EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Dookhith	**v**	East Suffolk and North Essex NHS Foundation Trust

Heard at: Bury St Edmunds

On: 21, 22, 23, 24, 28, 29, 30 November 2022

Before: Employment Judge K J Palmer

Members: Mr R Allan and Mr A Schooler

Appearances
For the Claimants: Ms M Sharpe, Counsel
For the Respondent: Ms H McLorinan, Counsel

RESERVED JUDGMENT

It is the unanimous Judgment of this Tribunal as follows:

1. The Claimant's claim for unfair dismissal, fails and is dismissed.

2. The Claimant's claims in direct disability discrimination, fail and are dismissed.

3. The Claimant's claims for unlawful deduction of wages, fail and are dismissed.

4. The Claimant's claim for notice pay and holiday pay, fail and are dismissed.

REASONS

1. This matter came before this Tribunal originally listed for an eight day in person Hearing, commencing on 21 November 2022. It was scheduled to end on 30 November 2022. Unfortunately, it was only possible to schedule

seven days out of the eight as the Tribunal was not available to sit on Friday 25 November 2022.

The Claim

2. The Claimant was employed by the Respondent as a Registered Nurse from 27 March 2016 until her dismissal with effect from 18 November 2019. She presented a claim form to this Tribunal on 4 March 2020, following a period of Early Conciliation from 8 January 2020 to 6 February 2020. In that claim form the Claimant pursues claims for unfair dismissal, disability discrimination and claims for notice pay, holiday pay and arrears of pay.

3. The matters and issues to be determined by this Tribunal were discussed, set out and clarified in a Preliminary Hearing before Employment Judge Alliott, sitting alone, on 11 December 2020. Employment Judge Alliott set out the issues at paragraph 4 of his Summary and I do not propose to repeat them verbatim here. These will be dealt with one by one in the conclusions to this Judgment.

4. In essence, however, the Claimant pursues a claim for unfair dismissal pursuant to her dismissal by letter on 18 October 2019, with notice. There originally appeared to be some dispute as to the effective date of termination as this was flagged in Employment Judge Alliott's Summary. However, this was not mentioned during the seven day Hearing before us and we were not addressed on this. It may be because little or nothing turns on it. One of the Claimant's claims is that she was not paid during her notice period. The letter of dismissal clearly indicates that she is entitled to a calendar month notice and purports to give her one month's notice expiring on 18 November 2019. In the absence of any detailed submissions and no evidence, the Tribunal makes a finding that the effective date of determination was in fact 18 November 2019.

5. The Claimant pursues an unfair dismissal claim arising out of this dismissal. The Respondents defend this on the basis that they say the dismissal was fair by reason of conduct.

6. The Claimant pursues a disability discrimination claim under s.13 of the Equality Act 2010 ("EqA"). She argues that she was directly discriminated against on the basis that it was perceived she was disabled. The Claimant does not argue that she is disabled under s.6 EqA 2010, rather the complete opposite that at no time has she been, or is she, disabled, but that certain treatment of her was less favourable treatment because of the perception on the part of the Respondents that she was disabled. Those issues are set out by Employment Judge Alliott in paragraph 4.6 – 4.9 inclusive. 4.9 is broken down, but mis-numbered. However, there are nine separate acts of discrimination relied upon.

Witnesses

7. The Tribunal heard evidence from the Claimant and four witnesses for the Respondent. Those were:

    - Claire Thompson, who gave her evidence by Cloud Video Platform (CVP);
    - Rosa Baker;
    - Kay Hamilton; and
    - Mike Mears.

8. We had a detailed witness statement in front of us from Roz Yale. That was the subject of an Application which we deal with below.

    Application and Decision re: Witness Statement of Roz Yale

9. Prior to the commencement of this Hearing, we were led to believe by correspondence forwarded to us by the Administration, that there would be two preliminary Applications before us concerning witness evidence. One related to Claire Thompson who had been produced by the Respondents late in the day as a witness. The Application was for her evidence to be given by CVP. However, before the trial commenced both parties confirmed that there was no further issue with Claire Thompson. The Claimant was happy for her to give evidence by CVP. This she did.

10. The only preliminary issue remaining was that relating to Roz Yale. Roz Yale is employed by the Respondent Trust as Matron and she works on the Critical Care Unit at Ipswich and Colchester hospital. She was one of the Respondent's principal witnesses and intricately involved in the factual matrix in these proceedings.

11. This trial was due to take place in September of 2021, but was postponed pursuant to an Application pursued by the Claimant. We have no details of that Application before us save for submissions made by Counsel. We also have the Tribunal file. The file reveals that there was an Application by the Claimant for postponement of the Full Merits Hearing due to take place between 6 and 14 September 2021. Such Application was first floated on 27 May 2021 by those representing the Claimant. This was resisted by those representing the Respondents. The reason for the Application was the non-availability of the Claimant's Counsel, although the explanation ventured by the Claimant's Solicitors was brief to say the least.

12. That initial Application for Postponement was refused by Regional Employment Judge Foxwell on 28 July 2021. A further, more detailed Application was lodged by the Claimant's Solicitors on the same day, 28 July 2021. Pursuant to that, on 6 August 2021, Regional Employment Judge Foxwell granted the postponement. Matters were re-listed to November 2022 and this Hearing; a delay of some 14 months. In that time Roz Yale, whose witness statement was exchanged in accordance with the Tribunal's Orders, has become very ill with Long Covid. We have evidence

before us of her illness and that is not disputed. This has meant that, albeit that we were originally led to believe that she would be able to give evidence by CVP, that she cannot give evidence at all and the Respondents seek to rely solely on her written witness statement.

13. Usually, a Tribunal would explain to the parties that a witness statement exchanged properly and in accordance with the Tribunal's Orders would be read, but that weight would only be given to the contents of that statement which was commensurate with the witnesses failure to appear to be cross examined and tested on that evidence. However, somewhat unusually, the Claimant resists this approach and requests the Tribunal to disregard Roz Yale's evidence in its entirety and to take no cognisance of the statement.

14. We heard brief submissions from both Counsel on this point. Counsel for the Respondent Ms McLorinan pointed out that until the Claimant's Application for Postponement last year, Roz Yale was ready, willing and able to attend Tribunal and be cross examined, but that as a direct result of the delay pursuant to the Claimant's successful Application for a Postponement, Roz Yale's illness has meant that she can no longer attend. She points out that the reason the Claimant was ultimately able to persuade Regional Employment Judge Foxwell to re-visit his refusal of the Application to Postpone, was entirely based on the fact that the Claimant said that Counsel who she had instructed was intimately acquainted with her case and no longer available for the September Hearing date. However, arriving here in November, 14 months later, the Claimant has in fact instructed different Counsel in any event. She asks us to take that into account when considering how to view the evidence of Roz Yale.

15. We considered the preliminary point and take the view that there are no circumstances in this case under which we would be prepared to disregard entirely the witness statement of Roz Yale. It is clearly pivotal to the Respondent's case and it was submitted in accordance with the Tribunal Orders. The fact that Roz Yale is now not able to attend, either in person or by CVP to be cross examined on that evidence, is entirely due to illness and is therefore no fault of hers. Whilst we acknowledge Ms McLorinan's submissions that it is ironic that having persuaded our Regional Employment Judge Foxwell to reconsider his decision to postpone on the basis that her original Counsel was not available for the Hearing in September, the Claimant now attends the re-listed Hearing with fresh Counsel in any event there is no evidence that the Claimant or her advisors deliberately misled Regional Employment Judge Foxwell at the time of their Application to Postpone.

16. Accordingly, and taking into account the overriding objective and the balance of prejudice, the Tribunal has decided that it will read and take into account the evidence of Roz Yale on the basis of her written statement. However, she is not here to be cross examined and tested on that evidence and therefore, we shall naturally accord such weight to her evidence as we would any witness who was not available to be cross examined.

17. The Respondents did produce a witness statement from a Mr David Everitt, but it was agreed by both parties at the outset of this Tribunal that his evidence went to the detail of the Claimant's holiday pay claim, unlawful Deduction of Wages Act claim and that his evidence was more akin evidence appropriate to a Remedy Hearing should the Claimant succeed in those claims. We understand that in essence, there is only one point before us with respect to the Unlawful Deduction of Wages Act claim and the holiday pay claim and the notice pay claim which is whether at the time the periods covered by those claims, for which the Claimant claims payment, were periods when she was away from work on an unauthorised basis. If we find that her absence was unauthorised and that there was no good reason for it, we will conclude that for those periods when she was not paid and when she was not deemed to accrue holiday, she was not entitled to be paid or accrue holiday or be paid notice. If we find that, then that is the end to the matter. If we conclude that her absence was not unauthorised then we will find that she was entitled to be paid for those periods and accrue holiday and be paid notice and a further Remedy Hearing to determine the amounts payable may be necessary. Accordingly, the parties decided for the purposes of this liability Hearing, to dispense with the evidence of Mr Everitt.

18. In essence therefore, we heard evidence from the Claimant and four witnesses for the Respondent, one of whom appeared by CVP. The fifth witness, Roz Yale, appeared only on paper.

Findings of Fact

19. It is necessary for us to make certain findings of fact. However, as is very often the case with lengthy, multi day trials before the Employment Tribunal, we had a plethora of documentation and evidence before us. We had an agreed Bundle running to some 849 pages and a Claimant's Supplementary Bundle, which was not objected to by the Respondents, of a further 615 pages. The Claimant's witness statement ran to some 149 pages. The Claimant gave evidence for a day and a half in the witness box. We received a written opening skeleton argument from the Respondents, running to some 141 paragraphs and the Claimant's opening note from Claimant's Counsel running to some 38 pages and a further written document at the end from Claimant's Counsel with written submissions running to some 47 pages.

20. Much of this documentation in front of us was not directly relevant to the issues to be determined as set out in the Summary of Employment Judge Alliott. A great deal of evidence we heard and a great deal of submission relates to background and peripheral events not directly associated with the Claimant's claims and the issues before us. We do not therefore venture into making findings in respect of facts we do not consider to be directly relevant to those issues.

21. The Claimant, who was employed as a Band 5 Registered Nurse originally worked on Curtain Ward at the Ipswich Hospital. During the course of the latter part of 2017 there was a breakdown in relationships between herself and some of her peers and accordingly, the Claimant moved to work on the Critical Care Unit on 29 October 2017. Much was heard about the background relating to this move, but we do not consider it relevant to the issues before us.

22. Initially the Claimant was on a probationary period at the Critical Care Unit, but her role was made permanent on 1 February 2018.

23. In her witness statement, which was before us, Roz Yale described problems which the staff encountered at CCU with the Claimant's working and communication skills. These included the Claimant's intense need for detailed instructions and multiple questions. Staff felt under pressure and scrutiny from the Claimant who would persist in a line of enquiry even when clear answers had been provided, the Claimant was perceived to stand on the periphery for patient hand over and ward rounds, appearing unengaged. There was a perception that the Claimant could be unpredictable and that the mood of the shift was different when the Claimant was working, staff were concerned that they could not talk freely in the Claimant's company for fear of it being taken out of context. The Claimant was perceived to have a very literal interpretation of verbal communications and there was a perception that the Claimant had a need to have everything in writing and was inflexible.

24. Naturally, Roz Yale was not here to be tested on this evidence, yet much of her evidence is supported by evidence gathered during the disciplinary investigation which subsequently led to disciplinary procedures.

25. Two incidents led to the issues which are before this Tribunal.

26. The first took place on 25 March 2018.

27. The Claimant had been allocated a Level 3 patient. These are the most critically unwell patients who may well have multi-organ failure and would be on a ventilator. The Claimant was at the patient's bedside as she was required to be, but due to interactions with other members of staff that she was unhappy with, she left the patient's bedside and refused to return. An account of what happened was provided by the Supervising Sister on the day, Ajitha Ayyappan. Further information was provided by another colleague Maria Rodriguez who emailed Roz Yale because she was upset by the Claimant's behaviour.

28. Roz Yale had a meeting with the Claimant to discuss this incident on 27 March 2018. Roz Yale, in her witness statement, states that she regarded the Claimant's behaviour at this meeting as being unusual. She said the Claimant did not look at her for the whole one hour 30 minutes and just continued talking incessantly. It was at this point that Roz Yale raised the question that the Claimant might benefit from an Assessment by

Occupational Health, who might be able to assess the Claimant for any underlying medical conditions such as Autism. The Claimant reacted to this by refusing any such referral and indicating that she would go straight to a Solicitor if referred. We regard this reaction as somewhat strange as we accept that Roz Yale at this stage was only ever seeking to assist the Claimant and to help her in light of the behaviour she was exhibiting.

29. We accept Roz Yale's witness statement that she was seeking to put in place helpful and additional support for the Claimant. The Claimant clearly did not see it this way and it is clearly at this point that the Claimant started to feel that she was being targeted. We do not believe that she was.

30. There was then a further incident on 13 June 2018. A patient complained about treatment he had received from the Claimant. The patient was a young man with multiple injuries and was wearing a leg brace. The patient described that the Claimant was trying to help him move on her own. This was very painful for him and he had repeatedly asked the Claimant to get help from someone else. He usually had two people to help him with his leg, so that his leg could be supported. He complained that the Claimant had not listened to him and that failure to do so had caused him pain and distress. Details of this incident were also provided by Ajitha Ayyappan and another colleague Kate Chyc.

31. Matters had clearly become difficult between the Claimant and a number of her colleagues on CCU, as at this time the Claimant lodged a number of formal written grievances about other members of staff and colleagues with whom she worked. She also presented a complaint to the Respondent's CEO Nick Holme about a failure to formally investigate concerns about herself when she was previously on Curtain Ward.

32. Pursuant to these incidents, a meeting took place on 2 July 2018. This meeting was attended by Roz Yale, Rebecca Pulford, Hanne Ness, Claire Thompson, Derry Tucker and Claire Edmondson. Concerns about the Claimant's behaviour were discussed and the decision was taken by Claire Thompson and Claire Edmondson that she should be removed from clinical duties due to concerns for patient safety. She was not suspended from work. This is despite the fact that the Claimant has throughout these proceedings, as have those advising her, referred to this action as a suspension. It was not a suspension. She was removed from clinical duties due to concerns about patient safety.

33. There is nothing before us to suggest that the decision was taken for any other reason. When taken to the various documents in cross examination, event, the Claimant had difficulty in suggesting that the decision was for any other reason. Yet her case is that the decision was taken because of a perception that she was suffering from a mental condition that would have amounted to disability; a disability under s.6 of the Equality Act 2010, namely Autism.

34. There is no question that Roz Yale and others considered that the Claimant might have such a condition and that is why they sought to assist her by referring her to Occupational Health. However, the decision to restrict her duties was not in any way as a result of those suspicions. This is a principal plank of the Claimant's claim and there is simply no evidence to support the argument that the decision was taken for any other reason than patient safety.

35. She was placed on restricted duties involving no direct patient contact. This was communicated to her verbally by Roz Yale on 5 July 2018 and subsequently in writing on 10 July 2018.

36. It may at this point be useful for the Tribunal to make some comments about the Claimant's evidence up to this point. We found her evidence under cross examination to be unusual. Generally she refused to answer questions put to her by Ms McLorinan. She did this by obfuscating, by avoiding the question and often by saying that the question had already been answered when it had not. She would often go off into a rambling monologue about something entirely unconnected with the factual subject matter in respect of which she was being questioned. She was taken to a lot of the documents, including those relating to the decision to remove her from clinical duties temporarily and whilst she seemed to suggest that Roz Yale and all of those who had been present and provided evidence as to the two incidents in March and June, had been making up their version of events with which she did not agree. She did not, at any stage, volunteer a different version of events. In fact, as Ms McLorinan pointed out, nowhere in her very lengthy witness statement or at any time during the whole process from July 2018 through to her dismissal, did she ever volunteer her version of events in respect of those two incidents.

37. Where we could follow and understand her evidence under cross examination, we consider it unreliable and where there is conflict on evidence between her and the Respondents witnesses, including Roz Yale irrespective of her inability to attend at this Tribunal, we prefer the evidence of the Respondent's witnesses.

38. Very early in the process, the Claimant chose to stop engaging with the Respondents shortly after she was removed from clinical duties and after it was suggested to her that an Occupational Health Referral might be beneficial. She then instructed Solicitors and for the rest of the process and would communicate only through them. She essentially stepped away from the processes and refused to engage. There are exceptions to this, including her attendance at the second Disciplinary Hearing and the Appeal Hearing pursuant to her dismissal.

39. The Claimant was not required to work whilst suitable non-clinical duties were identified for her. It is worth mentioning that having stopped working on 5 July 2018, the Claimant did not at any stage return to work between then and her dismissal.

40. For the avoidance of doubt, it has been suggested that the decision to remove the Claimant from clinical duties was motivated by the grievances she had raised. We found no evidence to support this assertion. We are content and happy to make a finding that the reason was solely related to that which was explained to the Claimant at the time; namely patient safety.

41. Much of the Claimant's ire and the driving force behind these proceedings, appears to be her unhappiness at being referred to Occupation Health. It is important that we refer to this. The Claimant's Managers at the Respondent were concerned that her conduct might be the behaviour of an individual with a mental health condition or learning disability, such as Autism. They felt that might explain some of her behaviour. Remember, these are staff who work in the medical profession and some, if not all, will have some experience of such individuals. Staff suspected that the Claimant might be autistic as she displayed personality traits they perceived to be consistent with this. As a result she was offered an Occupational Health referral verbally, in March 2018 and at the meeting on 5 July 2018. She declined. In the letter confirming the outcome of the meeting on 5 July 2018, Roz Yale asked the Claimant to attend an Occupational Health appointment. She was reluctant to do so and in fact, at no stage throughout the whole process did she ever agree to attend such an appointment. It was made clear to her that if she did not attend, a decision would have to be made based on the information available.

42. It is very clear to us that the intention behind this was to attempt to gain evidence about any potential health condition, to take this into account when deciding how to view and deal with the Claimant's conduct. The Claimant seems to have misinterpreted this in the view of this Tribunal. She regards it as insulting and considers that all decisions of the Respondent going forward, were then based on the assumption that she had Autism. The Tribunal does not accept this. The evidence that we have seen and heard in this Tribunal leads us very firmly to the view that these attempts were made in the Claimant's best interests. Had she acceded to undergo an Occupational Health Assessment, it might have shown up medical conditions which would cause the Respondents to deal with the Claimant's behaviour and conduct, differently. They may have decided to make adjustments to the way in which they dealt with her throughout the subsequent processes. Her point blank refusal and the letters from her GP, which made it absolutely clear that the Claimant had no history of any mental health conditions, left the Respondents with no choice but to treat the Claimant's behaviour as a conduct related issue and proceed accordingly. The Tribunal cannot fault the Respondent's in this respect.

43. The Claimant obtained a letter from her GP dated 6 August 2018, which was very short, but specified in terms,

> *"This is to confirm that this lady has no record of mental illness or learning disability of any sort in her entire GP records dating from 1976."*

The letter was signed by Doctor Stuart Rudge.

44. In providing this letter, the Claimant's Solicitors who were then instructed, authorised the Respondents to liaise directly with the Claimant's GP in relation to the contents of the letter. As a result, the Respondents wrote to the Claimant's GP seeking further clarification. In essence they said they remained very concerned about certain behaviours of the Claimant and explained that it would be in the Claimant's best interest to accede to an examination by an Occupational Health expert, in that if such an examination identified an underlying medical condition, then the Trust would support her with any treatment and would consider reasonable adjustments. They listed the behaviours which had been concerning them and asked the GP to specifically consider whether he could definitively rule out mental health or learning disability at present, rather than purely on the basis of medical history.

45. This was a letter that went into some detail, but the response from Doctor Rudge was again perfunctory and simply stated,

> *"I can confirm again that this lady has no history of mental health disease or learning difficulties, your description is more in line with behavioural problems."*

46. From that point going forwards, the Tribunal accepts that the Respondents took the GP's response at face value and they decided to deal with the Claimant's conduct and behaviour out with any consideration of possible medical explanation and decided to treat her behaviour as a conduct related disciplinary matter. Ultimately, non-clinical duties were found for the Claimant and she was informed on 2 August 2018 that she would be required to re-start work on this basis from 6 August 2018. She refused.

47. In cross examination, the Claimant accepted that there was no reason other than her own decision that prevented her from returning to work. She accepted that she received a very clear instruction to do so. She was asked directly in cross examination if there was any medical reason why she could no return to work and she answered that there was no physical, emotional or cognitive reason why she could not work. She was not on sick leave, she simply chose not to come back to work. She proffered no real explanation as to why. She accepted that she was aware that she was at that time informed that a refusal to work was unauthorised absence. She accepted that she refused to correspond with the correspondence other than through her Solicitors.

48. For the avoidance of doubt, we consider that the Respondents did all they reasonably could be expected do to assist the Claimant and seek out medical evidence which might have explained her behaviour. The Claimant deliberately resisted these attempts and left the Respondents no alternative but to proceed on the basis that her behaviours were purely conduct related.

49. Accordingly, the Respondents initiated a Disciplinary Investigation. There was some delay in his process which is regrettable. The Investigator was

changed from René Ward to Rosa Baker and terms of reference were put together with respect to that Disciplinary Investigation. There were five terms of reference to be investigated:

49.1 the incident on 25 March 2018;
49.2 the incident on 13 June 2018;
49.3 ongoing general behaviours that caused distress to colleagues that had led to a breakdown of trust and confidence in the Claimant by the Team;
49.4 whether the decision to restrict the Claimant's clinical duties amounted to a breach of her employment contract, (this had been suggested by the Claimant's Solicitors); and
49.5 whether the Claimant had been absent without leave since 6 August 2018 when she had been requested to return to work.

50. Rosa Baker interviewed a number of witnesses: Claire Carr, Ajitha Ayyappan, Ed Barnes, Felicity Chapman, Jane Adimocum, Jane Scott, Kate Chyc, Roz Yale, Rebecca Pulford and Alison Farrow.

51. The Claimant refused to attend an Investigation Meeting. She gave no medical reason, it was simply a case of her refusing to engage. She accepted that this was the case under cross examination. The Claimant was informed that she could submit a statement in writing if she wished, but she refused to do so.

52. The Investigation Report completed on 13 March 2019, recommended that the matter be referred to a Disciplinary Hearing. It then proceeded through four Disciplinary Hearings.

53. The Respondents then proceeded to a First Disciplinary Hearing and the Claimant was written to on 21 March 2019 and subsequently a full Disciplinary Pack was sent to her on 27 March 2019. She was informed that Kay Hamilton would Chair the Hearing and she was invited to attend a meeting on 2 April 2019, by letter dated 22 March 2019.

54. The Claimant's Solicitors confirmed she would not attend. No reason was given other than the fact that they argued that any disciplinary process should be suspended pending the Claimant having referred herself to her professional body the NMC, in respect of complaints she raised against others. There was some suggestion that some documents provided were unsigned and it appears this may have been put forward as a reason why the Claimant was not proposing to attend, but it is not clear.

55. The Solicitors asked for Word copies of each document supplied by the Respondents in the Disciplinary Pack. There is no real explanation as to why. They also asked for a detailed chronology of events. The letter is confusing and really explains no good reason why the Claimant proposes not to attend.

56. In her evidence, Kay Hamilton explained that she discussed the matter with Claire Adams, Head of Employee Relations, to understand how matters could be dealt with pursuant to the letter from the Claimant's Solicitors. She was told that the Disciplinary Hearing should go ahead as the NMC would want to know the outcome of any internal process before dealing with matters raised to them arising out of the same incident. As a result, Kay Hamilton confirmed to the Claimant's Solicitors that the Hearing would go ahead. The Claimant did not attend and the Hearing proceeded in her absence.

57. The Report produced by Rosa Baker formed the basis of the allegations against the Claimant and Roz Yale, Felicity Chapman and Claire Adams were called as witnesses.

58. After due consideration, a detailed Outcome Letter was sent to the Claimant on 8 April 2019. This records that the incidents on 25 March 2018 and 13 June 2018 were regarded as sufficiently serious to warrant formal action against the Claimant, that the allegation of poor communication with colleagues warranted further efforts to work with the Claimant and those colleagues to mitigate those issues, that the decision to restrict the Claimant's clinical duties was a legitimate response to concerns about poor clinical practice and an appropriate measure to safeguard patient care, that the Claimant had repeatedly refused to attend work without good reason. There had been some delays in the investigation process, but these were contributed to by the Claimant's refusal to engage. They concluded that unauthorised absence, particularly long term, was a serious disciplinary offence.

59. Given some mitigation, such as delaying an investigation and evidence of measures taken to mitigate conduct concerns, the panel took the view that the Claimant should be given a further chance to comply with Management instructions and attend work.

60. Accordingly, they issued a formal written warning, effective for 12 months and added a series of conditions. These were as follows:

    60.1 that the Claimant immediately return to work and attend a Return to Work meeting, this was to involve a gradual return to clinical duties, that is that the Claimant would no longer be restricted to non-clinical duties as she had been during the Investigation and Disciplinary;

    60.2 that she agreed to and comply with an Action Plan setting out behavioural and clinical expectations of her;

    60.3 that she engage in measures to mitigate concerns about her standards of communication; and

    60.4 that she produce a reflective statement in relation to the incidents on 25 March 2018 and 13 June 2018.

61. She was warned that if she refused to engage and return to work, the Disciplinary Hearing would reconvene and consider further sanctions.

62. It was explained to her that despite the fact she had been absent without leave since 6 August 2018, she had continued to be paid but that the Respondent was not proposing to seek repayment of any such payment, where such payment had been made.

63. Having heard Kay Hamilton's evidence and read all the various documentation which led to this outcome, the Tribunal is entirely satisfied that the decision of the panel was in no way motivated by or tainted by, a belief that the Claimant was Autistic, or was suffering from a disability in any way. The decision was clearly based upon the evidence before it of the Claimant's behaviour and more particularly, the two incidents.

64. We make a finding of fact that belief in the Claimant's disability and / or mental impairment of Autism, or for any other reason, played absolutely no part in the Panel's decision.

65. We are bound to comment that we consider that the decision was lenient and most favourable to the Claimant and really gave her every opportunity to come back to work, to go back into clinical duties and to deal with the difficulties that she had experienced with colleagues. All she had to do was engage in the processes outlined. We regard the Panel as having made a perfectly fair, reasoned and sensible decision based on due consideration of a great deal of evidence before it.

66. Nevertheless, the Claimant sought to appeal this decision by writing a letter herself on 15 April 2019. Oddly, in this letter the Claimant complains that in the disciplinary decision there was no reference made in relation to the psychiatric or learning disability issues. This is entirely at odds with the Claimant's case throughout and before this Tribunal and entirely contradictory to her position before this Tribunal. We consider this somewhat indicative of the fact that the Claimant really has no proper understanding of the nature of the claim she is trying to bring. However, she has vehemently and adamantly refused to engage in any process that might have assisted her in explaining her conduct to her employers.

67. The Claimant was sent a Notice of Appeal Hearing, but her Solicitors then wrote indicating that she would not attend. The reason appears to be that this was endorsed by the Claimant during cross examination that the Action Plan specified as being part of the sanction had not yet been produced. The Tribunal does not consider this a valid reason for not attending the Appeal Hearing. The Appeal was an appeal against the outcome of the disciplinary process and one would not expect the details of any Action Plan which was part of the sanctions imposed to be the subject matter of that Appeal. There was really no good reason for non-attendance. The Solicitors also argued that the Claimant had had insufficient time to prepare, which does not bear close scrutiny. The Claimant had presented her Appeal in mid-April, was refusing to work and therefore had plenty of time to prepare. The Hearing

was not to be until 7 June 2019. As the Claimant did not attend, the Respondents considered that the matter was closed.

68. As a result of the Claimant continuing to refuse to attend work and refusing to comply with the other disciplinary sanctions, the second Disciplinary Hearing was arranged. It was explained that this was a reconvened Disciplinary Hearing of the first Panel. The Tribunal is bound to say that much was made by those representing the Claimant at this Tribunal of the fact that the four Disciplinary Hearings were dealt with by the same Panel. The argument appears to be that a fresh Panel should have been convened on each occasion. The Tribunal does not accept that argument and finds it unattractive. The disciplinary sanction had been issued by the Panel and had not been complied with. The same Panel reconvened, as it turns out, on three further occasions to consider that non-compliance. We do not consider that it would be appropriate or proportionate in the circumstances to have re-formed a fresh Panel on each occasion. We do not consider that this constitutes an error of process on the Respondent's part. The examination of the original Disciplinary Panel and its subsequent appearance in subsequent Hearings was conducted entirely properly, they considered a considerable volume of evidence and reached reasonable conclusions based on proper and due consideration. In fact, we consider that they were particularly lenient towards the Claimant and her continued refusal to attend work without reason.

69. We also consider that there was no good reason for the Claimant not to attend work from 6 August 2018 and that any absence from that date was unauthorised. There was nothing before us to suggest otherwise. The Claimant herself admitted that there was no good reason for her non-attendance. We therefore consider all absence beyond that date, through to the point of dismissal, to be unauthorised.

70. The Respondents wrote to the Claimant setting out return to work arrangements. The Claimant, via her Solicitors, actually confirmed that she would be returning to work but under protest. However, the Claimant did not show up for work and no explanation was then provided. The Respondents confirmed on 17 April 2019, that the Claimant's pay would be stopped and that the Disciplinary Hearing would be reconvened if she did not return to work by 24 April 2019. This was subsequently confirmed. Further information about the reconvened Disciplinary Hearing was then sent to the Claimant on 30 April 2019.

71. The Claimant attended that Disciplinary Hearing which took place on 8 May 2019. The Claimant asked that she be moved to a hospital nearer to where she lived, but she otherwise failed to engage in the disciplinary process, or explain why she had refused to work since 6 August 2018.

72. The outcome of the Second Disciplinary Hearing was issued on 16 May 2019. The previous conditions of return to work were re-issued as set out in the outcome to the First Disciplinary Hearing. The Claimant was to attend a Return to Work meeting on 22 May 2019, agree an Action Plan, engage

in measures to improve communication and provide a written reflective statement. The Tribunal regards this as a lenient response to the Claimant's failure to accede to the measures set out pursuant to the First Disciplinary Hearing. In effect, no further sanction was applied.

73. On 21 May 2019, the Claimant indicated via her Solicitors that she would refuse to work under Roz Yale. Her Return to Work meeting did take place on 22 May 2019, attended by the Claimant, Roz Yale and Claire Adams of HR. On 23 May 2019, a letter was sent. There was due consideration given in discussion about moving the Claimant to another Ward and the need to have an Action Plan.

74. The Respondents then made arrangements to move the Claimant to Layer Marney Ward in Colchester Hospital and devised an Action Plan and a Return to Work process. A Return to Work meeting was held on 13 June 2019.

75. However, the Claimant refused to agree the Action Plan and was invited to a Third Disciplinary Hearing. There was delay caused by the fact that the Claimant indicated via her Solicitors, somewhat bizarrely, that an Occupational Health Referral may now well assist, only for the Claimant not to attend an arranged Occupational Health Referral appointment. A third Disciplinary Hearing was fixed for 28 August 2019, but the Claimant's Solicitors contacted the Respondents in advance to confirm that the Claimant would not be attending.

76. The Hearing proceeded in her absence and the outcome was a Final Formal Disciplinary Warning, effective for 12 months. Kay Hamilton, in her evidence, states that she considers it would have been reasonable to dismiss the Claimant at this time. But she thought the Claimant should be given another opportunity. She wanted the Claimant to be given the opportunity to return to work in her preferred post and to engage in the processes to enable that to happen. This outcome was communicated to the Claimant on 10 September 2019. In this letter it was specified that the Claimant needed to agree to an Action Plan, return to work and engage with measures taken by her Managers to mitigate the conduct concerns and provide a reflective statement.

77. A further opportunity was given to the Claimant to attend an Occupational Health appointment so that any health issues which may, or may not, have affected her work, could be taken into account on her return. There was an error in the notification of the appointment, but the Claimant did not follow up and clearly exhibited no intention to attend. The Claimant refused to return to work and inevitably a fourth Disciplinary Hearing was convened. She was invited to attend on 3 October 2019. Her Solicitors confirmed she would not attend the Hearing.

78. The Hearing took place on 10 October 2019. Accordingly, she was dismissed for failure to comply with reasonable Management requests having failed to return to work, agree an Action Plan, or undertake a

reflective statement. Her employment terminated after a months' notice pursuant to a Letter of Dismissal on 18 November 2019.

79. The Claimant did Appeal. This Appeal was referred to Mike Mears from whom we heard evidence. He explained that he had been parachuted into the Appeal somewhat at the eleventh hour, but under cross examination confirmed he had had the opportunity of reading all the necessary documentation beforehand. He received the Appeal Pack on 11 December 2019 and engaged in some serious late night reading to appraise himself of the situation.

80. The Hearing took place on 12 December 2019. Mr Mears, who is a Director of Information Communication and Technology at the Trust Chaired the Appeal. Kay Hamilton attended to present the Management case pursuant to a lengthy Management Appeal Statement of Case which was before us. The Claimant attended unaccompanied. The Claimant's Solicitor had produced a letter for the Hearing on 10 December 2019. This consisted of six pages and some seven further pages of supporting documents. The Hearing was briefly adjourned so that Ms Hamilton could read the Solicitor's letter which she had previously not seen. The Claimant put forward nothing further than had been advanced in her Solicitor's letter.

81. Pursuant to that Appeal, Mr Mears concluded that the decision to dismiss the Claimant should be upheld. A letter confirming that was sent to the Claimant on 13 December 2019.

General Comments about the evidence we heard

82. We have already made extensive comments about the evidence we heard from the Claimant. We will add that much of it led us to believe that the Claimant was not fully cognisant with the case that she was trying to pursue. There are inconsistencies in her approach and contradictions in some of the documents that she produced. Further contradiction appears in some of the letters produced by her Solicitor. These were generally confusing, aggressive and often contradicted themselves.

83. We can only conclude that there has been a considerable degree of miscommunication between the Claimant and her Solicitors who have largely liaised with the Respondents on her behalf throughout this process. Nevertheless, we do not find the Claimant's evidence to have been helpful before this Tribunal.

84. The Respondent's evidence, on the other hand, given by the witnesses cited above, was clear and concise. All of the Respondent's witnesses who attended gave no impression whatsoever that any of the decision making process they had been involved in was in any way because of any perception of a disability of the Claimant's such as Autism. The cross examination of those witnesses was almost entirely confined to the arguments of failures in procedure, none of which the Tribunal regards as

significant. Much was made of the fact that during the process of refusing to attend the majority of Hearings, the Claimant's Solicitors asked for the Disciplinary Hearings to be conducted in writing. That is, for questions to be sent to the Claimant for her to answer those questions and those answers to be taken into account. We do not consider that that would have been an appropriate method of proceeding by the Respondents.

85. Ms McLorinan then pointed out this would have unduly lengthened the process and made it more difficult and unmanageable and would not, in any event, have been likely have been to the Claimant's advantage. The Claimant was given every opportunity of attending the first, third and fourth Disciplinary Hearings, but refused to do so. She was also given the opportunity of writing in with a statement to support her case. At no stage did she ever provide any explanation for the two incidents which form a considerable part of the disciplinary process and she still has not, after seven days of Tribunal time, done so.

86. Turning to the evidence of Roz Yale. We have already indicated above that we were happy to read her statement. We regard a great deal of what is in her statement to be irrefutable in terms of simple, accepted, chronological fact. Where the Claimant does take issue with her evidence, it is largely corroborated and supported by documents before us and the testimony of other witnesses. We therefore do not consider the evidence of Roz Yale to be unsafe.

Submissions

87. We do not propose to repeat the lengthy submissions which we had before us. These are well documented.

The Law

Disability Discrimination - Direct

88. Disability Discrimination is governed by s.13 of the Equality Act 2010 ("EqA"). It reads as follows:

> 13. Direct Discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
> (2) …
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

89. The Claimant relies on a hypothetical comparator. She also relies on a perception of discrimination. She is not disabled for the purposes of s.6 EqA 2010, nor has she ever advanced the suggestion that she was.

90. Cases pursuant to perceived discrimination are rare, but there are some Authorities. Those that exist are based on the interpretation of the Law which accepts that the concept of perception discrimination extends to include actions undertaken because the person (A) referred to in s.13, thinks that the person (B) has a particular protected characteristic which includes disability. The Claimant does not actually need to have that protected characteristic.

91. Probably the most well known Authority on perceived discrimination is Chief Constable of Norfolk v Coffey [2020] ICR145, which is a Court of Appeal decision. To date this is the only Appellate Authority on perceived disability discrimination. In the Court of Appeal it was common ground between the parties that in a claim of perceived disability discrimination, the putative discriminator must believe that all the elements in the statutory definition of disability in s.6 EqA 2010 are present, although it is not necessary that he or she should attach the label "disability" to them.

92. In all discrimination claims, the Tribunal must be mindful of the burden of proof provisions within s.136 EqA 2010. These are as follows:

> 136. Burden of Proof
>
> (1) …
> (2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

93. It is accepted by Authorities that the Claimant needs to make out a prima facie case of discrimination at the first stage. If the Claimant is successful in doing so, then the burden of proof shifts from the Claimant at that point to the Respondent to provide a non-discriminatory explanation for the treatment of the Claimant.

94. In a case where the Claimant brings multiple allegations of unfavourable treatment, the Tribunal will be expected to consider whether the burden of proof has shifted for each individual allegation; Essex County Council v Jarrett [2015] UKEAT0045/15. We are also guided by IGEN Limited & Ors. v Wong & Ors. [2005] IRLR258, which points out that this is a two stage process:

    a. At the first stage, the complainant is required to prove facts from which the Tribunal could conclude in the absence of an adequate

explanation that the Respondent had unlawfully discriminated. If the Complainant does not prove such facts, he or she will fail.

b. At the second stage, if the Tribunal could conclude the possibility of unlawful discrimination then there is a shift in the burden to the Respondent in this second stage. The Respondent is required to prove that they did not unlawfully discriminate.

95. The Claimant is required to provide the Tribunal with sufficient facts on which to commence its consideration. Inferences cannot be drawn from thin air; Chapman v Simon [1994] IRLR124 and Shamoon v Chief Constable of Royal Ulster Constabulary [2003] IRLR285.

96. The Tribunal is required to consider the mental processes of the alleged discriminator in relation to each allegation.

97. The Claimant's case before this Tribunal is that the Respondent took various steps because it believed she was Autistic and therefore disabled. The Tribunal must examine the factual matrix.

Unfair Dismissal

98. This is governed by s.98 of the Employment Rights Act 1996 ("ERA"),

> 98. General
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it-
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) relates to the conduct of the employee,
> (c) is that the employee was redundant, or
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) …

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

99. In answering these questions, the Tribunal is guided by an number of Authorities. In conduct related cases the Tribunals are guided by the case of British Home Stores v Burchell [1978] IRLR379. This suggests a three stage test. This is known as the Burchell test. The Burchell test can be distilled into the Tribunal determining whether the Respondent genuinely believed that the Claimant was guilty of misconduct on reasonable grounds following a reasonable investigation?

100. This assists the Tribunal in determining s.98(4) ERA 1996, but the leading Authority on such determination is Iceland Frozen Foods v Jones [1982] IRLR 439, which tells us that as a Tribunal we must consider whether the decision to dismiss fell within a band of reasonable responses of an employer faced with that set of circumstances. It is very important that a Tribunal must not substitute its own view as to what would have been reasonable.

Unlawful Deduction of Wages

101. This is governed by s.13 ERA 1996,

> 13. Right not to suffer unauthorised deductions
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless-
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> (b) the worker has previously signified inwriting his agreement or consent to the making of the deduction.

102. The right to pursue a claim arises under s.23 of the same Act.

Holiday Pay

103. The claim for accrued unpaid holiday pay on termination of employment arises under Regulation 14 of the Working Time Regulations 1998, as amended.

Notice Pay

104. Whilst it has not been articulated or it is not clear from any of the documents before us and we received no submissions on this point, it appears that the Claimant's claim for notice pay during the period of notice from 18 October 2019 to 18 November 2019, falls within her claim for unlawful deduction of wages under s.13 ERA 1996. It has not been clearly articulated as a breach of contract claim falling under the jurisdiction of the Tribunal in that respect. For the reasons given below, however, the distinction is immaterial in this case.

Conclusions

Disability Discrimination claim

105. The Claimant's claim is based on the Respondent perceiving the Claimant to have a physical or mental impairment which had a substantial and long term adverse effect on the Claimant's ability to carry out normal day to day activities within the meaning of s.6(1) of the Equality Act 2010.

106. The Claimant relies upon Autism as the perceived disability.

107. For the avoidance of doubt, it is the Claimant's case that she was not disabled within the meaning of the Equality Act 2010.

108. The Claimant must show a prima facie case before the burden of proof reverts to the Respondent, as detailed above.

109. The discriminatory acts complained of, as set out in Employment Judge Alliott's Case Management Summary are as follows:

Allegation 1

Being subjected to suspension from her substantive post on 5 July 2018.

110. On the evidence before it, the Claimant was not suspended. She was placed on restricted duties involving no direct patient contact. She was asked not to attend work whilst a suitable alternative non-clinical role could be identified for a temporary period of time whilst matters were further investigated. Such a role was identified by 6 August 2018 and the Claimant was required to come back to work. The Tribunal has made a finding that this did not amount to a suspension. However, for the avoidance of doubt, the actions of the Respondent and the decision of Claire Thompson, Roz

Yale and Claire Edmondson, was a decision taken due to genuine concerns about patient safety pursuant to the two incidents which took place in March and June.

111. Applying the test under s.13 ERA 1996 through our findings of fact, we do not consider that a hypothetical comparator not perceived as having Autism would have been treated any differently. Whomsoever was involved, whenever there is a serious concern that an employee's behaviour could put patients at risk, it is very likely that restricted duties will be put in place and this is envisaged by the Respondent's Disciplinary Policy.

112. Nevertheless, even if we had concluded that this treatment was less favourable than that which would have been meted out to a hypothetical comparator, the evidence before us is clear that the decision was not taken because of a perception that the Claimant was disabled by virtue of Autism. It may, at that time, have been in the minds of Roz Yale, Claire Thompson and Claire Edmondson that the behaviour of the Claimant might have suggested that she had some underlying medical condition such as Autism, but this played no part in that decision. It was the Claimant's behaviour that caused her to be placed on restricted duties. The Respondent did suspect that a medical condition may be the cause of the problem at that time, but that is not why she was placed on restricted duties.

113. Shortly thereafter, the Claimant elicited a letter from her GP confirming that no medical condition existed and a further confirmation from the GP was clear in that he reiterated that no such medical condition existed in the Claimant's record and that problems were behavioural issues.

114. The Tribunal concludes that this immediately led the Respondents and those involved in the decision making processes thereafter, to conclude that the Claimant was clearly not disabled and therefore no decision taken after that point could possibly have been tainted with a perception of disability amounting to Autism.

Allegation 2

Issuing the Claimant with a written warning from 8 April 2019, following a Disciplinary Hearing on 2 April 2019.

115. This was essentially part of the outcome of the First Disciplinary Hearing conducted by the Disciplinary Panel. The Decision Maker was Kay Hamilton, from whom the Tribunal heard impressive evidence. By the time that Disciplinary Hearing took place, subject to some regrettable delays, there was never any suggestion that any process being conducted by the Respondent were on the basis of a perception that the Claimant was disabled by reason of Autism. Pursuant to the medical evidence obtained by the Claimant, the Claimant's behaviours, the subject of the examination of that disciplinary process were all treated as conduct. We consider this entirely appropriate in the circumstances. All evidence is clear that the decision made pursuant to that First Disciplinary Hearing was on the basis

of the conduct and the detailed evidence relating to that conduct that was before that Disciplinary Panel.

116. We do not consider that the issuing of a written warning was less favourable treatment. We consider that anyone who had caused a patient distress due to not listening to them and had unreasonably refused to attend work for an extended period of time, would have been issued with, at the very least, a written warning.

117. In any event, it is clear on the evidence before us that this decision was not taken based on any perception of the Claimant's perceived disability by way of Autism. Kay Hamilton did not believe the Claimant was disabled. The Claimant's GP had expressly confirmed that she was not. The Claimant had always maintained that she was not. The Claimant's conduct was behavioural and this was the basis upon which the Disciplinary Panel properly conducted its considerations.

Allegation 3

Requiring the Claimant to Comply with the conditions as set out in the letter of 8 April 2019. In particular, to immediately return to work, to agree to and comply with an Action Plan, to engage in measures to mitigate Management concerns and to produce a reflective statement.

118. For the reasons set out above, we do not consider that this amounts to less favourable treatment. The same conditions would have been imposed on any employee who was unreasonably refusing to work and about whom similar problems had been identified.

119. In any event, these sanctions were not reached by the Disciplinary Panel, in particular by the Decision Maker Kay Hamilton, on the basis of a perception that the Claimant was disabled.

Allegation 4

Deciding to reconvene and the holding of a reconvened Disciplinary Hearing on 28 August 2019, to consider whether the Claimant:

a. failed to agree to and comply with an Action Plan which sets out behavioural and clinical expectations of her;
b. failed to engage fully in any measures taken by her Managers to mitigate concerns about her standard of communication, co-operation and her colleagues trust in her; and
c. failed to produce and provide to the Line Manager a written reflective statement.

120. The Disciplinary Hearing was reconvened because the Claimant had failed to comply with sanctions set out pursuant to the First Disciplinary Hearing. We do not consider any of these actions to amount to less favourable treatment. The same action would have been taken for any employee who

refused to attend work and comply with other reasonable Management instructions without good excuse.

121. In any event, the evidence is clear that this decision was not in any way taken on the basis of a perception that the Claimant was disabled by reason of Autism. Kay Hamilton did not believe the Claimant was disabled. The Claimant's GP had confirmed that she was not. The evidence before Kay Hamilton was as a result of the Claimant's conduct and was behavioural.

Allegation 5

Issuing the Claimant with a final formal Disciplinary Warning, effective for 12 months, from 10 September 2019, the date of the letter which notified the Claimant of the outcome of the Disciplinary Hearing; imposing conditions that the Claimant provide her comments of the proposed Action Plan by no later than 7 days from the date of the letter; that she confirms her agreement to the Action Plan; and that she return to work in accordance with the Plan by no later than 14 days from the date of the letter.

122. The Tribunal concludes that this does not amount to less favourable treatment. The same action would have been taken for any employee who refused to attend work and comply with the other reasonable Management instructions without good excuse.

123. In any event, the evidence is clear in that this action was not on the basis of any perception that the Claimant was disabled by reason of Autism. The reasons given above are repeated.

Allegation 6

Deciding to reconvene and the holding of a Disciplinary Panel held on 10 October 2019, to consider allegations that the Claimant had failed to comment, on or agreed to and complied with an Action Plan which set out behavioural and clinical expectations of her; failed to engage fully in any measures taken by her Managers to mitigate concerns about her standards of communication; co-operation and her colleagues trust in her; and failed to produce and provide to her Line Manager a written reflective statement.

124. The Tribunal concludes that this action on behalf of the Respondents does not amount to less favourable treatment, as the same action would have been taken for any employee who refused to attend work and comply with the other reasonable Management instructions without good excuse.

125. In any event, none of these actions were taken by the Respondent on the basis of any perception that the Claimant was disabled by reason of Autism. Kay Hamilton did not believe the Claimant was disabled. The Claimant's GP had expressly confirmed that she was not. The Claimant's conduct was behavioural and this was the basis upon which Kay Hamilton worked. There was no good excuse for the Claimant's conduct and it was reasonable to have a further Disciplinary Hearing when the Claimant continued to attend work or comply with reasonable Management instructions.

Allegation 7

The commencement and conduct of an investigation into the Claimant's mental health, and the Claimant's conduct.

126. The Tribunal concludes here that the Respondent did attempt to commence an investigation into the Claimant's mental health at the early stages of the processes undertaken by the Respondent. Essentially, the Respondents sought medical input by the Claimant's GP and an Occupational Health Report to establish whether there was any medical condition which might explain the Claimant's conduct. The purpose of this was to determine whether there were any reasonable adjustments that the Respondent might make, both in the process followed in the investigation of the Claimant's conduct and the outcome. However, no such investigation even got off the ground as the Claimant consistently refused to attend any Occupational Health appointments and obtained letters from her GP definitively indicating that she was not disabled.

127. At that point going forward, the Respondent pursued the matter no further.

128. The Tribunal concludes that this does not amount to less favourable treatment. They would have attempted to commence an investigation in order to assist both the Claimant and their investigation in any circumstances where any employee had exhibited the behaviour exhibited by the Claimant.

129. Referring the Claimant to Occupational Health advice is not less favourable treatment. Arguably, it is more favourable as it represents the Respondent seeking to investigate all relevant matters to provide additional support to the Claimant.

130. No medical investigation even got off the ground, let alone one that would definitively have determined that the Claimant was disabled for the purposes of the Equality Act 2010.

131. In any event, we do not conclude that this attempt was because of a perception that the Claimant was disabled. It was done because of the Claimant's conduct and the Respondents wanted to investigate whether there was any reason to explain that conduct. They may have had a suspicion that there was a medical condition, but they had not formed a view that she satisfied the definition of disability under the Equality Act 2010.

Allegation 8

Dismissing the Claimant.

132. The Tribunal concludes that this does not amount to less favourable treatment. The same action would have been taken for any employee who

refused to attend work and refused to comply with the other reasonable Management instructions of the Respondent.

133. In any event, the evidence is clear that the reason for the Claimant's dismissal was her conduct and was not in any way based on a perception that the Claimant was disabled by reason of Autism.

Allegation 9

Dismissing the Claimant's Appeal against dismissal by letter dated 13 December 2020, following a Hearing of 12 December 2020.

134. The Tribunal concludes that this did not amount to less favourable treatment. The same action would have been taken for any employee who refused to attend work and comply with other reasonable Management instructions.

135. In any event, the evidence is clear in that this action taken by Mike Mears was not in any way based on a perception that the Claimant was disabled. Mike Mears did not believe that the Claimant was disabled. The Claimant's GP had expressly confirmed that she was not. The Claimant had said throughout that she was not disabled. The decision was taken on the basis of the Claimant's conduct.

Burden of Proof

136. For the reasons set out above, we do not consider that in any of the nine allegations above, has the Claimant produced sufficient facts to persuade the Tribunal that a prima facie case exists and therefore the burden of proof does not switch to the Respondent on the basis of the Law set out above.

137. For the avoidance of doubt, that statement applies to each of the nine allegations set out above.

Unfair Dismissal Claim

138. It is the Respondent's case that the Claimant was dismissed because of her conduct, that being a reason falling under s.98(2)(b) ERA 1996. Ms Hamilton gave evidence to the Tribunal and she was the decision maker. The Claimant had been absent without leave since 6 august 2018 and it is the Respondent's position that she was unreasonably refusing to return to work. She had also continued to fail to comply with the reasonable management instructions set out in the first, second and third Disciplinary Outcome letters. We accept the Respondent's assertion that there is no evidence whatsoever to suggest that there was any other reason for the dismissal.

139. Accordingly, we conclude that the dismissal was by reason of conduct.

140. Applying the test in Burchell we conclude that the test was satisfied by the Respondents. A reasonable investigation was carried out prior to the first Disciplinary Hearing with detailed terms of reference being put together and various individuals being interviewed as witnesses. The Claimant chose not to attend an investigatory meeting.

141. The subsequent Disciplinary Hearings were based on the Claimant's failure to return to work or engage with the measures designed to improve her communication skills. She was invited to attend the Disciplinary Hearing at each stage and she had ample opportunity to provide any explanation she wished. She was represented by Solicitors throughout. No feasible grounds for the Claimant's failure to return to work were given. In her own evidence before this Tribunal, the Claimant admitted there was no reason for her not returning to work. She refused to work for 15 months prior to the decision to dismiss her. She also failed to comply with the other management requests made in her Disciplinary Outcome letter.

142. We therefore regard that the Respondents had a reasonably held belief in the Claimant's misconduct and that this was formed following an extensive investigation. We consider that the Burchell has been more than satisfied.

143. Turning to s.98(4) ERA 1996 and considering whether the decision to dismiss fell within the "band of reasonable responses" in accordance with the test outlined in Iceland Frozen Food v Jones (as detailed above), we consider that the decision did so fall within that band.

144. Having gone through the exhaustive disciplinary processes which they had and mindful of the Claimant's wilful refusal without excuse to return to work and comply with the other requests set out in the Disciplinary Outcome letters, we conclude that the Respondents were entitled to dismiss the Claimant by reason of conduct and that that decision fell within the band of reasonable responses of an employer faced with the set of circumstances they were faced with. We would stress that the Tribunal has not substituted its own view as to what would be reasonable in such circumstances.

145. We also considered that a fair and proper process was followed by the Respondents at all times and that procedurally the decision to dismiss was fair. The Respondent conducted an exhaustive series of Disciplinary Hearings and gave the Claimant many opportunities to avoid the ultimate sanction of dismissal. All disciplinary processes were conducted entirely fairly and properly and the Claimant was given ample opportunity to take part. In most instances she chose not to do so.

146. The initial misconduct was investigated, a Report produced and an independent panel considered it. The Claimant did not participate at all in the investigation and the first Disciplinary. She did not attend an Appeal Hearing to the first written warning. She was informed of evidence and hearings at each stage of the second, third and fourth Disciplinary Hearing.

147. We see nothing sinister in the same panel meeting to consider subsequent Disciplinary Hearings and we conclude that that does not render the process flawed or suspect. We do not accept the assertions put forward by the Claimant and her Counsel that an investigation by post should have been undertaken by writing to the Claimant with specific questions. That is not a usual disciplinary process and is a poor substitute for face to face meetings and investigations. It is to be remembered that there was no medical reason why the Claimant could not attend the meetings. She simply chose not to do so. She admitted this by her own evidence. She was given the opportunity, having decided not to attend the meetings, to present written submissions but she failed to do so.

148. For the reasons set out above, the dismissal was fair.

Claims for Notice Pay, Holiday Pay and Unauthorised Deduction of Wages

149. As previously detailed in this Judgment, we did not hear any detailed evidence as to the Claimant's claims in respect of payments specified above. What is clear, however, is that all of the Claimant's claims cover the period where she was refusing to work. We regard that period as being unauthorised absence, as even on her own evidence, there was no good reason why the Claimant was refusing to work. She was not sick, or unwell. We conclude that the Claimant had no right to pay where she refused to work. There could never be an intention between the parties that the Claimant would be paid for work she refused to do. In fact, the evidence before us suggests that the Claimant was in fact over paid in error. The Respondents have not sought to recover those payments. We accept the Respondent's submissions that the Claimant was not entitled to be paid from 6 August 2018 onwards.

Notice Pay

150. Whilst it is not clear in the Claimant's claim, we also heard little or no submissions from the Claimant and her Counsel. For the avoidance of doubt, we consider that the Claimant's failure to attend work without excuse amounts to a repudiatory breach of her contract of employment entitling the Respondents to dismiss her without notice.

Holiday Pay

151. We received extensive submissions from the Respondent, nothing from the Claimant. However, we accept the Respondent's primary position that the Claimant did not accrue holiday pay in the period when she was refusing to work.

152. Nevertheless, the Respondents did make payment to the Claimant upon termination. We have studied the Respondent's calculations in their written submissions and accept them. Thus, for the avoidance of doubt, even if we did conclude that the Claimant continued to accrue holiday while she was absent without leave, which we do not, the Respondents have made right

and proper payment to her for those accrued holidays at termination. We do not propose to repeat the calculations set out by the Respondents, save to say we accept their calculations. In any event, we reiterate that holidays cannot accrue during periods of absence without leave. We draw the same conclusion with respect to any bank holidays the Claimant claims as part of her claims.

Jurisdiction

153. As each and every one of the Claimant's claims have been dismissed, we do not need to address the issue of jurisdiction; whether any of the Claimant's claims were out of time, or whether we should extend time to validate them on the just and equitable basis. The claims have failed and they are dismissed.

3 March 2023

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Employment Judge K J Palmer

Sent to the parties on: 7/3/2023

NG

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For the Tribunal Office.