



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms K Gibbons

v

Oxfordshire County Council

Heard at:

Reading

On: 23, 24, 25 and 26 October 2023
& 23 January 2024 (deliberation day)

Before:

Employment Judge Hawksworth

Members:

Ms S P Hughes

Mrs C Tufts

Appearances:

For the Claimant:

Mr I Wheaton (counsel)

For the Respondent:

Ms S Tharoo (counsel)

RESERVED JUDGMENT

The unanimous decision of the tribunal is that:-

1. The claimant's complaint of unfair dismissal fails and is dismissed.
2. The claimant's complaint of discrimination arising from disability fails and is dismissed.

REASONS

Claim, hearing and evidence

1. The claimant, Ms Gibbons, was employed by the respondent as a Senior Auditor, from November 2019 to 7 June 2022. The claim form was presented on 28 October 2022 after Acas early conciliation from 18 August 2022 to 29 September 2022. The claimant claims unfair dismissal and discrimination arising from disability.
2. The respondent presented its response on 28 November 2022. The respondent defends the claim.

3. There was a preliminary hearing at which there was a discussion to clarify the complaints.
4. The final hearing took place from 23 to 26 October 2023 in person at Reading Tribunals. There was an agreed bundle of 1,407 pages. Page references in this judgment are references to the agreed bundle. The claimant had prepared a supplemental bundle of additional documents but told us at the start of the hearing that she had decided not to rely on this.
5. On the second day of the hearing the respondent provided late disclosure of an email dated 17 August 2021. The email was referred to in the witness statements but could not be located. It was found following further searches. We added this to the bundle and gave it page numbers 1408 and 1409.
6. On the third day of the hearing the claimant produced late disclosure of a doctor's letter. The respondent did not object to the inclusion of the letter in the bundle, subject to being permitted to recall the claimant to ask her about it. We allowed this without objection from the claimant's counsel. The doctor's letter was added to the bundle as page 1410. During the course of questions to the claimant about this, two emails from the claimant to her GP surgery requesting the letter were disclosed by the claimant and added to the bundle by consent. These were numbered 1411 and 1412. Later the same day an amended version of the GP letter was produced which was again included in the bundle by consent. We numbered the amended letter 1413.
7. We heard witness evidence from the claimant and her partner Mr Roberts on the first and second days of the hearing. At the end of the second day we heard from the respondent's witness Ms Pennington. On the third day of the hearing we heard from the respondent's witnesses, Ms Cox, Mr Dyson and Mr Fenton. All the witnesses had produced witness statements which we read at the start of the hearing.
8. The claimant's counsel provided an updated schedule of loss and the respondent's counsel provided an opening note.
9. Both parties made helpful written and oral closing comments at the end of the hearing. We did not have sufficient time to deliver our judgment on the afternoon of the fourth day of the hearing so we reserved judgment. The judge apologises to the parties and their representatives for the delay in promulgation of this reserved judgment. The parties have been told the reason for the delay.

The issues

10. The issues for us to decide were clarified at a preliminary hearing on 21 April 2023. At the start of the hearing before us the claimant's counsel made an application to make two amendments to the claim:
 - 10.1 first, to rely on another "something arising in consequence of disability" for the purposes of the section 15 claim;

- 10.2 also, to add a complaint of failure to make reasonable adjustments by failing to delaying the disciplinary hearing.
11. For reasons given at the hearing we allowed the first amendment but refused the second. In summary, we weighed up the prejudice to the claimant of not allowing the amendment against the prejudice to the respondent of allowing the amendment. We decided that the balance fell in favour of the claimant on the first amendment because it was an addition to a complaint which had already been brought and which had been understood from the respondents in its ET3. The balance fell in favour of the respondent in relation to the second complaint as this would have meant the introduction of a wholly new complaint which had not been identified prior to the first day of the hearing.
12. Therefore the issues for us to decide at the liability hearing, as identified at the preliminary hearing, and including the permitted amendment are as follows (numbering has been retained from the case management orders):

1. Unfair dismissal

- 1.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
- 1.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
- 1.2.1 there were reasonable grounds for that belief;
 - 1.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 1.2.3 the respondent otherwise acted in a procedurally fair manner;
 - 1.2.4 dismissal was within the range of reasonable responses.

[2. Remedy for unfair dismissal – for remedy hearing]

3. Disability

- 3.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:
- 3.1.1 Did she have a mental impairment: anxiety and depression?
 - 3.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

3.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

3.1.5.2 if not, were they likely to recur?

4. Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the respondent treat the claimant unfavourably by:

4.1.1 Dismissing the claimant?

4.2 Did the following things arise in consequence of the claimant's disability:

4.2.1 the claimant's sickness absence between 22 November 2021 and 7 June 2022; and

[allowed on amendment] 4.2.2 the claimant's inability to take part in the procedures that were required of her.

4.3 Did the respondent dismiss the claimant because of that sickness absence or [allowed on amendment] that inability?

4.4 Was the treatment a proportionate means of achieving a legitimate aim?

4.5 The Tribunal will decide in particular:

4.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2 could something less discriminatory have been done instead;

4.5.3 how should the needs of the claimant and the respondent be balanced?

4.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

13. We heard evidence, made findings of fact and reached conclusions on these issues as explained below.

Findings of fact

14. In this section we set out our decision about what happened. Where the parties disagree about what happened, we decide what we think is most likely to have happened, based on the evidence we heard and the documents we read.

Introduction

15. The claimant joined the respondent in November 2019 as a Senior Auditor. Her manager was Sarah Cox. They had monthly one-to-one meetings and an extended one-to-one every three months.
16. On 12 May 2020 the claimant was told that she had passed her probation period. No performance issues were raised.
17. Towards the end of 2020 Ms Cox felt that performance issues with the claimant's work were beginning to arise. Ms Cox asked the claimant to work with an experienced colleague as a buddy. In January 2021 at the one-to-one meeting between the claimant and Ms Cox, the claimant told Ms Cox that she was not happy working in this way with her colleague. She did not see the point and felt relegated.
18. In May 2021 the claimant had a half day's absence with chest pain which led to some medical investigations.
19. On 6 July 2021 Ms Cox received a manager's briefing about the respondent's wellbeing absence plan and stress risk assessment. Managers were advised to ask their teams to complete them. Ms Cox emailed her team and asked them to complete the wellbeing action plan and stress risk assessment before their next one-to-one meeting.

Summary of one-to-one meetings

20. Between July and November 2021 the monthly meetings between the claimant and Ms Cox continued. In summary, over the course of those meetings, Ms Cox took the following steps:
 - 20.1 she followed up her request (made to the whole team) for the claimant to complete the stress risk assessment and wellbeing action plan;
 - 20.2 she introduced a supportive improvement plan to address her concerns about the claimant's performance;
 - 20.3 when the claimant said she wanted to make a flexible working request for one day's study leave, Ms Cox gave the claimant her initial view and advice on the formal procedure.
21. The claimant became increasingly unhappy about Ms Cox's actions at these meetings. She engaged in protracted discussions about the minutes of the meeting at which the supportive improvement plan was raised. We find that the steps taken by Ms Cox were normal and reasonable management actions.

22. During these meetings, the claimant did not tell Ms Cox that she had an anxiety or mental health condition. Rather, the claimant expressly said she did not have any medical condition, and she suggested that Ms Cox's enquiries about her health and wellbeing were an attempt to 'drum up' a medical issue.

The one-to-one meetings

23. At the claimant's one-to-one on 27 July 2021, the claimant had not completed the wellbeing action plan or stress risk assessment as requested. She said that she would complete it. Ms Cox asked the claimant about her health; the claimant confirmed that she had had the all-clear. This related to the investigation into her chest pain. We do not find that there was any discussion about anxiety or the claimant struggling at this meeting.
24. On 16 August 2021 Ms Cox emailed the claimant to ask for information about her timesheets. We find that the reason she did this was because she wanted more details about 11 days training which the claimant had recorded. She did not ask other members of her team the same question, because she did not have similar queries about time recording by them.
25. The next one-to-one meeting between Ms Cox and the claimant was on 25 August 2021. The claimant had not completed the wellbeing action plan or the stress risk assessment. The claimant and Ms Cox had a discussion about brain fog, keeping a clear head and the need for regular walks. Based on the evidence including the notes of this meeting we do not find that the claimant was specifically referring to or expressly mentioned anxiety. Ms Cox understood the claimant to be talking about the challenges of working from home during the pandemic.
26. On 13 September 2021 there was another one-to-one meeting between the claimant and Ms Cox. Ms Cox asked the claimant how her health was and the claimant said that everything was now fine. Ms Cox reasonably understood that to be a reference to the investigations into the claimant's chest pain.
27. Ms Cox mentioned to the claimant that she had had a conversation with a colleague earlier that day who had told her that the claimant had said that she felt isolated. The claimant said that she was just having a bad day and these were infrequent. Ms Cox asked the claimant whether she would like to return to work in the office to help with feelings of isolation. The claimant said she would think about it. Ms Cox asked the claimant to complete the wellbeing action plan and the stress risk assessment.
28. In the same meeting, the claimant's request for flexible working for one day a week was discussed. The claimant described this as a request for study leave to help her to work towards a professional exam she was doing. Ms Cox said her initial assessment was that she was unlikely to support this request, for operational reasons, but that the claimant should make a formal request under the procedure, and there was a right to an appeal if the request was not granted.

29. They went on to talk about the claimant’s work objectives and Ms Cox said that she felt it was necessary to move towards a more formal supportive improvement plan. She emphasized that it was intended to be a constructive plan to help the claimant’s performance. The claimant asked if it was a formal route. Ms Cox said that it was and that it would result in a formal performance process being followed if the claimant’s performance did not improve.
30. The following week, on 20 September 2021, Ms Cox sent a note of the one-to-one meeting to the claimant. The claimant was unhappy about the content of the note. She and Ms Cox exchanged lengthy emails about it. The claimant said she was unsure why Ms Cox felt that she was upset or isolated and the claimant said, “I can assure you that this was not the case”. She apologised if she had given that impression. She said she did not feel isolated and would appreciate clarity on why this had been raised. She again referred to her flexible working request being for study leave.
31. On the same day the claimant sent Ms Cox the completed wellbeing action plan (she did not complete the stress risk assessment). The claimant’s answers to the questions in the wellbeing action plan gave the strong impression that she had no mental health issues. We include below some of the questions in the action plan, and the claimant’s answers.

Question on wellbeing action plan	Claimant’s response
How might experiencing poor mental health impact on your work?	Personally, never have this, I understand people suffering with poor mental health, it would be detrimental.
Are there any situations at work that can trigger poor mental health or cause your mental health to deteriorate for you?	Not that I am aware
What support could be put in place to minimise triggers or help you to manage the impact?	n/a
What early warning signs that you or we might notice when you are starting to experience poor mental health?	n/a
If we notice early warning signs that you are experiencing poor mental health - what should we do?	If any assumptions are being made about, in any manner, I would like it in writing
We need to keep in regular contact if you are off sick. What is the best way for us to contact you and how often?	Mobile and weekly

32. The next one-to-one meeting between Ms Cox and the claimant was due to take place on 19 October 2021. The claimant wrote to Ms Cox to say that she would like to have a union representative present with her and asked to

reschedule because of her representative's availability. The claimant also replied to the ongoing discussions about the note of the September one-to-one. She said:

“Regarding your first comment in red I don't understand why we are trying to drum up that I have some sort of medical issue. I have stated multiple times in writing I don't have a medical issue. Please can you state in writing why you're trying to assert that I have a medical issue when you know I don't have one. Please can I understand the motivation for this. In response to your second response in red again I have stated that I did not have any kind of emotional response. To portray me in this light is misleading.”

33. Ms Cox rearranged the one-to-one meeting as requested.
34. On 1 November 2021 the claimant made a request for any records held on her performance management issues.
35. The next one-to-one meeting between Ms Cox took place on 10 November 2021. The claimant's union representative was present and an HR representative also attended.

The claimant's sickness absence

36. The claimant was off work sick the day after the meeting, 11 November. She returned to work the next day, Friday 12 November. She was then off sick from the following Monday, 15 November 2021. She did not return to work again before being dismissed.
37. The claimant telephoned Ms Cox to report sick on 11, 15, 16, 17 and 18 November. She texted her on 19 November.
38. On 22 November 2021 the claimant had been off work sick for seven days and could no longer self-certify. She called Ms Cox. The claimant recorded this call without telling Ms Cox. We listened to the recording at the request of the parties. Our assessment of the call is that Ms Cox was professional and sympathetic towards the claimant and she did not put pressure on her to do anything she was unable to do.
39. The claimant said she was unfit for work and that she would be seeing her GP on Friday at the end of the week to get a backdated fit note. Ms Cox highlighted that the risk that the claimant might not be able to get a backdated fit note and she was no longer able to self-certify. The claimant said that she was aware of that. She said that she was having tests on Thursday and had an appointment on Friday. Ms Cox accepted that. Ms Cox asked the claimant to confirm where on the respondent's online directories the claimant had stored some documents she was working on. This was so that the work could be reallocated. The claimant said she had stored her work off-line or on a private directory, but that she was not well enough to deal with discussions about it. Ms Cox accepted that.

40. On 26 November 2021 the GP gave the claimant a fit note which was backdated to 22 November and another fit note which said the claimant would be unfit for work up to 9 December.
41. On 2 December 2021 Ms Cox followed up her conversation with the claimant and asked if she could, by 6 December, email over to Ms Cox everything that she had stored offline, as it was needed for the reallocation of the work. Ms Cox also asked the claimant to complete the stress risk assessment and wellbeing action plan and to update the wellbeing action plan to reflect the change in circumstances since she completed it in September 2021. The claimant did not reply to this and did not complete either document.
42. On 10 December 2021 the claimant sent a WhatsApp message to Ms Cox as her fit note had expired. Ms Cox replied to ask, "Shall we catch up next week for an update on how you're feeling and how the GP appointment went?". The claimant did not reply to this message.
43. The GP issued another fit note and thereafter fit notes were issued every four weeks which said the claimant was not fit for work. Up to December they recorded the claimant had work related stress and from January they recorded anxiety and depression or anxiety and stress. At no point did the fit notes say that the claimant would be fit for work with adjustments to hours, role or location.
44. On 13 December 2021 Ms Cox texted the claimant to say she had emailed a letter to her. This letter raised concerns about the lack of communication from the claimant and enclosed a copy of the sickness policy explaining the need for the employer to have contact with the employee while off sick. It had an invitation to a Teams meeting on 16 December and a list of things that would be discussed. This letter was sent in accordance with the respondent's policy that long-term absence processes were triggered after 20 days absence. It also informed the claimant about the respondent's employee assistance programme.
45. On 14 December 2021 the claimant replied by WhatsApp to Ms Cox saying "I will not be returning to work this week. Please understand sick leave". Other than forwarding fit notes, this was the last time the claimant contacted the respondent before the disciplinary process began in May 2022.
46. Ms Cox asked the respondent's Human Resources department to advise and assist and on 15 December 2021 HR sent an email to the claimant saying that they would like her to attend the meeting on 16 December. The email said that if the claimant was saying she was unable to attend the meeting, the respondent would need to complete a referral to Occupational Health and take advice about her capability to attend a meeting with them.
47. A copy of the sickness absence policy was attached to this email. The policy said that it is essential for regular contact between the manager and employee to be maintained throughout the period of absence. The wellbeing action plan which the claimant had completed in September 2021 also said

this. The claimant knew the respondent's sickness absence policy because she had conducted an audit which encompassed the policy. The claimant's terms and conditions required the claimant to comply with the respondent's policies.

48. The claimant did not reply to the email from HR. She did not reply to her union representative who had, at the request of the respondent, also sent her an email. The claimant did not attend the meeting on 16 December 2021.
49. On 16 December 2021 Ms Cox emailed the claimant to say that she would be making a referral to Occupational Health for advice as to whether there were any medical reasons why the claimant was unable to attend management sickness meetings. She also told the claimant that her sick pay would reduce to half pay on 13 January 2022 and to nil pay on 15 March 2022. The claimant did not reply to this correspondence.
50. The respondent emailed the claimant on 31 December 2021 and 10 January 2022 to let her know that the Occupational Health appointment would take place by telephone on 21 January 2022.
51. The claimant did not attend the appointment with Occupational Health. Her partner answered the phone and said she was not well enough to participate.
52. The respondent's HR department wrote to the claimant on 26 January 2022. The claimant did not reply.
53. Ms Cox emailed the claimant on 10 February 2022. She referred to the fact that she had not met the claimant since the start of her sickness absence, and said she had concerns about her wellbeing. She suggested a meeting the following week, on 17 February 2022. Ms Cox said she would be happy to meet the claimant at home, or at a mutually convenient location. The claimant did not reply to Ms Cox's email.
54. On 3 March 2022 Ms Cox emailed the claimant to say that her entitlement to sick pay was coming to an end and that her pay would be reduced to nil pay from 15 March 2022.
55. The respondent's HR department wrote to the claimant on 7 March 2022 asking her to contact her manager by 10 March 2022 as regular contact was required under the respondent's procedures. The letter said that if the claimant did not make contact, the respondent would have to look at its formal procedures. The claimant did not reply.
56. On 12 and 21 April 2022 the respondent's HR department wrote to the claimant again asking her to attend a meeting on 27 April 2022 to discuss her continued sickness absence. The claimant did not reply to either of these communications.

Disciplinary process

57. By mid-May 2022, other than providing fit notes, the claimant had not been in contact with the respondent since 14 December 2022, around 5 months. The respondent wrote to the claimant on 17 May 2022 to say that in light of the lack of contact, the claimant was invited to a disciplinary hearing on 25 May 2022:

“The meeting has been arranged to discuss the allegation that during your period of sickness absence (from Monday 15 November to date), you have failed to respond to any communications from your line manager or from HR. You have failed to comply with the council's procedures by not completing the stress risk assessment or wellness action plan, you have failed to attend planned sickness review meetings and you have not attended any booked Occupational Health appointments made for you.

You should understand that these allegations are serious and if proven could constitute gross misconduct and result in dismissal.”

58. The claimant instructed solicitors who wrote to the respondent on 19 May 2022. They said the claimant was a disabled person for the purposes of the Equality Act 2010 by virtue of her anxiety and depression. They said that the claimant had been unable to carry out many day-to-day activities and functions ‘over a prolonged period’. They said that the respondent had subjected the claimant to unreasonable and unattainable performance targets and had failed to address her concerns, leading to the complete breakdown in the employment relationship. The claimant’s solicitors asked for the disciplinary hearing to be postponed ‘so that the parties may address the matter appropriately’.
59. The respondent agreed to postpone the hearing to 7 June 2022. On 6 June 2022 the claimant’s solicitors wrote to the respondent to say the claimant was not fit to attend the hearing or in a position to provide detailed submissions or detailed instructions to allow them to make submissions on her behalf. They did not ask for another postponement of the hearing.
60. The disciplinary hearing went ahead on 7 June 2022. The decision maker was Ian Dyson, the respondent’s assistant director of finance. He was assisted by an HR advisor. The claimant did not attend and was not represented.
61. Mr Dyson concluded that, with the exception of sending sick notes, the claimant had failed to respond to any communications from her line manager or HR and had failed to complete the stress risk assessment and updated wellbeing action plan. He reviewed the claimant’s solicitor’s letter; he felt it did not address any of the matters for which the disciplinary hearing had been convened. He concluded that the claimant had not complied with the respondent’s sickness policy and procedure and she had not engaged with her managers, HR or OH. He decided that, as she was able to engage with solicitors, her failure to engage with the respondent was intentional.

62. He considered this to be a failure to obey lawful and proper instructions, and a failure to follow formal management procedures, both of which are examples of misconduct listed in the respondent's disciplinary policy. He decided that the claimant had failed to comply with the respondent's policies as required in her terms and conditions.
63. Mr Dyson decided this was gross misconduct and that the claimant should be dismissed with immediate effect. The respondent wrote to the claimant on 10 June 2022 to inform her of the decision and the reasons for it.
64. The claimant appealed against the decision to dismiss her. She completed an appeal form on 22 June 2022. In the form, the claimant included a two and half page narrative explanation of her reasons for appeal. She said she had been penalised for suffering from serious ill health. She said it appeared she had been dismissed because of her condition, or the symptoms and circumstances arising from her condition.
65. The claimant was invited to an appeal hearing on 2 August 2022. She was sent a copy of the appeal pack.
66. The claimant asked to be legally represented at the hearing. The respondent told the claimant that she could not be legally represented but she could be represented by a trade union representative or a colleague. The claimant replied to say that she would not be attending the appeal meeting because the respondent had rejected her request for legal representation.
67. The appeal hearing started on 2 August 2022. The appeal was heard by a panel of three councillors, chaired by Councillor Ted Fenton. On the morning of the appeal hearing the claimant emailed the respondent to say that she would not be attending because she had been prohibited from having legal representation and the respondent had not responded to or addressed the statements and requests she had made. The panel decided to proceed in the claimant's absence. They asked questions of Ms Cox and Mr Dyson. The hearing took around two hours.
68. The appeal panel decided that it was not clear to what extent the claimant's health condition was a relevant factor in her failure to keep in adequate contact with the council during her period of absence. It noted that it had been very difficult for the council to explore this because the claimant had not responded to correspondence/contact but the claimant now had legal representation. The panel decided that further action should be taken to see if the claimant would be willing to attend an occupational health appointment so that the question of whether her health condition was a relevant factor in the failure to keep in contact could be assessed. The panel decided it would reconvene once additional information had been made available as soon as possible and within one month.
69. The respondent's HR business partner emailed the claimant on 2 August 2022 to tell her the panel's decision. She said:

“The appeal panel have adjourned as they consider that in order to reach a view as to the impact your illness had on your ability to engage with the council, they need to obtain further information. Therefore the panel would like to know if you would be willing to attend an Occupational Health assessment. Every effort will be made to accommodate your attendance. Following receipt of the Occupational Health report, the hearing will reconvene to make a decision, within the next month.”

70. The claimant did not reply to the email, and the respondent sent another email on 12 August 2022. On 17 August 2022 the claimant replied to the respondent. She said that Ms Cox had wanted to dismiss her and had constructed a scenario to do so. She said that after the questions and statements presented by her solicitor had been addressed to move things to a solution, she would be happy to participate in a medical examination. She said the council had refused to engage with her solicitor and that she would be obtaining a certificate to present her evidence in an industrial tribunal.
71. On 19 August 2022 the respondent’s HR business partner sent a letter to the claimant by email. She said that the focus of the disciplinary process was the claimant’s conduct and non-compliance with the council’s sickness absence procedure. She said:

“The impact your illness has had on your ability to engage with the Council is a matter which Occupational Health may be able to advise on. If this information is not available to the Appeal Panel it will need to make a decision based on the current information in the appeal hearing pack, which you have seen, and it will not have the benefit of any additional information regarding your health.”
72. The letter also said that the request to attend an occupational health assessment was a separate matter to the questions and statements raised by the claimant’s solicitors. The respondent encouraged the claimant to attend the reconvened appeal hearing. It said, ‘I would like to give you a further opportunity to consider an occupational health assessment, please let me know whether you would consent to an Occupational Health assessment...before the reconvened appeal hearing on 1 September 2022.’
73. At about the same time, the respondent’s legal team were in contact with the claimant’s solicitors.
74. The claimant did not reply to this emailed letter. She emailed the respondent’s HR department at 09:01 on the morning of the reconvened hearing on 1 September 2022 to say that she had registered with Acas and if the council chose not to engage, would be starting a tribunal claim.
75. The appeal hearing reconvened on 1 September 2022. The appeal panel said it had been unable to determine whether the claimant’s medical condition impacted on her ability to engage with the respondent and fulfil the requirements of the Sickness Management police, in particular because the claimant declined to attend an occupational health appointment, and did not

provide separate medical information other than fit notes. The panel noted the many attempts to engage with the claimant since her absence began on 15 November 2021. The panel decided not to uphold the claimant's appeal.

76. The claimant was informed of the panel's decision in a letter sent to her on 7 September 2022.

The medical evidence

77. The claimant provided the tribunal with a statement about the impact of her health conditions. She also provided a copy of her GP records. These were very heavily redacted. For example, 14 records of contact in the 8 day period between 18 and 26 November 2021 were redacted and 26 records of contact in the 7 day period between 26 November 2021 and 3 December 2021 were redacted. We accept the claimant's evidence that the redacted entries were not related to her mental health.
78. There was a dispute about when the claimant's mental health condition started. We do not accept (as the claimant invited us to) that there was a typographical error in her impact statement and that, although the statement said her anxiety started in November 2021, she meant to say that it had started a year earlier in November 2020. The earlier date was not consistent with the GP medical records we saw. We also do not accept that the claimant discussed mental health issues with the respondent during the period from July to October 2021. In fact, the claimant said quite forcefully to the respondent in September 2021 that she did not have any medical issues. We do not accept the claimant's suggestion that when she said she had no medical issue she meant no physical health issue. That was not consistent with the responses she provided at that time in the wellbeing questionnaire which expressly said she never had poor mental health. On the basis of the evidence before us, we do not find that the claimant had anxiety or depression before November 2021.
79. We accept that from early November 2021 the claimant had anxiety and depression. This is consistent with her GP records and her responses to GAD and PHQ questionnaires which she completed on 16 November 2021. Those showed that the claimant had severe depression and severe anxiety at that time and that she had been experiencing symptoms nearly every day over the past two weeks.
80. We accept that from November 2021 the claimant's conditions had an impact on the following activities:
- 80.1 The claimant found social contact difficult because she could not hold eye contact, had a blank expression and could not recall conversations from a day previously. She wanted to avoid others;
 - 80.2 She experienced a lack of sleep, not sleeping for more than 3 hours a night;

- 80.3 She previously enjoyed walking but found going for walks became physically taxing because of lack of sleep.
81. The claimant was prescribed anti-depressants from December 2021 but stopped taking them because of a bad reaction. She had talking therapy and CBT from January 2022 to May 2022. She continued online CBT and daily mindfulness practices to help with anxiety and depression.
82. The claimant's condition varied from time to time and she had good days and bad days. She found the treatment and the practices she learned helped. Her PHQ and GAD scores reflect these features. By January 2022 the claimant's depression had improved and was mild, and her anxiety was assessed as moderate. In March 2022 her depression was mild and her anxiety score was less than the cut off point for mild. In May 2022 the claimant had mild anxiety and mild depression.
83. We find that without the therapy, the claimant's anxiety and depression would have been likely to have continued at the level she was experiencing in November 2021.
84. On the last day of the hearing before us, the claimant produced two doctor's letters, both dated 24 October 2023. The first letter said:
- 'I am writing in my capacity as GP. The above-mentioned patient was deemed not fit to attend work or attend meetings, absence management or disciplinary proceedings between December 2021 to June 2022 due to anxiety and depression as well as work-related stress.'
85. The second letter, amended by the doctor at the claimant's request, included an additional sentence which said, 'It is important to note that the duration of Ms Gibbons' anxiety and depression would likely extend beyond 12 months'.
86. We have decided that we cannot attach any weight to these letters. They were written over a year after the relevant time, by a doctor who had never met or treated the claimant. The GP records which were before the tribunal did not address fitness to take part in procedures (we accepted that the redacted parts were not relevant to mental health issues). It is unclear what evidence the GP had to support the view about the claimant's fitness to attend meetings during the relevant period, or what the doctor understood to be required from those meetings and proceedings. In relation to fitness to attend meetings, the letters essentially copied the same words the claimant had used in her request for the letter. The doctor gave no reason why they felt the claimant was considered to be unfit to attend meetings, absence management or disciplinary proceedings.
87. By May 2022, shortly before the dismissal in June 2022, the claimant's anxiety and depression were both recorded as mild. In May the claimant instructed solicitors about work-related matters. In June she completed the respondent's appeal form. She did not attend the appeal hearing, and said

this was because the respondent had refused her request to be legally represented, not because of her health condition. Similarly, at the time of the appeal, the claimant did not say she was able to attend an occupational health appointment, rather she said she would attend if the respondent replied to her solicitor's letter.

88. We do not find that the claimant was unable to take part in the respondent's attendance management and disciplinary procedures.

The law

Unfair dismissal

89. Section 98(2) of the Employment Rights Act 1996 sets out reasons for dismissal which are potentially fair reasons. These include reasons which *"relate to the conduct of the employee."*

90. In a complaint of unfair dismissal which the employer says is for conduct reasons, the role of the tribunal is not to examine whether the employee is guilty of the alleged misconduct. Guidance set out in the case of British Home Stores v Burchell requires the tribunal to consider the following issues:

90.1 whether, at the time of dismissal, the employer genuinely believed the employee to be guilty of misconduct;

90.2 whether, at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and

90.3 whether, at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

91. Where there is a potentially fair reason for dismissal, the tribunal has to consider (under section 98(4) of the Employment Rights Act 1996)

"whether in the circumstances (taking into account the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a fair reason for dismissal."

92. This is determined in accordance with equity and the substantial merits of the case. The tribunal considers whether dismissal was within the range of reasonable responses open to the employer. The tribunal must not substitute its own view of the appropriate penalty for that of the employer.

Disability

93. Disability is a protected characteristic under sections 4 and 6 of the Equality Act 2010. The burden of proof is on the claimant to establish that she has a disability within the meaning of the Equality Act 2010.

94. The definition of disability is contained in section 6 of the Equality Act:
- “(1) A person (P) has a disability if:*
- (a) P has a physical or mental impairment; and*
- (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”*
95. Schedule 1 to the Equality Act sets out additional detail concerning the determination of disability. In relation to long-term effects, paragraph 2 of schedule 1 provides:
- “(1) The effect of an impairment is long-term if –*
- a) it has lasted for at least 12 months,*
- b) it is likely to last for at least 12 months, or*
- c) it is likely to last for the rest of the life of the person affected.*
- (2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if the effect is likely to recur.”*
96. Substantial means more than minor or trivial (section 212).
97. When considering whether an effect is long-term, the question is whether there has been a substantial adverse effect as at the date the alleged discriminatory acts occurred or if not, whether as at that date, there was a substantial adverse effect which was likely to last 12 months (Tesco Stores Ltd v Tennant [2020] IRLR 363 EAT).
98. Paragraph 5 of schedule 1 deals with the effect of medical treatment. It says:
- “(1) An impairment is to be treated as having a substantial effect on the ability of the person concerned to carry out normal day-to-day activities if –*
- a) measures are being taken to correct it, and,*
- b) but for that, it would be likely to have that effect.*
- (2) ‘Measures’ includes, in particular, medical treatment and the use of a prosthesis or other aid.”*
99. This requires the tribunal to consider what the effect on the claimant’s abilities would have been but for the medical treatment (sometimes referred to as the ‘deduced effect’). The deduced effect was considered by the EAT in J v DLA Piper [2010] IRLR 936, at paragraph 57, which concluded:

“There is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of anti-depressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped: the proposition could of course be challenged, but in the absence of such challenge ... it is unclear what elaboration was required.”

100. Statutory guidance on matters to be taken into account in determining questions relating to the definition of disability was issued in 2011 (the ‘Guidance’). Paragraph 12 of schedule 1 of the Equality Act requires employment tribunals to take account of any aspect of the Guidance which it thinks is relevant.
101. Section B deals with the cumulative effects of an impairment. It is important to consider whether the effects of an impairment on more than one activity taken together could result in an overall substantial effect (paragraph B4).
102. Paragraph C3 of the Guidance explains that ‘likely’ should be interpreted as meaning that ‘it could well happen’. This is a lower hurdle than the test of whether something is more likely to happen than not.

Discrimination arising from disability

103. Section 15(1) of the Equality Act 2010 provides that 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.”

104. Section 15(2) says that:

“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.”

105. There are four elements to section 15(1), as explained by the EAT in Secretary of State for Justice and another v Dunn EAT 0234/16:

- 105.1 there must be unfavourable treatment;
- 105.2 there must be something that arises in consequence of the claimant’s disability;
- 105.3 the unfavourable treatment must be because of the something that arises in consequence of the disability; and
- 105.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

106. In Pnaiser v NHS England and anor 2016 IRLR 170, the EAT summarised the approach to be taken under section 15. The tribunal must identify whether there was unfavourable treatment and by whom. It must determine the cause of or reason for the treatment, focusing on the conscious or

unconscious thought processes of the alleged discriminator. There may be more than one reason or cause for the treatment and, as in a direct discrimination case, the 'something' need not be the main or sole reason for the treatment but it must have at least a significant (more than trivial) influence so as to amount to an effective reason for or cause of it. If an effective reason or cause is 'something arising in consequence of' the claimant's disability, the tribunal will consider whether the respondent can show that the treatment is a proportionate means of achieving a legitimate aim.

Burden of proof in complaints of discrimination

107. Sections 136(2) and (3) provide for a shifting burden of proof in proceedings under the act:

"(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) This does not apply if A shows that A did not contravene the provision."

108. This means that if there are facts from which the tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.

109. If the burden shifts to the respondent, the respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

Conclusions

110. We applied these legal principles to our findings of fact, to reach our conclusions on each of the issues for determination by us. We have started with disability and the complaint of discrimination arising from disability, before considering unfair dismissal.

Disability

111. The alleged discriminatory treatment is the dismissal which took place on 7 June 2022. We have to consider whether the claimant met the definition of disability at that date.

112. We have accepted, based on the claimant's evidence and GP records that from early November 2021 the claimant had anxiety and depression. That is a 'mental impairment', the term used in section 6 of the Equality Act.

113. We have also accepted that the claimant's anxiety and depression affected her ability to carry out day-to-day activities, specifically taking part in social

activities (social contact), sleeping and going for walks. We have concluded that the effect on these activities was more than minor or trivial, particularly when the cumulative effect is considered, and therefore the effect was substantial.

114. We have found that the claimant had talking therapies from about January 2022 and that her conditions improved with this therapy. We also found that without the therapy, the claimant's anxiety and depression would have remained severe. We conclude that without therapy, there would have been a substantial impact on day-to-day activities throughout the period from November 2021 to June 2022, a period of seven months.
115. The last element of the test for disability under the Equality Act is whether the effects of the impairment were long-term. As we have found that there was a substantial effect on day-to-day activities throughout the period from November 2021 to June 2022, that means that by the time of the dismissal, the effects had not lasted for 12 months. They had lasted for 7 months. Therefore we need to consider whether the second part of this element of the test is met, that is whether, in June 2022, the effects of the claimant's mental health conditions were likely to last for a further five months. The relevant test is whether that 'could well happen'.
116. We have concluded that the second part of this element of the test is met in that the substantial effects of the claimant's mental health conditions could well have lasted for a further five months. We have not attached any weight to the claimant's GP's second letter, for reasons explained in our findings of fact. However, our own assessment is that, given the severity of the claimant's condition in November 2021, if she had not received the therapy which she found helpful, the effects could well have continued for a further five months.
117. For these reasons we find that the claimant was disabled within the meaning of section 6 of the Equality Act 2010 in June 2022 at the time of the dismissal.

Discrimination arising from disability

118. To consider this complaint, we have followed the approach explained in Pnaiser.
119. The respondent dismissed the claimant on 7 June 2022. That was unfavourable treatment. It was by Mr Dyson.
120. We have to determine the cause of or reason for the dismissal, focusing on the conscious or unconscious thought processes of the alleged discriminator. The reason for the dismissal was the claimant's failure to engage with the respondent during sick leave, as required under her terms and conditions of employment. Mr Dyson decided that this was an intentional failure, and that it amounted to gross misconduct. (The performance issues raised by Ms Cox did not play a part in the decision to

dismiss, and there was no scenario constructed by Ms Cox to try to dismiss the claimant.)

121. The reason for dismissal was the claimant's failure to engage with the respondent during sick leave. The first 'something arising' relied on by the claimant of sickness absence between 22 November 2021 and 7 June 2022 was not the reason for dismissal. The sickness absence was the context in which the matters which led to the dismissal occurred, but it was not the reason (or a reason) for the dismissal. We are entirely satisfied that if the claimant had maintained some contact with the respondent during her sickness absence she would not have been dismissed on 7 June 2022. The claim based on this 'something arising' fails, because this 'something arising' was not a reason for or a cause of the unfavourable treatment.
122. The second 'something arising' in the amended list of issues was put as an 'inability to take part in the procedures that were required of the claimant'. We have not found that the claimant had this 'something': we have not found that she was unable to take part in the respondent's procedures. Further, we have not found an inability to take part in procedures was the reason for dismissal. The reason for dismissal was wider than this; it was the claimant's failure to engage at all.
123. Although the reason for the claimant's dismissal was not the 'something arising' relied on by the claimant in the list of issues, for completeness, we have gone on to consider whether the claimant's failure to engage was something arising from the claimant's disability.
124. The evidence does not suggest that the claimant's failure to engage with the respondent arose in consequence of her anxiety and depression. The claimant's condition did not remain static during the entirety of her absence. With treatment, there were times when her condition improved and was assessed as mild. She had good days and bad days. She was able to engage with work related issues with her solicitor. She was able to complete the appeal form. We conclude that there were times when the claimant could have made some limited contact with the respondent. The claimant's comment to Ms Cox in December 2021 that she should 'understand sick leave' suggested that, although she was aware of the respondent's policy, the claimant felt that being on sick leave should mean that she did not have to be in touch with the respondent at all.
125. There was no contemporaneous medical evidence which said that the claimant's failure to engage with the respondent was something arising from her anxiety and depression. We have not accepted the later evidence of 24 October 2023 letter that the claimant was unfit to attend meetings, absence management or disciplinary proceedings, for reasons we have explained. In any event, that letter did not say that the claimant could not engage at all.
126. We have concluded that the claimant did not have an inability to take part in the respondent's procedures, and that, based on the evidence before us, the failure to engage was not something which arose in consequence of the

claimant's disability. Therefore, the complaint based on this 'something arising' also fails.

127. If we had accepted that the failure to engage with the respondent was something arising in consequence of disability, we would also have had to decide whether the respondent knew or could reasonably have been expected to know that the claimant was a disabled person.
128. We would have decided that the respondent did not know that the claimant was disabled, and could not have been expected to know. Between 15 December 2021 and 19 May 2022, the respondent only had the claimant's fit notes. These said that the claimant was not fit for work. They did not give any information about the features of the claimant's ill health which the respondent would have needed to understand to know or to have been expected to know that the claimant was disabled. For example, the respondent had no evidence of the effect on the claimant's day-to-day activities, or on whether the condition was likely to be long term.
129. The claimant's solicitor's letter of 19 May 2022 asserted that the claimant was disabled within the meaning of section 6. It said that the claimant had been unable to carry out many day-to-day activities and functions over a 'prolonged period'. We agree with the respondent's counsel that this assertion, unsupported by any evidence, was not sufficient to impute knowledge of disability on the part of the respondent. Rather, it put the respondent on notice that the claimant might be a disabled person, such that it should have taken steps to find out whether the claimant had a disability.
130. The respondent was not ignoring evidence of disability or failing to investigate it properly. The respondent had for some time been taking steps to understand the claimant's health and wellbeing. Ms Cox had identified in December 2021 that the respondent would need to understand whether there were medical issues affecting the claimant's capability to attend meetings. She had asked the claimant to complete a stress risk assessment, and a wellbeing absence plan and to attend an occupational health appointment. The appeal panel's view was that the possible impact of the claimant's health was so important that the claimant should be given further opportunities to provide evidence about it. These were reasonable enquiries to make of the claimant in the circumstances..
131. In response to the enquiries made by the respondent, the claimant only completed the wellbeing absence plan in September 2021 in which she said that she did not have any medical issues. She did not attend an occupational health appointment on any of the three occasions when the respondent asked her to. In these circumstances, the respondent could not reasonably have been expected to take any other steps to understand whether the claimant was disabled.
132. The fact that the claimant had a disability under the Equality Act was not so obvious that the respondent should, on the information that it had, have known about it. In particular, there was a real issue as to whether the

claimant's condition met the long-term element of the test. The claimant's condition had started more recently than 12 months ago. Without medical evidence other than the fit notes, at the time of dismissal, the respondent did not have sufficient information to enable it to understand whether any effect on claimant's ability to carry out day to day activities was likely to be long term, that is whether it was likely to last for 12 months, such that the claimant's condition would be a disability under the Equality Act. The panel considering the appeal was in a similar position. It had no new medical evidence from which it could have gained actual or constructive knowledge of the claimant's disability by the time of the appeal.

133. For these reasons, we have concluded that the respondent did not know and could not have been expected to know that the claimant was disabled within the meaning of section 6 of the Equality Act. The claim would also have failed on this point.

134. If we had accepted that the failure to engage with the respondent was something arising in consequence of disability, and that the respondent knew or could have been expected to know that the claimant was a disabled person, we would also have gone on to consider whether dismissal was a proportionate means of achieving a legitimate aim. We would have accepted that it was, for the following reasons:

134.1 We accept that the respondent has a legitimate aim to management its workforce effectively and to have procedures in place to manage employees who are absent on a long term basis;

134.2 The claimant had not been at work for more than six months and (other than forwarding her fit notes) had not contacted the respondent for about five months by the time of the dismissal;

134.3 There was no evidence about when the claimant might be able to engage or return to work, because the claimant had refused to attend an occupational health appointment, and the respondent could not leave things as they were indefinitely;

134.4 It was proportionate to regard the failure to engage as a conduct matter, and the claimant was aware of the requirements of the respondent's policy;

134.5 As part of the appeal process, the respondent gave the claimant two further opportunities to attend an occupational health appointment, but she failed to do so;

134.6 It was proportionate for the respondent to regard the matters raised by the claimant's solicitors as separate from the need to obtain medical advice about the claimant. This was explained to the claimant.

135. The claim would also have failed on this point.

136. Therefore, the complaint of discrimination arising from disability in relation to the dismissal of the claimant based on an inability to take part in the required procedures (or a failure to engage) does not succeed.

137. The complaint of discrimination arising from disability fails for these reasons.

Unfair dismissal

138. The respondent says that the reason for dismissal was conduct. We conclude for the reasons explained below, applying the three stage test in British Home Stores v Burchell, that the respondent has established that the reason for the claimant's dismissal was a reason relating to her conduct. That was a potentially fair reason for dismissal. (As explained above, we do not accept the claimant's suggestion that Ms Cox had constructed a performance scenario to engineer the claimant's dismissal. The performance issues were separate from the conduct the respondent was considering.)

139. The decision to dismiss was made by Mr Dyson. At the time of dismissal on 7 June 2022, Mr Dyson had a genuine belief that the claimant was guilty of misconduct, namely intentionally failing to engage with the respondent while on sick leave, as required in the respondent's sickness management policy and the claimant's terms and conditions of employment.

140. Mr Dyson had reasonable grounds for his belief as he knew that:

140.1 The claimant had been off work since 15 November 2021;

140.2 She had failed to respond to numerous communications from Ms Cox and HR;

140.3 She had not completed the stress risk assessment and had not updated the wellbeing action plan to reflect the change in circumstances since she had become unfit to work;

140.4 She had failed to attend an occupational health telephone appointment;

140.5 The claimant was able to engage with a solicitor during the period when she was unfit for work;

140.6 The sickness policy required engagement and the claimant's terms and conditions of employment required her to comply with council policies.

141. At the time Mr Dyson formed his belief in the claimant's misconduct, the respondent had carried out as much investigation as was reasonable in the circumstances. Ms Cox had prepared a management report supported by 19 appendices. The allegations related mostly to written communications and there was little factual dispute at this stage. The extent of the investigation was reasonable in the circumstances.

142. We next consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient grounds to dismiss her (that is, whether dismissal was within the range of reasonable responses). The burden of proof here is neutral.
143. The respondent followed its own sickness management and disciplinary policies in the way it dealt with the claimant's case.
144. The respondent adopted a procedure which was within the range of reasonable responses:
- 144.1 The claimant was told the allegation she was facing, she was told of its seriousness and the potential for it to result in dismissal. The claimant was provided with a copy of the management report and appendices;
 - 144.2 The claimant was invited to a disciplinary hearing with a manager who was not involved in the matters which were the subject of the allegation. It was reasonable to proceed in the claimant's absence, having rescheduled once;
 - 144.3 The claimant was offered an appeal with a panel of councillors who also had no previous involvement. It was reasonable for them to proceed in the claimant's absence. She had been told every effort would be made to accommodate her attendance and she declined to attend.
145. Mr Dyson reached the conclusion that the claimant had intentionally failed to engage with the respondent during a period of sickness absence of over 6 months. He considered this to be a refusal or failure to obey lawful and proper instructions, and a failure to follow formal management procedures which were examples of misconduct in the respondent's disciplinary policy.
146. Having reached that conclusion, it was reasonable to treat the claimant's conduct as a reason for dismissal. The only additional step which Mr Dyson could have taken would have been to have given the claimant another opportunity to engage and in particular an opportunity to attend occupational health so that further consideration could have been given to whether the claimant's failure to engage was related to her health condition. The decision makers on appeal afforded the claimant two further opportunities to do so. The claimant declined to take those opportunities.
147. We conclude that the decision to dismiss was one which was well within the range of reasonable responses.
148. For these reasons, the complaint of unfair dismissal fails.
149. The claimant's complaints not having succeeded, the remedy hearing listed for 29 February 2024 is not needed and has been vacated.

Employment Judge Hawksworth

Date: 7 February 2024

Sent to the parties on: 7 February 2024

For the Tribunal Office