EMPLOYMENT TRIBUNALS

Claimant: **Ms K Bonk**

Respondent: **Lainston House Limited**

RECORD OF A PRELIMINARY HEARING

Heard at: Southampton **On:** 20, 21, 22, 23, 24, 25 February 2023

Before: Employment Judge Dawson, Mr Knight, Mr Evans

Appearances

For the claimant: In person

For the respondent: Ms Platt

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The compensatory award will be reduced to reflect the fact that a fair procedure would have resulted in the claimant's dismissal two weeks after her actual dismissal.

3. The claimant's other claims are dismissed.

4. The remedy to which the claimant is entitled will be decided on 19 April 2023 at Southampton Employment Tribunal, West Hampshire Magistrate's Court, 100 The Avenue, Southampton, Hampshire SO17 1EY

5. The parties are to attend by 9.30 am on the first day in anticipation that the hearing will commence at 10.00 am.

REASONS

Introduction and issues

1. By a claim form presented to the employment tribunal on 10 October 2021 the claimant presented claims of discrimination on the grounds of disability and, within the document headed “Details of the claim” attached to the claim form (and hereafter referred to as the Grounds of complaint), complaints of being subjected to a detriment for making a protected disclosure. At that time the claimant remained employed by the respondent but it is not in dispute that she was dismissed on notice on 10 January 2022. Although we have not seen any application to amend the claim form, it is not in dispute that before us the claimant also claims unfair dismissal (as well as other claims).

2. The matter came before Employment Judge Gray on 1 February 2022 when he identified the issues in the claim in some detail. Those issues appear at page 56 of the bundle. However, he also directed that the claimant provide details of any new complaints that had arisen in the notice period. The claimant did that on 1 March 2022.

3. Thus the issues that we have to determine are those identified by Employment Judge Gray as well as the additional detriments which the claimant says she suffered in her notice period.

4. The parties had agreed an updated list of issues which is largely the same as that created by Employment Judge Gray and is reproduced in appendix 2 hereto.

5. At the outset of the hearing that the issues were discussed on a line by line basis and the following clarifications were provided

    a. The only potentially fair reason for dismissal being relied upon by the respondent was some other substantial reason as set out in the occupational health report from December 2021.

    b. In respect of the unfair dismissal claim, the respondent argues that if the dismissal was unfair the claimant would have been dismissed on the grounds of capability in any event.

    c. In respect of the alleged protected disclosure at issue 3.1.1.1, the respondent admitted that at some point in 2021 the claimant objected

verbally to the requirement for cleaning cups and glasses in the rooms; it did not admit that the claimant made reference to touchpads[1].

d. In respect of the disclosure at 3.1.1.1, the respondent admitted that it was a disclosure of information, but not that the claimant reasonably believed the disclosure of information was made in the public interest or tended to show that the health or safety of any individual was being more likely to be endangered. The respondent does admit that the disclosure was made to the claimant's employer.

e. In respect of the disclosure at 3.1.1.2, the respondent admits that the email was sent in the terms set out and admits that it was a disclosure of information, but not that the claimant reasonably believed the disclosure of information was made in the public interest or tended to show that the health or safety of any individual was being more likely to be endangered. The respondent does admit that the disclosure was made to the claimant's employer.

f. In respect of issue 7.2 the respondent does not admit that the claimant had a reduction in the ability to clean multiple rooms because of her disability (or otherwise). The respondent admits that a general limit on the number of rooms which the claimant would be given was agreed but says that was because she worked short shifts.

g. The respect of issue 7.5, the respondent asserts that it's aim was that the operational requirements of the housekeeping department were met and that shifts were allocated to various staff to maximise operational efficiency.

h. The respondent admits that the claimant made a protected act as alleged and admits that it did the things alleged in 10.2.

i. In respect of the remedy section of the issues, the respondent does not pursue an allegation that the claimant contributed to her dismissal by her conduct.

6. During the course of the hearing the claimant confirmed that her part-time workers regulations claim was limited to the allegation at paragraph 11.1.3 and she was not pursuing the allegations in 11.1.1 and 11.1.2.

The hearing

7. We heard from the claimant who gave evidence in line with her witness statement. Her witness statement also referred to her claim form and the claimant confirmed the truth of both documents on oath. Thus the claim form stood as part of the claimant's evidence in chief.

8. For the respondent we heard from

[1] This concession was extended further during closing submissions as set out below

a. Ms Russell, currently a room attendant at Lainston House hotel, but Deputy Head Housekeeper until November 2020 and a supervisor until 17 July 2021.
b. Ms Amarowicz, currently Head Housekeeper for the respondent, but at the relevant time a Housekeeping Supervisor .
c. Ms Offord, People and Development Coordinator at the respondent.
d. Mr Cool, at the relevant time Housekeeping Manager for the respondent.
e. Ms Lee, Housekeeping Manager at a hotel in the same group as a respondent but, until March 2020, Housekeeping Manager at Lainston House hotel.
f. Ms Hill, Head Of People and Learning for the respondent (although employed by a different company in the same group of companies as the respondent)

9. We were also provided with a bundle of documents and, except where stated, references to page numbers below are to the hearing bundle.

10. A timetable for the hearing had been agreed with Employment Judge Gray and the case was listed for 5 days, to include delivering judgment and dealing with remedy if appropriate. The timetable did not give particulars of how long each party would spend with each witness, or indeed how the time would be divided between the parties. At the outset it was agreed that the evidence of the claimant would be completed within one day and the evidence of the respondent within 1.5 days. Having regard to the Presidential Guidance – General Case Management - Guidance Note 5 (p15), we invited the claimant to think about and tell us how long she wished to spend with each witness. After lunch on the first day, when the tribunal had read the papers, the claimant indicated that she would wish to spend one hour asking each of the witnesses questions. The tribunal agreed to that. We also agreed with the claimant that we would remind her when there was 20 minutes left of the hour and when there was 10 minutes left of the hour. We also asked the claimant, during the course of the hearing, whether it would be helpful for us to guide her as to the need for the questions to be relevant to the issues. The claimant thought it would be helpful although the tribunal was also conscious that too much interruption could impede the flow of cross examination and make a hearing unfair.

11. As the case proceeded it became apparent to the tribunal that the claimant found the process of presenting her case difficult. It was apparent that the claimant found recollection of the events to be emotionally challenging and, in particular, in the afternoons seemed to struggle to focus her thoughts. We frequently reminded the claimant that if she wished to take a break she could ask for one and asked the claimant on occasions whether she needed to take a break. To assist the claimant the tribunal rose early on the 2nd, 3rd and 4th days of the hearing. As a consequence the timetable was not adhered to but the tribunal considered that the adjustments were necessary to assist the claimant to properly present her case.

12. Generally the claimant did complete her questions within the hour that she had anticipated, the main exception being the cross examination of Ms Hill which the tribunal allowed to run beyond the hour. The tribunal agreed with the

claimant that she could be given 1 hour and 30 minutes for the witness but, in fact, she only needed 1 hour and 15 minutes. The tribunal did not guillotine the claimant in respect of any cross-examination.

13. At the outset of the cross-examination of Ms Hill (on the afternoon of the 3rd day) it became apparent that there may be documents which had not been disclosed, being documents described as "Promark" documents. Those documents were payroll documents which showed the days when members of staff had been working. Given the issues in the case, it seemed to the tribunal that those documents were clearly disclosable and we reminded the respondent of its ongoing obligations of disclosure. The case adjourned early on that day and overnight the respondent provided a further 24 pages of records. The claimant was understandably unhappy with that situation and the tribunal gave the claimant time on the morning of the 4th day to consider the documents. Initially the tribunal gave the claimant one hour (she had received the documents at 9 PM on the 3rd day) and when the claimant asked for an extra 15 minutes, she was given that. The claimant confirmed that she did not need more time. The tribunal guided the claimant as to what her options were, saying that it seemed to the tribunal that the claimant had the following options (although the claimant may think of others);

    a. she could ask the tribunal to take no account of the documents, given their late disclosure,

    b. she could accept that the documents should be admitted to the hearing and make whatever submissions she wanted to about them and ask Ms Hill questions about them,

    c. she could ask for witnesses to be recalled so that she could ask them about the documents,

    d. she could ask the tribunal to adjourn the case for the rest of the day to allow her to consider the documents further or discuss matters with others,

    e. she could ask the tribunal to strike out the Response on the basis that the documents meant that a fair trial was no longer possible.

14. The claimant indicated that she did not want to ask the tribunal to take no account of the documents (they tended to support her case), she did not want to recall witnesses so that she could ask them questions about the documents, she did not want to adjourn for the rest of the day. She asked the tribunal to strike out the Response. The tribunal heard submissions and gave an oral judgment refusing to strike out the response on the basis that we considered a fair hearing was still possible, even though we thought the behaviour of the respondent was unreasonable in leaving the disclosure of the documents until the end of the hearing. The documents were clearly relevant and should have been identified by the respondent as such. Although the behaviour of respondent was unreasonable, documents tended to support the claimant's case and the claimant did not need any further time to consider them. We could consider the documents and the hearing would not be unfair. As we gave full

reasons, written reasons have not been give but will be provided if either party requests them within 14 days of this judgment being sent to the parties.

Findings of Fact

15. The respondent operates a five-star hotel known as the Lainston House. It is part of a wider group of hotels, the group having a current count of employees of around 1000 and a count of around 600 at the time of the coronavirus pandemic.

16. The claimant commenced working for the respondent in 2012 on a part-time basis working 20 hours over 5 days. The claimant's original contract appears at page 490 of the bundle and describes her job title as Room Attendant. The claimant agreed that she signed an updated contract on 2 April 2018. The claimant worked at the Lainston House hotel. The claimant agreed in cross examination that her hours of work were 9.30 – 1.30pm or 10.00 – 2.00pm from Monday to Friday.

17. For the purposes of communication staff at the hotel had access to a group chat facility called Hubbub, which was described as being similar to WhatsApp.

18. The claimant was off work for a period in 2017/2018 and in 2018 was diagnosed with endogenous depression, which the respondent accepts amounts to a disability for the purposes of this hearing. The claimant was referred to Occupational Health on 17 January 2019 which led to a report being prepared which is undated but appears at page 120.

19. The occupational health report stated that the claimant was medically fit for full or part-time hours and for the duties of her substantive post. She was likely to be fatigued on her return to work. The practitioner was asked the question "are there any factors associated with the individuals work that may be contributing to this condition/illness?" He replied "whilst Ms Bonk does not specifically identify any work impact I believe there is a mismatch between what Ms Bonk believes her role and priorities to be and what management see as her role. I suggest Ms Bonk is taken through the role…" In answer to the question of whether the provisions of the Equality Act applied, the practitioner stated that it did and suggested, as appropriate adjustments, reasonable time off to attend medical appointments, a 10 to 15% in absence trigger points and a full update on the changes in her role and activities.

20. The occupational health report does not suggest that the claimant cannot work at the same speed as a non-disabled person or that there is any other reason why the claimant should have a limit on the number of rooms she was required to clean.

21. A meeting took place on 12 February 2019 between Ms Lee, the then housekeeping manager and the claimant. The note of the meeting recorded that the claimant had requested to be more involved with the room side of housekeeping, stated that the claimant felt she could manage both public areas and cleaning room duties and as from the 25 February 2019 the claimant was happy to clean 3 rooms daily and public areas. The record of the meeting appears at page 123.

22. The claimant makes clear in her Grounds of Complaint that the reference to 3 rooms is a reference to the equivalent of 3 full-services. If a guest checks out and a new guest is to occupy the room than a full-service is required which involves changing the bed linen; however if a guest is not leaving the room then the room service does not need to involve changing the linen (unless there is a specific reason to), which is described as half service.

23. We have heard from the claimant and Ms Lee in respect of that agreement and both agreed that the claimant had wanted to move to room cleaning so that she was less isolated and was working with others. The claimant's case, as put to Ms Lee in cross examination, was that the agreement of cleaning 3 rooms (on a full-service basis) was because that was all she could cope with. Ms Lee was adamant that she was unaware that the claimant could not clean more than 3 rooms and the only reason that 3 services were agreed was because the claimant was working half shifts and therefore that was an appropriate number to clean. At the end of her questioning of Ms Lee in this respect, the claimant appeared to acknowledge that Ms Lee would have been unaware that there was a medical reason for wanting to only clean a maximum of 3 rooms.

24. There is no contemporaneous evidence which suggests that the respondent was told that, for medical reasons, the claimant could only clean 3 bedrooms at the most. As we have indicated, the Occupational Health report did not suggest that the claimant's disability meant that she could not work at the same speed as other employees.

25. The claimant made a disability impact statement dated 1 March 2022 upon which she was cross examined by the respondent. In particular the claimant confirmed the part of that statement in which she said "Everything I do must be in particular order and I must be sure that is done to the smallest detail and I can't stop myself from doing this, that's why simple things take me longer than usual and even when I double and sometimes triple check everything I will later constantly think about it- if I really done everything right and if I didn't forget about anything." (p63 sic). That statement was not challenged by the respondent. However, the disability impact statement does not suggest that the respondent was aware of that position.

26. Moving away from the chronology for the moment, in May 2021 there was a meeting between the claimant and Mr Cool, at that time housekeeping manager, in which he annotated the document which had been created following the meeting in February 2019. He added a note that stated that the claimant was happy to clean more than 3 rooms if needed and the claimant confirmed in cross examination that was correct. She said that she had said the same to Mr Cool as she had said to Ms Lee, which was that if she could she would do more than 3 rooms (page 153).

27. We find that the claimant did not tell the respondent that the reason she may be unable to clean more than 3 rooms on a full-service basis (or the equivalent) was because of her depression. It is apparent that the claimant had not told the occupational health practitioner that the depression affected her in this way and, in those circumstances, we find it is unlikely she would have told her employer.

28. We find that the respondent was content to agree the limit of 3 rooms having spoken to the claimant, in the context of the fact that the claimant was working part-time hours and it is more likely than not that because the respondent was happy to agree a general limit of 3 rooms, there was no need for the claimant to explain the difficulties she faced because of her disability in that respect and she did not do so.

29. It is not in dispute that in March 2020, as a result of the coronavirus pandemic, the respondent's hotel went into lockdown (the 1st lockdown). The claimant was furloughed with a number of other staff and was paid 80% of her salary.

30. That lockdown came to an end and the hotel reopened in August 2020 and remained open until the 2nd national lockdown came into force on 5 November 2020. That lockdown ended on 2 December 2020 when England returned to a 3 tier system of restrictions. The hotel closed again due to coronavirus restrictions on 26 December 2020, reopening on 12 May 2021 (the 3rd lockdown).

31. While the hotel was open, but during the coronavirus period [2], various protocols were in place to ensure the safety of guests. One of the steps in the respondent's risk assessment was that cups/mugs and glasses in guest rooms would be replaced with fresh ones and rather than being washed in the bathroom, used ones would be washed in the hotel's dishwasher (see page 583).

32. Another arrangement during the coronavirus period was that guests could place a leaflet on their door if they did not want their rooms cleaned. During that period, according to the respondent, room attendants may be allocated 10 or 12 rooms to clean but would only be required to clean 2 or 3 in the end because guests did not want their rooms cleaning. The agreed evidence was that on the days when the claimant was working, she may be given more than 3 full room services to carry out when jobs were allocated, but it was not known, at the point of allocation, how many rooms she would actually be required to clean.

33. Both the claimant and Ms Russell agreed during the claimant's cross examination of Ms Russell, that if the claimant ended up cleaning 2 or 3 rooms she would not complain but if she was required to clean 6 rooms or more then she would. Thus there does not appear to be a dispute that on occasions the claimant did complain about the number of rooms she had been required to clean at that time.

34. The claimant, however, has given no specific evidence as to what number of rooms she was required to clean each day. The claimant's claim form (which she confirmed in evidence) only states that on a daily basis she was given "much more rooms that was agreed" (sic) and states that she was constantly worried that if she could not maintain the expected standard she would be told off or guests would complain. The claim form refers to emails that the claimant

[2] by which we mean the time in 2020 and 2021 when even though there was no lockdown, businesses were being particularly cautious about the risk of contamination and some legal restrictions remained in place.

sent to HR explaining how the situation was impacting her mental health in August and October 2020.

35. We have not been taken to any emails from the claimant to HR in August and October 2020. There is an email dated 22 November 2020 from the claimant to Jamie Morris where she states

> Hi Jamie, as we approach reopening of the hotel I just wanted to let you know that I hope that soon as we will be back some action will be taken to accommodate and respect arrangements which were made after occupational health meeting (p140).

36. Ms Morris replied stating that the respondent was asking all staff to be as flexible as they could be around the business and stating that she would meet the claimant on 2 December 2020. On the same day, the claimant replied stating, amongst other things,

> I can't agree with you that we have catch ups- it was me coming to you in distress and asking for help because my supervisor and deputy manager treated me unfair (you know the story)
>
> …
>
> With all my respect to you- your email make me feel like you undermining seriousness of the situation , you know I got mental health issues for very long time and that I'm cover under equality and diversity act and in August I told you that I was diagnosed with MS (as you know I told Miranda about this as well)
> …
>
> With the regret I'm realising that after 8,5 years working at Lainston , I have to start formal proceedings because I don't see any other options and this is just heartbreaking
>
> (p137, sic)

37. In the course of cross-examination the claimant was taken to a chart at pages 518 and 519 which show that on each day the claimant worked in September she was required to do 7 or 8 “S” where S stands for a half service. In addition in August 2020 and in October 2020 it is clear that on a number of days the claimant was given 7 or 8 “S” services. However that evidence must be seen in the context of it being accepted that the claimant was given more than the equivalent of 3 full-services to carry out because guests may not require their rooms to be cleaned. The rotas do not, for the most part, show how many rooms the claimant actually cleaned.

38. The claimant did not suggest that she was ever disciplined if she did not clean a certain number of rooms per day nor was she required to work longer than her shift. The claimant’s complaint is that she felt anxious if she was being asked to do more than the equivalent of 3 full-services.

39. Doing the best we can on the evidence which we have, we find, on the balance of probabilities that because of the respondent's practice during the coronavirus, there would have been days when the claimant was allocated, say, 8 rooms to clean and because of the requirements of guests, there would have been days when she needed to clean more than the equivalent of 3 rooms on a full-service basis. We are unable to say how frequent that problem was but it was sufficiently frequent for the claimant to be emailing the respondent in November 2020 and asking for it to reinstate the arrangement made at the meeting in February 2019.

40. One of the claimant's complaints is that during the second lockdown between 5th November and 2 December 2020, 6 of her colleagues were given shifts whereas the claimant was not. The claimant and respondent agreed, during the course of the hearing, that the first day of the November lockdown was 5 November 2020 and people went back to work at the hotel on 1 December 2020.

41. It is necessary for us to make findings of fact about the actual work done during the November lockdown, both by the claimant and other members of the housekeeping team. It is also necessary for us to make findings as to why the claimant was not offered more shifts than she was given. The claimant's case is that she was not given shifts because her ability to clean multiple rooms was reduced by her disability.

42. The Promark records shows that the claimant was not given any work during the relevant period. We have also received Promark records for Ms Russell, Ms Amarowicz , Mr Komoly, Mr Alcantara, Mr Neale, Ms King and Ms Sisley. Ms Russell was Deputy Head Housekeeper until 30 November 2020, following which she became a supervisor. Ms Amarowicz was a supervisor. Because of the difference in position we do not consider Ms Russell and Ms Amarowicz to be useful comparators in deciding whether the claimant had fewer shifts than her colleagues. Mr Komoly had 5 shifts during the period in question, Mr Alcantara worked 4 shifts. Mr Neale did not work any shifts, Ms King worked 1 shift and Ms Sisely worked 3 shifts. The shifts were not all at weekends.

43. Thus, it is apparent that the claimant had fewer shifts than some of her colleagues although not than Mr Neale.

44. In respect of the reason why the claimant was not offered more shifts than she was, we make the following findings.

45. After the first lockdown the hotel re-opened in August 2020 and there were complaints about the spa baths. Ms Russell, in her witness statement, explained that they had been left so long without being cleaned by housekeeping that there was dirt floating when the bath was run. Therefore, Ms Russell explains, she managed to persuade the respondent's management to have some housekeeping people in during the November lockdown. She also states (paragraph 15) that Sunil Kanjanghat, the General Manager, asked if anyone could do the late shift or night shifts.

46. In her oral evidence to the tribunal she said to the tribunal that the presence of housekeeping staff was to do with security, Mr Kanjanghat's concern was about security and that he asked her for the names of people who would do a late shift. Ms Russell recommended Tomas Komoly because he lived on site and Karen Sisley because she had asked for extra shifts. Thus there is a difference in emphasis between the witness statement which appears to suggest that the presence of housekeepers was primarily because of cleanliness issues whereas the oral evidence focused on security.

47. Ms Amarowicz , in her witness statement, supports what Ms Russell says in her statement, stating that for the 2nd lockdown, Mr Kanjanghat agreed to start preparing for reopening sooner. She says that the only people who worked were Tom, Alejandro and Karen and the claimant was not asked because of the speed at which she worked and/or because she had not previously worked weekend shifts. An email from her dated 25 March 2022 states:

> They did extra cleaning at the hotel. Scrubbing showers, cleaning toilets, cleaning window frames, etc. I'm not entirely sure but believe some of their shifts were part of security during November lockdown The lockdown from December 2020 was mainly to cover housekeeping cleaning, public areas, toilets, bedrooms. We wanted to make sure that all the jobs won't be left for last minute as it happened after first lockdown.
>
> Security shifts were organised by Sunil.
>
> (p 477)

48. Ms Amarowicz told us in her oral evidence that the rota during the second lockdown was done by Mr Kanjanghat, she said that as far as she was aware she and Ms Russell would propose a name in response to a request by Mr Kanjanghat but he may say "no" to that person and they would propose a different person.

49. It was put to Ms Amarowicz that she did not give the claimant shifts in that period because she was unable to work as quickly as others, due to her disability, and she was viewed as lazy. Her response to that was that she was not aware that the claimant had mental health issues at the time. She had known about the claimant's depression in 2014 but she was not aware of whether that was continuing in 2020.

50. Having regard to Ms Amarowicz's statement it does appear that the speed at which the claimant worked was a relevant factor in the decision as to whether she would be put forward for shifts and we find that it was a factor and influenced the question of whether she would be put forward for shifts in more than a trivial way.

51. The claimant's case, as set out in the list of issues, is that at the beginning of December 2020 she raised with Ms Russell and Ms Amarowicz that there was a breach of the covid measures risk assessment in that cups and glasses were

being cleaned in the rooms and the touchpads were not being cleaned frequently enough.

52. The Grounds of Complaint sent with the claim form state that the claimant notified HR by email about serious breaches of the Covid protocol in May 2021 but does not refer to an earlier conversation. The claimant does not deal with this point in her witness statement. However, the claimant was cross examined about having made a disclosure in December 2020 and confirmed that was her position.

53. Ms Russell says that she cannot remember Ms Bonk raising concerns with her about such issues but she cannot state that she did not. Ms Amarowicz says that she has no recollection of the claimant raising any concerns like that and believes that she would have remembered if she did.

54. The respondent's witnesses accepted that over time its practices had reverted back to washing mugs in the guest bedrooms. We find that was partly because when they were sent to the pot wash for cleaning they were getting chipped. There was also a shortage of mugs because of the need to have mugs in the guests bedrooms whilst other mugs were being washed in the pot wash.

55. In its closing submissions the respondent accepted that the claimant had made a qualifying disclosure in December 2020 but stated that it did not accept that the claimant's belief as to the risk to health and safety of guests was reasonable (paragraph 5.1). We find that the claimant had a genuine belief in the risk to the guests (which the respondent concedes) and that the belief was reasonable. There are 2 reasons for doing so. Firstly, the requirement not to wash mugs in the rooms is found in the respondent's own risk assessment at page 583. If the respondent considered there to be a risk, it is difficult to see why the claimant could not have a reasonable belief in the same risk. Moreover, once the claimant raised her concerns in writing the respondent changed its practice (as set out below). If the claimant's belief in a risk was not reasonable, it is difficult to see why the respondent changed its practices.

56. The claimant's case is that nothing was done at that time when she raised these concerns verbally.

57. We accept the claimant's evidence that nothing was done about the practice of washing mugs in the rooms when she made disclosures in December 2020. Given the amount of evidence which exists to show that the respondent changed its practices after the disclosure in May 2021 (which we set out below), we think there would be similar evidence if the respondent had changed its practices in December 2020.

58. The hotel was, then, closed between 26 December and 11 May 2021. During that period the claimant complains that 5 of her colleagues were given weekend shifts when she was not.

59. The claimant's case is that she was not given shifts either because she was considered to be slow in cleaning the rooms (as a result of her disability) or

because she had made the protected disclosure in December 2020 about the cleanliness of the mugs.

60. Again we must find, firstly, whether the claimant was given fewer shifts than her colleagues and, secondly, if she was, what the reason for that was.

61. We consider the appropriate people to compare the claimant with are Mr Komoly, Mr Neale. Ms King and Ms Sisley. Mr Alcantara worked no shifts during that period and we are told that he had left by then.

62. The claimant agreed that she worked shifts on 3rd and 17th April

63. According to the Promark records, Tomas Komoly worked on 29 December 2020, 9 January 2021 and 21 February 2021, 4 April 2021, 28 April 2021 and 1 and 8 May 2021 – 7 shifts.

64. According to the records Karen Sisley worked on 29 December 2020, 23 January 2021, 14 February 2021, 28 March 2021, 11 April 2021 and 25 April 2021 (6 shifts).

65. Isobel King worked on 24th of April and 2nd May according to those records (2 shifts) .

66. Matthew Neale worked on 29 December 2020, 3 February 2021, 4 February 2021, 27th of February 2021, 20th March, 10th April, 11th April and 18th April (8 shifts).

67. The respondent contends that the claimant could only expect to work half the number of shifts of her full-time colleagues because she, generally, only worked half of their hours.

68. Whilst the claimant was paid 80% of her pay whilst on furlough, on days when she was asked to work she was paid 100%.

69. We find claimant's case as set out in the list of issues is factually incorrect, she did not have no shifts in the period, she had two shifts as set out above and had been rostered to work an additional shift in March which was cancelled in the circumstances set out below. However she did, as the respondent concedes, have fewer shifts than three of her colleagues.

70. In respect of the lockdown period from December 2020 until May 2021, Ms Amarowicz's evidence was that Mr Cool was making most decisions about the rota and she was consulting with him until March 2021. After March 2021 she became involved in preparing the rotas. Mr Cool's witness statement states that, in fact, Ms Amarowicz did a lot of the rostering during that period and that she would post the rota on a group chat facility and check that he was happy with it before she would talk to Mr Kanjanghat to get approval. We find that Ms Amarowicz and Mr Cool were, generally, working together to create rotas in the period in question and the rotas were subject to approval by Mr Kanjanghat.

71. Ms Amarowicz sent a chat to Mr Cool on 19 February 2021 stating that she had sorted the rota for March because Mr Kanjanghat had asked for cover for

weekend by the house keeping team (page 152A). She stated that she had attached a rota and she wanted to check with him if it was okay. She said that she had spoken to Ms Russell and they were wondering if the claimant should do any of the shifts. She said that it was probably better for Mr Cool to decide about it and possibly get in touch with her. The attached rota showed the claimant scheduled to work on 6 March 2021 with other members of the team rostered for other Saturdays. Mr Cool replied stating that he would put the claimant on if it was a weekday but as it was a weekend and she did not usually work weekends he would drop her a message and see if she would like to do some. Ms Amarowicz replied to that message referring to the fact that the claimant attended by bus and on Saturday there was a bus service and suggesting that the claimant could be put on a full shift. She attached a bus timetable.

72. Mr Cool contacted the claimant and on 24 February 2021 wrote to Ms Amarowicz " yes please add [the claimant] on to a shift, let me know what date and time and I'll let her know."

73. That exchange does not suggest that there was any desire to prevent the claimant carrying out any work and indeed Ms Amarowicz appears to have been attempting to accommodate the claimant in terms of her need to travel by bus.

74. However, on 2 March 2021 Ms Amarowicz contacted Mr Cool and asked whether he would like to contact the claimant about the change in the rota. Mr Cool was apparently unaware of the change and asked Ms Amarowicz to clarify the position. She stated "he doesn't want anyone this weekend – already contacted Izzy. He is worried/concerned about security reasons would like to give some training before both do the shift." The reference to "he" is a reference to Mr Kanjanghat. As a consequence the claimant's work which had been rostered was withdrawn from her. The claimant was then invited to Lone Working and Hotel Safety Training and attended that training on 10 March 2021.

75. Ms Amarowicz says that the claimant was then included on the rota from April 2021. As we have indicated, the the claimant agreed that she worked shifts on 3rd and 17 April 2021.

76. We find that the respondent's evidence is correct insofar as it is asserted that the claimant did not work at weekends prior to the coronavirus period. The claimant accepts that. We also acknowledge as correct the respondent's assertion that the claimant worked part-time hours and therefore could not expect to be offered the same number of shifts as her colleagues during the lockdown period, although we consider she could expect to be offered approximately half the number of shifts if all other things were equal.

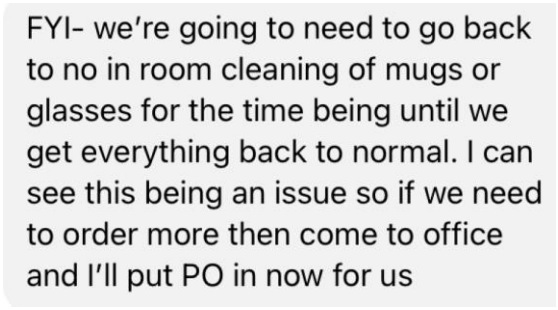
77. Ms Amarowicz does not suggest that in this period one of the reasons for not giving the claimant shifts was because of her speed, she explains that the claimant was initially not included on the rota because the housekeeping team was only working on weekends and the claimant did not work weekends. We find that explanation is true. Analysis of the days on which the claimant's

colleagues worked show that they were only asked to work on weekends and, as we have said, the claimant accepts that she did not work weekends before the lockdown. The way in which Ms Amarowicz sought to offer shifts to the claimant and went out of her way to consider the bus timetables suggests that there was no hostile intention towards the claimant either because she had made disclosures or otherwise and suggests that the respondent was seeking to use her services even though she was considered to be slower than other members of staff.

78. On 18 May 2021 the claimant wrote to Ms Morris stating

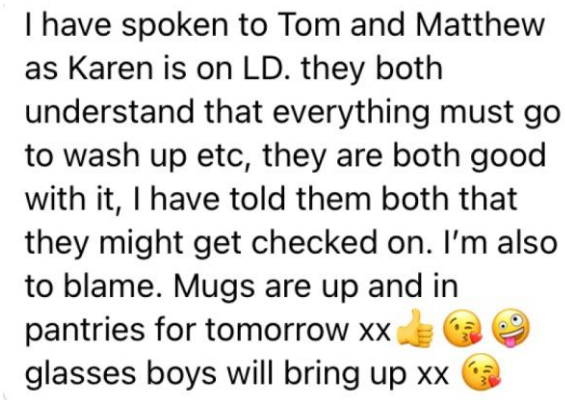
"I just wanted to let you know that I refuse to work in breach of covid protocol - washing mugs in the room especially when I don't even have a washing up liquid and something other than towels to dry them. In case that rules change and covid secure cleaning does not apply any more please let me know and I will be happy to work this way. To just clarify I'm not saying I will not work at all , I will just don't do parts which are in breach of covid protocol. I hope to hear from you soon . Have a great day."

79. On the same day a message was sent from the housekeeping senior team on the Hubbub system stating



80. Thus within a short period of time (the time stamps on the messages suggest 4 hours) the respondent had taken action based on the claimant's concerns.

81. On 14 June 2021 Ms Russell posted on hubbub



82. A housekeeping team meeting then took place on 24 June 2021 when Ms Amarowicz gave staff an update of a new protocol in respect of coronavirus.

The minutes record “mugs and glasses must be changed every day even if they have not been used, they must go to the pot wash be clean.” (Page 192).

83. We find that the respondent was not at all resistant to the claimant raising these matters and was responsive to her. The respondent did not seek to dismiss the claimant’s concerns and there is no basis for any finding that the respondent was irritated with the claimant because she had made the disclosures.

84. It appears from the evidence which we heard that from November 2020 the working relationship which the claimant had with the respondent was beginning to break down. We have not been presented with very clear evidence as to the cause of that breakdown but it appears to be, primarily, because the claimant believed that the respondent was not honouring the agreement made on 12 February 2019. That is what had led to the emails which were sent to Ms Morris in November 2020 and it is clear that the claimant felt she was being treated unfairly in that respect. It also seems that the claimant believed that she was not being offered her fair share of shifts during the lockdowns which, on the balance of probabilities, we think would have been upsetting to the claimant.

85. On 24th May 2021 the claimant had an accident at work and sustained an injury to her hand. She returned to work on 25 May 2021 but, according to her statement, left early to attend accident and emergency. She then worked on 26 May 2021 but went off sick on 27 May 2021.

86. On 10 June 2021 the claimant wrote to Jamie Morris, HR manager for the respondent stating that her hand was better, not fully recovered but she would be back at work the following day.

87. A return to work meeting was arranged which took place on 11 June 2021 with Ms Offord. Ms Offord noted that the claimant’s hand was, in her view, heavily strapped. There is a dispute as to how heavily strapped it was but there is no doubt that it was strapped. Ms Offord says that the claimant told her that her hand had a lump and she was in pain. Again that is disputed but it seems likely that, at least, the claimant told her that she was not fully recovered since that is what she had said in the email the previous day.

88. Ms Offord says that she felt it necessary for further medical guidance to be obtained to ensure there was no risk of further injury or a setback in the claimant’s recovery.

89. Initially she started to look for a medical certificate on the claimant’s file. She commented that the claimant’s file was a thick one. The claimant says that she described her as being the employee with the thickest file. Ms Offord says that she merely commented that the fire was thick as she sought to find a fit note within it.

90. We accept the evidence of Ms Offord in this respect. The claimant was not able to point to anything that would suggest that Ms Offord had any hostility towards her prior to the meeting commencing. It is likely that the claimant’s file was thick and it would be natural for a comment to be made such as the one made by Ms Offord. It is clear that the meeting was very emotionally charged from the

claimant's point of view and her recollection of it is likely to be affected by her strongly held belief that Ms Offord was treating her unfairly within the meeting. Indeed so strongly did she believe that Ms Offord was treating her unfairly that she started to record the meeting on her telephone part way through.

91. We find that wanting further medical information as to whether the claimant was fit for work was not an unreasonable position for her to take but instead of sending the claimant away to obtain further medical advice she asked the claimant for the name of her GP's practice and then telephoned the GP's practice. She says that she was only seeking to assist the claimant in getting an appointment. We have seen a transcript of part of the call, being the period from which the claimant turned on her telephone, and have also listened to that part of the call as well as a little more. Whilst the approach of Ms Offord was certainly unusual, the transcript is generally more consistent with her seeking to assist the claimant in obtaining an appointment than in some way trying to harass or bully the claimant.

92. The claimant reacted strongly to the behaviour of Ms Offord both in the way the claimant spoke to the GP's receptionist when the call had been answered and in the way she subsequently spoke to Ms Offord, however having regard to the issues in the case we do not need to make further findings of fact in that respect

93. On the question of whether or not the claimant gave permission for Ms Offord to call her GP's practice, Ms Offord's evidence is that she asked the claimant if she should phone the doctors surgery and the claimant said that she would probably not get through. Ms Offord then said "at least we can try". The claimant's case is that Ms Offord then asked for the name of her GP, which we accept since that seems the most likely explanation for why the claimant gave her the name of her GP practice. Ms Offord says that if the claimant had not wanted her to phone the GP she would not have given her the name of the practice. We find that be overly simplistic; the claimant was at a return to work meeting, she was meeting her employer and it is not surprising that the claimant would give the GPs name without, at the same time, consenting to the employer telephoning the GP in the presence of the claimant (or at all). The claimant was not asked for and did not give consent to Ms Offord telephoning the GP. That the claimant did not give that consent is borne out by the strength of her reaction when Ms Offord telephoned the practice.

94. We must make finding as to whether Ms Offord's behaviour on the day related to the claimant's disability of depression.

95. There is no evidence that the claimant's depression was a factor in the thinking of Ms Offord on the day in question. The claimant had been off work due to a hand injury. Ms Offord was telephoning the surgery about the claimant's fitness to return to work in respect of her hand injury. The claimant had not had any recent absence by reason of her depression. Although the claimant had made reference to her depression and the fact that she was protected by the Equality Act 2010 in correspondence in November 2020 there have not been recent correspondence from the claimant to that effect (or at least none to which we have been referred). There was no discussion on the day about the claimant's disability.

96. Having heard from Ms Offord we do not think that her actions on the day were in any way related to the claimant's disability of depression. Her actions were related to the claimant's absence due to her hand injury and the fact that the claimant was saying that her hand injury was not yet fully recovered.

97. On 17 June 2021 the claimant was signed off work following what she describes, in her claim form, as a complete breakdown. She did not return to work.

98. In July 2021 the claimant contacted Ms Hill seeking to resolve the situation she felt she was in. We find that the matters we have referred to above about the relationship beginning to break down were still operating on the claimant's mind but now the claimant felt particularly aggrieved by the way in which Ms Offord had behaved in the meeting on 11 June 2019.

99. The claimant's witness statement does not give any significant detail of the process by which she contacted Ms Hill and what happened thereafter and we accept the chronology as set out by Ms Hill in her witness statement which is supported by contemporaneous documents. The claimant called her on 16 July 2021 regarding the 2019 occupational health report and adjustments to her role as to the number of rooms she was required clean each day as well as the return to work interview on 11 June 2019.

100. Ms Hill's notes of the call on 16 July 2021 are detailed and show the reasons why the claimant had contacted her. The claimant was clearly unhappy about a large number of things (page 214)

101. Thereafter there was an agreement to meet in person and on the 20 July 2022 Ms Hill sent a letter to the claimant referring to the fact that the issues had been raised informally and inviting her to a meeting at 11:30 on 29th of July. The claimant was allowed to be accompanied by a colleague. The meeting lasted nearly 3 hours and shows that the claimant was given every opportunity to say what she wanted to. In the course of the meeting the claimant said that she did not trust Ms Morris did not want to have check in meetings with her and that she could not think of anybody else in the business who she could speak to. It was clear that she remained very aggrieved about the behaviour Ms Offord.

102. Ms Hill then had a meeting with Ms Offord (see page 294) and then emailed the claimant on 9 August 2021 to apologise for the delay in providing meeting notes following the meeting in July. On 16 August 2021 the claimant wrote to Ms Hill stating how upset she was with the company and that she intended to start pre-tribunal proceedings the following week (page 300). Ms Hill called her to apologise for the delay.

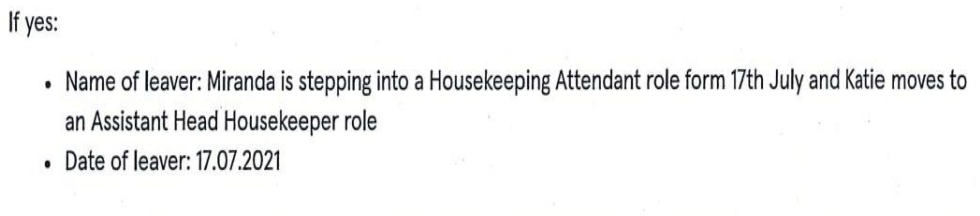
103. On 18 August 2021 Ms Hill wrote a letter to the claimant setting out a summary of the issues which had been raised and the actions she would state in respect of them. There was an agreement to meet again on 24 August 2021.

104. That meeting took place and the minutes are at page 340 of the bundle. The meeting lasted nearly 2 hours and in the course of it Ms Hill accepted that

Ms Offord had behaved inappropriately, said that was a mistake and said that she was happy to apologise. The claimant stated she wanted some justice.

105. According to the witness statement of Ms Russell, she had been Deputy Head Housekeeper until 30th of November 2020, following which she became a supervisor until she moved to being a room attendant from 17 July 2021. According to the witness statement of Ms Amarowicz, she had been housekeeping supervisor until 1 August 2021 when she became Deputy Head Housekeeper. Those assertions were not challenged by the claimant and explain why Ms Amarowicz stopped being a supervisor in August 2021 and why there was, at that point, a vacancy for the role of supervisor.

106. At page 482 is the respondent's internal record in respect of the advertisement for the role of Housekeeping Supervisor. It shows that the closing date for the job was 15 August 2021 and has an internal section called "internal job notes". The notes ask the question "is this role a like-for-like replacement?" which has been answered "yes". The notes then contain the following



If yes:

- Name of leaver: Miranda is stepping into a Housekeeping Attendant role form 17th July and Katie moves to an Assistant Head Housekeeper role
- Date of leaver: 17.07.2021

107. The notes show 3 people had been reviewed in respect of the job advertisement and one had been shortlisted (page 485).

108. On 26 August 2021, the claimant wrote to Ms Hill stating that she had to start legal proceedings because she had limited time to take her case to the tribunal.

109. On 11 October 2021 the claimant wrote to Ms Hill stating "I just wanted to let you know that I made employment tribunal claim and paperwork will be sent to Lainston House directly. I'm letting you know because you been in contact with ACAS in regards of this case but I wasn't able to point you as a person to be contacted in this matter in my ET1" (sic).

110. On 13 October 2021 Ms Morris wrote to the claimant stating "you have been signed off from work continuously since 17 June 2021 which means this absence is now classified as long-term sickness". The claimant was asked to complete an access to medical records form and it was noted that the respondent had asked the claimant to raise a formal grievance in respect of the matters that she felt were preventing her from moving forward with her employment. It was pointed out that as of that date the respondent had not received a grievance from the claimant and it was pointed out that the occupational health process did not prevent the claimant from raising a formal grievance (page 389).

111. On the same date the claimant replied stating that she would not give permission to the respondent to review her doctor's files but she was happy for occupational health professionals to be given them. She stated "regards of grievance we both know how this went and this was not only the issue of workload adjustments… I already submitted my claim to employment tribunal… and now third party will be able to give as there opinion about the issues raised and handling of everything"" (Page 400, sic)

112. On 29 October 2021 Ms Morris wrote stating "in respect of the last point above, we have a duty of care with regard to the working environment for both you and your colleagues. It is clear that you remain very dissatisfied with matters relating to your recent employment at Lainston remaining concerns. There is no action you need to take at present in this regard but we wanted to let you know now what will be required." (Page 404).

113. On 3 November 2021 the claimant replied stating "Please remember that despite the fact that I submitted my claim to employment tribunal, I'm open to the conversation (can be on the "without prejudice" terms) and finding resolution to the issues mention in the grievance plus email mention above and future of my employment with company without involvement of third party. The reason I'm open to conversation is simply because I wish to close this unpleasant chapter as soon as possible and my mental health not to be affected any more by unsolved work issues." (Page 414). In reply Ms Morris reiterated the importance of proceeding via the formal grievance procedure (page 416).

114. An occupational health meeting was scheduled for 14 December 2021 and the report pays at page 411 which is, again, undated.

115. Whilst the whole of the occupational health report must be read (and has been read) for its full content in context, the following paragraphs appear within it:

> The breakdown in trust is now at a level that Ms Bonk will only communicate by email / written format so it is recorded. When asked for examples of why she has lost faith in the management process she identifies that the job description given to occupational health is not one she has ever signed and feels it is a fabrication.
>
> Further examples include: Ms Bonk feels she is capable of submitting a grievance but declines to comply with submitting a formal grievance as she believes the previous procedure identified in the documents accompanying the referral was a formal grievance and does not see the value of repeating the process.
>
> ….
>
> Ms Bonk has identified to me that even if her current medical symptoms resolved, she does not know if she could return to

> work as the breakdown in trust between herself and her employer seems irretrievable.
>
> …
>
> I think it likely that Ms Bonk is so driven by her belief that she has been wronged and the lack of faith in the management systems of her employer that I cannot identify any adjustments that would enable Ms Bonk to return to work for the foreseeable future.
>
> …
>
> It is my opinion that Ms Bonk is unfit for work for the foreseeable future, the reason for this is both depression and a breakdown in the employee / employer relationship.
>
> …
>
> It is my opinion that Ms Bonk no longer trusts her employer in the form of local management. If this trust can be restored Ms Bonk is likely to return to work following further mental health interventions. If this trust is irrevocably broken then I think it unlikely that Ms Bonk will return to work for the foreseeable future.
>
> I suggest senior management from outside of Lainston House or the new general manager of Lainston House who has not been involved with the current situation meets with Ms Bonk at a neutral location to try and identify if the employee / employer relationship can be repaired.

116. On 16 December 2021 the claimant wrote to Ms Hill complaining that the respondent had provided the occupational health practitioner with a job description which was forged/altered (this was not the first time this allegation had been made) and also that an excessive amount of documents had been sent to the practitioner without informing the claimant, an example being given of meeting minutes. She stated that conduct was violating her rights and privacy and that she did not know if she would allow the occupational health report to be released because of the respondent's actions (page 455).

117. In the event the report was released to the respondent at the end of December 2021.

118. On 10 January 2022 Ms Morris emailed the claimant stating that it had been decided to terminate her employment and attaching a letter of notice of termination of employment. The email stated "As noted in the letter, you are required to return all company property back to us by the end of January 2022. As you have been assigned a locker and key, can I please ask that you make the necessary arrangements for this to be cleared by your partner Kamil by the deadline."

119. The accompanying letter sets out the rationale for dismissal without further process (albeit on 9 weeks' notice) and we paste below the relevant part of that letter:

> Breakdown in relationship
>
> The Report provides that the relationship has deteriorated to such an extent that you will now only communicate with us in written format, so that it is recorded, and that you do not wish to disclose details of your other recent diagnosis because you do not trust us to keep that information confidential. This indicates to us that the relationship has, regrettably, broken down to an irretrievable level.
>
> As you know, we had been seeking to use our formal grievance process as a potential means of understanding and then resolving your concerns, with a view to facilitating your return to work. In this regard the Report confirms that, whilst you feel able to go through a grievance process, you decline to do so as you disagree that the previous process with Carmen Hill was informal, and in any event you do not see the value. Again, this is indicative of an irretrievable breakdown.
>
> By way of example, the Report cites one of the issues causing your lost faith in management as your belief that the signed job description given to Occupational Health was fabricated by the company. We do not believe this to be the case, but we find ourselves in a position where we have no realistic means of persuading you of this, and even if that were possible we do not believe that it could salvage the relationship.
>
> The Report suggested the possibility of a meeting between you and other senior management, at a neutral location, to see if the relationship could be repaired. However, you have made clear that you will only communicate with us in written format, and we have in any event concluded that the relationship has broken down to such an extent that such a meeting would not alter the current position.
>
> The concerns you have raised with us previously are not limited just to the behaviour of senior management or the General Manager, and have related to several other employees who remain in the organisation and with whom you would have inevitably still had to interact at work. We have no confidence that, even if a return to work could have somehow have been facilitated, those issues would not have arisen again as a result of such interactions.

The letter concluded as follows:

> In accordance with clause 14 of your contract of employment, from the date of this letter we require that you do not to attend work. You are currently not medically fit to do so but, in any event, we will not require you to attend work or carry out any work during your notice period. You should therefore refrain from attending any of our premises and hotels and (with the exception of members of your own family) refrain from contacting or dealing with any of our officers, employees, workers, consultants, customers, suppliers or other business contacts.

120. On 17th of January 2022 the claimant replied stating, amongst other things, "I clearly expressed during the grievance meeting that I lost my trust in you and unfortunately this feeling deepened during the last few months that's why I feel I have to communicate with you in writing only… I do believe I went to the formal grievance process and I do not want to go through this again. It was and still is extremely upsetting for me especially that this leads us to the point where we are now." The email also stated "My employment with the company ends 14.03.2022 and regardless of me attending work or not during termination period I should be treated like every other employee, instead you remove/suspended my hubbub account on 10.01.2022. This is very unfair treatment because every other employee leaving the company go access to their account till the last day of employment (for example to say goodbye to everyone on the last day). Prohibiting me from accessing my locker to be able to retrieve my belongings and forcing me to involve another employee to access my locker and return company property on my behalf without any valid reason is very unfair and humiliating. I do not understand why I have to return company property by the 31.01.2022" (p463).

121. We must determine what the reason for the dismissal of the claimant was. It is apparent that the claimant agrees with the respondent that she was refusing to communicate with its employees except in writing. The claimant also agrees that despite the fact that the respondent had asked her to go through the grievance process in an attempt to resolve her concerns, she was refusing to do so. The occupational health report makes clear that Ms Bonk was so driven by her belief that she had been wronged and the lack of faith in the management systems of the respondent that the practitioner could not identify any adjustments which would enable her to return to work in the foreseeable future and that if trust with the respondent was irrevocably broken then it was unlikely that Ms Bonk would return to work for the foreseeable future.

122. Ms Hill told us that she took account of the fact that she had had two very lengthy meetings with the claimant and in the course of those meetings she believed that progress was being made only for, sometime later, the claimant to return to the same points again and, in reality, things not to have progressed at all. Ms Hill could not see how anything could change. The evidence of Ms Hill is borne out by the contemporaneous evidence which shows that there were 2 very lengthy meetings with the claimant and that despite Ms Hill stressing that Ms Offord was willing to apologise for the events of 11 June 2021 and the respondent accepting that Ms Offord had not behaved appropriately, the claimant did not seem to be able to move beyond her sense

of grievance in that respect. We accept the evidence of Ms Hill. We find that she was being honest with the tribunal about her beliefs at the time.

123. In cross-examination, the claimant stated that she thought it was very unlikely that she could have returned to work and she could not see herself having done so in January, February or March 2022.

124. The claimant also accepted that when she had received the occupational health report she did not contact the respondent to try and identify a way forward or suggest meeting with senior management from outside of Lainston House or the new general manager. She explained, however, that was because the occupational health practitioner had discussed with her the possibility of resolving matters by those means and she had agreed that she was willing to do so. Thus she was expecting the respondent to contact her. She was not expecting to be dismissed without further discussions taking place. We find that the claimant's position in that respect was reasonable.

125. We are surprised that the respondent did not follow the recommendation of the occupational health practitioner. Whilst we can understand why Ms Hill might think that such a suggestion would prove fruitless in the long run, she could not be sure, at that time, that it would prove fruitless. She did not know what the claimant's position was as to that suggestion. In the pre-penultimate paragraph of the occupational health report, the practitioner states "if this trust can be restored Ms Bonk is likely to return to work following further mental health interventions…"; thus it appears that the occupational health practitioner thought that it was not impossible that trust could be restored.

126. Having said that, in the light of the claimant's evidence at this hearing, we are satisfied that it is so unlikely that the relationship could be restored that we can say that such a meeting would, ultimately, have proved fruitless. The claimant accepted that she could not have returned to work (at least in January, February and March 2022). The claimant was asked by the tribunal what she would have liked the procedure to be, following the 2nd occupational health report, and she replied "I don't know, I didn't expect to receive the termination letter, I expected to be contacted to have a chat about the occupational health report and if they suggested, may be separate ways or something, it was a shock for me." The claimant did not suggest that she would have sought to find a way to work with the respondent to restore the relationship. The claimant had been off work for a long time and the stage had been reached where the respondent could and would have concluded that it was time to deal with matters conclusively.

127. On the balance of probabilities, we find that arranging a meeting as suggested by the occupational health practitioner need not have taken long and at that meeting it would have been apparent that all trust and confidence between the claimant and respondent had been lost and there was no realistic possibility of it being restored. Dismissal would have taken place at, or immediately following that meeting. We conclude that following the process suggested by the occupational health practitioner would have meant a delay of 2 weeks before the claimant was dismissed.

128. Having received the claimant's email of 17 January 2022, Ms Morris replied stating, amongst other things, "the company reserves the right to remove or suspend access to Hubbub where it considers this appropriate/necessary. Your employment is ending due to a fundamental breakdown in trust and confidence, and it is considered appropriate and necessary to remove your access in light of those circumstances. With regard to the collection and return of property, please let me know if you anticipate having any difficulties with the date requested for return of items. Likewise we are able to arrange to have items in your locker returned to you at your home address by recorded delivery, if you prefer. " (Page 465)

129. We were told by Ms Hill that people working their notice period do not have access to hubbub cut-off. However, if a person is not being required to work their notice period, or it is believed that the person has issues with the employer (by which we understood she meant hostility towards their employer), access to hubbub can be cut off. It is a decision taken by the human resources manager on site at the hotel. We accept that evidence, it seems to us that it is a position of common sense.

130. Although we were not told expressly the reasons why the claimant's access to hubbub was disconnected or why she was told that she should not attend the respondent's premises, we do not think that the position taken by the respondent was either particularly surprising or particularly unusual. It was a natural consequence of the way in which matters had worked themselves out.

The Law

Unfair Dismissal

131. Section 98 Employment Rights Act 1996 provides that it is for the Respondent to show the reason for dismissal and that it is a potentially fair reason.

132. Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case".

133. It has been accepted in a number of cases that a breakdown in trust and confidence can amount to some other substantial reason for dismissing an employee and, therefore, be a potentially fair reason for dismissal (Ezsias v North Glamorgan NHS Trust [2011] IRLR 550, McFarlane v Relate Avon [2010] ICR 507). Both of those cases may be said to be cases where it was the conduct of the employee who had brought about the breakdown in trust and confidence but in Jefferson (Commercial) LLP v Westgate *EAT* KEAT/0128/12/SM, it was accepted, at least implicitly, that where an employee had lost trust and confidence in his or her employer that might be some other substantial reason of a kind justifying dismissal.

134. In Jefferson there are 2 passages which are particularly important to the facts of this case; the employment tribunal in Jefferson had decided that although there had been a breakdown of trust and confidence, the dismissal was procedurally unfair because the employer did not hold a meeting with the claimant prior to dismissal. The EAT stated:

> [24] The need for a further meeting and why a further meeting should be an essential aspect of fairness in the present case is, however, not spelt out by the tribunal. By using the words: "There was no further meeting, no further discussion and that cannot be a fair dismissal", the tribunal appears to be stating a proposition of law. If so it was wrong to do so. The law is contained in s 98(4). Section 98(4) does in[3] terms require a given or any procedure involving further meetings. That is not to say that in most contexts a decision would not be unfair if there were no such meetings. It is plain that what is unreasonable or reasonable may often depend upon such a meeting or meetings, but as we have already pointed out, all depends upon the particular circumstances of the case to which s 98 makes explicit reference.
>
> …
>
> [28] This was, therefore, simply a case in which there had been a recognised complete breakdown of trust and confidence between the parties. We cannot for ourselves see, and the tribunal does not say anything to enlighten us, what the purpose of having a further meeting in these particular circumstances would be; Mr Shaw cannot help. We would simply emphasise that s 98(4) has to be applied sensibly and with regard to the substance of the case. It should never result in a tribunal applying a standard approach to a case, certainly without considering whether that case fully and properly justifies such an approach. It invites the tribunal to consider the circumstances of each case, which inevitably differ

135. In respect of the compensatory award, s123 Employment Rights Act 1996 provides

> (1)Subject to the provisions of this section and sections … , the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

136. One circumstance in which the tribunal will reduce compensation is where the dismissal was unfair because the employer failed to take a procedural step, but had the employer taken that step the tribunal is satisfied that the claimant would have been dismissed in any event. The tribunal can reduce compensation by a percentage amount to reflect that there is a chance, rather than a certainty, that the dismissal would have taken place in any event.

[3] It appears that a "not" may have been missed out of the report.

Protected Disclosures

137. Section 47B Employment Rights Act 1996 deals with detriments on grounds of making protected disclosures and provides that:

a. A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

138. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Reasonable Belief

139. That test on belief in the public interest was set out the case of *Chesterton Global v Nuromohamed* where it was reiterated that the tribunal must ask

b. whether the worker believed at the time he was making the disclosure that it was in the public interest and,

c. if so, whether that belief was reasonable

140. More than one view may be reasonable as to whether something is in the public interest

141. Moreover an employee can attempt to justify the belief after the event by reference to matters which were not in his head at the time as long as he had a genuine belief at the time that the disclosure was in the public interest. That belief does not have to be the predominant motor.

Dismissal

142. Section 103A Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason, or the principal reason, for the dismissal is that the employee made a protected disclosure.

Detriment due to Protected Disclosure

143. *Royal Mail Group Ltd v Jhuti* held that if a person in the hierarchy of responsibility above the employee determines that she should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

144. That approach was clarified by the EAT in *Kong v Gulf EA-2020-000357-JOJ* where HHJ Auerbach noted "First, the general rule that the motivation that can be ascribed to the employer is only that of the decision-maker(s) continues to apply. Secondly, there is no warrant to extend the exceptions beyond the scenario described by Underhill LJ, which will itself be a relatively rare occurrence, and the surely highly unusual variation encountered in Jhuti. Thirdly, whether in the scenario contemplated by Underhill LJ, or in the variation described by Lord Wilson, two common features are that (a) the person whose motivation is attributed to the employer sought to procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case. A third essential feature is that their role or position be of the particular kind described in either scenario, so as to make it appropriate for their motivation to be attributed to the employer" (para 71).

145. In respect of a claim of detriment, Harvey on Industrial Relations states "The term 'detriment' is not defined in the ERA 1996 but it is a concept that is familiar throughout discrimination law … and it is submitted that the term should be construed in a consistent fashion. If this is the case then a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. In order to establish a detriment it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of". The same approach has been set out by the Court of Appeal in *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73 at paragraphs 27 to 28.

146. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"

147. In *Jesudasen* the Court of Appeal stated "Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which

caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B" (paragraph 31).

Burden of Proof- Detriment

148. Section 48(2) Employment Rights Act 1996 provides that 'it is for the employer to show the ground on which any act, or deliberate failure to act, was done'.

Victimisation

149. Section 27 of the Equality Act 2010 provides

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

150. In every case the tribunal has to determine the reason why the claimant was treated as he was (per Lord Nicholls in *Nagarajan v London Regional Transport)*.

151. In the case of *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls considered that the test (must be what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason?

152. In deciding whether the claimant was subjected to a detriment we have had regard to the decision in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 that, in respect of the definition of detriment,

> "As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522 g, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

> But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Brightman LJ. As he put it in Ministry of Defence v Jeremiah [1980] ICR 13, 30, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": Barclays Bank plc v Kapur (No 2) [1995] IRLR 87. But, contrary to the view that was expressed in Lord Chancellor v Coker [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. (Paragraph 34 to 35).

Disability Discrimination

Discrimination because of Something Arising from Disability

153. In respect of a claim for discrimination arising from disability, under section 15(1) of the Equality Act 2010 a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

154. Under section 15(2), this 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.

155. The proper approach to section 15 claims was considered by Simler P in the case of *Pnaiser v NHS England* at paragraph 31. She held:

> (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 s.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 s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.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, [2015] All ER (D) 284 (Feb) 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 s.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 26–34 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 s.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 s.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 s.13 and a discrimination arising from disability claim under s.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.

156. In *Private Medicine Intermediaries Ltd v Hodkinson*, HHJ Eady QC held

> **[24]** The protection afforded by s 15 applies where the employee is treated "unfavourably". It does not necessitate the kind of comparison required by the use of the term "less favourable treatment" as in other forms of direct discrimination protection; neither is it to be understood as being the same as "detriment". "Unfavourable treatment" suggests the placing of a hurdle in front of, or creating a particular difficulty or disadvantage for, a person because of something arising in consequence of their disability. It will be for an ET to assess, but treatment that is *advantageous* will not be unfavourable merely because it might have been *more* advantageous.

Justification

157. In *Dr J Ali v Drs Torrosian, Lechi, Ebeid & Doshi t/a Bedford Hill Family Practice* Appeal No. UKEAT/0029/18/JOJ, HHJ Eady QC helpfully summarised the principles in relation to justification as follows.

> 15. Section 15(1)(b) thus allows that the unfavourable treatment relevantly identified for the purposes of section 15(1)(a) - here, the Claimant's dismissal - might be justified if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question has to be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (see *Chief Constable of West Yorkshire Police & Another v Homer* [2012] ICR 704 SC , and *Allonby v Accrington & Rossendale College & Other*s [2001] ICR 1189 CA).
>
> 16. Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (see Ojutiku v Manpower Services Commission [1982] ICR 661 CA per Stephenson LJ at page 674B-C, Land Registry v Houghton & Others UKEAT/0149/14 at paragraphs 8 and 9, and Hensman

v Ministry of Defence UKEAT/0067/14 at paragraphs 41, 42 and 44).

17. It is, further, common ground that when determining whether or not a measure is proportionate it will be relevant for the ET to consider whether or not any lesser measure might nevertheless have served the employer's legitimate aim (see the EAT's judgment in Naeem v Secretary of State for Justice [2014] ICR 472).

18. More specifically, the case law acknowledges that it will be for the ET to undertake a fair and detailed assessment of the working practices and business considerations involved, and to have regard to the business needs of the employer (see Hensman at paragraph 44). In that context, the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence will, no doubt, be a significant element in the balance that will determine the point at which their dismissal becomes justified, albeit, the evidence that may be required in this respect will be primarily a matter for the ET (see per Underhill LJ at paragraph 45 of O'Brien v Bolton St Catherine's Academy [2017] ICR 737 CA).

19. In O'Brien , a particular concern was raised as to what was said to have been the conflation by the ET in that case of the test applicable under section 15 of the EqA and that in the unfair dismissal claim, brought under section 98 of the Employment Rights Act 1996 ("ERA"). As Underhill LJ acknowledged in O'Brien , in carrying out the assessment required for the purposes of section 15 EqA , the ET is applying a different legal test to that arising in the context of an unfair dismissal claim under section 98 ERA . That said, Underhill LJ went on to deprecate the introduction of additional complexity where the substantive assessment is likely to be the same. Specifically, as he identified, where an ET is concerned with both such claims in the context of a dismissal for long-term sickness absence, the factors that are relevant for its determination of one claim are likely to be substantially the same as those to be weighed in the other (see paragraphs 53 to 55 of O'Brien).

20. As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied (see Trustees of Swansea University Pension and Assurance Scheme v Williams [2015] ICR 1197 EAT at paragraph 42). When the putative discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification (see Ministry of Justice v O'Brien [2013] UKSC 6 , see in particular

the judgment of the Court at paragraph 48; although the test remains an objective one, see O'Brien at paragraph 47).

Reasonable adjustments

158. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the Equality Act 2010.

159. Section 20 of the Equality Act 2010 provides in respect of the duty to make reasonable adjustments as follows:

'(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage

160. Paragraph 20 of Schedule 8 to the Equality Act 2010 provides

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) …

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

161. In *Environment Agency v Rowan* [2008] IRLR 20, the EAT gave guidance on how an employment tribunal should act when considering a claim of failure to make reasonable adjustments. The tribunal must identify:

"(*a*) the provision, criterion or practice applied by or on behalf of an employer, or;

(*b*) the physical feature of premises occupied by the employer;

(*c*) the identity of non-disabled comparators (where appropriate); and

(*d*) the nature and extent of the substantial disadvantage suffered by the claimant'.'

162. In respect of a provision criterion or practice in the case of *Ishola v Transport for London [2020] ICR 1204* the Court of Appeal held "however widely and purposively the concept was to be interpreted, it did not apply to every act of unfair treatment of a particular employee, as that was not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments was intended to address; that, in context, all three words carried the connotation of a state of affairs indicating how similar cases

were generally treated or how a similar case would be treated if it occurred again" (taken from the head note)The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1).

Harassment

163. The definition of harassment is found in section 26 of the Equality Act 2010. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

General Provisions under the Equality Act 2010

164. Some parts of the Equality Act 2010 apply to more than one type of discrimination. They include the following sections:

39 Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B) -

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

Burden of Proof

165. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

166. In *Madarassy v Nomura International plc* [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate 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.
>
> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

Time Limits

167. In respect of the Equality Act 2010, section 123 provides

> (1) [Subject to [sections 140A and 140B],] 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

168. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* UKEAT/0305/13 *(18 February 2014, unreported)*, the EAT stated "Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298 at para 25, [2010] IRLR 327, per Sedley LJ) a tribunal cannot hear a complaint unless the applicant convinces it that it is just

and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per Auld LJ in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, [2003] IRLR 434 (CA)). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was." (para 52).

169. In *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327, Sedley LJ stated : 'there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised' (para 31). In commenting on the case of *Robertson v Bexley Community Centre* [2003] IRLR 434, Wall LJ stated "it is, in essence, an elegant repetition of well-established principles relating to the exercise of a judicial discretion. What the case does, in my judgment, is to emphasise the wide discretion which the ET has – see the dictum of Gibson LJ cited above – and articulate the limited basis upon which the EAT and the court can interfere. Similarly, *DCA v Jones* [2008] IRLR 128 approves the *Keeble* guidelines, but emphasises that they are fact/case specific – see per Pill LJ at paragraph 50" (para 25).

170. In *Olufunso Adedeji v University Hospitals Birmingham Nhs Foundation Trust [2021] EWCA Civ 23* , Underhill LJ stated "It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.

Conclusions

171. Generally, we give our conclusions by reference to the list of issues, we will give our conclusions in the same order as the issues appear except that we will return to deal with questions of time at the end of the issues on liability.

Unfair dismissal

2.2 What was the reason for dismissal

172. We find that the reason for the dismissal was the genuinely held belief of Ms Hill that the relationship between the claimant and the respondent had irretrievably broken down because the claimant had lost all confidence in the respondent's employees and it was unlikely that relationship could be restored.

173. Such a breakdown may, we find, fall within the category of some other substantial reason for dismissing somebody and, thereby, a potentially fair reason for dismissal.

174. We take the next 2 issues in a different order to that in the List of Issues

2.4 Did the Respondent adopt a fair procedure?

175. We follow the law as set down in *Jefferson v Westgate* and note that section 98(4) Employment Rights Act 1996 does not require any procedure involving meetings. We note, also, that everything depends upon the particular circumstances of the case.

176. We consider that, in this case, even in circumstances where there had been a complete breakdown of trust and confidence between the parties, there was a purpose in having a further meeting. The meeting had been suggested by the occupational health practitioner and that suggestion carries the further suggestion that there was a possibility that such a meeting could restore the trust and confidence. The claimant was a long serving employee and the respondent knew that she had significant health conditions. Ms Hill was not in a position to definitively conclude that such a meeting would be fruitless (although we accept that she believed it would be). She had not asked the claimant whether she would be willing to engage in such a meeting and she could not know what a previously uninvolved person of the type recommended by the occupational health practitioner might be able to bring to the process. Although we have concluded that, ultimately, we do not believe that the process would have been successful, that is not to say that at the time when the decision to dismiss was made the position was so hopeless that Ms Hill could simply dispense with the suggestion of the occupational health practitioner.

177. In those circumstances we do not think that there was a fair procedure. Putting the matter another way (and in terms of section 98(4) of the Employment Rights Act 1996) in the circumstances, including the fact that the respondent was part of a larger group of hotels with access to significant resources, the employer acted unreasonably in treating the breakdown of trust and confidence as a sufficient reason for dismissing the claimant without having one further meeting with her in an attempt to explore the suggestion advanced by the occupational health physician.

2.3 Was the decision to dismiss a fair sanction?

178. If the trust and confidence had broken down as Ms Hill believed, the decision to dismiss was within the range of reasonable responses. There was no realistic possibility that giving the claimant a warning would cause things to improve and, in any event, this was not a misconduct case. In circumstances where Ms Hill genuinely believed that the relationship of trust and confidence could not be restored, dismissal was within the range of reasonable responses.

2.5 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

179. For the reasons we have given, we are satisfied that the claimant would have been dismissed even if that further meeting had taken place. However, we consider it would have taken 2 weeks for the respondent to go convene the extra meeting and decide that the position was truly hopeless. Thus the claimant has suffered a loss of 2 week's employment as a result of the dismissal. We are satisfied that the compensatory award should, after that two-week period, be reduced to nil to reflect the fact that the claimant would have been dismissed in any event.

3. Protected disclosure ('whistle blowing')

3.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

180. Given the concessions made by the respondent at paragraph 5.1 of its closing submissions, and given further our finding that the claimant's belief that there was a risk to the health and safety of guests was reasonable we find that the claimant did make qualifying disclosures in December 2020 and on 18 May 2021. For the purposes of clarity, and in case it is in dispute, we accept that when the claimant made her disclosures she believed that she was acting in the public interest because she was concerned the hotel guests were not being properly protected from the risks of coronavirus and that belief was reasonable

181. In those circumstances we do not need to address issues 3.1.1 - 3.1.6.

182. The respondent conceded that the disclosure was made to the claimant's employer.

Dismissal (Employment Rights Act s. 103A)

4.1 Was the making of any proven protected disclosure the principal reason for the Claimant's dismissal?

4.2.1 Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosures?

183. Given the way in which the respondent responded to the claimant's concerns, which was positive and responsive (at least by May 2021) we do not believe that the claimant has produced any evidence to raise the question of whether the reason for the dismissal was the protected disclosures. There is

simply no evidence that anybody was unhappy as a result of the disclosures or that anybody was motivated by the disclosures in the way they behaved with the claimant. The claimant has pointed to no evidence to suggest that Ms Hill was either aware of those disclosures or was acting because of them.

4.2.2 Has the Respondent proved its reason for the dismissal, namely some other substantial reason?

184. We are entirely satisfied that the sole reason for the claimant's dismissal was Ms Hill's genuine belief that the relationship between the claimant and the respondent had irrevocably broken down.

Detriment (Employment Rights Act 1996 section 47B)

5.1 Did the Respondent do the following things:

5.1.1 Give five of her colleagues weekend shifts between 26 December 2020 and 12 May 2021 but not the Claimant?

185. At paragraph 5.4 of the respondent's closing submissions, the respondent concedes that the claimant was not given as many weekend shifts as some of her colleagues. That is accurate having regard to the statistics which we have set out above. Having said that, it is not a correct to say that the claimant was not given any shifts during the relevant period.

5.2 By doing so, did it subject the Claimant to detriment?

186. We find that the claimant was subjected to a detriment by being given fewer shifts than her colleagues. When she was working a shift she would have been paid 100% of her salary, when she was not working a shift she was on furlough and therefore only paid 80% of her salary.

187. Moreover, a reasonable employee would have a sense of grievance if colleagues were being treated preferentially to them in the way that shifts were allocated.

188. Thus the claimant was subjected to a detriment by being given less shifts than her colleagues.

5.3 If so, was it done on the ground that they had made the verbal protected disclosures as set out above?

189. As we have set out above, the claimant was given fewer shifts initially because the shifts which were being worked took place at weekends and the claimant did not work on weekends. We are satisfied that was the only reason why the claimant was not initially given shifts in the lockdown period between 26 December 2020 and May 2021. Thereafter, the claimant was given shifts but only when she had completed the lone working training.

190. We have reminded ourselves that it is for the respondent to prove the reason for the action said to amount to a detriment pursuant to section 48(2) Employment Rights Act 1996

191. We are satisfied that the reason why the claimant was given fewer shifts was not because she had made protected disclosures but for the reasons set out above.

7 Discrimination arising from disability (Equality Act 2010 section 15)

7.1 Did the Respondent treat the Claimant unfavourably by:

7.1.1 six of her colleagues being given shifts between 1 November and 2 December 2020 when she was not?

192. The claimant did not work in the period between 1 November 2020 and 30 November 2020. Although she did work on the 1 December 2020 and thereafter, it was agreed by all parties that the 2nd lockdown had come to an end by the shift on 1 December 2020 and therefore most of the relevant members of staff worked on that day.

193. As we have set out above it is the case that other staff were given shifts when the claimant was not.

7.1.2 Five of her colleagues being given weekend shifts between 26 December 2020 and 12 May 2021 when she was not

194. As we have already set out, in connection with the claim of detriment because of making a protected disclosure, the claimant had fewer shifts than, at least some of, her colleagues in the period between 26 December 2020 and 12 May 2021. In its closing submissions the respondent accepted that.

7.2 Did the following thing arise in consequence of the Claimant's disability? The Claimant's case is that her ability to clean multiple rooms was reduced by her disability.

195. The fact that the claimant worked slowly was given by Ms Amarowicz as a reason why she was not given shifts in the lockdown in November 2020. In those circumstances it seems to us to be likely that the claimant's work was slower than that of her colleagues.

196. The respondent did not challenge the statement in the claimant's Disability Impact Statement, cited above, which sets out why it takes the claimant longer to do things than usual (see page 63). That evidence, taken with the statement by Ms Amarowicz, leads us to the conclusion that the claimant's ability to clean multiple rooms was reduced and that reduction was because of her endogenous depression.

7.3 Was the unfavourable treatment because of that thing?

197. We must address each period of lockdown separately.

198. In respect of the lockdown in November 2020, given the witness statement of Ms Amarowicz that it was in part because of the speed at which she would work that she was not given shifts in November 2020 it seems more likely than not that, at least in part, the reason why the claimant was not given shifts in November 2020 was because of something arising from her disability. We note that Ms Amarowicz also says that the claimant had not previously

worked weekend shifts, but looking at the shifts done by the claimant's colleagues in the November 2020 period, the shifts were not always done at weekends.

199. We find that the claimant's disability influenced the decision not to offer her shifts in the November 2020 lockdown, certainly to a degree more than trivial.

200. However we find that the position is different in relation to the lockdown period between December 26 and 12 May 2021. In that period there is clear evidence that Ms Amarowicz was seeking to give the claimant shifts at weekends, notwithstanding that Ms Amarowicz believed she worked more slowly. There is no evidence that, in that period, the respondent offered the claimant fewer shifts than it would otherwise have done because she was slow. Our view in relation to that period is that the claimant was overlooked, initially, because she had not worked weekends but once Ms Amarowicz thought about offering the claimant shifts, there is no evidence that she took account of the claimant's speed.

7.4 & 7.5 Was the treatment a proportionate means of achieving a legitimate aim?

201. We have been presented with no evidence as to why the operational requirements of the housekeeping department meant that the claimant could not be called upon to do shifts in the second (November 2020) lockdown period when the respondent had not sought to address her working speed prior to that. We were not told that there were particular deadlines or cost constraints which applied at that time. Moreover, given that the claimant's speed was not a factor in relation to the 3rd lockdown period (December to May 2021) it is difficult to see how the claimant's speed was a relevant factor in November 2020. It may be that the respondent had to work to particular deadlines or was concerned about particular costs, however we were not told about that. Thus we are not satisfied that that was a legitimate aim of the respondent.

202. The other aim advanced as a justification for not calling the claimant in November 2020 is that shifts should be allocated to various staff to maximise operational efficiency. If that were a genuine aim then it is difficult to see why the claimant was not given shifts. If the idea was to allocate shifts to various staff to maximise operational efficiency then one would expect shifts to be allocated to the claimant. Again we are not satisfied that this was a legitimate aim of the respondent.

203. Given that the respondent has not satisfied is that it had a legitimate aim in this respect it is not necessary for us to consider issue 7.5.

7.6 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

204. In correspondence dated 29 March 2022 the respondent wrote to the tribunal and the claimant stating "the Respondent accepts that it had knowledge that the Claimant was disabled as a result of her endogenous depression from 21 January 2019, when the report from the Claimant's first Occupational Health assessment was provided to the Respondent."

205. Thus, the answer to this issue is that the respondent did know that the claimant was disabled from January 2019 and, therefore, at the material time, being November 2020.

206. Thus, subject to the question of time, the claim of discrimination because of something arising from a disability would succeed in respect of the failure to give the claimant shifts in November 2020.

8. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

8.1 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

207. Again, the answer is that the respondent knew from January 2019.

8.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

8.2.1 Requiring more than three rooms or the equivalent of three full rooms to be cleaned a day in addition to ancillary cleaning, such as public toilets;

208. The evidence is that during the coronavirus period when the hotel was occupied (from August 2020 onwards) the claimant was assigned more than the equivalent of 3 full rooms to be cleaned a day and, as we set out above, there would have been days when the claimant ended up cleaning more than the equivalent of 3 rooms on a full-service basis. We find that amounted to a practice of the respondent since it was not a one-off occurrence, even though it was not a daily occurrence.

8.3 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was unable to clean more than three rooms or the equivalent of three full rooms a day in addition to ancillary cleaning, such as public toilets?

209. We find that the claimant was put at a disadvantage. Although the claimant was never disciplined if she did not complete more than 3 rooms a day and although she was able to leave work on time, we find that the claimant did feel anxious when she was allocated a large number of rooms and ended up cleaning more than 3 and that was a substantial disadvantage to her.

8.4 Did the Respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

210. We find that the respondent did not know that the claimant was placed at the disadvantage. It had understood that the agreement in relation to the number of rooms to be cleaned was because of the claimant's shorter shift. The claimant did not explain to the occupational health physician about the difficulties she had with checking etc. and does not appear to have needed to tell her managers. We find that she did not do so.

211. We have considered whether it could be said that the respondent ought to have known of the disadvantage. The claimant did not put her case in this way but in the course of deliberations we have considered the claimant's emails

of 22 November 2020 in which the claimant states that she hopes for some action to accommodate and respect arrangements made at the occupational health meeting (p144) and 30 November 2020 which states “you know I got mental health issues for very long time and that I’m under equality and diversity act…” (p137 sic). This could provide the foundation for an argument that if the respondent had investigated further then, it would have found out about the disadvantage.

212. The difficulty is that the claimant’s case was not put to the respondent or the tribunal on the basis that the respondent should have carried out more enquiries and, if it had done, it would have discovered the disadvantage that the claimant was at. That is not the case which was presented in the claimant’s witness statement, nor were any of the respondent’s witnesses asked about it. We do not feel able to speculate about what would have happened if the respondent had asked the claimant questions following those emails.

213. Given our conclusions on this point we do not need to consider issues 8.5 - 8.7.

9. Harassment related to disability (Equality Act 2010 s. 26)

9.1 Did the Respondent do the following things:

9.1.1 Ms Offord at a back to work meeting on the 11 June 2021 say to the Claimant that she is the employee with the thickest files?

214. We have found that Ms Offord did not say that the claimant was the employee with thickest file, although she did refer to the claimant’s file being a thick file.

9.1.2 At the same meeting call the Claimant’s GP practice without her permission?

215. The claimant did not give permission to Ms Offord to call her GP’s practice.

9.2 If so, was that unwanted conduct?

216. We find that the call by Ms Offord to her GP’s practice was unwanted, that is why the claimant reacted as strongly as she did.

Did it relate to the Claimant’s protected characteristic, namely disability?

217. For the reasons which we have given we do not think that the conduct was related to disability, the conduct was related to the claimant’s absence due to her hand injury and the fact that the claimant was saying that her hand injury had not yet fully recovered.

218. In those circumstances the claim of harassment related to disability fails and it is not necessary for us to consider issues 9.4 and 9.5.

10. Victimisation (Equality Act 2010 s. 27)

10.1 Did the Claimant do a protected act as follows: 10.1.1 Make this claim to the Employment Tribunal;

219. It is not in dispute that the claimant made a claim to the tribunal which has led to this hearing or that the claim amounted to a protected act.

10.2 Did the Respondent do the following things: 10.2.1 Dismiss the Claimant;

220. Again, it is not in dispute that the claimant was dismissed.

221. Dealing with issue 10.3, it is also not disputed that dismissing the claimant was subjecting her to a detriment.

10.4 If so, was it because the Claimant had done the protected act?

222. In considering this point we must take account of the proximity between the claimant telling the respondent that she had issued proceedings and the requirement by the respondent that the claimant went to see occupational health. There was only a two-day period between those 2 events being the delay between the 11th and 13 October 2021.

223. However, we have also taken account of the fact that the claimant had been threatening the respondent with legal proceedings since November 2020 but she does not suggest that she was treated detrimentally as a result and there is no evidence that she was subjected to a detriment.

224. We also take into account that, by October 2021, the respondent was faced with an employee who had been off work for a lengthy period of time and whilst the email of 11 October 2021 might have been a trigger for the respondent to start to take the claimant's absence more seriously, that does not mean that her dismissal was influenced by the fact that the claimant had issued proceedings.

225. The email of 13 October 2021 to the claimant asking her to see an occupational health practitioner reminded the claimant that she had been asked to raise a formal grievance in respect of matters which she felt were preventing her from moving forward and returning to her duties and stated that the occupational health process did not prevent the claimant from raising a formal grievance and she was encouraged to do so.

226. Having considered the evidence from the time and heard from Ms Hill, we accept that she was motivated by her belief that the relationship between the claimant and the respondent had wholly broken down. She was faced with the claimant who, both parties agree, would only communicate with the respondent in writing and who would not go through the grievance process. Whilst the fact that the claimant issued proceedings in October 2021 was part of the factual background to the decision to dismiss the claimant in January 2022, we do not find that it was more than a trivial influence on Ms Hill's decision.

11. Part-time workers Regulations 2000

227. As we have indicated, the claimant abandoned her claims under the Part Time Workers Regulations 2000 except for allegation 11.1.3

11.1 Was the Claimant treated less favourably than a comparable full-time worker by:

1.1.3 Offering promotion to the Claimant's colleague a few days after the meeting on 24 August 2021

228. There is no dispute that one of the claimant's colleagues was promoted to a supervisor role shortly after the meeting on 24 August 2021. The role was advertised in order to replace Ms Amarowicz who had become Deputy Head Housekeeper.

229. There is also no dispute that the claimant did not apply for the role, nor did she speak to anyone at the time about having any interest in the role (although she had expressed an interest in a supervisor role in the past).

230. In circumstances where the claimant did not apply for the job it is difficult to see how offering the promotion to one of her colleagues can be less favourable treatment of the claimant. However, even if it can be said that the claimant was treated less favourably than a colleague, the claimant cannot show any evidence that she was treated less favourably because she was a part-time worker. The claimant did not apply for the role and therefore was not promoted to the role. That situation was nothing to do with the fact that the claimant was a part-time worker.

231. In the course of the hearing the claimant appeared to suggest that she was disadvantaged because all of the more senior roles were full-time roles and she was a part-time worker. However, even then, she did not suggest that she would not have been appointed to a full-time role because she was applying as a part-time worker. Although the claimant might have argued (although, in fact, she did not) that she could not apply for a full-time role, that does not mean that she was discriminated against as a part-time worker.

232. This claim therefore fails.

Time limits

233. The question of time only arises in relation to the claim of discrimination because of something arising from dismissal in relation to the failure to provide the claimant with shifts during November 2020.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

234. The claim was not made within that period, the claim was presented to the tribunal on 10 October 2021, some 11 months after the action complained of.

1.2.2 If not, was there conduct extending over a period?

235. The only conduct extending over a period was the failure to give shifts to the claimant in November 2020. That conduct extended only to 30 November 2020 (the claimant being back at work on 1 December 2020). Thus time begins to run from 30 November 2020.

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

236. At risk of repetition, the claim was not presented until 11 months after the end of the period.

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

237. The claimant has given no explanation as to why the complaints were not made in time and it is apparent that she was well aware of the ability to bring proceedings since she was threatening to do so in her correspondence from November 2020.

238. There is no suggestion that the claimant was unable to present a claim before she did due to ill health or for any other reason.

239. The respondent has not suggested that it is in any way prejudiced by the late presentation of the claims in the sense that it has not been able to defend the claim made against it because of the passage of time.

240. We must consider all of the relevant factors, which we consider to be those we have set out above,.

241. We conclude that the lack of any satisfactory explanation for why the claim was not presented in time and the considerable delay (when seen against the short time period which Parliament has given for the presentation of such claims) outweigh the lack of prejudice to the respondent and, in all the circumstances, we do not consider it just deductible to extend time for presentation of the claim.

Overall conclusions

242. The above conclusions section of this judgment has been lengthy and in an attempt to assist the parties we summarise the conclusions further as follows:

a. The claimant was unfairly dismissed by the respondent because it did not follow the occupational health practitioner's suggestion of having a further meeting with her before deciding whether the relationship of trust and confidence could be restored. However, had such a meeting taken place the only way in which the outcome would have been different is that the dismissal of the claimant would have been delayed by 2 weeks.

b. The claims based on the making of a protected disclosure fail because although the claimant did make protected disclosures, she was not dismissed for that reason nor was she subjected to a detriment for that reason. That claim, therefore, fails.

c. The claim of discrimination because of something arising from disability would have succeeded in relation to the failure by the respondent to give the claimant shifts in November 2020, if the claim had been presented in time. However the claim was presented 11 months after it arose and it is not just and equitable to extend the period for the presentation of the claim. That claim, therefore, fails.

d. The claim of discrimination because of something arising from disability in relation to the shifts between 26 December 2020 and 11 May 2021 fails because the reason for the claimant not being given many shifts in that period was not because of her slow speed.

e. The claim of failure to make reasonable adjustments fails because the respondent did not know and did not ought to have known that the disability of the claimant put her at a disadvantage because she was not able to work quickly.

f. The claim of victimisation of fails because the fact that the claimant had issued proceedings was not more than a trivial influence on the decision of Ms Hill to dismiss her.

g. The claim under the Part-Time Workers Regulations fails because the reason that the claimant's colleague was offered a promotion to the role of supervisor was nothing to do with the claimants part-time worker status.

243. It is hoped that the parties will be able to agree the remedy in respect of unfair dismissal given that it is likely that any compensation will be limited to the basic award and the loss of earnings which the claimant has suffered in the two-week period which would have taken the respondent to implement the occupational health practitioner's advice. We stress, however, that is a provisional view on which we have not heard submissions. There may be reasons why the claimant seeks a greater level of compensation or why the respondent says the compensation should be less. Those matters will be considered at the remedy hearing.

Employment Judge Dawson
Date: 8 March 2023

Judgment sent to the Parties: 20 March 2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

APPENDIX

LIST OF ISSUES

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

1.2 Were the discrimination complaints made within the time limit in section

123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1 The Claimant has been dismissed with notice with an effective date of termination of 14 March 2022.

2.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to some other substantial reason, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996. The Claimant disputes this reason.

2.3 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

2.4 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure by asserting that no procedure was followed.

2.5 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

3. Protected disclosure ('whistle blowing')

3.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1 What did the Claimant say or write? When? To whom? The Claimant says they made disclosures on these occasions:

3.1.1.1 Verbally in the beginning of December 2020 to Ms Russell and verbally, also in the beginning of December 2020, to Ms Amarowicz saying that there was a breach of the COVID measures risk assessment by requiring cups and glasses to be cleaned in the rooms and the touch pads not being cleaned frequently enough.

3.1.1.2 in writing (by email dated 18 May 2021) to Mr Morris saying that there was a breach of the COVID measures risk assessment by requiring cups to be cleaned in the rooms.

3.1.2 Were the disclosures of 'information'?

3.1.3 Did they believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 Did they believe it tended to show that:

3.1.5.1 the health or safety of any individual had been, was being or was likely to be endangered;

3.1.6 Was that belief reasonable?

3.2 If the Claimant made a qualifying disclosure, was it a protected disclosure because it was made to;

3.2.1 the Claimant's employer?

4. Dismissal (Employment Rights Act s. 103A)

4.1 Was the making of any proven protected disclosure the principal reason for the Claimant's dismissal?

4.2 The Claimant did have two years' service and the questions which the Tribunal will have to address are:

4.2.1 Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosures?

4.2.2 Has the Respondent proved its reason for the dismissal, namely some other substantial reason?

4.2.3 If not, does the Tribunal accept the reason put forward by the Claimant or does it decide that there was a different reason for the dismissal?

5. Detriment (Employment Rights Act 1996 section 47B)

5.1 Did the Respondent do the following things:

5.1.1 Give five of her colleagues weekend shifts between 26 December 2020 and 12 May 2021 but not the Claimant.

5.2 By doing so, did it subject the Claimant to detriment?

5.3 If so, was it done on the ground that they had made the verbal protected disclosures as set out above?

6. Disability

6.1 The Respondent accepts that the Claimant is disabled by reason of her Endogenous Depression and that it had knowledge from 21st of January 2019

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

7.1 Did the Respondent treat the Claimant unfavourably by:

7.1.1 six of her colleagues being given shifts between 1 November and 2 December 2020 when she was not;

7.1.2 five of her colleagues being given weekend shifts between 26 December 2020 and 12 May 2021 when she was not;

7.2 Did the following thing arise in consequence of the Claimant's disability? The Claimant's case is that her ability to clean multiple rooms was reduced by her disability.

7.3 Was the unfavourable treatment because of that thing?

7.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent will clarify its position on this in its amended response.

7.5 The Tribunal will decide in particular:

7.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

7.5.2 Could something less discriminatory have been done instead;

7.5.3 How should the needs of the Claimant and the Respondent be balanced?

7.6 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

8. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

8.1 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

8.2 A "PCP" is a provision, criterion or practice. Did the Respondent have

the following PCPs:

8.2.1 Requiring more than three rooms or the equivalent of three full rooms to be cleaned a day in addition to ancillary cleaning, such as public toilets;

8.3 Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was unable to clean more than three rooms or the equivalent of three full rooms a day in addition to ancillary cleaning, such as public toilets?

8.4 Did the Respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

8.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

8.5.1 Limiting the Claimant's duties to cleaning three rooms or the equivalent of three full rooms a day in addition to ancillary cleaning, such as public toilets;

8.6 Was it reasonable for the Respondent to have to take those steps and when?

8.7 Did the Respondent fail to take those steps?

9. Harassment related to disability (Equality Act 2010 s. 26)

9.1 Did the Respondent do the following things:

9.1.1 Ms Offord at a back to work meeting on the 11 June 2021 say to the Claimant that she is the employee with the thickest files; and

9.1.2 At the same meeting call the Claimant's GP practice without her permission.

9.2 If so, was that unwanted conduct?

9.3 Did it relate to the Claimant's protected characteristic, namely disability?

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

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

10. Victimisation (Equality Act 2010 s. 27)

10.1 Did the Claimant do a protected act as follows:

10.1.1 Make this claim to the Employment Tribunal;

10.2 Did the Respondent do the following things:

10.2.1 Dismiss the Claimant

10.2.2 On 10 January 2022 cut her off from HUBBUB thereby preventing her from saying goodbye to colleagues; and

10.2.3; on 10 January 2022 not permitting her to enter hotel grounds

10.3 By doing so, did the Respondent subject the Claimant to detriment?

10.4 If so, was it because the Claimant had done the protected act?

11. Part-time workers Regulations 2000

11.1 Was the Claimant treated less favourably than a comparable full-time worker by:

1.1.1 six of her colleagues being given shifts between 1 November and 2 December 2020 when she was not;

11.1.2 five of her colleagues being given weekend shifts between 26 December 2020 and 12 May 2021 when she was not;

11.1.3 Offering promotion to the Claimant's colleague a few days after he meeting on 24 August 2021.

11.2 Was the treatment alleged above on the ground that the Claimant was a part time worker?

11.3 Can the Respondent objectively justify the alleged treatment?

12. Remedy

Unfair dismissal

12.1 The Claimant does not wish to be reinstated and/or re-engaged.

12.2 What basic award is payable to the Claimant, if any?

12.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

12.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

12.4.1 What financial losses has the dismissal caused the Claimant?

12.4.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

12.4.3 If not, for what period of loss should the Claimant be compensated?

12.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

12.4.5 If so, should the Claimant's compensation be reduced? By how much?

12.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

12.4.7 If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce their compensatory award? By what proportion?

<u>Detriment (s. 47B)</u>

12.5 What financial losses has the detrimental treatment caused the Claimant?

12.6 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

12.7 If not, for what period of loss should the Claimant be compensated?

12.8 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

12.9 Is it just and equitable to award the Claimant other compensation?

12.10 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

12.11 Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and equitable to reduce the claimant's compensation? By what proportion?

12.12 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

<u>Discrimination or victimisation</u>

12.13 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

12.14 What financial losses has the discrimination caused the Claimant?

12.15 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

12.16 If not, for what period of loss should the Claimant be compensated for?

12.17 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

12.18 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

12.19 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

12.20 Should interest be awarded? How much?