EMPLOYMENT TRIBUNALS

Claimant: **Ms L Whitelock**

Respondent: **DL Insurance Services Limited**

Heard at: **Leeds**
By CVP video link

On: **10,11,12 and 13 November 2020**

Deliberations: **17 November 2020**

Before: **Employment Judge Shepherd**

Members: **Mr T Downes**
Mr K Lannaman

Appearances: **For the Claimant: Mr Penman**
For the Respondent: Mr Gorasia

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of unfair dismissal is well founded and succeeds. The Respondent is ordered to pay the sum of £1,364.74 to the Claimant.

2. The claim of disability discrimination is well-founded and succeeds. The Respondent is ordered to pay the sum of £10,285.00 to the Claimant.

3. The claim of breach of contract – notice pay is well-founded and succeeds. The award of four weeks' notice pay is within the award for unfair dismissal.

4. The total amount the Respondent is ordered to pay to the Claimant is £11,649.74.

REASONS

1. The Claimant was represented by Mr Penman and the Respondent was represented by Mr Gorasia. This was a remote hearing and took place by CVP video link.

2. By a claim form presented on 11 September 2019, the Claimant brought complaints of unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments and leave was granted to include a claim of breach of contract.

3. The Tribunal heard evidence from:

Louise Whitelock, the Claimant;
Chris Parker, Team Leader;
Kay Shields, Team Leader;
Yasmin Murray, Operational Manager;
Julie Hayes, Operational Manager.

4. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 307. A further supplemental bundle was also provided consisting of 20 pages. The Tribunal considered the documents to which it was referred by the parties.

5. At a Preliminary Hearing before Employment Judge Shulman on 30 October 2019 the issues to be determined by the Tribunal had been identified. These issues were discussed further during the course of this hearing, amended and agreed to be as follows:

5.1. <u>Unfair Dismissal</u>

The parties accept that the Claimant was dismissed from her employment with the Respondent.

(a) What was the reason for the Claimant's dismissal?

(b) Was the reason for the Claimant's dismissal a potentially fair reason pursuant to section 98(2)(b) ERA?

(c) As the reason given for dismissal was conduct, did the Respondent hold a genuine belief that the Claimant was deliberately failing to provide/offer annual quotes to VW customers?

(d) If the Respondent did hold a genuine belief in the Claimant's misconduct, was it based on reasonable grounds?

(e) Did the Respondent follow a reasonable investigation and overall procedure?

(f) Was the Claimant's dismissal within the band of reasonable responses open to a reasonable employer?

(g) Did the Respondent act reasonably in all the circumstances in dismissing the Claimant pursuant to section 98(4) ERA?

(h) If the Respondent is found to have unfairly dismissed the Claimant should any award made by the Tribunal be reduced for contributory fault?

(i) If the Respondent is found to have unfairly dismissed the Claimant on procedural grounds, should any award made by the Tribunal be reduced in light of the fact that any such procedural flaws would not have made any difference to the eventual outcome and that the Claimant, would, therefore, have been dismissed in any event? And/or to what extent and when?

5.2. Disability

(j) The Respondent accepts that the Claimant was disabled by virtue of anxiety/depression as at February 2019 and accepts that it had actual or constructive knowledge of the same at that date.

(k) The Claimant contends that the Respondent had knowledge of the Claimant's disability as at November 2018.

5.3. Section 15 Equality Act 2010 Claim

(l) The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act 2010 is two disciplinary warnings and ultimately dismissal.

(m) Does the Claimant prove that the Respondent treated the Claimant as set out in paragraph 5.3(i) above?

(n) Did the Respondent treat the Claimant as aforesaid because of the "something arising" in consequence of the disability? The Claimant contends that the "something arising" is a propensity to make mistakes, get distressed, freeze and/or suffer from panic attacks when dealing with customers.

(o) Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent's legitimate aim is: Managing employee conduct and/or ensuring a comprehensive level of service by the Respondent.

(p) Save for the first disciplinary warning (issued in November 2018), the Respondent accepts that it had knowledge of the Claimant's disability.

5.4. Section 20/21 Equality Act 2010: Reasonable Adjustments Claim

(b) Did the Respondent apply the following PCP: That employees must carry out the duties in the capacity of a customer advisor in the motor insurance department in accordance with its conduct/disciplinary standards.

(c) Did the application of the above PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that: Working in the motor insurance team with the disability of the Claimant makes it more likely that the Claimant would have incurred disciplinary sanctions?

(d) Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant; however, the following adjustments have been identified:

(I) To move the Claimant to a different department;

(II) To provide the Claimant with more training;

(III) To deal with the Claimant taking into account her disability.

(e) Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

5.5. Breach of Contract/Wrongful Dismissal

(f) Was the Claimant, in fact, guilty of misconduct serious enough to justify her summary dismissal?

(g) Did the Respondent waive the breach?

(h) How much notice was the Claimant entitled to?

5.6. Jurisdiction

(i) The Claimant's claims in respect of the first disciplinary warning and Final Written warning are out of time, is it just and equitable to extend time pursuant to s123(1) Equality Act 2010.

(j) The Claimant's claims in respect of the first disciplinary warning and Final Written warning are out of time. Is it just and equitable to extend time pursuant to s123(1) Equality Act 2010.

6. Remedies

If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

The Tribunal may consider a declaration in respect of any proven unlawful discrimination, and/or compensation for loss of earnings, injury to feelings, breach of

contract, any other unfair dismissal compensation and/or the award of interest.

7. The issue of whether the Claimant was a disabled person was originally identified as an issue but no longer falls to be determined as the Respondent has conceded that the Claimant was, at all relevant times, a disabled person for the purposes of section 6 of the Equality Act 2010 with regard to her condition of anxiety and/or depression. It was also conceded that the Respondent had knowledge of the Claimant' disability. There is an issue with regard to knowledge that the Claimant was placed at a substantial disadvantage.

8. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions. Where the Tribunal heard evidence on matters for which it makes no finding or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its conclusions in an attempt to avoid unnecessary repetition and some of the conclusions are set out in the findings of fact.

8. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions. Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its conclusions in an attempt to avoid unnecessary repetition and some of the conclusions are set out in the findings of fact.

8.1. The Claimant was employed by the Respondent from 24 October 2016 at its Doncaster premises. She was employed as a Motor Sales Consultant.

8.2. The Claimant worked in the motor team and her duties included selling insurance policies, retaining customers and amending policies. She was required to conduct calls with the respondent's car insurance customers in respect of a number of insurance brands including Volkswagen which offers a 5-day complimentary insurance cover.

8.3. On 7 February 2017 the Claimant was involved in an accident. She was a passenger in a stationary car that was hit from behind. Since that time the claimant has suffered from mental health problems.

8.4. On 16 July 2018 the claimant was given a written warning which was to remain in force 12 months. The written warning was for failure to meet the respondent's required standards.

8.5. On 13 September 2018 the Claimant raised a grievance against her team leader, Chris Parker. She referred to her anxiety and depression and Mr Parker's bullying.

8.6. On 27 September 2018 the claimant attended a grievance meeting. She was informed that she would be moving teams.

8.7. In October 2018 the claimant moved to a new team and her team leader was Kay Shields. In her end of year review the claimant said that she was feeling motivated and indicated that she had received “fantastic” feedback from her team leader.

8.8. In a 1-2-1 meeting with Kay Shields in respect of the period covering January 2019 there was discussion with regard to the Claimant struggling with depression which she had had since a car accident.

8.9. The Claimant attended an Occupational Health assessment and on 12 February 2019 and Occupational Health report was provided. This recommended that the claimant should be transferred from car insurance to pet or travel insurance.

8.10. The report referred to the information the Claimant had provided to the Occupational Health Advisor.

It was stated:

> “Since the accident she has been particularly nervous, sometimes to the point of panic attacks, she also gets flashbacks of the accident. She is nervous when travelling in a car, particularly when she is near to the site of the accident. She does not like to talk about injuries with clients that they may have suffered in an accident. She has had a panic attack whilst talking to a client. She is prone to headaches and she may have difficulty getting off to sleep
> …
> So, In summary, Ms Whitlock is suffering with her nerves which is manifesting as general anxiety, tension headaches, pain in her neck and shoulders and sometimes as panic attacks. Talking about injuries suffered in accidents with clients is rekindling memories of her own accident.
>
> I have advised her to read the information on the MIND website about dealing with anxiety and panic attacks. Soaking in a warm bath, or placing a warm bag against the tense and painful muscles in her neck will also be helpful. There is no need for her to take pregabalin tablets. If she wants to take analgesic tablets then it should be paracetamol.
> …
> Specific Questions Asked (Not Covered in the text above)
>
> 1. How do Louise's medical conditions affect her?
>
> See above. Her neck and shoulder pains are due to chronic feelings of anxiety.
>
> 2. How do the conditions impact on her ability to do her role?
>
> Talking about injury accidents Is rekindling memories of her own car accident.

3. Are there any adjustments that we need to put into place to support her in her role?

Yes, I recommend that she is transferred from car insurance to pet or travel insurance.

4. Is there a relationship between her condition and not achieving standards of quality or trading?

There may be. She is very anxious and mistakes are more common in someone who is very anxious. Moving her to one of the above sections will remove the triggering of her anxiety by the need for her to talk about injury accidents to clients. If this does not give rise to an improvement in behavioural therapy to address her chronic feelings of anxiety and intrusive thoughts about the accident. She does not need more counselling or physiotherapy."

8.11. In the notes of the record of a 1-2-1 conversation for the period 1 February 2019 to 28 February 2019 it is stated in the Manager's evaluation:

"Louise had her occ health referral back who advised there is nothing physical wrong with Louise's back/shoulders, however they said that she was suffering from anxiety due to the nature of her car accident and dealing with car insurance and claims, Louise said that she felt she was getting things wrong because of this which was then causing her to have more anxiety, they recommended that she moves to travel or pet, after having a meeting with Louise she told me that she did not want to leave motor as she said she would prefer motor and is happy with the support from myself…"

8.12. In her evidence to the Tribunal the Claimant said that the record of this 1-2-1 conversation is not accurate. She was more than happy to move departments and that she kept chasing to move departments.

8.13. On 8 May 2019 the claimant attended a disciplinary hearing before Kay Shields. The Claimant was issued with a final written warning and was placed on a Personal Improvement Plan for four weeks. This was confirmed in a letter dated 15 May 2019.

8.14. On 17 May 2019 the Claimant sent an email to Julie Hayes, Operations Manager and Ryan Hilton, Doncaster Centre Manager stating:

"I am writing to you with concerns of my mental health.

I feel I am struggling at the moment at work, I feel on edge and anxious every time I walk into the building - don't get me wrong I love my job, I wouldn't change it for the world, but I need to express my feelings.

Ever since I have been on the Volkswagen Financial Services providing the 5-day cover for customers, I feel I have been

> deteriorating into a bad spiral. The only escape I have is when I walk around the lake on my lunch if the weather is nice, just to get out and clear my head ready for the next half of my day.
>
> I am formally bringing this to your attention that I want 6 months off of VW brands so I can recuperate and get my head sorted out. I feel I try my absolute hardest every time a VW call comes through and I cannot seem to hit the target, my other targets and calls are suffering as I am constantly thinking of VW, I go home and I feel I cannot relax, I am not eating properly, I cannot settle and get any sleep, so I come into work with 4/5 hours sleep and do a 9-and-a-half-hour shift - my home life has been affected as I am constantly snapping and arguing with my family.
>
> I have been trying to battle through this but suffering in silence is no help and I am now calling out for your help.
>
> I want to have my mental health back to where it used to be — healthy, the VW brands have given me so much anxiety and depression that I have had to go back to the doctors and get stronger anti-depressants because the ones I was on originally didn't help at all.
>
> I have been doing VW for coming up a year and every time I press available, I dread what call will come through, if a DLG brand comes through I feel relaxed and positive. When a VW brand comes through, I try to be as positive as possible but there's this weight on my shoulders which makes me feel pressured and anxious.
>
> In the interest of my health both mental and physically I request something to change immediately. I would like to request to be taken off of the Volkswagen lines so I can get my mental health back to how I used to be —then I can go back on the VW lines and take it from there when I start feeling better."

8.15. In the notes of a 1-2-1 conversation with Kay Shields for the period of May 2019 it is recorded that the Claimant had sat down with Kay Shields and Julie Hayes and had a welfare chat:

> "Louise was feeling down, due to her not getting the sales, I have explained to Louise that it is not around the number and around the behaviour and Louise is very above the line on VW calls and does attempt to get the instant by CTC and selling on brand benefit, since this I have listened to Louise calls on VW and there were opportunities to strengthen her calls by personalising to the customer and the brand, now we have assured Louise she is happy taking VW calls and is aware I will continue to support her."

8.16. In the same notes the employee response section records the Claimant as stating:

> "This month I have struggled mentally – especially with Volkswagen, however, after sitting down and talking with my managers about how I'm feeling which has made my mindset a little bit stronger. I can't lie and say I don't suffer because I do"

The Claimant went on to say that she had had the best trading month for a long time.

8.17. Julie Hayes said, during the course of her oral evidence to the Tribunal, that she had offered the Claimant the opportunity to move to pet and travel again in May 2019. There was no documentary evidence of this. It was not mentioned in the grounds of resistance or Julie 'Hayes' witness statement. It was only said during the course of cross-examination of the final witness. In the notes of the disciplinary hearing there is reference to the offer in February following the advice from Occupational Health. Taking into account the totality of the evidence, the Tribunal is not satisfied that there was a second offer to the claimant of a move to the Pet and Travel section.

8.18. In the records of the 1-2-1 conversation for the month of June 2019 Kay Shields states that the Claimant said that she was feeling better and not as anxious on VW calls. It was also said that it was:

> "Another month in gold for Louise, well done this shows she is utilising blueprint in her calls and delivering a great customer experience, well done Louise keep up the great conversations and wowing your customers…"

8.19. The claimant's Employee Evaluation included:

> "This month, since opening up and talking to my managers about how I have been feeling in terms of VW I have been feeling better, I do have some days where I feel pressured and stressed, but I just ignore it and carry on."

8.20. Kay Shields checked on the Claimant's performance. She listened to a number of calls in which the Claimant had provided the free five-day cover

quote to Volkswagen customers but then had missed out the annual quote. She couldn't understand that there were some Volkswagen calls in which the Claimant had made no attempt to give the annual quote but there were other calls where she had followed the process perfectly.

8.21. In a feedback form dated 21 June 2019 handwritten notes by Kay Shields have been included in which it is said that the claimant chose not quote as she said the line was bad. When it was pointed out that this was not the case Kay Shields' note shows that the Claimant had said nothing and she had then admitted that there was no reason why she had made a conscious choice to not quote to the customer. In the feedback for another call on the same day it also states in Kay Shields' handwritten notes that the Claimant

said that doesn't have an excuse as to why she made a conscious choice not to "signpost". The note goes on to say that the claimant had admitted she got lazy whilst Kay Shields was on annual leave. The Claimant said that these handwritten notes were fabricated. Kay Shields said that they were entered before the claimant signed the feedback forms.

8.22. During her evidence, Kay Shields said that the words were her words. She had asked the Claimant if there was a reason why the Claimant had made a conscious choice. She said she did this by way of an open question. However, she had put the words to the Claimant she had asked whether there was any reason the Claimant made a conscious choice and the Claimant replied that there was not. The Claimant had not said that it was related to a disability.

8.23. On 1 July 2019 the Claimant attended an informal investigation meeting with Kay Shields. The notes of that meeting show the claimant as saying:

> "The reason I don't quote is because VW drains me, I know I am supposed to do it but when the customer comes through and I try to do a 5 day and they are being difficult and asking why I need the information it puts me off, I hate VW so much with a passion and I don't want to do it I want them on and off the phone."

8.24. Kay Shields said that there were several calls where the customer was nice and pleasant, yet the Claimant was still not providing the annual quote. She said the Claimant could offer no mitigation for missing the quote other than she didn't like it. This clearly showed that the Claimant knew what she was supposed to be doing was capable of doing it, but was consciously choosing not to.

8.25. The Claimant was absent from work from 15 to 19 July 2019 by reason of anxiety.

8.26. On 18 July 2019 the Claimant sent an email to Ryan Hilton, the Doncaster Centre Manager. She indicated that she had been advised by her GP to take another month off but she had resisted this as she would rather go back to work in order to improve her health. Within that email she said:

> "The best course of action would be that I request that a move to a different department such as motor service as I feel this would be far less stressful.
> If you could see fit that this could happen to help improve my mental health state I would appreciate this, I would like this to be considered permanent if not 3-6 months to help with my health issues."

8.27. On 25/07/2019 Yasmin Murray, Operational Manager, wrote to the Claimant requiring her to attend a disciplinary hearing. Within the letter it was stated:

> "You need to be aware that the potential outcome of this meeting may be the decision to dismiss you from the business.

> The purpose of the meeting is to discuss the allegations that are being made and the specific issues I wish to discuss are:
> Failure to meet the required operational conduct and integrity standards, specifically by failing to provide customers with on annual quote after completing a 5-day cover."

8.28. On 5 August 2019 the Claimant attended a disciplinary hearing. Yasmin Murray was the disciplinary manager. There was an HR representative present and a notetaker. The Claimant was accompanied by her Trade Union representative.

8.29. At that hearing the notes show that Yasmin Murray referred to the Occupational Health from the motor section which was to move the Claimant from the motor section which the Claimant had declined. It was also stated that to move the Claimant would mean someone else would need training to take her place. It was also stated:

> "… Your behaviour has shown you can do it, it's will, not skill. I've taken into consideration all your mitigation made a decision based on the evidence. I have decided to dismiss you from the business with immediate effect due to gross misconduct for not following the correct procedure on Volkswagen calls. I feel you made a conscious choice not to do it and are guilty of making a conscious choice not to follow the process. You had recognition that when you do it you do it well. You have said you have chosen to do it with people listening to you, which further confirms this is a choice."

8.30. The Claimant sent emails to the Doncaster Centre manager and HR on 15 August 2019 indicating that she intended to appeal. In the email to the Doncaster Centre Manager she stated

> "I just want to apologise for all the wrongs I have done wrong, I would like to appeal to you for me to return to direct line on probationary."

She indicated that she had respect for Direct Line and felt she was still a value to the company. She asked for her dismissal to be overturned and to move to a different department and a different team leader on a probationary period.

8.31. On 16 August 2019 the Claimant sent an email to HR although it appears to be a request to the site manager:

> "In any 1-1's not one person has told me I am doing anything incorrect, where is the fairness and justice in this? Not one person who is above me has come to me and told me that I need to put something wrong right.
> As you can understand this has destroyed me, direct line was my family, my friends and my life, I brought an intimate health issue to you, a good work place would not have let this get this far.
> Was it my mental health status that got me sacked?

> I have been left jobless with mental health issues, this is gross misconduct and dishonest in someone in direct line who has done this to me. I have been left in a financial mess and no one could approach me and tell me I was doing something wrong…
>
> I'm at home in tears not knowing why I have been sacked - his company has let me down, I came in when I shouldn't of. I can only think of the only logical way of getting rid of me was due to my mental health…
>
> Can someone tell me what I have done - what is the actual reason - what is the reason why I was let go immediately - no one has given me an opportunity - it must be due to my mental health issues, this just proves that direct line is an uncaring employee…?
>
> I don't understand how quickly this has escalated.
> I'm 22 years old and I'm on fluoxetine and beta blockers, no one has shown me any sympathy and the only person who did was you, then 2 weeks later I have been released.…"

8.32. On 22 August 2019 Yasmin Murray wrote to the Claimant confirming the dismissal with effect from 14 August 2019 and it was indicated that the specific allegations were:

> "Failing to adhere to the required standards of giving an annual quote once the 5–day free cover expires on partnership brands."

8.33. Within the letter Yasmin Murray set out points raised by the Claimant including:

> "Point 1 - None of this was wilful and you struggle with your mental health - Whilst I acknowledge and accept you suffer with your mental health, I do believe you have had support from your people leader around your wellbeing. In your last 9 Personal Growth sessions, you've had a welfare checkpoint and in 6 of them, you've acknowledged you are happy at work and feel supported, we always encourage people to speak out and ask for extra support when needed. I do not feel as you suffer from mental health, this has a direct impact on you not following the correct process. You confirmed Volkswagen calls drain you, you chose to skip quoting and wanted to hurry customers of the call, as well as choosing to do It when being listened too. Therefore, I reject this point…
>
> Taking all the information into consideration, I took my decision because I consider that you have failed to meet the required standards in relation to adhering to the required standards of giving an annual quote once the 5 – day free cover expires on partnership brands."

8.34. The Respondent's "Expected Standards and conduct – VW 5-day cover" which the Claimant signed on 19 September 2018 provide:

> "As a consultant at Direct Line Group, a key part of your role is

dealing with 5-day insurance customers.
You must be working towards delivering against your Priorities at all times and following any actions set. These actions may be an intrinsic part of the role, a specific action set in a rollout or meeting, specific actions set in your coaching, or a reasonable request from a coach/ team leader.
Specifically, with 5 days cover the expectation is that you-

-Positively position to customers that you will complete an annual quotation as well as providing them complementary cover.

-Use Connect skills throughout the call to create the best possible experience and set up the strong negotiation of a sale.

-Positively deliver the premium followed by an immediate flex close.

- Look to secure call backs on as many calls as possible-this could be to chase a sale or obtain further information needed if the PH does not have it to hand (eg vehicle BHP, conviction details)

Moving forward, failure to follow any of the above or any kind of action that has already been set and discussed will be deemed a conduct issue and dealt with as such. Conduct is a very serious issue and could lead to disciplinary action being taken. If we get the behaviours right, the numbers will follow and this now needs to be consistent.

By signing this, you are confirming that you have both the will and the skill to follow agreed actions. It is a commitment to truly bringing all of yourself to work and giving your best at all times. Please make sure you make the conscious choice to consistently follow any actions set, and sit right at the top of the accountability ladder moving forward. "

8.35. On 11 September 2019, the Claimant presented a claim to the Employment Tribunal. She made complaints of unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments and, at a later Preliminary Hearing, leave was granted to include a claim of breach of contract.

The Law

Unfair Dismissal

9. Where an employee brings an unfair dismissal claim before an Employment Tribunal, it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons in section 98(1) and (2) of the

Employment Rights Act 1996. If the employer establishes such a reason the Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Conduct is a potentially fair reason for dismissal under section 98(2).

10. In determining the reasonableness of the dismissal with regard to section 98(4) the Tribunal should have regard to the three-part test set out by the Employment Appeals Tribunal in *British Home Stores Limited v Burchell [1978] IRLR379*. That provides that an employer, before dismissing an employee, by reason of misconduct, should hold a genuine belief in the employee's guilt, held on reasonable grounds after a reasonable investigation. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in *Iceland Foods Limited v Jones [1982] IRLR 439*. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether the dismissal had been within "the band of reasonable responses" available to the employer. In the case of *Sainsbury's Supermarkets Limited v Hitt [2003] IRLR23* the Court of Appeal confirmed that the "band of reasonable responses" approach applies to the conduct of investigations as much as to other procedural and substantive decisions to dismiss. Providing an employer carries out an appropriate investigation and gives the employee a fair opportunity to explain his conduct, it would be wrong for the Employment Tribunal to suggest that further investigation should have been carried out. For, by doing so, they are substituting their own standards as to what was an adequate investigation for the standard that could be objectively expected from a reasonable employer. In *Ucatt v Brain [1981] IRLR 225* Sir John Donaldson stated:

> "Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, 'Would a reasonable employer in those circumstances dismiss', seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question 'Would we dismiss', because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances, the employer is entitled to say to the Tribunal, 'Well, you should be satisfied that a reasonable employer would regard these circumstances as a sufficient reason for dismissing', because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances".

11. Stephenson L J stated in *Weddel v Tepper [1980] IRLR 96*:

> "Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they

> jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Burchell, 'carried out as much investigation into the matter as was reasonable in all the circumstances of the case'. That means that they must act reasonably in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably".

12. In the employment context "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Exactly what type of conduct amounts to gross misconduct will depend on the facts of the individual case. Generally to be gross misconduct, the misconduct should so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. Thus in the context of section 98(4) of the 1996 Act it is for the Tribunal to consider:

(a) Was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct and

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

13. One of the factors that a Tribunal has to consider when assessing compensation in a case where there is a substantively fair reason for the dismissal but where there had been procedural failings in the dismissal process, is whether the employee would still have been dismissed if a proper procedure had been followed. If the Tribunal concludes that even if a fair procedure had been followed, dismissal would still have occurred then that can sound in the compensation that is awarded. In *Polkey v. AE Dayton Services Limited [1988] ICR 142* the House of Lords approved the remarks of Browne-Wilkinson J in *Siliphant's case [1983] IRLR 91*:

> "There is no need for an 'all or nothing' decision; if the Tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the nominal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."

14. If the Tribunal finds that the claimant caused or contributed to his dismissal, then the basic award may be, and the compensatory award must be reduced by such proportion as it considers just and equitable. If the employee substantially contributed to his own dismissal then this will mean a substantial percentage reduction in the award, even of 100%, leaving the employee with a finding of

unfair dismissal but no compensation. This is usually relevant in respect of misconduct dismissals.

Discrimination arising from Disability

15. Section 15 of the Equality Act 2010 states:

Section 15

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arises in consequences of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

16. Under section 15 there is no requirement for a Claimant to identify a comparator. The question is whether there has been unfavourable treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in *Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14* at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

17 The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see *IPC Media Ltd v Millar [2013] IRLR 707*: was it because of such a consequence?

18. With regard to justification, The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] ICR 1565, CA to a claim of discrimination under section 15 Equality Act 2010. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. In effect the Tribunal needs to balance the discriminatory effect of the stated treatment against the legitimate aims of the employer on an objective basis in considering whether any unfavourable treatment was justified .

19. The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

20. Both parties referred to the case of *Pnaiser v NHS England* [2016] IRLR 170 in which it was provided as follows:

"In the course of submissions I was referred by counsel to a number of authorities including *IPC Media Ltd v Millar* [2013] IRLR 707, *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14/RN and *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893, as indicating the proper approach to determining section 15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between

the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

21. **Duty to Make Reasonable Adjustments**

Section 20 of the Equality Act 2010 states:

"(1) Where this Act imposes a duty to make reasonable adjustments of a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation

to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

22. Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out *in Environment Agency v Rowan [2008] ICR 218*, where it was indicated that an Employment Tribunal must identify the provision, criterion or practice ("PCP") applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

23. **Burden of Proof**

Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this 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) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal."

24. Guidance has been given to Tribunals in a number of cases. In *Igen v Wong [2005] IRLR 258* (a sex discrimination case decided under the old law but which will apply to the Equality Act) and approved again in *Madarassy v Normura International plc [2007] EWCA 33.*

25. To summarise, the Claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the Claimant does this, then the Respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the Claimant has established a prima facie case (which will require the Tribunal to hear evidence from the Claimant and the Respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The Respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

26. In *Project Management Institute v Latif (2007) IRLR 579* The EAT gave guidance as to how Tribunal's should approach the burden of proof in failure to make reasonable adjustments claims. The burden of proof only shifts once the Claimant has established not only that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances. Therefore the burden is reversed only once potential reasonable adjustment has been identified. It not be in every case that the Claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but "it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not". The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

27. **Time limits**

Section 123 of the Equality Act 2010 states:

> (1) ...Proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> ...
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;

> (b) a failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

28. The Court of Appeal made clear in *Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686***,** that *i*n cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish 'an act extending over a period', is that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an "ongoing situation or continuing state of affairs" as oppose to "a succession of unconnected or isolated specific acts". It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

29. In the case of *Humphries v Chevler Packaging Ltd EAT 0224/*06 the Employment Appeal Tribunal confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make reasonable adjustment. In the case of *Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170* the Court of Appeal held that where an employer was not deliberately failing to comply with the duty and the omission was due to lack of diligence or competence, or any reason other than conscious refusal, it is to be treated as having decided upon the omission when the person does an act inconsistent with doing the omitted act or when, if the employer had been acting reasonably, it would have made the adjustments. In the recently reported Court of Appeal case of *Abertawe Bro Morgannwg University v Morgan* [2018] WLR197 it was stated:

> "In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20 (3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run

on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to redress the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became a should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired."

30. The Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the Claimant to convince the Tribunal that it should do so, and *'the exercise of discretion is the exception rather than the rule*' (*Robertson v Bexley Community Centre [2003] EWCA Civ 576* per Auld LJ *at para 25)*.

31. The Tribunal's discretion to extend time under the 'just and equitable' formula is similar to that given to the civil courts by section 33 of the Limitation Act 1980 for extending time in personal injury cases (*British Coal Corpn v Keeble,* [1997] IRLR 336*).* Under section 33, a court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

1. The length of and reasons for the delay;

2. The extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time; the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant;

3. The duration of any disability of the claimant arising after the date of the accrual of the cause of action;

4. The extent to which the Claimant acted promptly and reasonably once he knew of his potential cause of action. Using internal proceedings is not in itself an excuse for not issuing within time see Robinson v The Post Office but is a relevant factor.

5. The steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

32. Time limits are short for a good purpose- to get claims before the Tribunal when the best resolution is possible. If people come to the Tribunal promptly when they have reached a point where the employer has said it will not take a step which the claimant believes should be taken, then, if it agrees with the claimant The Tribunal can make a constructive recommendation. Left unresolved, even minor omissions by employers often have devastating consequences which it is too late to remedy in that way.

33. The parties' representatives made submissions to the Tribunal. They provided written submissions and also made oral submissions. Mr Gorasia, on behalf of the Respondent provided submissions first followed by Mr Penman, on behalf of the Claimant. These submissions were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and the authorities referred to even where no specific reference is made to them.

33. Conclusions

The Tribunal has considered each of the identified issues in turn.

34. **Unfair Dismissal**

(a) What was the reason for the Claimant's dismissal?

(b) Was the reason for the Claimant's dismissal a potentially fair reason pursuant to section 98(2)(b) ERA?

(c) As the reason given for dismissal was conduct, did the Respondent hold a genuine belief that the Claimant was deliberately failing to provide/offer annual quotes to VW Customers?

(d) If the Respondent did hold a genuine belief in the Claimant's misconduct, was it based on reasonable grounds?

(e) Did the Respondent follow a reasonable investigation and overall procedure?

(f) Was the Claimant's dismissal within the band of reasonable responses open to a reasonable employer?

(g) Did the Respondent act reasonably in all the circumstances in dismissing the Claimant pursuant to section 98(4) ERA?

(h) If the Respondent is found to have unfairly dismissed the Claimant should any award made by the Tribunal be reduced for contributory fault?

(i) If the Respondent is found to have unfairly dismissed the Claimant on procedural grounds, should any award made by the Tribunal be reduced in light of the fact that any such procedural flaws would not have made any difference to the eventual outcome and that the Claimant, would, therefore, have been dismissed in any event? And/or to what extent and when?

35. The Tribunal is satisfied that the reason for dismissal was that of conduct. The respondent held a genuine belief that the Claimant had deliberately chosen not to quote for annual insurance to VW customers.

36. Yasmin Murray, the dismissing officer held that belief. Her evidence was clear on this point and the reason for the dismissal given in the disciplinary hearing and the letter of dismissal shows the conclusion was reached that the Claimant had made a conscious choice not to provide the annual quote.

37. It was contended by Mr Gorasia on behalf the Respondent that the Claimant had the opportunity of asserting factors in her defence and the evidence clearly shows that Yasmin Murray considered the answers that the Claimant gave at the disciplinary hearing carefully before concluding, on the balance of probabilities, that she was satisfied that the Claimant had committed an act of gross misconduct.

38. Mr Gorasia contended that to conclude that the Claimant was not guilty of gross misconduct would be outside the band of reasonable responses given the totality of the evidence of misconduct. The Respondent concluded that the Claimant did in fact deliberately fail to comply with their operational call standards.

39. Had the Claimant genuinely felt that her alleged misconduct was as a result of her disability or arose from it, it would have been easy to articulate this in a clear manner. Instead, the Claimant sought to deflect and outmanoeuvre the Respondent at every conceivable opportunity. Mr Gorasia referred to the Claimant's "haphazard and tenuous relationship with the truth" which has meant that her defence and explanation for why she committed the acts of Misconduct lacks any internal consistency, logic or reason.

40. Mr Penman, on behalf of the Claimant, made submissions that Yasmin Murray relied on the Claimant's apparent admissions that she had made a conscious choice not to quote. It had become apparent from the evidence of Kay Shields that those were Ms Shields' words that had been put to the Claimant and the Claimant herself had never admitted to Ms Murray that she was deliberately refusing to quote. Ms Murray had dismissed the Claimant's explanations for her actions without any further investigation into her mental health or the effect that it was having on her work. She did not obtain the Occupational Health report which would have told her that the Claimant had had a panic attack at work and any mistakes she was making may be linked to anxiety. She effectively required the claimant prove that she was suffering from mental health issues and that they were affecting her work instead of conducting a thorough investigation to satisfy herself that she was not.

41. Mr Penman submitted that dismissal was not within the range of reasonable responses open to the Respondent. Had the respondent properly investigated it would have concluded that the Claimant's mental health was a significant influence on her inability to quote annual insurance on VW calls.

42. The question of whether there was a reasonable investigation has been a matter of concern to the Tribunal and has been considered very carefully. The Occupational Health report did refer to the Claimant having a panic attack when talking to a client. The Claimant had informed the respondent that the VW brand had given her anxiety and depression such that she had to return to her doctor to obtain stronger medication. She said that she hated VW with a passion. She had asked to be moved to another department.

43. The Claimant did understand the consequences and possible effect on the business. Yasmin Murray, in the disciplinary hearing put it to the Claimant that she had made a conscious choice not to quote. The Claimant referred to her mental health issues and that she was having therapy. She referred to having panic attacks. She said that her confidence goes on VW, she shut down and could not do it. Her trade union representative said that it had not been wilful. She referred to the claimant's medication, anxiety and that she struggled with VW and said it was not deliberate avoidance.

44. The Tribunal has been careful not to substitute its own view for that of the Respondent and has considered the question on the basis of whether the investigation was outside the band of reasonable responses from the information known to the Respondent at the time of dismissal.

45. The Respondent was made aware that the Claimant was suffering from mental health issues but did not take this into account or investigate it further as a reasonable employer acting reasonably would have done. The Respondent concluded that it had been a conscious choice of the Claimant not to provide the annual quote. That conclusion was reached without reasonable consideration of the Claimant's disability.

46. The investigation was not within the band of reasonable responses and, on the facts before the Respondent, the Tribunal, applying the objective test of a reasonable employer finds that dismissal was not within the band of reasonable responses available to the respondent.

47. It was submitted on behalf of the Respondent that the Claimant had given unreliable and, at times, untrue evidence during cross-examination and had attempted to deflect answering straightforward questions when it did not suit her case. The respondent relied on the inconsistency of the Claimant's actions in that she did provide the quotes on occasions when she was being monitored and this was further evidence that her actions were wilful.

48. The Tribunal has taken this into account, there were some concerns about the Claimant's evidence. However, the Tribunal has considered the totality of the evidence. The Tribunal finds that the Respondent did not give sufficient consideration to the mental health of the Claimant and the decision to dismiss was outside the band of reasonable responses.

49. **Disability**

(j) The Respondent accepts that the Claimant was disabled by virtue of anxiety/depression as at February 2019 and accepts that it had actual or constructive knowledge of the same at that date.

(k) The Claimant contends that the Respondent had knowledge of the Claimant's disability as at November 2018.

50. **Section 15 Equality Act 2010 Claim**

(l) The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act 2010 is two disciplinary warnings and ultimately dismissal.

(m) Does the Claimant prove that the Respondent treated the Claimant as set out in paragraph 5.3(i) above?

(n) Did the Respondent treat the Claimant as aforesaid because of the "something arising" in consequence of the disability? The Claimant contends that the "something arising" is a propensity to make mistakes, get distressed, freeze and/or suffer from panic attacks when dealing with customers.

(o) Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent's legitimate aim is: Managing employee conduct and/or ensuring a comprehensive level of service by the Respondent.

(p) Save for the first disciplinary warning (issued in November 2018), the Respondent accepts that it had knowledge of the Claimant's disability.

51. The Respondent contends that the Claimant was fully able to undertake insurance quotes for the other insurance brands of the Respondent and the Claimant's aversion to VW customers was not something arising from her disability. Mr Gorasia referred to the disciplinary hearings which had led to the warnings given by Chris Parker and Kay Shields. The Claimant did not seek to contend that anything arising from her disability was causing her behaviour. Her conduct was as a result of distractions such as engaging in Skype messages, emails and other distractions in the office.

52. Mr Gorasia submitted that the Tribunal's focus should be on the "something" which arises in consequence of the Claimant's disability and whether the conduct in respect of the Claimant choosing not to follow the Respondent's call processes arose in consequence of that "something". The question of causation is one which needs to be examined objectively and the onus is on the Claimant to demonstrate a prima facie case in this respect.

53. The Tribunal is satisfied that the Claimant has established that the warnings and dismissal were unfavourable treatment which was something arising in consequence of the Claimant's disability. In the first disciplinary hearing the Claimant informed Chris Parker that she had been told that she had PTSD and had to see a therapist and that customers would go into detail and it would bring flashbacks.

54. In a 1-2-1 conversation with Kay Shields in February 2019 it was set out that the claimant was suffering from anxiety and that she felt she was getting things wrong because of this. It had been recommended that she moved to another sections. The Respondent has disciplined the Claimant in respect of something which arose as a consequence of her disability.

55. The Tribunal has considered carefully the "something" arising in consequence of the Claimant's disability. The Occupational Health report and the Claimant's repeated assertions that she panicked when she had to deal with VW calls. She said that she froze. She was unable to cope with the calls and provide the annual quote. In the circumstances, the Tribunal is satisfied that this inability to provide the annual quote was the something arising in consequence of the Claimant's disability. The Respondent's focus was entirely on whether this was a deliberate or conscious choice of the Claimant.

56. The Tribunal is satisfied that the Claimant has established a prima facie case and the respondent's conclusion that, because, among other things, the claimant could provide the annual quotation on some occasions, meant that it was a deliberate act, does not, on an objective basis, show that it was not something arising out of the Claimant's disability. The Claimant knew how to provide the annual quote and she could do it on some occasions. However, the Tribunal is satisfied that, the failure to provide the quotes on some calls was because of the Claimant's anxiety and sometimes panic attacks.

57. With regard to justification, in respect of the disciplinary warnings, the Tribunal has considered whether these were a proportionate means of achieving the legitimate aim of managing employee conduct and/or ensuring a comprehensive level of service by the Respondent.

58. Managing employee conduct and/or ensuring a comprehensive level of service by the Respondent is a legitimate aim but the Tribunal has considered whether it was proportionate to impose the warnings and dismiss the Claimant. The Tribunal is satisfied that the Respondent had been made aware that the Claimant was suffering from mental health issues and, in those circumstances, it would have been proportionate to take this into account and give appropriate support to the Claimant and not provide written warnings and, ultimately, dismiss the claimant. The Tribunal has considered the balance of the discriminatory impact on the claimant of the warnings and dismissal against what was reasonably necessary to achieve the legitimate aim. The Tribunal has considered this on an objective basis. There were many other options the respondent could have taken such as transferring the claimant to another department, changing her duties, training. The Tribunal is satisfied that the respondent has not established that actions taken against the claimant were disproportionate.

Section 20/21 Equality Act 2010: Reasonable Adjustments Claim

(k) Did the Respondent apply the following PCP: That employees must carry out the duties in the capacity of a customer advisor in the motor insurance department in accordance with its conduct/disciplinary standards.

(l) Did the application of the above PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that: Working in the motor insurance team with the disability of the Claimant makes it more likely that the Claimant would have incurred disciplinary sanctions?

(m) Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant, however the following adjustments have been identified:

(I) To move the Claimant to a different department;

(II) To provide the Claimant with more training;

(III) To deal with the Claimant taking into account her disability.

(n) Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

59. The Tribunal is satisfied that the PCP was applied and that it put the Claimant at a substantial disadvantage in relation to non-disabled employees as it was more likely that she would make errors and be unable to complete her role to the expected standard.

60. There was an offer of a move made to the Claimant after the Respondent received the Occupational Health report in February 2019. The Claimant did not wish to move to the pet and travel insurance section at that time as that was where her mother worked. However, that would have been an adjustment that would have gone some way to avoid the disadvantage. It would have been reasonable to go further in order to ameliorate the substantial disadvantage and to take into account the Claimant's disability and not provide a written warning**.**

61. The Respondent employed a large number of employees across six departments in the Doncaster centre. The evidence was that there were in excess of 700 employees and many of those were at the claimant's grade.

62. The Tribunal is satisfied that it would have been a reasonable adjustment for the respondent to move the claimant to another department or remove the VW calls from her. The respondent referred to the need for further training if someone took over the VW calls from the Claimant and if the Claimant moved to another department. The Tribunal finds that the Respondent could have made these reasonable adjustments with minimal ad hoc training. There was a failure to make reasonable adjustments.

63. The Respondent knew or should have known that the Claimant was placed at a substantial disadvantage. From as early as the first disciplinary hearing on 2 July 2018 the claimant informed Chris Parker that she had been told she had PTSD and had to see a therapist and that going into detailed discussions with customers would provoke flashbacks. There was knowledge or constructive knowledge at that time.

64. There was a reasonable adjustment in proposing to move the Claimant in February 2019, after the first written warning. The Tribunal is not satisfied that the Claimant was offered the opportunity to move again at the time of the final written warning**.** The evidence was provided very late and was not credible. Julie Hayes had not mentioned it in her witness statement. It was not included in the grounds of resistance.

65. **Breach of Contract/Wrongful Dismissal**

(o) Was the Claimant, in fact, guilty of misconduct serious enough to justify her summary dismissal?

(p) Did the Respondent waive the breach?

(q) How much notice was the Claimant entitled?

66. The Tribunal is not satisfied that the Claimant was guilty of misconduct serious enough to justify summary dismissal. The Tribunal is not satisfied that she was guilty of deliberate breach of the respondent's expected standards. The failure to provide an annual quote on some of the VW calls was as a result of her mental health issues. It was agreed that the claimant was entitled to 4 weeks' notice pay including the bonus and ''core cash'.

67. **Jurisdiction**

(r) The Claimant's claims in respect of the first disciplinary warning and Final Written warning are out of time, is it just and equitable to extend time pursuant to s123(1) Equality Act 2010.

68. The claim in respect of the first written warning was substantially out of time, approximately 11 months. The Tribunal heard little evidence with regard to the reasons for delay. However, the prejudice to the Claimant outweighs the prejudice to the Respondent. If the Claimant was not permitted to rely on that warning she would be prevented from bringing that part of the discrimination claim. The Respondent could still defend that part of the claim. There was no substantial effect on the evidence and, taking into account all the factors, the Tribunal is satisfied that it is just and equitable to extend time in this respect. The claim in respect of discrimination by way of dismissal was presented within time.

69. **Remedy**

Unfair dismissal

70. **Basic award**

The Claimant worked for the respondent for two full years under the age of 22 and the basic award is therefore: –

2 x half a week's gross pay - £357.21.

71**. Compensatory award**

Loss of earnings - The Claimant obtained further employment within four weeks of the date of termination. In that employment she received substantially higher basic pay. She has acted reasonably to mitigate her loss. The bonus in respect of her employment with the Respondent would have been reduced to a large extent if she had been moved to a different department. It was agreed by the respondent that the figure for 'core cash' was payable to the Claimant. This would still leave her earnings in her new employment as higher than those with the Respondent if the bonus was decreased. In those

circumstances, the Tribunal finds it just and equitable that no loss of earnings beyond the four weeks is awarded.

The Tribunal finds it just and equitable to award four weeks loss of earnings.
The figures provided in the schedule loss appeared to be gross figures of four weeks loss of earnings. – £1,875.29.

It is just and equitable to reduce that figure by the amount overpaid – a gross figure of £1,367.76. It is notable that these are gross figures but the parties can make the appropriate adjustments and, if necessary, return to the Tribunal in that regard.

Loss of statutory protection – £500.00.

Total compensatory award is therefore £1,007.53.

The total award for unfair dismissal is £1,364.74.

72. This dismissal was substantively unfair and no reduction is made in accordance with the case of *Polkey v A E Dayton Services Ltd* [1988] ICR 142 in respect of the chance that a fair dismissal would have taken place.

73. The Tribunal has considered whether there should be any reduction for contributory fault. No such reduction is made as the Tribunal finds that there was no culpable or blameworthy conduct on the part of the Claimant that contributed to the dismissal. The reason was because of her mental health. She was genuinely struggling, panicking and freezing in respect of VW calls. The Occupational Health report refers to anxiety and panic attacks and recommends that she is transferred to pet or travel insurance. The medical report for the personal injury claim refers to the Claimant feeling overwhelmed by any external stress.

74. The award in respect of wrongful dismissal is that of notice pay and that replicates the amount awarded in respect of loss of earnings in the compensatory award and is not awarded again.

75. **Disability discrimination remedy.**

The figure for loss of earnings has been included in the award for unfair dismissal and compensation is not awarded again in respect of loss that is already been taken into account in dealing with the other claim. The compensation is therefore in respect of injury to feelings.

76**. Injury to feelings**

The evidence in this regard was within the Claimant's disability impact statement relating to her status as a disabled person. This was dated 4 February 2020 and was not challenged in this hearing and, among other things, included:

The Claimant said that the Respondent contributed towards and exacerbated her mental health problems by dismissing her.

77. She said that she is still in her very early 20s and has basically lost her will to live. She felt that she had lost her ability to love or feel loved. She had lost motivation and her self-belief was shattered. She had gained weight, lost interest in her personal care. She was not motivated to wash and dress or brush her hair. She just wanted to hide away from life. She didn't eat with her family and ate in her own room where she felt safest.
This was a statement in respect of the Claimant's disability status and was dated over nine months before this hearing. The Claimant stated that she felt the only way forward was to try to achieve vindication through the Tribunal process.

78. There was no medical evidence or indication of the medication the Claimant is taking at the time of the hearing. It was not clear what injury to feelings and what element of the Claimant's mental health problems had resulted from her mental condition prior to the disciplinary hearings and dismissal.

79. The Tribunal has given careful consideration to the appropriate amount of damages for injury to feelings and is satisfied that it is just and equitable to order a sum towards the top of the lower band in the guidance provided by the Court of Appeal in the case of *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR as adjusted to take account of inflation.

80. The Tribunal finds it just and equitable to award the sum of £8,500.00 for injury to feelings.

81. The Tribunal has provided an uplift in accordance with the Court of Appeal decision in *Simmons v Castle* [2012] EWCR Save 1039 that general damages should be increased by 10%. £850.00.

82. **Interest on damages for injury to feelings**

The Tribunal considers it appropriate to award interest on the compensation for injury to feelings from the date on which the discrimination took place to the date of the hearing. The rate is, surprisingly, still at 8%. Taking that over the period of 15 months provides a further 10% of £9,350.00. – £935.00 making a total award for injury to feelings of £10,285.00

83. in the circumstances, the claims succeed and the Respondent is ordered to pay the total amount of £11,649.74 to the Claimant.

Employment Judge Shepherd
Date: 1 December 2020
Sent to the parties on:
Date: 2 December 2020