimant's health and she provides regular updates. They have discussions about their day, what they are doing socially, about sports, their families and their relationships. The messages demonstrate a close mutual friendship.



47. The claimant describes Mr. Richmond as a 'very good' friend. On 1 January 2020 she sends a message saying: "*Thank you for being my pillar you have no idea what it means to me*". In cross-examination the claimant was taken to messages where she uses terms of endearment to Mr. Richmond. Unsolicited she describes him as '*lovable*'. She refers to him as '*dear*' and '*dearest*'.
48. In her witness statement the claimant says the messages became more '*awkward for me as he ended his messages with heart emoji's and kisses*'. The claimant was taken to her own messages ending with kisses. She was using terms of endearment regularly in her messages. She was unable to explain how the message exchanged support her case.
49. She says Mr. Richmond made her feel uncomfortable by inviting her for meal after work. She accepts Mr. Richmond also invited her colleague Leslie Harrison. He took them both to a restaurant that his wife was attending with her friends. If the claimant did not enjoy the WhatsApp messaging and wanted it to stop she could just have stopped using kisses in her messages/terms of endearment. These were out of work communications the claimant appears to have actively engaged in, because she enjoyed and relied upon this contact. She describes Mr. Richmond in affectionate terms and her '*pillar*' because she feels comfortable with him and relies upon him. To allege now that she was being 'groomed' by Mr. Richmond, is a completely unfounded and untrue allegation which must be particularly upsetting for him to hear.

### **Conversation about Lesley Harrison 3 March 2020.**

50. The claimant alleges that on 3 March 2020, she informed Mr. Richmond that Leslie Harrison was fully trained and that she would be doing the February month accounts, but the claimant '**would still supervise**'. The claimant accepts Leslie Harrison was not able to perform the claimant's role. Ms. Harrison was employed as the claimant's assistant. She could not do the monthly accounts without the claimant's supervision and those accounts were only a part of the claimant's role. While capable, she was not sufficiently qualified or experienced to perform the claimant's role.
51. Mr. Richmond confirmed that the company accounts function requires a very senior experienced financial controller and that function could not have been undertaken by Ms. Harrison alone because she was not qualified or trained.
52. The claimant asks the tribunal to infer that the reason for her dismissal was related to her disability. She relies on this discussion to say her health was an issue and the respondent had '*no room for her as soon as someone else could cover her work*'. There was no evidence to support that inference. The respondent had fully supported the claimant since her diagnosis and was not intending to get rid of, or to replace the claimant, with Lesley Harrison.

### **Sexual Harassment Allegation**

53. The claimant alleges that on 3 March 2020 while she was sat at the table with Mr. Richmond in his office he looked at her and said: "*you have no idea*

*nor can you comprehend how much I feel for you". Her response was "oh for heaven's sake, David please keep our relationship professional". The claimant describes this as a 'romantic advance' indicating that he wanted an affair which she rejected. She does not suggest he did or said anything more than the words identified. She complains this was unwanted conduct of a sexual nature.*

54. Mr. Richmond denies making the comment. He has been a credible witness who we found has openly accepted the things that he has said or done. He has given an honest account of the events.
55. In deciding whether the comment was made we considered the nature of the relationship between the claimant and Mr. Richmond. Their close friendship had not changed over the 7 months prior to this alleged comment. It was difficult to see how the claimant has interpreted these words as a romantic advance or a desire to have an affair. She had a close friendship and had used similar words to express her own deep feelings towards Mr. Richmond. Unsolicited she used terms of endearment towards him. We considered the contemporaneous WhatsApp communications after 3 March 2020. There was no change in their relationship/style of communication. The claimant made no reference to the alleged comment or her interpretation of it, in any communication prior to her dismissal. If it had happened she would have referred to it in her detailed response to the disciplinary allegations. The first time the claimant made any reference to the comment is in her letter of appeal which is when she says she 'joined the dots together'.
56. For those reasons we preferred and accepted Mr. Richmond's evidence, that the alleged comments on 3 March 2020 were not made.

### **Background to Disciplinary Process**

57. On 5 March 2020, Mr. Richmond asked Ruth Lawson (who also works in accounts) for a list of all the management salaries. He requested the salaries because the business had lost a big customer, it had to consider the potential impact of COVID and had to make some savings. From that list he noticed the claimant's salary was higher than he expected it to be. His initial thought was that it must be a mistake and he decided to wait until the claimant arrived at work to ask her about it.
58. At that time, Ruth Lawson also showed Mr. Richmond the company taxi account. She identified that the claimant had been using the account for trips to the train station, restaurants and pubs and had not made any payment for these trips.
59. When Mr. Richmond spoke to the claimant about the salary and the taxis, the claimant was defensive. She told him she had assumed her rent would be part of her salary and she offered to pay the company back for the taxis she had used. Mr. Richmond confirmed that he had not agreed to increasing her pay and had only agreed to the claimant's free use of the company taxi account when she was unable to drive to work when she was taking cannabis medication. He had also agreed, that Rudi could use the taxi account for free for the taxis used for his wedding. At this stage he was not

considering any disciplinary process because he thought the claimant would reduce her salary and repay the money owed to resolve the situation.

60. On 6 March 2020, the claimant sent Mr. Richmond a WhatsApp message asking him how much notice she was required to give to leave the business. Although at that time she indicated her intention to resign she changed her mind. At that stage, Mr. Richmond decided to pass the matter onto Mr. Graham to deal with. As the Managing Director he was the most senior officer of the company available to carry out the disciplinary process. Mr. Richmond was asked to provide a statement and had no further involvement in the disciplinary process.

### **The disciplinary process**

61. Mr. Graham was tasked with dealing with the investigation and disciplinary process. On 9 March 2020, he sent the claimant an invitation to a disciplinary hearing fixed for 10am on 13<sup>th</sup> of March 2020. He provided copies of the evidence he had gathered (Mr. Richmond's statement, printouts of monthly salary payments, printouts showing the alleged taxis booked on the company account). The invitation letter (pages 102-103) identifies the allegations, that they were serious and if proven could result in dismissal. It confirms Mr. Graham's intention to follow the ACAS code, and informs the claimant of her right to have a companion at the disciplinary hearing

62. The three allegations were that the claimant:

1. *“had increased her salary without the knowledge or authorisation of the company. In particular, it is alleged that in May 2019 the company agreed to rent a property in Leeds for you for six months (as you have nowhere to stay for short period). You moved out of this property in August 2019. However, you then added the amount the company paid in rent to your personal salary, without authorisation. Further in December 2019 you rented another property and asked the company to pay for your rent. The company agreed. You retained an increase of £350 per month to your salary without the company's knowledge or authorization”.*
2. *“had used the company taxi account for personal purposes without the knowledge or authorisation the company. It is alleged that David Richmond agreed that you could use the company taxi account to get a taxi to work when you were taking CPD tablets (as you said you didn't want to drive due to the effects of those tablets). However, you used the company account more than 20 times between 16 August 2019 and 5 March 2020, including for personal trips to golf clubs, restaurants and pubs which the company therefore paid for”.*
3. *“actions, as set out above, have damaged the trust and confidence the company has in you”.*

63. On 9 March 2020, the claimant confirmed that she would be attending the hearing and would be accompanied by her son, Rudi. On 10<sup>th</sup> of March 2020, the claimant asked for more time to review the evidence ‘*due to the severity of the accusations*’. She confirmed that she would now be attending with her solicitor. On 11 March 2020, the claimant asked for additional time to prepare because of medical appointments that she had that week and the following week. She did not specify the dates/times of the appointments.

64. On 11 March 2020, the respondent acknowledged that any medical appointments could be accommodated but formed the view that the claimant had been notified of the allegations on 9 March 2020 and had been provided with all the supporting documents since that date. This was a case where there was limited documentation for her to review. The dispute involved the claimant and Mr. Richmond and the claimant had been provided with a copy of Mr. Richmond's statement so that she could respond to it and provide her own account of events. Mr. Graham's view was that the hearing could not be delayed indefinitely.
65. In response to that email, the claimant requested that reasonable adjustments should be made for her by delaying the hearing because of her disability. By email dated 11 March 2020, Mr. Graham agreed to delay the hearing until 16 March 2020.
66. Although the claimant alleges that there was insufficient time between 9 March 2020 and 16 March 2020 to prepare for the hearing, she accepted that by 16 March 2020 she had prepared her case in response and was not actually disadvantaged in any way. She had prepared a '5' page typed response. It was detailed. She had broken each allegation down into parts to answer them more fully and to provide her version of events. She felt that trust and confidence had already been broken because these were serious allegations of theft/fraud.
67. At the disciplinary hearing the claimant chose not to provide a copy of her written response to Mr. Graham. She read it out. Although she brought 32 pages of WhatsApp messages with her to the hearing, she did not share them with Mr. Graham. She told him she was using the messages to show her 'close relationship' with Mr. Richmond. If she believed these were 'trumped up' charges made against her because Mr. Richmond had made a romantic advance/wanted an affair, this was time to tell Mr. Graham. She did not tell Mr. Graham about the alleged comments on 3 March 2020. She cannot explain this failure. Mr. Graham had no knowledge of any allegations of sexual harassment made against Mr. Richmond/the claimant's rejection of a romantic advance. He could not have taken those matters into account in his decision-making process.
68. After the disciplinary hearing, the claimant checked the minutes of the hearing and made changes to the minutes to ensure their accuracy. She accepted she was fully prepared for the hearing. She put her case and said whatever she wanted to say in her defence/mitigation. The minutes of the disciplinary hearing demonstrate the claimant's full and robust participation. She did not request a postponement. She did not ask for more time or indicate that she needed more time to prepare.
69. On 16 March 2020, Mr. Graham provided an outcome letter dismissing the claimant. He sets out his rationale clearly explaining how he evaluated the evidence for each allegation and why he found the allegations proven. For the taxi account allegation, he set out the two accounts and the areas of dispute and agreement. The claimant's said Mr. Richmond had given her permission to use the company taxi account for her free personal use, without limitation. Mr. Richmond's said he had only given permission for the use of free taxis when the claimant was taking cannabis (CBD) pills and as

wedding gift for the taxis booked for Rudi's wedding. Mr. Graham reviewed the taxi account and saw that the claimant had used the account for personal nights out over a long period of time and had never paid for these journeys (including one journey in the name of her friend which was paid for by the company). He concluded that *"it would be a strange business decision for David to allow you to use it for all personal journeys and not have some rules in place or require repayment or authorisation. I am a director of the business and I have an account but the money is deducted from my salary. Although you are a key member of staff, I cannot accept that David would have allowed you to use the company account for personal taxis (and not let anyone else do the same) and would then have suddenly backtracked on this out of the blue"*.

70. For the second allegation that the claimant had increased her salary without the knowledge or authorisation of the company, his letter states: *"I have considered the evidence and the fact that you and David have very different versions of events. I note that there is no documentary evidence at all, but that it does seem clear that David did agree that the company would agree to pay your rent at various points. The **dispute is not about your rent but about the rent value being added to your salary.** You acknowledged in the hearing that you were out of the office for full days to attend hospital for chemotherapy and that the company paid you full pay despite this. In the circumstances it seems unlikely that the company would further increase your salary. In addition, **you have not suggested why David would agree to increase the salary and then backtrack and suggest he had not agreed to it. On the evidence that I have I consider you added the rent onto your salary and therefore the allegation is proven"**.*
71. For the third allegation, Mr. Graham decided that by her actions the claimant had damaged trust and confidence. The claimant agreed that trust and confidence had been broken because these were serious allegations of theft/fraud. She does not challenge this part of the dismissal decision. She also accepted that Mr. Graham was the decision maker.
72. By letter dated 22<sup>nd</sup> of March 2020 the claimant appealed against her dismissal. In relation to the taxi account she maintains that Mr. Richmond had given her consent to use the taxi account. For the salary increase she refers to the support Mr. Richmond had given her since her cancer diagnosis by *"telling her that he would pay for her funeral that he would look after her son and pay her salary for a year if she needed to take the time off"*. She refers to the discussion she had about the salary increase and says his "exact" words were "I don't ever want to hear you say that you can't **justify your salary.** You have given this company more of your time and always put the company first if anything this company owes you".
73. Ms. Quigley points to the inconsistency in the claimant's evidence when she refers to her salary which goes to her credibility. At times in her evidence she refers to being told that she did not have to justify her 'salary' and at other times she refers to not having to justify a 'salary increase'. Those were two very different propositions. The claimant knew the respondent was happy to pay her salary, regardless of her ability to work so in that sense her salary (£40,000) was 'justified'. She also knew a salary increase was not justified so there was no reason why it would have been said in the way alleged.

74. In the appeal letter for the first time the claimant suggests there is new evidence to consider. She says: "**on reflection**, on Tuesday, 3 March 2020 before I was wrongly accused David had expressed feelings towards me to which I responded that I wanted to keep matters professional". She also suggests the sanction imposed was unreasonable.
75. On 23<sup>rd</sup> of March 2020, Mr. Graham informed the claimant that an appeal hearing would be arranged but the respondent faced some practical difficulties because of the COVID situation and because it was **likely** that an external third party would hear the appeal because of the allegations made against Mr. Richmond.
76. On the same day the claimant responded stating that if the hearing date was not confirmed to her by 27 March 2020, she would be taking matters further. On 25 March 2020, Mr. Graham wrote to the claimant explaining the difficulties the business was facing arranging the appeal. Finding a third-party consultant, the financial situation with COVID and the future uncertainty and viability of the business at that time were all difficulties identified. He confirmed he was '**committed to progressing the appeal as soon as practicable**' and that he would be in contact with the claimant to confirm the arrangements as soon as he was able to.
77. After this letter, the claimant did not contact the respondent again. She decided that for her, that was the end of the process and contacted ACAS before presenting her claim to the Tribunal.

### Submissions

78. Ms. Quigley provided written submissions. Ms. Palmer made oral submissions. We considered those submissions in finding the facts and in reaching our conclusions.

### Applicable Law

#### Unfair Dismissal

79. First the tribunal must identify the reason for dismissal. As per Cairns LJ in *Abernethy v Mott Hay and Anderson [1974] ICR 323*: "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". A potentially fair reason for dismissal relates to conduct (section 98(2)(b). Employment Rights Act 1996 ('ERA'). The employer must at the stage at which it forms the belief that the employee has committed the misconduct must have a genuine belief on reasonable grounds after carrying out a reasonable investigation. If the employer has shown that was the reason for dismissal was a potentially fair reason section 98(4) ERA applies and provides as follows: "*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.*

80. It is not for the Tribunal to substitute its view for the employer but to review the reasonableness of the employer's decision. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal (*Iceland Frozen Foods-v-Jones 1983 IRLR 439 EAT*).

### **Harassment related to sex/of a sexual nature/related to rejection of the unwanted conduct**

81. Section 26 Equality Act 2010 ('EqA') provides as follows:

- "(1) A person (A) harasses another (B) if—*
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and*
  - (b) the conduct has the purpose or effect of—*
    - (i) violating B's dignity, or*
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
- (2) A also harasses B if—*
- (a) A engages in unwanted conduct of a sexual nature, and*
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).*
- (3) A also harasses B if—*
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and*
  - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
- (a) the perception of B;*
  - (b) the other circumstances of the case;*
  - (c) whether it is reasonable for the conduct to have that effect.*

82. The protected characteristic the claimant relies upon for the purposes of section 26(1) is her 'sex'.

83. In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, the EAT provided guidance on how the issues should be determined in a harassment claim. First, whether the respondent engaged in unwanted conduct? Secondly, whether the conduct in question either have the purpose or have the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her? Thirdly, was that conduct, on the grounds of a protected characteristic or not? When deciding the purpose/effect the tribunal should have regard to the context of the alleged harassment and whether it was "reasonable" for the conduct to have had the effect complained of:

### Direct Discrimination

84. Section 39 EqA provides that an employer must not discriminate against an employee by dismissing the employee. Section 13 EqA provides as follows:

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

85. Disability is one of the protected characteristics (s4 EqA). It is agreed the claimant was a disabled person at the relevant time. Less favourable treatment must be established by reference to a comparator. Section 23 EqA provides that for the purposes of that comparison *“there must be no material difference between the circumstances relating to each case”*. No named comparator is advanced by the claimant therefore a valid comparator would be an employee holding the position of financial controller with no disability, with no prior disciplinary record who was found to have received salary of £3,550.01 and used the company taxi account, without the employer’s prior knowledge or authority. And that as a result, of those actions had damaged trust and confidence and been dismissed.

86. Section 136(2) EqA sets out the burden of proof provisions, which provide that *“it is for the claimant to prove facts from which the Tribunal could decide in the absence of any other explanation that the contravention occurred”*.

87. Even if there is less favorable treatment it does not follow that there is a prima facie case of discrimination. The claimant must be able to show that she was treated less favourably because of her disability (see *Igen-v-Wong (1999) ICR877* and *Madarassy-v-Nomura International (2007) IRLR246* at para 56.

88. An alternative approach which a tribunal might adopt is simply to ask **why the treatment was afforded to the claimant**. If part of the reason was the claimant’s disability, then it is extremely likely that a comparator would have been treated differently and the treatment is likely to be discriminatory (*Shammon-v-Chief Constable of the Royal Ulster Constabulary (2003) IRLR285*).

89. In determining whether the claimant has discharged the burden of proving a prima facie case of discrimination, the tribunal is entitled to consider all the factual evidence adduced by both the claimant and respondent: see *Laing-v-Manchester City Council (2006) IRLR 748* and *Madarassy*.

### Discrimination Arising from Disability.

Section 15 EqA provides as follows:

*“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.”*

90. In order to succeed in a claim of discrimination arising from disability the claimant must prove a prima face case, that the dismissal was for a reason arising in consequence of his disability.

### Failure to make Reasonable Adjustments



91. Sections 20 and 21 EqA deal with the duty and failure to make reasonable adjustments. The claimant relies upon section 20(3) which provides that: *“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” there is a duty to “take such steps as it is reasonable to take to avoid the disadvantage”*. Section 21 provides that a failure to comply with a duty when it is engaged is a failure to make reasonable adjustments.
92. Section 212(1) EqA defines *“a substantial disadvantage is one which is more than minor or trivial”*. The Equality and Human Rights Code of Practice (2011) guidance provides that *“whether such a disadvantage exists in a particular case is a question of fact and is to be assessed on an objective*

### **Unauthorised Deductions from Wages**

93. Section 13(3) ERA provides that *“where the total amount of wages paid on any occasion by an employer to a worker is less than the amount properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated as a deduction made by the employer from the worker’s wages on that occasion.*
94. Section 14(1)(a) provides that section 13 does not apply to a deduction from a worker’s wages made by the employer *“where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages”*.

## **Conclusions**

### **Unfair Dismissal**

95. The first issue the tribunal had to decide, was the reason for dismissal. What were the set of facts known to Mr. Graham or beliefs held by him, which caused him to dismiss the claimant? The sole reason that Mr. Graham dismissed the claimant was because he genuinely believed, and had found that the claimant had, without the company’s prior knowledge or authority, used the company taxi account for personal purposes and had increased her salary by £3,550.01. He also found that those actions had damaged the company’s trust and confidence in the claimant.
96. Mr. Graham was tasked with carrying out the investigation and the disciplinary hearing. He was the most senior officer of the company available to carry out the process. Mr. Graham informed the claimant of the allegations in sufficient detail for her understand them and to respond to them. He provided all the evidence he had gathered to the claimant on 9 March 2020. The claimant understood there was a factual dispute in relation to the 2 allegations, between her account of events and Mr. Richmond’s account. The claimant has not identified anything that Mr. Graham failed to do in his conduct of the investigation or disciplinary hearing but complains that he did not have a separate investigation meeting before the disciplinary hearing.
97. Ms. Quigley referred to the case of Sunshine Hotel v Goddard [2019] UKEAT. She contends that there is no legal requirement that an employer hold an investigation meeting before holding a disciplinary meeting, or that

separate people must perform the roles, if that is not practicable. For the dismissal to be fair section 98(4) of the Employment Rights Act 1996, simply requires an employer to act 'reasonably'. She submits the respondent followed a fair procedure consistent with the ACAS Code. Mr. Graham was the most appropriate person to carry out the process because of Mr. Richmond's involvement in the factual dispute. The allegations were clearly defined in advance. All the relevant evidence relied upon was provided to the claimant in advance. The claimant was given a reasonable opportunity to prepare her case in response. She was given a full opportunity to state her case at the hearing and was offered the right to appeal.

98. We found the investigation conducted by Mr. Graham was reasonable. The claimant was provided with all the relevant evidence. She did not identify any other witness or lines of enquiry that Mr. Graham could have pursued. From 9 March until the 16 March 2020, she had reasonable time to prepare her answers. Having been suspended on full pay, she was not working during this period. She was prepared and was ready to answer the allegations. She fully and robustly participated in the disciplinary hearing, saying whatever she wanted to say, in her defence/mitigation.

99. At the end of the disciplinary hearing, Mr. Graham had reasonable grounds to support his belief that the claimant was guilty of the misconduct. His outcome letter explains in detail how he reached his decision (paragraphs 69-71). He evaluated all the evidence. He decided the claimant's account was not plausible. On the balance of probabilities, he reasonably concluded the allegations were proven. The claimant was offered the right of appeal. Mr. Graham explained the practical difficulties and unprecedented circumstances the business was facing in March 2020 (the impact of the COVID lockdown, the need for the company to appoint an external third party to hear an appeal). He made a clear and honest commitment to the claimant that he would arrange a date for the appeal as soon as it was practicable. The claimant chose not to wait for an appeal date instead choosing to present her claim to the Tribunal. The respondent had followed a fair procedure.

100. We then considered the reasonableness of the dismissal sanction. As the financial controller, the claimant's role was to manage the company finances. She was found to have taken £3,550.01 in wages that she was not entitled to, and had used the company taxi account, when she should have paid for her personal use of the taxi's. The claimant has correctly viewed these as allegations of theft/fraud which could reasonably be treated by an employer as serious/gross misconduct. In her role the claimant worked autonomously. She was part of the senior management team. She was working without scrutiny/challenge. Trust was an essential requirement of that relationship and when Mr Graham decided the company could no longer trust the claimant he could not continue her employment. In those circumstances the claimant's summary dismissal was a sanction that falls within the band of reasonable responses. The dismissal was procedurally and substantively fair and the complaint of unfair dismissal fails and is dismissed.

#### **Harassment related to sex**

101. The claimant has not proved that on 3 March 2020, the unwanted she relies upon occurred. Her complaint of harassment related to sex/of a sexual nature therefore fails at the first hurdle. We found that Mr. Richmond

had not made the alleged comments (see paragraphs 53-56). She relies on these comments to suggest that her rejection of his romantic advance/desire for an affair, was one of the reasons for her dismissal. She accepted that Mr. Graham did not know about the alleged (and unproven) comments, when he dismissed the claimant on 16 March 2020. The alleged unwanted conduct or the claimant's rejection of it, could not have been, and was not the reason why Mr. Graham dismissed the claimant.

### **Direct Disability Discrimination**

102. The second reason the claimant advances for her dismissal was her cancer (disability). There is no evidence that the claimant was treated less favourably after her cancer diagnosis or that the respondent had in any way viewed her ill-health negatively. Mr. Richmond's response was always helpful and positive. Whenever the claimant was not able to work, she was paid full pay, not sick pay. Mr. Richmond intended to continue to pay full pay for the foreseeable future. When the claimant was worried about how she/her family would pay for her funeral costs, Mr. Richmond stepped in and offered to pay those costs. When she was unable to drive because of her medication, he agreed she could use the company taxi account without charge. In December 2019, even when he found out that the claimant had paid her landlord out of company funds, without his authority, he chose not to treat it as a disciplinary matter, expecting the claimant to reduce her salary by the rent value. It was because of all the support he provided since her cancer diagnosis that the claimant describes him as her 'pillar'. With all that undisputed evidence, it is difficult to understand how/why the claimant made this complaint. This employer had gone above and beyond what an employer would reasonably be expected to do to support a disabled employee in these circumstances. The claimant has not proved any facts from which the tribunal could conclude that she was dismissed because of her disability. When we consider the reason why the claimant was dismissed it had nothing whatsoever to do with her disability and was only because of her serious misconduct. The claimant was not dismissed because of her disability. The complaint of direct disability discrimination fails and is dismissed.

### **Discrimination Arising from Disability**

93. Again, the claimant's own evidence does not support her complaint that she was dismissed because of something arising in consequence of her disability, namely the likelihood that she would stop working for the respondent in the near future and/or concerns about the impact of her health on her work. We repeat what we have said above in relation to the claimant's disability and the way she was treated following her cancer diagnosis. There was no evidence that the claimant's health or her inability to work was a cause of concern for the respondent. Whenever a health-issue arose adjustments were made and solutions were offered. There was no evidence the respondent wanted to replace her. They could not have replaced the claimant with Ms. Harrison. Our findings at paragraphs 50-52 do not support this complaint. The claimant has not proved a prima facie case, that the dismissal was for a reason arising in consequence of her disability. She was not dismissed for a reason related to her disability. The complaint of discrimination arising from disability fails and is dismissed.

**Failure to make Reasonable Adjustments**

95. The respondent decided to extend time for the disciplinary hearing set on 9 March 2020 for 13 March 2020 to 16 March 2020. Did the respondent apply a “PCP” of requiring the claimant to attend a disciplinary hearing within a short timescale? The claimant was suspended and was not required to work from 9<sup>th</sup> March 2020. She therefore had the period from 9 March 2020 to 16 March 2020 (7 days) to prepare. That was not a short time scale.
96. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant’s disability? Although the claimant case was put on the basis she did not have enough time to prepare, she accepted that was not the case. We found that by having the disciplinary hearing on 16 March 2020, the claimant was not put at a substantial disadvantage because she had enough time to prepare. She was fully prepared. She participated fully and robustly. She was not put at a substantial disadvantage by the PCP applied. The duty to make reasonable adjustments was not engaged. There was therefore no failure to make reasonable adjustments and that complaint fails and is dismissed.

**Unauthorised deductions**

97. The wage properly payable per month was £3,333.33. The claimant was not entitled to an additional salary payment of £3,550.01. The respondent was entitled to deduct the sum of £3,550.01 from the claimant’s final salary because it was an overpayment of wages which is an excepted deduction (Section 14(1)(a) Employment Rights Act 1996). The deduction made by the respondent was therefore authorised. The complaint made of an unauthorised deduction from wages, also fails and is dismissed

Employment Judge Rogerson

Date 6 October 2020