EMPLOYMENT TRIBUNALS

Claimant: Mrs S Bath

Respondent: The Local Authority

Heard: In person **On:** 2-5 October 2023

By CVP (Deliberations and Judgment) 9-10 October 2023

Before:
Employment Judge JM Wade
Mr M Brewer
Mr D Wilks

Appearances
For the claimant: In person, with Susan Bath
For the respondent: Ms R Senior, counsel

The unanimous Judgment of the Tribunal is:

JUDGMENT

The claimant's Equality Act complaints are dismissed.

REASONS

Introduction, hearing and evidence

1. The claimant commenced employment with the respondent as a senior social worker in October 2020. She was dismissed on 12 May 2022. The respondent at all times knew of her dyslexia and recurring depression and anxiety. She brought complaints of Section 15 discrimination concerning the dismissal, a failure to make reasonable adjustments and harassment.

2. The claimant has acted throughout as a litigant in person and has been supported by her ex-wife during this hearing, both to identify pages when giving evidence, and generally when the need arose.

3. The hearing file was around 1100 pages. The case had been fully prepared for a hearing in the summer of this year – regrettably put off for lack of a Tribunal. There were two developments by this hearing: the respondent had made a Rule 50 application, which was granted on an interim basis and the Tribunal admitted one extra document – the respondent's supervision policy.

4. The claimant, her ex-wife and six respondent witnesses had exchanged written statements. Much of their evidence pointed the Tribunal to the relevant documents – virtually all of the material events were documented and comprehensively so. There was little material dispute about the chain of events. The claimant had no questions for two of the respondent's witnesses.

5. The Tribunal assessed the oral evidence to be generally compelling and honest – the circumstances of this case are inherently sad and difficult and that was addressed with dignity and compassion by everyone involved.

6. The Tribunal discussed the potential for other proceedings with the claimant. She said she had heard nothing more in relation to potential driving related criminal charges, nor regulatory proceedings. We therefore proceeded with the hearing but nevertheless, our findings of fact are deliberately contained and only those necessary to address her Employment Tribunal allegations to mitigate any risk of straying into territory which may come to be examined in a different context.

7. The complaints and issues were agreed at a hearing on 25 October 2022 and appear below as headings where appropriate.

Findings of fact

8. The claimant had suffered recurrent depression from childhood, resulting in a number of suicide attempts. At the time of these events she was in her late thirties and diagnosed with recurrent depressive disorder. She had been diagnosed with Dyslexia at University and been provided with "Read and Write" software as an auxiliary aid. This was in place when she entered the social work profession and enables her to keep her learning disability unseen and private at work. She also has Type II Diabetes and B12 deficiency.

9. The respondent is a local authority providing statutory services including social care for vulnerable adults. It employs social workers at grades 7 to 9 and on into management and senior grades. Their work includes presenting at court in family and care matters, and they are regulated by Social Work England ("SWE"). Regular supervision is provided at least monthly to reflect on professional practice. Part of supervision focusses on the welfare of the social worker and any matters that might be affecting practice.

10. The respondent also supports "Wellness Action Plans" as a tool for staff whose mental health may be compromised, or to support them remaining well, or to have measures in place should they become unwell (a "WAP"). Those plans are completed by the staff member, it is their responsibility to review them regularly, and they are then discussed and agreed with managers and held confidentially. They can include reasonable adjustments. Fundamentally, they seek to remove the stigma associated with discussing mental health in the workplace.

11. The claimant's regular medications were an anti-depressant and an anti-psychotic, the latter taken to help the claimant sleep. From April 2019 to August 2020 the claimant had engaged in occasional problematic binge drinking, on the April occasion losing consciousness at home with her ex-wife. At that time she was working as a social worker in a care home setting. Her ex-wife has polycystic kidney disease – chronic kidney failure - which is life limiting. The claimant remains her next of kin and carer. She attended AA sessions for a spell in 2019 in response to that incident.

12. In or around July 2020 the claimant had applied for a position as a senior social worker with the respondent. Her long marriage was breaking down and her previous role involved the strain of Covid related deaths at work. She moved away from the family home to take up the role with the respondent.

13. In October she made a good start with the respondent, a WAP was in place, her managers were supportive, and everyone was working from home. Sadly her best friend from University also died that month.

14. The claimant's work involved managing the progress to discharge team with another "Grade 9" colleague. They supervised more junior social workers and worked with other agencies in assessing when vulnerable adults could be discharged to home, and/or required capacity assessments, and/or required the funding of care packages. They had delegated authority for funding decisions.

15. From late January to May the claimant developed romantic hopes for a manager. They had a friendly relationship, albeit in February the manager sent a message seeking work related contact only in the context of a happy marriage. Nevertheless their friendly exchanges continued by email and they met up in person a couple of times in February and April or May, sharing information about their lives. The manager also forwarded the claimant a fixed term promotion opportunity and helped with her application.

16. The claimant's wish for a greater attachment was apparent from emotional messages she sent the manager when drinking; she also expressed her wish for a child. Her wishes were not reciprocated, which caused distress. She was moving to a village around this time and her GP had started a reduction in her anti-psychotic medication because of potential impact on diabetes. In May she also took part in the interview for secondment for six months as a Grade 12 Principal Social Worker (PSW), working at policy and strategic level. This was to be vacant due to maternity leave.

17. On 26 May 2021, the claimant engaged in binge drinking and took an overdose of her anti-psychotic medication, that night sending the manager an emotional "good bye" message. The consequent hospital admission resulted in the stoppage of that medication, and ongoing care from local mental health services. The claimant had two weeks or so off work at that time. Her ex-wife came to visit to help support her recovery.

18. The manager was kind to the claimant about her absence, but in June 2021 and July, the manager raised in supervision that the claimant had sent him inappropriate

messages. He was comfortable he could maintain professional boundaries, he believed it happened when the claimant was drinking, and he did not want to raise it formally.

19. The claimant received fantastic support on her return to work, updating her WAP on 7 June, providing for weekly meetings to manage workload and general well being, and providing for signs of mental health decline to be picked up. On 24 June she secured the temporary promoted position and on 22 July reported that she was feeling very well and threw herself into her new post, which was a job share. In her remaining 15 hours, or two days, she continued her operational social worker post in the progress to discharge team.

20. On 28 August the claimant visited the manager's home after work. He subsequently complained, concerned as to how his home address had been found. There was an investigation, and the claimant reported they had been in a relationship and she had visited wanting closure. As the claimant had not improperly accessed records, the matter was taken no further but she was advised by email that she must maintain professional boundaries, and that as the manager had also complained of weekend phone messages she was urged to refrain from contacting him. The claimant was offered counselling and occupational health referral but she did not pursue that in mid September.

21. From the end of August the manager's spouse began sending the claimant text messages, warning her of the consequences of continuing to pursue the manager or intrude on their home or marriage.

22. On the evening of 30 September the claimant reported to her line manager that she was suffering a miscarriage and would not be able to work. She also messaged the manager's spouse in similar emotional terms, telling the spouse that the manager was the father.

23. Again, the claimant received very good pastoral support from her line manager in response to her deteriorating health, both physical and mental, including encouraging her to take time off.

24. On 1 October the manager reported the messages sent the previous evening to the manager's spouse and requested a formal investigation of both the contact from the claimant, and how the spouse's number had been obtained (given they had both changed their mobile numbers). In fact the spouse had messaged the claimant from two numbers and the claimant had simply replied. There was no untoward obtaining of the spouse's number.

25. The claimant was concerned that the spouse had her telephone number, and she raised this in discussions with her line manager. Meanwhile, in response to the spouse's complaint about the claimant it had been agreed that the claimant's line manager would raise with her the nature of that complaint, and in particular that the manager's account of matters was very different – in short the manager denied any relationship at all, and with the spouse, they considered themselves victims of harassment and stalking by the claimant.

26. On 11 October the claimant had a good and supportive return to work discussion with her line manager. The meeting then addressed the manager's complaint. The line manager asked the claimant to be honest with her, and asked who was the father of the baby because the manager denied any intimacy. That question had a profound effect on the claimant, because she considered she was being accusing of lying. She was at first shocked and then became very distressed.

27. Later that day the claimant again drove to the manager's house and was seen by a neighbour and the manager's family. She was alleged by them to be drunk. That incident was promptly reported to the respondent. That day the claimant was again admitted to hospital having attempted suicide. After a short stay she was discharged to the home treatment team because she had family support and the team provided intensive support.

28. The claimant submitted a two week fit note identifying "miscarriage" as the reason for taking two weeks off work at this time. On her return on 26 October she had a further return to work discussion, and a preliminary discussion to let her know that the manager/spouse complaints would be investigated independently. She was also pointed to the respondent's policies to support alcohol use, but she said they were not needed at that time. The claimant raised again the access of the spouse to her telephone number and asked why spouse/manager did not just call the police about her.

29. The spouse/manager did call the police and a potential crime was logged for investigation.

30. In the return to work discussion the claimant also confirmed she had been admitted for a short hospital stay for mental health. Occupational health was available to her at all times and an urgent referral was made. Advice was then received from an appointment on 27 October. The claimant then returned to work with adjustments in place, including a change in duties to remove her from potential contact with the manager. Her position was that working was helpful to her recovery.

31. The Investigating Officer was appointed to investigate the complaint against the claimant. He approached it objectively and independently. His position in the investigation was that if he found evidence of sex or other inappropriate conduct taking place during working hours, the manager would become the subject of a disciplinary investigation. He had an open mind about that.

32. At the beginning of November the claimant and her line manager also agreed changes to her WAP to reflect the changes to duties, that they would catch up twice weekly, and otherwise supportive measures. They recorded matters in supervision including that the claimant said she used alcohol as a coping strategy.

33. At 6pm on 22 November the claimant started a chain of messages to the manager's best friend on Facebook messenger. In them she identified herself as principal social worker for the respondent and asked to meet the friend. She went on to discuss matters in emotional terms, describing the spouse as evil. These messages were forwarded to the respondent the next day. They were added to the matters to be investigated by the Investigating Officer and the claimant was suspended on 24 November 2021. Her laptop (with associated software) was removed from her. The

spouse sought the claimant's dismissal for gross misconduct as a resolution to her complaint.

34. The matters requiring investigation were: the 22 November messages, described as amounting to professional misconduct, and bringing the respondent into disrepute; harassment of the colleague and family member, including visiting the colleague's home address. All these matters were described as matters of gross misconduct.

35. The respondent also referred the matters to the regulator, SWE, as it was obliged to do.

36. On 5 December the claimant crashed a new car into a tree. She was admitted to hospital and had been drinking. Her ex-wife came to provide support at that time. She had travelled from her home (which was some distance away) eight times between July and December of 2021, when the claimant was in crisis/drinking. The claimant's home had become known to the police as a premises of concern. 5/6 December was the eighth such occasion.

37. The hospital trust which had admitted the claimant post-crash made a referral about her to the respondent under its "person in position of trust (PIPOT)" procedures – that is when information is known suggesting such a person may be a risk to others.

38. There was great concern from colleagues around this time because the claimant had been messaging them whilst drinking and emotional. She also emailed The Investigating Officer late at night. On 6 December the "PIPOT" referral was received and the tree incident then became known to a small number of colleagues including The Investigating Officer who needed to know. Within exchanges of information concerning the PIPOT referral there was mention of the claimant previously accessing mental health services in a different region and a reference to alcohol addiction.

39. The claimant's line manager called her every week during her suspension as a welfare measure.

40. The respondent put its investigation on hold to await both SWE and Police investigations. In December the police confirmed the tree incident would be delayed by four to six months to await lab reports of alcohol in the blood. They confirmed in February that the harassment matter had been investigated and closed and there would be no charging of the claimant. This decision recorded that the spouse had also sent the claimant unpleasant messages.

41. The Investigating Officer then completed further investigations. He had recorded at length interviews with those involved.

42. On 29 March 2022 the claimant was invited to attend a hearing on 12 May 2022. The process for the disciplinary was that the claimant was required to lodge any documents on which she wished to rely, fifteen working days before the hearing – by 20 April – and to notify the respondent of any witnesses to attend for her. The management case and details of witnesses would then be forwarded to the claimant by 27 April. In formal communications throughout this process the claimant was referred to the respondent's counselling and support services.

43. On 12 April HR reminded the claimant of the deadline for her case documents – 20 April. The claimant arranged to come to work to access her laptop for specific documents.

44. On Friday 29 April 2021 the claimant also requested access to her laptop auxiliary aid software and a printer to assist preparation of her statement for the disciplinary hearing. The request was put through to IT, but in the meantime the licence for the software expired. The respondent tried to arrange a new licence but, when that was not achieved in time, the claimant was encouraged to ask her union rep to proof read her statement. The claimant did not provide any further documents for the hearing, albeit she was told time would be extended if she wished to submit documents late.

45. The disciplinary hearing Chair (who had managed the manager for around 9 months, but not met him in person due to Covid) conducted the hearing in a fair way, with opportunities for management and the claimant and her trade union representative to ask questions. The hearing began with about an hour or so of the investigating officer's presentation. Towards the end of his evidence he said this: "[t*he claimant] has admitted to four counts of gross misconduct and to breaching the terms of her suspension. There are no circumstances, however they may be described, romanticised or fanaticised that justify this level of breach from a person entrusted as Principal Social Worker..."*

46. There was then an adjournment and the manager was brought in to be asked questions. The claimant's questions were focussed on why the manager had given her telephone number to spouse, and the Chair intervened to say that a statement had been provided by spouse to the effect that spouse had accessed it from his phone without his knowledge or consent.

47. He was then asked by the claimant about a message that was not in the disciplinary pack, and he responded that it was in the information he had provided to the police and he had copies with him. There was then an adjournment for everyone to consider whether that documentation could be relied on. The chair recorded when the meeting resumed after the adjournment that some of the information was new and some was duplicated and all parties agreed to continue.

48. The claimant asked the manager further questions and others asked him questions.

49. Towards the end of the hearing the claimant read out a comprehensive, well structured and prepared statement and it was recorded in the minutes. The statement included reliance on the claimant's mental health as mitigating factors, but also sought to deflect any accountability away from the claimant towards: the manager for preying on a vulnerable person; the spouse for threatening messages; the respondent for failing to support the claimant; and alleging discrimination by the respondent against the claimant.

50. The Chair and panel then asked the claimant questions. There was then an adjournment.

51. The Chair then announced that she had decided to dismiss the claimant. The conduct was admitted. The only issue was mitigation. She considered that the

claimant's statement was not mitigation. She did not believe there was any alternative to dismissal because the claimant did not display an understanding of the inappropriateness of her behaviours or the impact on others; she had said all the right things when matters had been discussed with her but had then gone on to do actions which were exactly against the instructions given by the line manager – namely to visit the manager's house again and contact his friend.

52. The Chair concluded that the respondent could not have confidence in the claimant to carry out her job role at that time without breaching professional and conduct standards. Her behaviours had persisted despite support and despite being given clear instructions. Her role involved supporting vulnerable people in the community and the Chair simply did not have confidence that that support would not be compromised by the claimant's behaviours. Similarly, she could not have confidence that other job roles would not be similarly affected by the claimant's behaviour.

53. The claimant appealed this decision submitting more evidence of her WAP plans and other medical evidence. She withdrew from the appeal when she was not permitted to question the manager further by the appeal panel Chair.

54. She commenced ACAS conciliation on 18 May 2022, a certificate was issued on 28 June 2022 and her claim was presented on 26 July 2022.

The Law

Section 15 Discrimination

55. In section 15 cases, the key question is the reason why the claimant was subjected to the alleged unfavourable treatment. Section 15 says:

(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.

56. The "something arising in consequence of B's disability" sometimes has to be proven by a claimant, or sometimes is accepted by an employer. The Equality and Human Rights Commission Code of Practice on Employment ("the Code"), at paragraph 5.9, also gives examples of consequences of disability, including an inability to use certain work equipment, walk unaided or a need to follow a restricted diet.
57. Unfavourable treatment because of fatigue sounds straightforward: for example a security guard might say, I was disciplined for being found asleep on duty, but my fatigue arises in consequence of my arthritis. In T-Systems v Lewis (UKEAT/0042/15/JOJ) His Honour Judge Richardson sets out a four stage test for Section 15 discrimination:

There must be a contravention of Section 39(2)

There must be unfavourable treatment

There must be "something arising in consequence of the disability"; and

The unfavourable treatment must be because of the "something".

58. This means at stages 3 and 4 the Tribunal sometimes has to look at two different ways in which facts in the case relate to each other. The first is: does the "something" arise in consequence of disability? In the example above the Tribunal would have to find that the fatigue did arise in consequence of the arthritis (and not, for example, because the guard had been up all night looking after a sick child). Stage 3 can sometimes be straightforward, and sometimes complicated.
59. Stage 4 is whether the unfavourable treatment was because of the "something". "Because of" at stage 4 means that the "something arising" operated on the mind of the person making the decision (consciously or sub-consciously) to a significant (that is material) extent. See Lord Justice Underhill at paragraph 17 of IPC Media Limited v Millar UKEAT/0395/12 SM and at paragraph 25. The Tribunal, as its starting point, has to identify the individual(s) responsible for the decision or act or behaviour or failure to act which is being complained about. It does not matter whether the putative employer has knowledge that the something arose in consequence of disability, provided there is knowledge of the disability itself - City of York v Grosset [2016] ICR 1492 CA. See also the full guidance in Pnaiser v NHS England [2016] IRLR 710 EAT at 31. "A Tribunal may ask why A treated the claimant in the unfavourable way alleged....alternatively it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment". Motive is irrelevant.
60. There is also often a "Stage 5" in a Section 15 claim: the employer in the example above can say that the disciplinary action was appropriate and necessary to achieve its aim of making sure security guards look after the premises.
61. This type of "justification" defence in section 15(2) is common to many other types of discrimination, including direct discrimination because of age, and indirect discrimination. Whether the employer's "means" are "proportionate" requires the Tribunal to determine whether they were "appropriate and necessary" (taking into account less discriminatory measures) (see Homer v Chief Constable of West Yorkshire [2012] UKSC 15 paragraphs 22 to 25). Section 15 does not derive directly from the European Equality Directive, but there is no judicial decision that the Homer approach should not be applied to Section 15 (2). Even on the bare statutory language, a structured approach is required to considering whether an employer has made out the defence.

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

62. Section 39 (5) imposes the duty to make adjustments on employers and Section 20 explains it:

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

63. Section 21 deals with failure to comply with the duty:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement (Schedule 8, paragraph 20 (1) of the 2010 Act).

64. The Tribunal potentially answering two questions: did the employer know about both disability and likely disadvantage; if not, ought the employer reasonably to have known? In Ridout v TC Group [1998] IRLR 628 the claimant had photo sensitive epilepsy. Her application form for a job said she had that disability. When she attended for interview she was put in a room with no windows illuminated by fluorescent strip lights. She attended wearing a pair of sun glasses hanging on a cord around her neck. She did not say the lighting in the room was a problem for her although she did comment on the lighting as she walked into the room in terms which the Tribunal found could merely have been to explain why she had dark glasses. The respondent did not realise that it should take any further steps. In the Judgment Morison P set out as one of the submissions made by the claimant that:

"T*he onus in this case was on the prospective employee to inform the prospective employer of a disability but that once he or she has done that the onus passes to the employer to make such enquiries as are necessary to satisfy himself that he can discharge his duties under section 6 (the predecessor of section 4A). Such enquiries may simply be limited to making further enquiries of the employee. The submission made to us was that the appellant, having discharged the onus on her at the first stage, the prospective employer failed to take two opportunities to consider their position first on receipt of the application form and secondly when she arrived for interview".*

65. That submission was rejected. The EAT said:

"*Subsection 6 requires the Tribunal to measure the extent of the duty, if any, against the actual or assumed knowledge of the employer both as to the disability and its likelihood of causing the individual a substantial disadvantage in comparison with persons who are not disabled … It seems to us they were entitled from the material before them to conclude no reasonable employer would be expected to know without being told in terms by the applicant that the arrangements which he in fact made in this case for the interview procedure might disadvantage this particular applicant for the job. As it was said in argument, this form of epilepsy is very rare".*

66. And later:

"We accept what Counsel for the appellant was saying that Tribunals should be careful not to impose on disabled people … a duty to 'harp on' about their disability … It would

be unsatisfactory to expect a disabled person to have to go into a great long detailed explanation as to the effects their disablement had on them merely to cause the employer to make adjustments which he probably should have made in the first place. On the other hand, a balance must be struck. It is equally undesirable that an employer should be required to ask a number of questions about a person suffering from a disability as to whether he or she feels disadvantaged. There may well be circumstances in which that question would not arise. It would be wrong if, merely to protect themselves from liability, the employers … were to ask a number of questions which they would not have asked of somebody who was able-bodied. People must be taken very much on the basis of how they present themselves".

67. As to the type of adjustments that were envisaged by the 2010 Act, the guidance from the 1995 Act is rehearsed in the Code. The Tribunal must take into account those parts of the Code which appear to be relevant.

68. At paragraph 6.28: whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular to:
    - 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 for him to take the step;
    - the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;
    - the extent of his financial and other resources
    - the availability to him of financial or other assistance with respect to taking the step;
    - the nature of his activities and the size of his undertaking.

69. At paragraph 6.33, the following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments

    - allocating some of the disabled person's duties to another person;
    - transferring him to fill an existing vacancy;
    - altering his hours of working or training;
    - assigning him to a different place of work or training;
    - allowing him to be absent during working or training hours for rehabilitation, assessment, or treatment;
    - modifying procedures for testing or assessment;
    - providing supervision or other support.

70. We also note that the purpose of the statutory code, approved by parliament, is to provide a detailed explanation of the 2010 Act and to provide practical guidance on compliance. In Spence-v-Intype Libra Elias P (as he then was) summarised the position in relation to reasonable adjustments under the 1995 Act at paragraphs 43 and 48:

    "We accept that the concept of reasonable adjustment is a broad one, but we do not consider that this assists the argument. The nature of the reasonable steps

envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice. That is in fact precisely what Lords Hope and Rodger say in the paragraphs relied upon; the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise… In short, what s4(A) envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work."

Harassment and establishing Discrimination

71. Section 40 prohibits harassment by employers and section 26 relevantly provides:-

(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.
…….. (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.

Limitation

72. Section 123(1) of the Equality Act 2010: "Proceedings on a complaint within section 120 may not be brought after the end of - (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

73. Those periods are extended by the ACAS conciliation provisions where conciliation is commenced within the relevant time time either by the "stop the clock" provision or providing a further month from the close of conciliation.

74. Time runs from the date of the alleged discriminatory act (but lack of knowledge is relevant to the grant of an extension) - see Mr GS Virdi v Commissioner of Police of the Metropolis and another [2007] IRLR 24 EAT; In the case of a failure to make a reasonable adjustments, an omission time runs from the date when a person does an act inconsistent with making the adjustment; or on the expiry of the period in which the person might reasonably have been expected to do it (Section 123(4)). See Matuszowicz v Kingston upon Hull City Council [2009] EWCA Civ 22 on the exercise of discretion in such circumstances.

75. The Tribunal also considers "forensic prejudice" in assessing the prejudice to each party from an extension of time - see Wells Cathedral School Ltd v Souter EA 2020 000801 JOJ.

76. Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 makes clear that the Tribunal is entitled to consider the merits of a claim in the exercise of its discretion.

77. The Act confers the widest possible discretion on the Employment Tribunal in determining whether or not it is just and equitable to fix a different time limit Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640. That said the power of the Tribunal is a discretion, to be exercised judicially, assessing relevant factors and the weight to be given in each case. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time. Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.

78. If there are circumstances which would otherwise render it just and equitable to extend time, the length of extension required is not of itself, a limiting factor unless the delay would prejudice the possibility of a fair trial see Afolabi -v- Southwark LBC 2003 EWCA Civ 15.

79. In exercising discretion under the Section 123 (1)(b) case law has also established that the Tribunal must consider the length of and reasons for delay, and consider the prejudice to both parties.

80. Section 33(3) of the Limitation Act 1980 contains a helpful checklist of other matters which might need to be considered (in personal injury and other claims with longer time limits), but also for the Tribunal to bear in mind if relevant:
the extent to which the cogency of the evidence is likely to be affected by the delay;
the extent to which the party sued had cooperated with any requests for information;
the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Discussion and Conclusions

Section 15 - Did the claimant's (admitted) inappropriate conduct in sending a message arise in consequence of the claimant's mental health impairment?

81. This is an oversimplification of the conduct which led to the claimant's dismissal. That conduct was: the August visit to the manager's home; the October visit to the manager's home; and the messages to him, the spouse and his friend; and the implications of these actions both in the employment relationship and professionally.

82. The claimant's case was that she was not in drink when she visited the manager's home on either occasion. We reject that case. Her position on it is highly unlikely and uncorroborated; and there are a number of witnesses who say the opposite; a photograph of the claimant's car, as parked, indicates disordered driving.

83. Alcohol being disinhibitory, it is also highly likely that the claimant had taken drink to enable an otherwise hardworking and rational person to engage in such conduct. It was also her case that she used alcohol as a coping mechanism - we accept that evidence corroborated, as it was, by a wealth of underlying information and indeed her ex-wife's evidence.

84. As to the messages to the friend and the manager – again – explicable by drink and a belief in, or wish for, a relationship which was being denied. Additionally, in relation to one message, which suggested she had medical records concerning pregnancy, the claimant said she was psychotic – the message was surprising in content. On balance, then, it is also likely that some communications were at a time when the claimant was dissociating from reality.

85. Undoubtedly the messages and conduct are in circumstances of a highly disrupted emotional state, for which there were many causes: underlying recurrent depression and anxiety, bereavement, house move, marriage breakdown – the claimant had these and more to navigate.

86. The claimant's evidence about her own thinking was, as Ms Senior reminded us, that each action had a reason - "wanting closure" in the August visit, wanting to challenge being called a liar, by the October visit, wanting the friend to safeguard the manager from his own spouse, by the message to friend. These were said to be "the reasons" and they did not arise from disability, but from the circumstances.

87. These might have been the claimant's "wants", but on balance we are satisfied that the actions taken to achieve them was conduct arising from the claimant's disability. Without drink, a coping mechanism for her disability, we consider these events would not have happened. These circumstances do challenge Section 15 causation, but on balance the claimant has satisfied the test – perhaps ironically, because her case denied alcohol was a reason for these actions.

<u>Was the treatment a proportionate means of achieving a legitimate aim?</u>

88. The Tribunal has to weigh the discriminatory effect on the claimant – she was losing her employment in her chosen profession, at a time when she had been through a number of other set backs – a profound effect – against the reasonable needs of the respondent.

89. Its legitimate aims were to safeguard clients and employees, and to maintain conduct standards. It is clear that in order to do so, it could not continue with the claimant's employment – it was, in truth, reasonably necessary to bring that employment to an end on 12 May 2022, some six months after the claimant had engaged in gross misconduct.

90. The circumstances of that employment included that it was relatively short - the claimant had worked for just over a year when suspended. She had been provided with a wealth of support for her mental health conditions through line management. She had not heeded the advice given, both on the first occasion and subsequently. She had said that the respondent's alcohol policies were not needed in October and was in denial. On this she had no insight or judgment.

91. "Appropriate and reasonably necessary" is about substance not process, but we note that the claimant had the opportunity to demonstrate insight and treatment for her alcohol problem, to seek character witnesses, to acknowledge and apologise for her conduct and not to seek to blame everyone else. Had she done so, the respondent may have been able to believe that the conduct would not be repeated. Without that belief it could not reasonably do anything else to achieve its aims other than dismiss the claimant.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

92. It was accepted that at all material times the respondent knew of the claimant's disabilities. Knowledge of particular disadvantage in particular circumstances was not conceded.

93. The claimant's auxiliary aid case concerning the Read and Write Gold was put in this way:

Did the lack of an auxiliary aid, namely the claimant's laptop with her dyslexia software installed, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was unable to prepare for her disciplinary hearing and/or found it more difficult to do so in circumstances where she asked for access to this aid on 29 April 2022 and was told by HR on 11 May that it could not be obtained from IT? (GOC para 28)

94. The claimant was indeed likely to spend more time preparing a written statement without her software. Nevertheless, she did do so, and comprehensively so. She was likely put to more time, but that was in the context of being suspended and having no other work to deliver – she was not under ordinary work pressures.

95. We ask the question whether it was reasonable for the respondent to have to provide the aid at the material time, namely when asked on 29 April. On balance we consider it was not reasonable. The claimant could have made the request in early April – she accepted she was mistaken in believing she had - and had she done so, we consider the respondent would have provided it. The only reason it did not do so was the difficulty of license expiry just at the time it was needed. The claimant could have sought a postponement of the hearing, but she did not do so and neither did her trade union representative. In short, we consider she has an unjustified sense of grievance about this and the complaint fails.

The claimant being given additional time to read documents supplied during the disciplinary hearing and/or adjourning the process to give her time to process the new information (GOC para 30)

96. The claimant's other in time reasonable adjustments case relied on a PCP of the format of disciplinary hearings. Hearings (whether disciplinary or this hearing) did put the claimant at a disadvantage in comparison with someone without dyslexia and anxiety because of the difficulties in processing information and expressing herself. The specific disadvantage was the time taken to take in written information when the Chair permitted the manager to rely on and bring into evidence the messages he had provided to the Police.

97. The adjustment alleged not to have been made was additional time to read those documents and/or adjourning the process to a different day to give the claimant time to process the new information, in the context of the claimant being without her software to assist her.

98. On the facts we have found, there was a twenty or so minute reading break. On return neither the claimant nor her union representative sought more time, nor did they seek to delay the hearing. The claimant may feel ill served by her union representative, but more likely, if he gave advice to press on, that was wise. The documents were produced in response to the claimant's question - she had asked about a particular message which was not in the disciplinary pack. It was then provided by the manager – his summary and presentation of all the messages and harassment alleged. The claimant knew of the particular message, because she had been the recipient of it. In truth, the messages between the claimant and the manager were a matter of fact – their content was not going to influence the panel at this stage as far as the claimant's conduct was concerned. Similarly, she knew that the police were taking matters no further and said so.

99. In that context then, on these facts, the respondent did not fail to make a reasonable adjustment by not itself adjourning the hearing for longer or to another day, because it was not reasonably to know that the claimant's anxiety would prevent her expressing her needs in such circumstances or lead to the shame and lack of confidence she describes. That shame or lack of confidence was not apparent in the detailed presentation that was read out.

100. The respondent was entitled to take matters relating to the claimant's disability at face value, rather than insist on more time, if the claimant did not seek it, when she had been able to confer privately with her representative. It was for him to identify that notwithstanding the claimant did not seek a longer break and/or continuation on a different day, that should be the course, given her difficulties and being without software to assist. The employer cannot reasonably be expected to stereotype or make assumptions about how matters can be conducted, whether the claimant asks for more time or not.

101. Further, imposing a longer break or to another day would not have changed matters in these circumstances. If the claimant had produced messages at the last minute which were suggestive of a mutual relationship, she would have been permitted to rely on them, as she was permitted to rely on emails submitted in advance. Her case was that she had deleted messages from the manager and could not produce them, and her messages to the manager were therefore being taken out of context without the full picture. There would have been consequences for the manager had he engaged in a relationship on work time evidenced in messages from him, but for the claimant, the position would be the same: her conduct issue was her response to rejection rather than taking part in a relationship on work time.

102. At the case management hearing the Employment Judge summarised the claimant's case on further adjustments relating to the period 27 August 2021 to 5 November 2021 as follows: "The *adjustments sought at paragraphs 4.6.1 – 4.6.5 are said to have been necessary to alleviate the disadvantage caused by the claimant's mental health impairments only. It has been raised with the claimant that the adjustments sought appear to relate to the institution of a process rather than*

identifying anything concrete which would alleviate her disadvantage. The claimant has articulated today that the revision of her Wellness Action Plan and a risk assessment would have identified triggers which could cause a deterioration in her mental health which in turn could have highlighted to the respondent if she needed support, time off, including taking annual leave rather than sickness absence, looking at reduced hours or the claimant losing the strategic aspect of her role.

103. The following adjustments were then recorded as the claimant's suggestions:

104. on 27 August 2021 a review of her Wellness Action Plan regarding changes in her role and what might be triggers in her mental health deterioration (GOC para 8)
105. on 7 September 2021 a review of her Wellness Action Plan after the claimant had expressed concerns, including her manager's wife obtaining her personal mobile number, as well as a risk assessment (GOC para 9)
106. a review of her Wellness Action Plan after her repeating her concerns on 4 October 2021 (GOC para 11)
107. a review of her Wellness Action Plan after repeating her concerns on 26 October 2021 in the context of a complaint having been made against her (GOC para 13)
108. a review of her Wellness Action Plan which had still not occurred prior to 5 of November 2021 (GOC para 15)

109. The PCP relied upon was the requirement of a senior social worker to carry out their full duties, and the relative disadvantage was said to be that the claimant struggled to perform her duties because of a deterioration in her mental health.

110. On the facts we have found, there were careful and considerate supervision meetings and weekly one to one discussions of welfare, and adjustments to address that by the claimant's line manager and others in the material period. There was also caring contact in between by email and text. The WAP was the claimant's document and at any stage she could have sought to update it and have a discussion with the manager using that as a tool. In reality those matters were being discussed in any event. At times the respondent did know that duties required to be adjusted and did so – to move the claimant away from the manager. At no stage did the claimant seek removal of her Grade 12 duties – in fact she expressed regret that they were only for a short fixed term. The respondent was not reasonably to know the claimant was at this relative disadvantage in the circumstances. These complaints are without merit.

111. During the hearing the claimant was again invited to clarify the practical measures that would have helped, and she identified that telling her how the spouse had obtained her mobile number to message her, would have alleviated her anxiety. It is difficult to construct the respondent's failure to investigate that or provide an answer from September 2021 as a failure to make an adjustment, and it was not understood or addressed as such in the grounds of resistance. Simply put, this is a complaint about the respondent's conduct in responding to what could, perhaps, have been seen as a grievance, or data protection complaint. As a data protection matter, the respondent did address it in writing through its process. The claimant also knew from the Chair in the disciplinary hearing that the spouse had confirmed in writing that she had accessed the manager's phone without his knowledge, and that, in the context of these events, was entirely likely.

112. To the extent that not knowing the answer before the disciplinary hearing was a worry for the claimant, and especially from the end of August until the beginning of October (the period of spouse messaging), the claimant could reasonably have addressed that in clear terms in her Wellness Action Plan as a trigger, highlighting it as a matter of concern for which as a disabled person, she was at greater disadvantage than a non disabled person in similar circumstances. She did not do so.

113. In all the circumstances, the claimant's reasonable adjustments allegations concerning her Wellness Action Plans would fail on these facts. They are also out of time, and the claimant is someone who understood the Equality Act and had union representation. Accepting she was very unwell in December, she did not advance any other reason why time should be extended concerning a failure to make reasonable adjustments during 27 August to 4 November 2021, for which a claim, or ACAS conciliation needed to have been commenced by 3 February 2022. She could reasonably have done so during her suspension and did not do so. We do not exercise our discretion to extend time. There is no prejudice to the claimant. The complaints are without merit.

Harassment

114. The allegations were as follows:

In the investigation into her conduct, her investigator accessing information regarding her mental health and her use of the Bradford mental health service and failing to keep this confidential as the claimant discovered on 26 April 2022 (GOC para 22 and 26)

Referring to the claimant as a "fantasist" in the investigation report (GOC para 30)

115. Were these matters unwanted conduct? Clearly they were, albeit the words used by the investigator were, "*there are no circumstances, however they may be described, romanticised or fanaticised that justify this level of breach".* The investigator meant to say "fantasised" and in that he was mirroring the language used by spouse in her complaint about the claimant.

116. The PIPOT information was included in the file of papers for the disciplinary hearing and was unwelcome to the claimant both because it contained reference to her previously using mental health services in a different region and because she took issue with the use of the word, "addiction" and other aspects of the hospital trust's description of their understanding of the tree incident.

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?

117. The sharing of the PIPOT information did relate to the claimant's mental health, because it contained such information and arose from hospital admission and mental health treatment. It was not the purpose of the Investigating Officer or those sharing the PIPOT information and including it in the file to violate the claimant's dignity or create the effect above. The purpose of the information was to provide all relevant

information for the investigation and hearing. There was concern and compassion shown for the claimant's circumstances by all involved, throughout the investigation.

118. The claimant's case was that the use of this word triggered a decline in her mental health. She had a sensitivity to this word, but also had insight into disassociating at times. She felt very strongly that because of her disability she would not be believed – or this was the effect of this word.

119. We find that the investigating officer's remarks in context did not relate to the claimant's mental health disability, they related to conduct towards a colleague following romantic rejection or unrequited love, to use his words. We accepted his evidence about that. These words would have been used of anyone whose explanation of their conduct failed to recognise that their feelings were unrequited and contact should cease.

120. Accepting that the language had an impact on the claimant because of her disability, does not alter our judgment that the conduct in context did not relate to disability. We deal with the position if we are wrong in that conclusion.

<u>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.</u>

121. We accept that the claimant felt violated and humiliated by her health and other information about the tree incident being included in the disciplinary file, (and that hearing the word fantasist or similar - for that is how she remembered it – was upsetting).

122. We assess, though, was it reasonable for these two matters to have the prohibited effect on the claimant. In context, it cannot be reasonable for the inclusion of health and other information in a hearing file in this context to have that effect on the claimant – that is to harass her related to her disability. The information was not shared beyond those who needed to know to fulfil their statutory and other duties. It was relevant to the disciplinary hearing because it went to the likelihood of repetition of conduct/mitigation and potential further criminal charges. The claimant had the opportunity within the hearing and appeal to discuss the material or challenge or correct the limited matters with which she disagreed. It would have been less fair for the respondent to have known the information, but not been transparent about it. The circumstances involved a chain of public servants, all doing their best to provide accurate information to fulfil their duties. These events were distressing for the claimant, but that was not because of harassment by the respondent in preparation of a transparent disciplinary file in accordance with its procedures.

123. As to the investigating officer's remarks, again, in all the circumstances of this case, one word in a sentence which had particular resonance for the claimant in all the circumstances of this case, is not reasonably to be perceived as harassment as defined. The harassment complaints are also dismissed.

Employment Judge JM Wade
10 October 2023