EMPLOYMENT TRIBUNALS

Claimant:	**Lorraine Gordon**
Respondent:	**Student Loans Company Limited**
Heard at:	**Newcastle Employment Tribunal (remotely by CVP)**
On:	**16th, 17th, 18th, 19th January 2023 (deliberations 2nd March 2023)**
Before:	**Employment Judge Sweeney** **Brenda Kirby** **Kenneth Smith**

Representation

Claimant:	**Mr D Taylor, lay representative**
Respondent:	**Mr K Scott, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

(1) The complaint of unfair dismissal is well founded and succeeds.

(2) The Claimant contributed towards her own dismissal and the basic and compensatory awards are reduced by 40%.

(3) The complaint of disability discrimination by way of failure to make reasonable adjustments is not well founded and is dismissed.

(4) The complaint of unfavourable treatment because of something arising in consequence of disability is not well founded and is dismissed.

REASONS

The claims

1. By a Claim Form presented on **15 June 2020**, the Claimant brought a number of complaints which, at a preliminary hearing on **08 September 2020** (**'the PH'**), were agreed and identified as follows:

   a) Unfair dismissal

   b) Discrimination because of something arising in consequence of disability: section 15 Equality Act 2010 **('EqA'**)

   c) Discrimination by way of failure to make reasonable adjustments: sections 20-21 **EqA**

2. At the **PH**, Employment Judge Martin, among other things, ordered the Claimant to provide further information regarding the complaint of failure to make reasonable adjustments and gave directions for the provision of a medical report to address how the symptoms of the Claimant's disability were manifested. She also directed the parties to agree a list of the legal and factual issues in the case. At the time, it was envisaged that the medical evidence was to be obtained in support of the Claimant's case that her alleged behaviour was in consequence of her disability. On **12 December 2020**, the Claimant wrote to the Tribunal to say that she was unable to obtain a report from her counsellor on the subject of manifestation. She asked for time to find an alternative source to provide such a report. She was granted an extension of time in which to do so. Later, on **20 November 2020**, the Claimant again wrote to say that she was unable to locate a suitably qualified person to provide such a report. She asked for a variation of the orders and that the parties agree a joint expert. The Respondent did not agree. Judge Martin refused the application to vary the order and for the appointment of a joint expert. She gave the Claimant a further extension of time to **23 December 2020** in order to obtain a report. On **10 December 2023**, the Claimant wrote to the Tribunal to say that she would aim to provide a report from a psychologist or psychiatrist. In the end, she provided a letter from her GP, which was at **page 90** of the bundle.

The Final Hearing

3. The parties had prepared an agreed bundle of documents consisting of 588 pages. The further information ordered by Judge Martin ('the further particulars') was at **pages 54-58** and the agreed issues were at **pages 72-73**. The Tribunal was assisted in this case by an agreed cast list and chronology.

4. At the outset of the hearing, the Tribunal discussed the issues with the parties. Those issues are set out in the Appendix at the end of these written reasons. As regards the complaint under section 15 Equality Act 2010, Mr Taylor explained that the Claimant was relying primarily on her mental health disability but also her physical disability as treated by powerful medication. Mr Taylor confirmed that the unfavourable treatment complained of was dismissal. As

regards the complaint of failure to make reasonable adjustments, on discussion, Mr Taylor confirmed that two PCPs were relied on:

PCP 1

a) The first PCP was the requirement that the Claimant maintain a certain level of attendance at work in order to avoid the risk of disciplinary sanctions under the attendance management policy and procedure.

b) This put the Claimant to a substantial disadvantage in that the Claimant's disability increased the likelihood of sickness absence which made it more difficult for her to comply with the PCP than her non-disabled peers, thus increasing the likelihood of warnings under the attendance management procedure and/or dismissal.

c) As a reasonable adjustment, the Respondent ought to have made a proportionate adjustment of the trigger points by increasing the number of periods of absence and the period of time before warnings applied.

PCP 2

a) The second PCP was the application of an informal intense performance plan aimed at improving the Claimant's performance (referring to paragraph 1.1.2.1 of the Claimant's further particulars on **page 56**).

b) This put the Claimant to a substantial disadvantage in that it put additional pressure on her at a time when her mental health was deteriorating.

c) As a reasonable adjustment, the Respondent ought to have implemented a formal performance improvement plan or 'PIP' (this was, on discussion, the only suggested adjustment).

Oral evidence

5. The Claimant gave evidence on her own behalf and called no other witnesses.

6. The Respondent called the following witnesses:

a) Sarah Barton, Senior Team Manager (Investigating Manager)

b) Joanne Thompson, Operations Manager (Dismissing Manager)

c) Chelsea Hurman, Department Head of Pre-Assessment (Appeals Manager)

d) Heather Cressey, People Advisor (HR Advisor to Appeals Manager)

Findings of fact

7. It is not our function to set out every piece of evidence or to make findings on every issue or dispute between the parties but only those which we have considered to be necessary for the purposes of determining the complaints. Having considered all the evidence before it (written and oral) and the submissions made by the representatives on behalf of the parties, the Tribunal finds the following key facts.

8. The Claimant was employed by the Respondent from **22 September 2008** as a Customer Service Adviser. She worked 37.5 hours a week and was based at the Respondent's call centre in Darlington. She was summarily dismissed for gross misconduct on **18 March 2020.**

9. The Respondent is a non-profit making, government-owned organisation set up in 1989 to provide loans and grants to students in universities and colleges throughout the United Kingdom. It employs approximately 3,000 people in Great Britain, some 1,500 of whom are based at its offices in Darlington.

The Claimant's disabilities

10. The Claimant has physical impairments in the form of chronic pain syndrome and an impairment to her right arm. The impairment to her arm came about after an injury to her right elbow in 2011, which required surgery. As a result of both the injury and the surgery she was left with permanent muscle and nerve damage. She regularly attends a pain management clinic for treatment of chronic pain syndrome. The Claimant also has anxiety and depression. She has been prescribed opiate, anti-inflammatory medication and anti-depressant medication to help with the pain and with her mental health.

11. The Respondent accepts that these impairments are such that she qualified, at all material times, as a disabled person within the meaning of section 6 **EqA**. The Respondent also accepts that, at all material times, it knew or ought reasonably to have known that the Claimant was disabled in respect of her physical and mental impairments.

The nature of the Claimant's work

12. The Claimant's role was to take calls from members of the public and, if able, to give advice in respect of their queries or, if unable, to refer them to someone more senior.

Call monitoring

13. As part of its quality assurance processes, the Respondent monitors telephone calls received by customer advisers at the call centre. When a call is monitored, the customer adviser's performance on the call is scored in accordance with a

model developed by the Respondent, known as 'Your Call Guidance'. Calls are given a rating or score which can be any one of the following four: 'Achieved', 'Met with Development', 'Met with Action' or 'Risk'. A 'Risk' call includes, among other things, those where the employee is rude or argumentative. The Your Call Guidance summarises a Risk call as one where: '*your call did not meet the expectations of our customers. Immediate action is required to ensure that on your future calls you are delivering accurate information to our customers in the correct way*.' [**page 351**].

14. The Respondent also requires customer service advisers to adhere to what are known as 'adherence targets'. 'Adherence' is a measure of the time advisers are available to take calls, are on calls or on breaks. These adherence targets are used to assess, among other things, how much resource is needed to meet demand as well as the performance of employees. Following previous advice from Occupational Health ('**OH'**), the Claimant was given an adjusted adherence target owing to her physical disabilities. The target was adjusted to 79%. The Claimant was also afforded extended breaks. However, the Claimant struggled to meet the adjusted adherence targets.

15. Given the centrality of telephone assistance and advice to the Respondent's operations, team managers are also regularly involved in coaching staff on telephone handling. The Claimant accepted that there is, what Mr Scott described as, a 'coaching culture' within the organisation and that coaching was of fundamental importance to her role. Coaching involves a team manager giving feedback and instruction on telephone handling. An 'Advisor Toolkit' is available for employees. This emphasises the need to be professional at all times, allowing the caller to speak and to end calls professionally. The toolkit refers to the ability to place a caller on hold to gain clarity or seek information or assistance from elsewhere or to afford time to review an account.

16. Dealing with members of the public can be difficult and occasionally, customer service advisers are subjected to difficult, unreasonable, and sometimes abusive callers. In acknowledgement of this, the Respondent publishes guidance on how to deal with aggressive or abusive calls. The Claimant understood what she was expected to do in circumstances where a caller became abusive. She also understood what she was expected to do if a caller wished to speak to a manager. The guidance is referred to as the '*THREAT'* method and is accessible to employees. *THREAT* stands for:

    T – Tell a Team Manager (*make the team manager aware so they can decide the correct course of action to take e.g. call listening, call termination*)

    H – Highlight (*highlight to the customer that this is unacceptable and if they continue the call will be terminated*)

R – Reassure (*as mentioned aggressive customers are generally frustrated with their circumstances, reassuring them that we are here to help can often defuse the situation*)

E – Empathy (*similar to the above, show the customer you care by using empathy*)

A – Act (*using available means, attempt to resolve the customer's issue, a simple step forward that shows progress can calm an irate customer*)

T – Terminate (*if threats continue terminate the call and report this incident to your manager*)

The Respondent's policies

17. The Respondent has a Code of Conduct Policy which outlines the reasonable expectations of the behaviour of its customer service advisers. They are expected to adhere to eight "SLC behaviours", namely: '*ask questions; listen; think and align; take ownership; deliver; measure performance; give and take feedback; develop self and others*.' When interacting with the public, employees are expected to be courteous and helpful. The policy states that employees found to have violated the policy could be subject to disciplinary action, up to and including termination of employment. The Claimant understood the policy and the standards expected of call handlers, even when dealing with difficult callers.

Occupational health reports and risk assessments

18. On **17 May 2017**, the Respondent referred the Claimant to **OH**. Iain Dunkley, a Senior Occupational Health Adviser employed by Optima Health, prepared a report dated **20 June 2017** [**pages 466-467].** He advised the Respondent that the Claimant was fit to carry out her normal duties with workplace adjustments. Mr Dunkley wrote:

"*I note that you are aware of this lady's on-going difficulty with pain and swelling in her dominant arm that remains problematic for her on daily basis. She reports that during the work day her pain becomes worse and she requires the use of strong painkilling medication. Side effects of decreased concentration and increase drowsiness are commonly associated with this medication and this lady advises that she experiences these, particularly during the afternoon*."

19. He noted that the Claimant continued to be reviewed by pain management specialists but that she did not anticipate any treatment that may resolve the problem with her arm. He noted down the result of the side effects of the medication, as described by the Claimant, on her work as being that she struggles with concentration and meeting time limits for calls, as well taking longer to type up notes and that she has to take a break after calls to gather information together.

20. Mr Dunkley noted that the Claimant appeared to experience reduced concentration and increased fatigue after taking medication, that the pattern of her pain was that it becomes worse through use during the mornings, requiring medication that affects her more in the afternoons. He advised that focussing on work which minimises the requirement for increased concentration in the afternoons may be more appropriate for her.

21. In 2019, the Claimant had been undertaking, or hoping to undertake, some further studies with the Open University, in respect of which she had applied to the Respondent for a Part-time Maintenance Loan ('**PMTL')**.

22. In a report dated **18 January 2019** [**pages 472-474**], Justin Smithson, another **OH** Adviser described the Claimant's current circumstances thus:

"…she suffers with a chronic condition with symptoms of pain and swelling and reduced function affecting her dominant arm/hand and the right side of her body. She reports that these symptoms are progressing in severity….I also understand that her medication has been adjusted and it appears that Lorraine experiences reduced concentration and fatigue as a side effect of taking this medication, as well as a reduced ability to cope with multiple sources of information such as spoken word and screen-based information".

23. Mr Smithson recommended micro breaks of about 5 minutes, every 30 minutes. He also advised that the Claimant was unlikely to meet her productivity targets and that she would benefit from adjusted targets. He suggested regular one-to-ones with the Claimant. The Claimant was afforded micro breaks and her targets were adjusted.

The Claimant's performance

24. As alluded to above, the Claimant was considered an underperformer, even taking into account the fact that her targets were adjusted in line with **OH** advice. The Respondent has a Performance Improvement Policy. Under the formal stages of this policy, an employee may be placed on an Improvement Agreement' or what is more commonly referred to as a formal Performance Improvement Plan ('**PIP'**). When an employee is placed on a PIP their performance is formally monitored during a 'review period'. This involves the provision of feedback through regular one-to-one review meetings [see 'key principles': **page 171**]. and if their performance does not improve, they are at risk of receiving a warning or series of warnings which may ultimately end up with their dismissal. Although a PIP is aimed at improving performance, it is a necessary step along the road to dismissal if performance does not improve. The PIP procedure envisages two further steps: a First Performance Improvement Hearing and a Final Performance Improvement Hearing. At the first hearing, the line manager must reiterate that failure to reach the required standards within specified timescales without mitigating reasons, could result

in termination of employment. At the second hearing, the process could be extended or the employee could potentially be dismissed [**pages 178-179**].

25. However, the Claimant had not been placed on a formal Performance Improvement Plan ('**PIP'**). Instead, her managers attempted to improve her performance, positively and in a less formal setting, through regular one-to-one meetings and constructive coaching.

26. It is clear to the Tribunal from a reading of the documentation [for example, **pages 475-483K**] and the evidence as a whole, that the Respondent's managers (in particular but not exclusively, Emma Smalley) put a lot of time in with the Claimant with a view to helping her to improve her performance. The Respondent has, what appears to the Tribunal, well designed procedures for managing, appraising and developing its staff. It also has available e-learning tools which offer guidance and are accessible to employees to assist them in their work. It also has an Employee Assistance Helpline. We agree with the Respondent, and so find, that there is considerable support in place for employees and that the Claimant was provided with a good level of support from her managers. Yet, the Claimant still struggled to meet her adjusted targets. The Claimant's performance was such that she was likely to have been placed on a **PIP** (had she not been dismissed, that is). On **27 September 2019**, when discussing with the Claimant that she was to move to a new team, Joanne Dixon confirmed that, after she had time to adjust to her new chair and keyboard, her new team manager, Laura Aislabie, would review her performance with a view to deciding whether to progress to a **PIP [page 425]**. However, she never was placed on one.

Attendance levels/sickness absence

27. On **01 May 2018**, the Claimant was advised that her attendance would be monitored for the next year (that is, until **30 April 2019**) as she had hit a trigger point of having 3 absences in a rolling period of 6 months [**page 496**]. She was then absent on two further occasions (**20 June 2018** and **08 August 2018**). That meant that she had now hit 5 instances of absence in a rolling period of 12 months. Although it could have done so, the Respondent did not initiate a Formal Attendance Hearing at that point. Emma Smalley explained that she was applying discretion not to progress to the next stage of the attendance management policy.

28. The Claimant was absent again on sick leave from **15 August 2018 to 21 August 2018** [**page 501**]. She was also absent for a day on **20 September 2018** [**page 504**]. Again, Ms Smalley applied discretion not to advance the Claimant to the formal stage of the attendance management policy [**page 506**]. That was the 4th time Ms Smalley had exercised her discretion not to advance the Claimant to the formal stage of the attendance management policy.

29. The Claimant was absent again for one day on **10 October 2018**. On her return to work on **11 October 2018**, Ms Smalley informed her that she would now advance to the formal stage and that she would receive a letter inviting her to a formal hearing [**page 517**].

30. The Claimant duly attended a Formal Attendance Hearing on **29 October 2018**. She was told that her attendance levels would be monitored for a further 12 months and that if attendance levels continued to be unsatisfactory, this may result in progression to the final stage of the formal attendance procedure before the end of the 12 months review period. The outcome letter of that hearing is at **pages 519-520** of the bundle. The Claimant was also removed from 'Choices', which is concerned with buying additional holidays.

31. The Claimant was absent again on **09 July 2019** for three days [**page 530**] and on **25 October 2019** for one day [**page 534**]. She attended a Final Attendance Hearing Review on **09 December 2019** [**pages 543-549**], the outcome of which was that it was agreed by Joanne Dixon to continue to monitor the Claimant's attendance for a further period of 12 months from then – in essence, to reset the clock. This came about following her trade union representative's suggestion to re-start the 12 months formal attendance period from that date. Towards the end of the notes of the meeting, it states: '*sanctions to be applied until her attendance met the company standard, as outlined in the Absence Management Policy (some or all may apply)*'. It then lists 5 sanctions [**page 548**]. Those are the sanctions listed, along with some others, in the Claimant's further particulars [**page 54**].

32. Ms Dixon then wrote to the Claimant on **16 December 2019**, confirming the outcome, making no reference to any sanctions [**page 550**]. The Claimant agreed with the decision. Joanne Dixon asked the Claimant if she would agree to the Respondent obtaining her medical records, and if so that they would go through OH who would request the records from her GP. The Claimant also agreed with this.

33. The Claimant was unsure which, if any, sanctions had actually been applied to her. She referred to being excluded from the company bonus scheme during the period of monitoring. However, she gave no evidence as to how any such scheme worked, what she would have been entitled to, if anything and in respect of which period or periods of time. There was no challenge to paragraph 3.17 of the Grounds of Resistance [**page 65**] and no evidence on which the Tribunal could make any findings in respect of any sanctions that might have been applied. It was accepted by the Respondent, in paragraph 3.18 of the Grounds of Resistance that the Claimant did not receive a bonus for the year 2018/2019 and that an appeal upholding that decision was competed on **26 June 2019,** almost a year before the presentation of the Claim Form on **15 June 2020**. However, there was no evidence before the Tribunal as to whether the Claimant would, in any event, have qualified for any bonus (had her

attendance not been monitored) or if so, how much any such bonus would have been.

The Claimant's pain levels

34. During certainly the latter months of her employment with the Respondent (if not for much longer) the Claimant maintained what has been referred to in these proceedings as an 'Aux diary' ('aux' being short for 'auxiliary'). This was a personal diary – in the sense that it was purely for the Claimant's own personal purposes and was not something which she had been asked or expected to maintain by the Respondent, albeit she did tell her manager she was keeping a diary. An extract of the Aux diary was in the bundle at **pages 328 – 334**. The entries covered only a short period of time from **10 December 2019** to **18 December 2019**.

35. The Claimant created this diary for two reasons: to help her keep a track of work and to help in managing her health. Each day, she typed in the date. She sometimes cut and pasted a screenshot of her work schedule for the day so that, in the event of the online system going down, she would still have a record of what lay ahead of her that day. On each day, she made a series of entries with the letter 'A' followed by a number. For example, 'A1', A2', 'A3' and so on. Each of those entries represented a code on the Respondent's system: an 'aux' or auxiliary code. Each code represents a separate task undertaken by the customer service adviser. The amount of time spent by an adviser on the tasks represented by the codes enables management to assess from within its own systems how an employee is performing and whether the employee is meeting the Adherence targets.

36. The Claimant entered the code (representing the task she had been engaged on) and the time spent on that task in her Aux diary. Management did not refer to the Claimant's diary to assess adherence targets – it relied on its electronic systems. The Aux diary was, in this respect, simply a sort of aide-memoire to assist the Claimant to see if she was meeting her target and as a means of keeping track, in particular, on what medication she had taken.

37. The second purpose for maintaining the aux diary was to manage her health. The Claimant's condition is such that she experiences pain on a daily basis. She devised a system of recording her pain levels on a scale from 1 to 10 and entering the level in her Aux diary. She said that her pain level, on her scale, is never less than level 7. She also used the Aux diary to keep track of medication she had taken during the day. As an example, against the code A7 on **16 December 2019** (in fact, it says '16/12/2001' but that is a typographical error and should be 16/12/2019) she has recorded '*'bbbk 9 arm 8*'. That stands for a pain level of 9 for her back and a pain level of 8 for her arm, between the times of 11.3 (another typo) and 11.37 am. At the top of the page, just after she had logged on at 08.01, she has recorded '*tramedol'* (her medication) and '*back 8 arm 7*'. There were many other such entries in the Aux diary.

Telephone call on 13 December 2019

38. On Friday **13 December 2019**, at 08:51:55, the Claimant took a call from a customer inquiring why the money for her **PTML** had not arrived in her account. About 3 minutes 41 seconds into the call, the Claimant placed the caller on hold for a period of 4 minutes 30 seconds. The call ended at 09:06:45. There was a transcript of the call at **pages 317-320**. To third party observers, such as the tribunal, it seems clear that the Claimant started the call professionally and courteously, having taken the caller through security checks and trying to explain to her that the SLC was awaiting confirmation of her attendance from the university. The caller made clear her frustrations with SLC quite early into the call. She asked whether the Claimant was going to listen to her, following which the Claimant interjected and talked over the caller. When she placed the caller on hold, the Claimant carried out some further inquiries. Upon reconnecting to the caller, she said that her account had been approved but for tuition fees only; that the part time maintenance loan had only been added on two days earlier, and that the university needs to confirm attendance prior to payment being made. The caller explained that she was aware that the maintenance loan had only just gone through but that she had a complaint in about that very fact. She said she would like to speak to the Claimant's manager. The Claimant said that she could redial if she wanted to do this. At the point at which the caller said she did not want to redial, the Claimant terminated the call.

39. After the call had ended, the Claimant entered a note on the customer's account the last sentence of which read: '*Due to the barrage of verbal bullying by cust. Adv Cust on more than one occasion, that this would not be tolerated as advisors are here to assist and calls are recorded'* [**page 252-253**]. Whatever the views of others, such as those managers, who listened to the call, we find that the Claimant personally saw the caller on this occasion to be abusive towards her. We emphasise: we do not find that the caller was abusive. We have not heard the call. The transcript suggests that the caller was demanding, which is how we would describe her based only on the written account. The Claimant did not make any entry in the aux diary as to her pain levels at the time or that she had taken any medication during the call.

40. The Claimant does not dispute the description of the call as set out by the Respondent in paragraph 2.11 of its Grounds of Resistance [**page 30**]. We find, and she accepts in any event, that she handled this call badly. In cross examination, she accepted that she was rude and condescending, that the way she dealt with the caller was not in line with the Respondent's code of conduct and that it amounted to a serious breach of the Respondent's standards, falling short of some of the eight SLC behaviours. It was, as she herself put it, the worst call she had conducted in her 11 years' employment.

41. When speaking to the caller on **13 December 2019**, the Claimant said "*I'm a student myself so I know how the system works especially from your point of view*" [**page 317**]. She then went on to mention the Open University. This was a reference to the fact that the Claimant had undertaken her own university studies. Indeed, she too had applied for a **PTML** which had initially been rejected. As at the date of this call, the Claimant was awaiting the outcome of an appeal against the refusal by SLC to award her a **PTML**. Although she does not accept it, we find that the Claimant was indeed disaffected with the Respondent following its rejection of her **PTML** application, which upset her. On the morning of **13 December 2019**, when she was confronted by a caller who was inquiring about payment of **PTML** and who displayed what she regarded as an abrupt and unreasonable tone and manner, the Claimant felt little sympathy or empathy. She regarded the caller's demand for answers and to speak to someone in seniority as abusive. Her standards slipped considerably as her own personal frustrations got the better of her, causing her to react as she did and resulting in what everyone agreed was a badly handled call. In short, she lost her patience – a necessary trait when dealing with difficult calls from members of the public.

42. In the Claimant's Aux diary, the entry for **13 December 2019** is as follows [**page 330**]:

Avaya	*08:00*
A5 8.03	*gel x1 trametol*
A3	*8.31 – 08.42*
A7	*9.34*

43. Immediately below these entries, the Claimant inserted a screenshot from her computer showing her activities for the week commencing **9th December 2019**. This shows that, on **13 December**, the Claimant was scheduled to be on '*Open Time'* from 08:00 – 09:30am. This was to be followed by a break from 09:30am – 09:45am. Then '*Open Time'* from 09:45am to 10:30am. This was followed by *'Conf out of office'* from 10:30am to 11:30am, then '*Non Sick Abs'* from 11:30am to 03:30pm and finally '*Lunch o/o'* from 03:30pm to 04:00pm [**pages 331 – 332**].,

44. The reference to 'Avaya' is to the phone system operated by the customer service advisers. The entry signifies that the Claimant started her shift and logged on to the system at 8am. The auxiliary code A5 represented 'miscellaneous' tasks. The Claimant used this code in her aux diary to indicate that she was taking a toilet break or taking medication, for example. She used this code because it was the code that an adviser would enter if doing something that wasn't a scheduled task. She entered her pain levels next to the code A3, which was the Respondent's code for 'admin' tasks. In her evidence to the Tribunal, she said that wherever we see an 'A3' entry in her Aux diary, that indicates that she was in pain.

45. Upon considering the extracts from the Aux diary contained in the bundle, there were pain level entries recorded as follows – all against code A3 unless otherwise stated:

    a) On **10 December 2019** there were three entries made at different times:

    - *'back 8, arm 7'* (recorded against Code A8)

    b) On **11 December 2019** there were four entries at different times:

    - *'arm 7, back 7 but nagging'*
    - '*7 neck, 6 back, 8 arm'*
    - '*back 8-9, arm 8*
    - *'arm starting to ache more, arm 9, back 8-9'*

    c) On **12 December 2019** there were three entries at different times:

    - '*back 9, arm 8'*
    - *'back 8, leg 8'*
    - *'back 9, arm 7'*

    d) On **16 December 2019** there were three entries at different times:

    - *'back 8, arm 7'*
    - *'back 9, arm 8'* (recorded against Code A7)
    - *'back 9, arr'*

    e) On **17 December 2019** (shown incorrectly as '17 Feb') there was one entry:

    - *'marm 8, back 8'*

    f) On **18 December 2019** there were three entries at different times:

    - *'back 9, arm 8'*
    - *'back 9, arm 9'*
    - *'arm ache 9, back 9'*
    - *'back shoulder 9, arm 8'*

46. There are references also to the Claimant taking medication on each of the days for which extracts from the Aux diary were provided. As regards **13 December 2019**, the reference to 'gel' is to a gel (similar to an ibuprofen gel) that the Claimant applied to her elbow joint. At the same time that she applied this, she also took 1 tramadol, a strong opiate-based painkiller. The **13 December 2019** is the only day of those made available to us where the Claimant does not describe any pain level.

47. Very shortly after the **13 December** call, at 09.32, the Claimant emailed Lucy Seaton, an assessor, to say that a student had been on the phone and had been completely unreasonable when she (the Claimant) attempted to deal with her query [**page 461**]. The Claimant alluded to the caller having verbally abused and bullied her and referred to her previous championing of zero tolerance to be written on Gov.UK. She did not mention that she had been in any pain or discomfort during the call or that she had handled it badly. Although Lucy Seaton was not the Claimant's manager and, therefore, not a person to whom she would ordinarily be expected to share how she was feeling at the time of this call, we found it surprising that she did not say anything at all in that email about the pain she was in when dealing with the caller. The Claimant's case to us was that she was in serious pain at the time this call came through (and that this explained, or was a factor in, her behaviour towards the caller). Mr Scott asked that, had that been the case, why she had not mentioned this at the first opportunity. The Claimant said in evidence that Lucy Seaton was not her manager and that she only emailed Ms Seaton because she believed her to be the last person to have dealt with the caller. We were not persuaded by this. That does not explain why she saw the need to send a personal email to Ms Seaton. Anything relevant to a case is entered on the system or account, so that when the next person looks at the case, they will see all relevant entries on the screen. Indeed, that is what the Claimant did. Ms Seaton would have been able to see that information when she looked on the account. There was no need to send Ms Seaton any kind of email. She emailed Ms Seaton to highlight the fact that she regarded this caller as abusive. It was more a case of the Claimant 'sounding off' about the caller to the person who was handling the account. What we find surprising is that the Claimant mentions that mental health is important to advisors yet makes no reference to her physical health at the time of the call. Even though it may not be a matter for Ms Seaton, it was a natural moment where we would expect her to have at least mentioned her condition when she took the call, as part of simply giving an account of what happened. Instead, she described her exasperation at the caller thinking that the CEO of the company was on her side having backed up her claim.

48. The Claimant realised before emailing Ms Seaton that the call was a 'risk' call. In other words, she knew that she had handled it badly. Irrespective of whether she might have been expected to tell Ms Seaton how she was feeling during the call, she did not mention this to anybody else either. She did not contact anyone to say that she had been in such pain during the call that it adversely affected her performance.

49. The caller (although clearly unhappy) made no complaint against the business regarding the call. Nevertheless, the call was picked up on routine monitoring by the Respondent's Quality Assurance team. Joanne Dixon then asked a Senior Customer Adviser, Chantelle Currah ('**Chantelle**'), to listen to the call. Chantelle was supporting the Claimant's team in the absence of the normal line

manager, Laura Aislabie, who was on annual leave. The Claimant also checked the account herself and noticed that it had been picked up by the quality assurance team. On Tuesday, **17 December 2019**, the Claimant then emailed Chantelle, with a copy to Laura Aislabie, saying, among other things, that she took the worst call of her 11 years in the company and that she was prepared to accept a 'risk' call [**page 460**]. There is no mention in this call that the Claimant's pain levels were such that it made her behave as she did towards the caller.

50. Chantelle listened to the call. She then asked the Claimant to listen to the call with her. However, the Claimant would not do so. She said to Chantelle that she did not need to listen to the call and that Chantelle could provide any feedback at the desk. That is precisely what Chantelle did. She completed a 'Your Call' coaching document on **17 December 2019** [**page 459**], in which she said:

"Lorraine and I have discussed the Risk Call that was marked for Lorraine. Lorraine is aware of the risk call and has emailed me her response and has accepted that it was a risk. Lorraine does not wish to listen to the call. I have listened to the call and told Lorraine that the call sounds like an argument between Lorraine and the customer. We have discussed that Lorraine will continue to give customers three warnings and terminate the call if the customer is being abusive and rude. Lorraine has discussed that there should be some guidance online that customers should not be rude to advisors. Lorraine has detailed this in the email she has sent to me and her manager Laura."

51. Receiving a 'risk' rating does not, as far as the Respondent is concerned, normally result in disciplinary action. It is, as Ms Barton set out in her witness statement, primarily a performance improvement tool rather than a disciplinary process. If an employee was receiving a lot of 'risk' ratings, they would normally be put on a **PIP**.

52. On **18 December 2019**, the Claimant was suspended on full pay pending an investigation into the following allegations:

- Abusive behaviour towards a customer during a telephone call
- Unreasonable refusal to follow an instruction issued by a manager

Investigation

53. Sarah Barton was given the task of investigating those matters. In doing so, she interviewed the following people:

- Emma Smalley, Claimant's Team Manager up to **September 2019** [**pages 202-207**]
- Joanne Dixon, Operations Manager [**pages 208-215**]
- Chantelle Currah, Senior Adviser [**pages 216-221**]

- Laura Aislabie, Team Manager [**pages 223-228**]

54. Of the Team Managers' mentioned in these proceedings, Emma Smalley was one whom the Claimant trusted – albeit, as the Claimant put it, that trust did not come about overnight [**page 239**].

55. Emma Smalley told Ms Barton that during the time she managed the Claimant, she had lots of risk calls for things like talking over people, being rude, arguing back and that she and the Claimant worked on this a lot [**page 203**]. Emma Smalley told Ms Barton that it was hard to give the Claimant feedback as she would challenge everything.

56. Emma Smalley told Ms Barton that the Claimant had a 'tracker' which she filled in to record what she was doing and that she entered what pain she was in [**page 204**]. This 'tracker' is, we find, a reference to the Claimant's Aux diary. Ms Smalley also told Ms Barton that the Claimant was very bitter about not being accepted for a loan. This was a reference to the **PTML**. She told Ms Barton that the Claimant had failed to call customers back in the past after she had given them the wrong information or had been argumentative. She also said that the Claimant was selective about who she would receive feedback from and that she (the Claimant) had said that she would only do it with Ms Smalley. She told Ms Barton that the Claimant's previous manager, Andy Mason, reported to her that the Claimant did not take well to feedback. She said that the Claimant tended to make excuses for her actions and would not accept fault [**page 205**]. She said the Claimant was an underperformer in terms of performance and behaviours. She explained that the Claimant's appraisal feedback was to work on taking feedback, to try and meet adjusted targets and to work on transferring calls to managers or seeking managers' advice when dealing with difficult calls. She said to Ms Barton that she tried everything to help the Claimant but that she chose not to get on board; that she got to a point where she could not deal with the Claimant as she was physically drained due to managing her. She described the Claimant as a lovely woman who just doesn't like being told no.

57. Joanne Dixon told Ms Barton that the Claimant did not make anyone aware of the call at the time and, if a customer had asked to speak to a manager during a call, the Respondent would expect the customer adviser to speak to their team manager and would not expect this request to be refused or for the adviser to terminate the call. Joanne Dixon also told Ms Barton that managers have struggled with the Claimant, that they find her very defensive and that she refuses to take on support. She explained that the Claimant had adjusted targets, that she was currently taking on 10 calls where others will take 30 or more. She said that the Claimant had performance, behavioural and absence issues but was not on a PIP, as they had been waiting for equipment through Access to Work which had taken a while. She told Ms Barton that the Claimant had a weekly catch up with Laura Aislabie and that she received remote

coaching. She referred to a recorded discussion on **11 September 2019** where the Claimant had been asked, but refused, to call a customer back to correct advice she had given over the phone. Joanne Dixon told Ms Barton that a Senior Customer Adviser, Kelsey Harrison, had said that the Claimant was unwilling to listen to a call or to take coaching and that another manager, Sharon Parkin, had to speak with the Claimant in the past about terminating calls.

58. Chantelle told Ms Barton that she had scheduled coaching for **16 December 2019**, that she wanted Matt Smith to be present but that the Claimant refused to go into the room and said that Chantelle should just do the feedback at the desk. She said that the Claimant would not listen to the call and would not listen to feedback. In response to a question from Ms Barton about what outcome was given /quality team feedback, Chantelle said: "*I told Lorraine it sounded like arguing and that she was talking over the customer. I had been told not to challenge Lorraine when covering the team so I tried my best. I have dealt with challenging people before*." When asked by Ms Barton whether any coaching had taken place, Chantelle said: "*No it didn't, she didn't want any*". Chantelle told Ms Barton that, in the past, the Claimant had listened to calls, that she just wouldn't listen to this one. When asked whether the Claimant had refused anything else, Chantelle said no, that she had been good that week.

59. Laura Aislabie told Ms Barton that she believed the Claimant's rudeness to the caller was more to do with the PTML, that she does not like dealing which customers on PTMLs [**page 225**]. She told Ms Barton that if the Claimant does not want to do something she won't do it, that she is always getting coaching, that if she does not agree with something she will kick off and go somewhere else then email an '*ops manager'*. Laura Aislabie told Ms Barton that the Claimant is marked down every month due to her attitude and behaviour and that she has been given feedback on how to handle this kind of situation (that being a reference to the call on **13 December**). She told Ms Barton that the Claimant had been on performance improvement plans in the past, that she was due to go on to a PIP more recently but due to getting new equipment, it was agreed to give her 30 days to bed in the equipment. Ms Aislabie said that the Claimant was underperforming in everything even with an adjusted target of 79%. She told Ms Barton that the Claimant had said to her that she was sick of coaching, that she has had too much coaching and that during coaching sessions the Claimant would give excuses for why she does things. She said that the Claimant was unwilling to listen to feedback. She said that the Claimant had told her loads of times that her medication makes her angry and that she (Ms Aislabie) has said to her that she needed to discuss that with her doctor [**page 226**]. She told Ms Barton that the Claimant never feels that she has done anything wrong, that she will blame her medication rather than admit she is wrong.

60. Ms Barton interviewed the Claimant on **10th, 28th 31st January and 3rd February 2020.** There were reasonable explanations on the part of both the

Claimant and the Respondent explaining why the interview was not completed in one go and why dates had to be re-scheduled and we do not intend to set out at length what those reasons were, as they are not material to our conclusions. On each occasion the Claimant was accompanied by her representative, Stephen Palmer. The notes of interview were contained in the bundle:

- **10th January 2020 [pages 229-235]**
- **28th January 2020 [pages 235-247]**
- **31st January 2020 [pages 250-264]**
- **3rd February 2020 [pages 265-269]**

61. In the first interview, the Claimant was afforded the opportunity of listening to the call and was provided with a transcript of it. After an adjournment to enable her to listen to it, she said that the call could have been better, that she wanted to get the caller on hold so that she could take her medication. She said that on that day, her pain levels were at 9-10 on her pain scale. She told Ms Barton that she had been trying to get the caller on hold she was in that much pain, that the pain kept escalating and '*behaviour breeds behaviour'*. She said the customer would not let her speak, was not listening to her and was just ranting for rantings sake; that nothing she said on that call would have been any good, you could not pacify her, that she (the customer) was just that type of person. There was no sign from the aux diary that the Claimant took medication during the call, while the caller was on hold. The only reference to medication was much earlier, at 08.03am. Nor, as we have earlier observed, was there any reference to pain levels.

62. In the second interview with Ms Barton, on **page 236**, the Claimant said that her behaviour on the call was '*not my normal way'*. She went on to say that since her operation in 2011, she has been on different medication and has managed to maintain the pain and stress herself. She said she was on some tablets for depression and they can make her go up and down. On the day in question, she said she had taken Tramadol, which takes a while to get into her system. She said her moods go up and down, and that she has managed this for a year. She said her pain level was sky high in the morning, so she put herself on an aux code and tried to put the customer on hold. She said that the pain started before work, that she rates her pain from 1 to 10, that it is never lower than a 7 and sometimes it goes to a 12. She said that the pain goes up her arm and back. She said she had just '*got off a sick stage'* and was worried about taking time off sick, and that was on her mind. She said that an Individual Stress Risk Assessment ('**ISRA**') was to be done but had not been. Her representative said that stress and pain were a factor, that the company was aware and had planned to do an **ISRA**.

63. The Claimant said that, as well as medication for her pain, she was also on medication for depression [**page 237**]. She said that she understood from the

customer's point of view that she could have handled it differently, but they had to be in her shoes with the pain. On **page 240**, she told Ms Barton that she goes to a pain clinic, that the side effects of the medication affect her brain and she has to control them herself; that it was like having a cloud over your face. She said that the ant-depressant medication she was taking was fairly new. On **page 242**, she said she had put the call on mute so she could take paracetamol. On **page 243**, the Claimant's representative said that the Claimant's medical conditions should be considered. The Claimant told Ms Barton that some people think of her as argumentative but that it is just the way she is; that she needs to know the reasons why; that if she is told the reason, she will agree; if she is not told the reason, she will ask why.

64. In the third interview, the Claimant again said she was in pain [**page 252**]. She said that she did not refuse coaching from Chantelle, that she only refused to listen to the call [**page 254**]. She referred to a coaching document prepared by Chantelle and said that the coaching had been done by Chantelle at Laura Aislabie's desk. On **page 258**, the Claimant's representative said that it would be inappropriate to go down a PIP route until after support and equipment was in place and there had been an adjustment period. The Claimant herself expressed concerns that a PIP would be used to beat her over the head.

65. After the third interview, the Claimant provided Ms Barton with extracts from her Aux diary – those same extracts that were included in the hearing bundle. In the fourth interview, she referred Ms Barton to the entry on **13 December 2019** saying that '*you can see the level of pain I record'*. However, as we have already noted, she did not record a pain level for that day. She told Ms Barton that she applied a gel to her lower back and elbow joint [**page 265-266**]. She said that with hindsight she possibly should not have come to work that day but did so due to having her 'attendance' hanging over her head. This was a reference to the absence management procedure. Her representative said, on **page 267**, that the Claimant had been let down by the company on being turned down for student finance. This was a reference to the **PTML**.

66. Ms Barton prepared the report which was at **pages 270 – 275.** On **page 271**, in the section called 'Summary of response supporting the allegation:', Ms Barton wrote:

"Aux diary – this shows that Lorraine did experience pain on the day of the call, it does not however support that she took medication during the call or that her pain was very high at the time the call was taken as this was listed as a 3/10, which is lower than on some of the days Lorraine has worked as this can go up to 10+"

67. That was a misreading of the Claimant's diary entry. As we have noted, no pain level was recorded by the Claimant for that day. Although there was no pain level entry recorded, that does not, of course, mean that she was not in pain. We are satisfied, and so find, that the Claimant was in some degree of discomfort and pain on **13 December 2019**. Indeed, that is the case for her

every day and the Respondent does not dispute that she experienced pain on a daily basis. However, it had no way of measuring the extent of it, other than the Claimant's own say so. Whether the Claimant's behaviour during the call on **13 December 2019** was to any extent a consequence of her disability was a, if not the most, contentious issue in these proceedings. Because her case was put on the basis that the Claimant's conduct on **13 December 2019** was explained by the pain and the associated medication taken by her, it was necessary for the Tribunal to make findings of fact on these matters. The Claimant's pain levels fluctuate and differ from one day to the next and from hour to hour. The scale which she uses is, naturally, subjective. It was impossible, certainly on the evidence before the tribunal, to accurately measure or assess the degree of pain on an objective basis. The tribunal can only do the best it can on the available evidence before it. That required an analysis of not just the Claimant's oral evidence but any contemporaneous documents, including medical evidence, and an analysis of her own words and actions on and around the day in question.

68. When interviewed by Sarah Barton on **10 January 2020**, the Claimant said her pain level at the time was 9-10 [**page 232**]. However, we do not accept that evidence. From the absence of any pain level entry and from the absence of any reference to her pain on the day or in the days following the call, we infer and find that the Claimant's pain levels during the call were not to the extent that she maintained in these proceedings. We are unable to put any kind of number to any kind of scale. This is simply not possible. Nor is it necessary. Again, we emphasise that, while we accept and find that she was in some pain, it was not to the extent she suggested.

69. Following her investigation, Sarah Barton prepared a report [**pages 270-275**]. The two allegations are identified:

    a) Abusive behaviour towards a customer during a telephone call.

    b) Unreasonable refusal to follow an instruction issued by a manager.

70. The date the alleged conduct was said to have taken place was **13 December 2019**. The question against which this was entered said: *'when did the allegation taken [sic] place (one-off, several occasions or continuous – give details, dates and times)'* [**page 271**].

71. As evidence in support of the allegations, among other things, Ms Barton identified the following:

    a) A recorded discussion on **24 January 2019** regarding a call which had been terminated by the Claimant and a follow up one-to-one meeting of **01 February 2019** regarding that call.

    b) A coaching session on **07 August 2019**

c) Call feedback on 3 calls which show similarities of incorrect tone and language, flippancy, lack of empathy, taking ownership and threats to terminate calls

d) A one-to-one meeting on **08 May 2019** recording that the Claimant had refused a manager's request and emphasis on the need for the Claimant to take constructive feedback on board and learn from it.

e) 'Your call' feedback on **13 August 2019**,

f) A one-to-one in August, which mentions a refusal to follow a reasonable request,

g) A recorded discussion of **11 September 2019**, showing a refusal to follow a reasonable request and challenging constructive feedback.

h) A recorded discussion of **27 September 2019** showing resistance towards a PIP and an unprofessional reaction when advised of the possibility of a PIP,

i) A meeting of **01 November 2019**, showing a lack of accepting constructive feedback.

j) A weekly meeting document of **12 November 2019**, showing a refusal to have coaching and a lack of constructive feedback.

72. In the 'Decision and next steps' section at the end of the report, Ms Barton said that formal action was required. She ruled out not taking formal action because of past similar instances taking place and the seriousness of the event (of **13 December 2019**). Therefore, on **12 February 2020**, Joanne Thompson wrote to the Claimant informing her that she was to attend a disciplinary hearing on **27 February 2020**. She advised the Claimant of her right to be accompanied, that the allegations were potentially regarded as gross misconduct and she attached a copy of the report and evidence gathered by Ms Barton [**page 276-278**]. The disciplinary hearing was subsequently rearranged to take place on **05 March 2020.**

Disciplinary hearing

73. The Claimant was represented at the disciplinary hearing by a trade union representative, Paul Martin. Ms Thompson was the disciplinary chair. Ms Thompson decided to terminate the Claimant's employment without notice. She communicated this decision in a letter to the Claimant dated **18 March 2020** [**pages 293-296**]. In her letter, Ms Thompson sets out the two allegations and purported to deal with them separately.

Allegation 1

74. Under the first allegation 'abusive behaviour towards a customer', nowhere does Ms Thompson say that she concluded or believed that the Claimant abused the customer. Indeed, in her evidence to the Tribunal, she said that she did not believe that to be the case. In her written and oral evidence to the Tribunal she said that, had that been the only allegation against the Claimant, she would not have dismissed her. Ms Thompson highlighted items from the report, namely numbers: 8, 9, 10, 12, 13 and 15 and a recorded discussion on **11 September 2019**. Those included the matters in the above paragraph 71 (a),(b),(c),(e) and (g).

75. The only conclusions or findings that the tribunal could see that Ms Thompson had made – or at least which she expressed in the letter as having made - in relation to allegation 1 were: '*Having listened to the call I believe that such a call could bring the company in to disrepute'*; and '*you therefore failed to carry out agreed actions whilst on this call'* and '*you were careful to record at the time of the call your pain level in your aux diary and on reviewing this in the evidence bundle it was a 3'*. As regards the belief that the call 'could' bring the company in to disrepute, this had never been an allegation that was put to the Claimant and was canvassed by Ms Thompson at the disciplinary hearing [**page 281**]. Indeed, right at the outset of the hearing she said that there 'has been' reputational damage. Ms Thompson explains this in paragraph 19 of her witness statement. There was no evidence at the time or since that the caller did any of the things referred to in that paragraph.

76. On any analysis, given what was said in the letter, and in light of Ms Thompson's evidence to the Tribunal she did **not** believe the Claimant's conduct towards the customer to have been abusive behaviour. Although she did not in fact conclude that the Claimant engaged in abusive behaviour, in paragraph 34 of her witness statement, Ms Thompson said '*for me it was the combination of both allegation 1 and allegation 2 being upheld*'. That is contradictory to her evidence to the tribunal, which was that allegation 1 had not in fact been upheld as it was phrased. Therefore, despite not actually believing that the Claimant had engaged in abusive behaviour, nevertheless she upheld that allegation.

Allegation 2

77. As to the second allegation, we could not discern from the letter of dismissal what findings or conclusions Ms Thompson actually arrived at. There is simply nothing spelled out. She did not identify the instruction. She did not say that it had been refused. Nor does she address why any such refusal was, in her assessment, unreasonable. From the very beginning of this hearing, the Tribunal was unclear what 'instruction' was said to have been given and by whom and which was said to have been unreasonably refused by the Claimant. The letter of dismissal made us none the wiser. This was something that was

explored by Mr Taylor when asking questions of Ms Barton, Ms Thompson and Ms Hurman. Their evidence vividly demonstrated the total lack of clarity regarding the allegation and their various understanding of the allegation.

78. In her evidence, Ms Barton said that the instruction that formed the basis of allegation 2 was that given to the Claimant by Chantelle to go to a room and get coaching and listen to the call. However, Ms Barton did not formulate the allegation. It came ready made to her from the 'people team' (HR). When asked whether she had ascertained from anyone what the actual instruction was, Ms Barton did not say that she sought clarification, merely that she understood it to be the request from the covering team leader (Chantelle) to the Claimant to obtain feedback. It was clear to the tribunal, and we so find, that she had not ascertained precisely what the instruction was that formed the basis of the allegation. When asked whether she believed there to be a distinction between a request and an instruction, she added that Chantelle had scheduled a coaching session in the diary so she would normally take that to be an instruction. That was, we find, an assumption on Ms Barton's part. Therefore, from the outset it was not clear what, if any, instruction was said to have been refused.

79. In paragraph 11 of her witness statement, Ms Thompson described allegation 2 as '*unreasonable refusal to follow an instruction issued by a manager (coaching with Chantelle Currah)*'. However, when taken to the document at **page 459** by Mr Taylor, Ms Thompson accepted that this was a record of a coaching session conducted by Chantelle, that it was the only written record by Chantelle in relation to that call and that Chantelle must have deemed a coaching session to have taken place as she had written the account on the 'Your call' template, which is a coaching document. Ms Thompson accepted that there was no reference on that document to an instruction or to a refusal by the Claimant to be coached. When asked by the Employment Judge what instruction it was that **she** considered the Claimant to have refused, Ms Thompson's evidence was '*on this particular call there hasn't been an instruction'*. When asked, in that case, what instruction did she **conclude** the Claimant to have refused, Ms Thompson said: '*I can't give you pages, but reading the investigation, there was evidence that Lorraine had previously not followed a management instruction or refused coaching*.' Mr Scott endeavoured to rescue this situation in re-examination but to no avail. Ms Thompson found that the Claimant had refused to follow previous management instructions. In respect of the 13 December call, she believed that the Claimant had refused to listen to the call when asked to by Chantelle for the purposes of coaching her – something which the Claimant always accepted.

80. Ms Thompson, therefore, understood allegation 2 to be an allegation that the Claimant had refused coaching from Chantelle. We find that Ms Thompson did not, in fact conclude that the Claimant had refused an instruction to receive coaching from Chantelle. She concluded that the Claimant had refused to listen

to the call. However, Ms Thompson did not consider – let alone conclude - whether Chantelle had instructed her to listen to the call, as opposed to asking or even expecting the Claimant to do so. It is likely to be the case, and we so find, that there was and is a general expectation that an adviser will listen to a call with the manager when, and for the purposes of, receiving feedback from that manager and that Ms Thompson had this general expectation in mind. It is also likely to be the case that managers do not speak in terms of 'instruction' when scheduling in a coaching session or when asking employees to listen to a call. In normal day-to-day conversation, it is more likely than not that these things are either put as requests or go unspoken, as they are general expectations. Indeed, that was the essence of the evidence of Ms Barton, who, when asked what the instruction was, said that she took the fact of scheduling a coaching session as an instruction, because managers tend not to speak in terms of '*I am instructing you'*.

81. Of course, it is perfectly natural that managers and employees alike should converse in those terms; but when it comes to putting a disciplinary allegation to an employee that she unreasonably refused to follow a management instruction, with the risk of dismissal if it is refused, the employee is entitled to know with clarity precisely what the actual instruction was. It was very unclear whether the allegation was a refusal to be coached or a refusal to listen to the call. It was also never made clear to the Claimant that (irrespective of normal expectations) she had ever been instructed to listen to the call. To the extent that it is necessary, we find that the Claimant was not instructed to listen to the call. We accept her evidence that Chantelle asked her to listen to it, that she refused, that she asked Chantelle to give her desktop coaching instead and that Chantelle did not insist or instruct her to listen to the call but agreed to carry out desktop coaching. In her interview with Ms Barton, Chantelle told her that the Claimant wouldn't listen to the call. Nowhere does Chantelle say or imply that she told or in clear terms requested/directed that the Claimant listen to the call – and nowhere did Ms Thompson conclude – that the Claimant was told she had to listen to this call. We find that Ms Thompson, at the time she made her decision, had not identified the management instruction in respect of which the Claimant was said to have unreasonably refused to comply.

82. As further evidence of the lack of clarity on this allegation, in her witness statement at paragraph 8, Ms Hurman (who heard the appeal against dismissal) referred to the second allegation as '*her refusal for the coaching sessions'* (plural). When asked what she understood allegation 2 to be, she said to the Tribunal: '*I understood it to be a refusal to follow a management instruction on a number of occasions*.'

83. That may have been how she understood the allegation but that was not the allegation that was put to the Claimant. It was not the allegation that was set out in the investigation report which was about a single incident, **13 December 2019** followed by the single complaint of not following a management instruction

in relation to that call. As set out at the end of the report by Ms Barton, the relevance of the earlier references was as justification for her decision to proceed to a disciplinary hearing and as evidence in 'support' of the single allegation (single in the sense that the call and the refusal to listen to the call relate to the same incident). Yet both the dismissing manager (Ms Thompson) and the appeal manager (Ms Hurman) approached the matter on the basis that the disciplinary allegation encompassed all of the matters referred to by Ms Barton on **pages 272-273** and summarised in paragraph 71 above. Ms Thompson decided the sanction of dismissal on the basis of all those things and Ms Hurman considered the appeal against sanction in the same way.

84. Staying with the disciplinary hearing, for now, the Claimant's trade union representative said at that meeting that the Respondent should obtain a more up to date occupational health report. Ms Thompson rejected the suggestion of a follow up Occupational Health ('OH') referral because there had been one put in place before and there had been a stress risk assessment. In fact, there had been three OH reports over the years, the last of which was **18 January 2019**, over a year before the disciplinary hearing. The Individual Stress Risk Assessment ('ISRA') had been completed on **05 February 2019** [**pages 381-393**] and there had been a follow up meeting on **07 March 2019**, again about a year prior to the decision to dismiss.

85. Ms Thompson decided that the Claimant had committed gross misconduct and that her employment should be terminated summarily. Of course, strictly speaking – although she never expressed it in these terms – she had not upheld allegation 1. She found some lesser breach of the company standards. She confirmed that she would not have dismissed the Claimant on her findings in relation to allegation 1. As regards allegation 2, although she did not believe there to have been an instruction given by Chantelle on this occasion, she believed the Clamant had failed to follow management instructions in the past. Therefore, she settled on the sanction of summary dismissal because the Claimant had breached the company's standards on **13 December 2019** and had shown by her past behaviours that she did not take responsibility or take well to management instructions or feedback. The Claimant had never been given any disciplinary warning before in respect of these or any other historic matters, although it is right to say that her manager, Ms Smalley, had in the past drawn to the Claimant's attention matters of concern regarding her attitude and manner. However, Ms Thompson concluded that a written warning or a final written warning would be to no avail as the Claimant was likely to repeat her pattern of behaviour in the future, based on her past behaviours.

86. The Claimant appealed Ms Thompson's decision in a letter dated **23 March 2020** [**pages 297-300**]. Her grounds included:

    a) The sanction was disproportionate in that as regards allegation 1, the described behaviours were far from being abusive

b) The investigation was unfair and failed to explore her mitigating evidence particularly as regards her health both physical and mental

c) The absence of disciplinary warnings

87. That appeal was conducted by telephone on **30 April 2020** and the outcome was communicated to the Claimant by Ms Hurman on **12 May 2020** [**pages 312-316**]. The appeal was not upheld. That was so, even though Ms Hurman concluded that the Claimant's conduct on the call itself would not have been considered as gross misconduct and – as she confirmed to the tribunal – would not have resulted in dismissal. Therefore, like Ms Thompson, she did not conclude that the Claimant had engaged in abusive behaviour. This means that neither the decision-maker or the appeal manager believed the first allegation to have been made out. Yet neither expressly said as much in the letter of dismissal or in the letter rejecting the appeal.

88. Ms Hurman did not take account of the Claimant's pain levels. That is clear from paragraph 19 of her witness statement. She took the approach that, had the Claimant been in so much pain, she should not have been at work. She considered it not relevant to her decision that the Claimant experienced pain on other days.

89. The Claimant's case – before the disciplinary decision makers as it was before this tribunal - was that she lived with pain every day and that she recorded her pain levels on most, if not all days. If a decision maker is to consider whether pain caused or contributed to the employee's conduct on **13 December 2019**, it might be considered relevant to consider how that employee was affected by and coped with pain on the days or weeks either side of that date. Yet Ms Hurman did not consider it relevant to have a look at the Claimant's pain levels on any other day.

Relevant law

Unfair dismissal

Reason for dismissal

90. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section 98(2) or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reference to the 'reason' or 'principal reason' in section 98(1)(a) and s98(4) is not a reference to the category of reasons in section 98(2)(a)-(d) or for that matter in section 98(1)(b). It is a reference to the actual reason for dismissal (**Robinson v Combat Stress** UKEAT/0310/14 unreported). The categorisation of that reason (i.e. within which of subsection

98(2)(a)-(d) it falls) is a matter of legal analysis: **Wilson v Post Office** [2000] IRLR 834, CA.

91. The reason for dismissal 'is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation. In all cases, the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason: **West Midlands Co-Operative Society v Tipton** [1986] IRLR 112, HL

92. An employer may have multiple reasons for dismissing an employee. In **Robinson v Combat Stress** Langstaff P said at paragraphs 20 and 21:

"where an employer has a number of reasons which together form a composite reason for dismissal, the tribunal's task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that, once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss.

All must depend on the employer's evidence and the Tribunal's approach to it. But that approach must be to ask first what the reason was for the dismissal, and to deal with whether the employer acted reasonably or unreasonably by having regard to that reason: that is, the totality of the reason which the employer gives."

93. Where **the** reason is a composite of a number of conclusions about a number of different events the tribunal must examine all of the employer's reasoning as that was the actual reason for its dismissal.

94. In a 'misconduct' dismissal, the employer must also show that the principal reason for **dismissal** relates to the conduct of the employee.

Reasonableness

95. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. In **West Midlands Co-operative Society v Tipton**, Lord Bridge of Harwich stated, at paragraph 24:

"A dismissal is unfair if the employer unreasonably treats his real reason as a sufficient reason to dismiss the employee, either when he makes his original decision to dismiss or when he maintains that decision at the conclusion of an internal appeal."

96. The burden here is, of course, neutral. It is not for the employer to prove that it acted reasonably in this regard or for the employee to prove unreasonableness. Further, in assessing reasonableness, the Tribunal must not put itself in the position of the employer. It is not for the tribunal simply to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not but to determine whether the employer acted as a reasonable employer might have acted. It is not for the Tribunal to make its own assessment of the credibility of witnesses on the basis of evidence given before it. The relevant question is whether an employer, acting reasonably and fairly in the circumstances, could properly have accepted the facts and opinions which it did: **Linfood Cash and Carry Ltd v Thomson** [1989] I.C.R. 518, EAT and **Morgan v Electrolux Ltd** [1991] IRLR 89, CA.

97. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst in an unfair dismissal case, the parties often invite the tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions.

98. The approach to be taken when considering s98(4) is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether in the particular circumstances the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. In assessing the reasonableness of the response it must do so by reference to the objective standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). The Tribunal must not substitute its own view as to what was the right course of action.

99. In misconduct cases, the approach which a Tribunal takes is guided by the well known decision of **British Home Stores v Burchell** [1978] IRLR 379, EAT. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:

    (i) Did the employer carry out a reasonable investigation?

(ii) Did the employer believe that the employee was guilty of the conduct complained of?

(iii) Did the employer have reasonable grounds for that belief?

100. In gross misconduct unfair dismissal cases, in determining the question of fairness, it is unnecessary for the Tribunal to embark on any analysis of whether the conduct for which the employee was dismissed amounts to gross misconduct. In **Hope v British Medical Association** [2022] IRLR 206, the EAT held that whether dismissal by reason of conduct was fair or unfair within section 98(4) ERA depended not on the label or characterisation of the conduct as gross misconduct. Determination of the reasonableness of the decision involved the four-stage analysis summarised in **JJ Food Service Ltd v Kefil** [2013] IRLR 850:

- The employer's genuine belief in the misconduct
- The employer reaching that belief on reasonable grounds
- The employer conducting a reasonable investigation
- Whether dismissal was within the range of reasonable responses

101. When determining whether dismissal is a fair sanction, again, it is not for the Tribunal to substitute its view for that of the employer. The Tribunal must not ask whether a lesser sanction would have been reasonable but whether dismissal was reasonable.

Fair procedures

102. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

103. The tribunal's task under s.98(4) is to assess the fairness of the disciplinary process as a whole. Both the original disciplinary hearing and decision and the appeal hearing and decision are elements in the overall process of terminating the contract of employment. Where procedural deficiencies occur at an early stage, the tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, the open-mindedness of the decision-maker and its overall fairness: **Taylor v OCS Group Ltd** [2006] 1602 I.C.R. At the end of the day, the employment tribunal must consider whether there has been a fair result, reached by fair process. That assessment will depend on the facts of the case.

Polkey

104. What is known as 'the Polkey principle' (**Polkey v AD Dayton Services** [1988] I.C.R. 142,HL) is an example of the application of section 123(1) ERA 1996. Under this section 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. A tribunal may reduce the compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been followed. Thus the 'Polkey' exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.

105. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraphs 53 and 54).

Contributory conduct

106. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow Security Services Ltd v Millicent** [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have actually caused or contributed to the dismissal: **Nelson v BBC (No2)** [1980] I.C.R. 110, CA. The conduct need not be a breach of contract, or illegal conduct. It may be conduct that was 'perverse or foolish' or 'bloody-minded' or merely unreasonable in all the circumstances. Langstaff J offered tribunals some guidance in the case of **Steen v ASP Packaging** [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

107. There is an equivalent provision for reduction of the basic award, section 122(2) which states that '*where the tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable*

to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly'. The tribunal has a wider discretion to reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

108. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

Sections 20-21 Equality Act 2010: failure to make reasonable adjustments

109. The duty is set out thus:

(1) 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.

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

(3) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,
(b) altering it, or
(c) providing a reasonable means of avoiding it.

(4) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,
(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d) any other physical element or quality.

110. Paragraph 20 of Schedule 8 of the Act 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.

111. The focus of section 20 EqA is on affirmative action: **General Dynamics Information Technology Ltd v Carranza** [2015] I.C.R. 169, EAT, para 32. It is imperative to correctly identify the 'PCP''. Without doing this, it is not possible to determine whether it has put the disabled person at a substantial disadvantage or what adjustments are required. The question that has to be asked is whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. In the case of **Ishola v Transport for London** [2020] IRLR 368, the Court of Appeal observed that the words 'provision, criterion or practice' are not terms of art, but are ordinary English words. They are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. In context, and having regard to the function and purpose of the PCP in the 2010 Act, all three words carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again (see Simler LJ @ para 38).

112. The employer must take such steps as it is reasonable to take to avoid the disadvantage (section 20(3)). It is well established that 'steps' are not merely the mental processes, such as the making of an assessment but involve the practical actions which are to be taken to avoid the disadvantage: **General Dynamics Information Technology Ltd v Carranza**, @ para 35.

113. Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is capable of amounting to a relevant step under section 20(3). There is no requirement that the adjustment must have a good prospect of removing the disadvantage. It is enough if a tribunal finds there would have been a prospect of the disadvantage being alleviated: **Leeds Teaching Hospital NHS Trust v Foster** EAT 0552/10. The only question is whether it was reasonable for it to be taken.

114. The duty to comply with the reasonable adjustments requirement under section 20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage: **Abertawe Bro Morgannwg University Local Health Board v Morgan** *2018 ICR 1194, CA*.

115. The PCP, or the relevant physical feature, must put the employee to a comparative substantial disadvantage. As to comparators, in **Fareham College Corporation v Walters** [2009] IRLR 991, the EAT (Cox J) said:

"*in many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play*".

Knowledge of disability and disadvantage

116. In considering whether the employer can be said to be subject to a duty to make reasonable adjustments, the Tribunal must consider the knowledge of the Respondent. The law is clearly articulated in **Department of Work and Pensions v Alam** [2010] IRLR 283. The employer is not under a duty to make reasonable adjustments if it did not know or could not reasonably have known:

a. That the employee was a disabled person, and

b. That he was likely to be placed at a substantial disadvantage by the relevant PCP

Burden of proof

117. Section 136 Equality Act 2010 provides that:

(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

118. Section 136 EqA, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Grampian Health Board** [2012] I.C.R. 1054.

119. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had failed to make reasonable adjustments or harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

120. In the case of **Project Management Institute v Latif** [2007] IRLR 579, the EAT considered the application of section 136 in the context of reasonable adjustments. The burden does not shift at all in respect of the 'PCP' or 'substantial disadvantage'. Those are aspects of the complaint and issues of fact which a Claimant must establish in every case. The reversal of the burden comes into play on the issue of adjustments. By the time a case comes before a tribunal there must be some indication of what adjustments it is alleged should have been made. The burden is reversed once a potentially reasonable adjustment is identified. It is for the Claimant to identify not only that the duty to make reasonable adjustments has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Therefore, there must be evidence of some apparently reasonable adjustment that would have avoided the comparative substantial disadvantage occasioned by the PCP. At the very least it is important for the Respondent to understand the broad nature of the adjustment proposed and be given sufficient detail to enable it to engage with the question of whether it could reasonably be achieved or not.

121. Therefore, what a claimant must do is raise the issue as to whether a specific adjustment should have been made. Thus, the onus is firmly on the claimant and not the respondent to identify, in broad terms at least, the nature of the adjustment (or 'step') that would ameliorate the substantial disadvantage. Having done so, the burden then shifts to the employer to seek to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

Section 15 Equality Act 2010: discrimination because of something arising in consequence of disability

122. Section 15 provides:

(1) A person (A) discriminates against a disabled person (B) if--

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

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

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

123. The focus of section 15 is in making allowances for a person's disability: **General Dynamics Information Technology Ltd v Carranza** [2015] I.C.R. 169, EAT, para 32. An employer cannot discriminate against a disabled person contrary to section 15 if, at the time of the unfavourable treatment, it did not know that the Claimant had a disability and could not reasonably have been expected to know that.

124. For a claim under section 15 to succeed, there must be 'something' that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability. Paragraph 5.9 of the EHRC Employment Code states that the consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability'.

125. In **Pnaiser v NHS England and anor** [2016] IRLR 170, the EAT summarised the proper approach to section 15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person. The 'something' need not be the sole reason for the unfavourable treatment but it must be a significant or more than trivial reason for it. In considering whether the something arose 'in consequence of' the claimant's disability', this could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. There is no requirement that the employer be aware of the link between the disability and the 'something' when subjecting the employee to the unfavourable treatment complained of: **City of York Council v Grossett** [2018] I.C.R. 1492.

126. An employer will avoid liability under section 15 if it shows that the unfavourable treatment was a proportionate means of achieving a legitimate aim. In the EHRC Employment Code, paragraph 4.30 states that the means of achieving a legitimate aim must be proportionate. In deciding whether the means used to achieve the aim are proportionate the Tribunal is required to carry out a balancing exercise. To be proportionate a measure had to be both an appropriate means of achieving the legitimate aim and reasonably necessary: **Homer v Chief Constable of West Yorkshire** [2012] I.C.R. 704, SC, per Baroness Hale @ paras 24-25. Proportionality requires a balancing exercise between the impact on the employee and that of the employer: **Hardy & Hansons plc v Lax** [2005] ICR CA.

Submissions

127. The Claimant and the Respondent made oral submissions. We do not propose to add to what is an already lengthy decision by rehearsing those submissions. We took them into account before arriving at our conclusions.

Discussion and conclusions

128. We shall state our conclusions in the order that they are set out in the list of issues.

Unfair dismissal

Reason for dismissal

129. The first step in any unfair dismissal complaint is to identify the reason for dismissal. That is the actual reason which operated on the mind of those responsible for the decision to dismiss, not the characterisation of that reason, which might be described as the second step. We conclude that Ms Thompson dismissed the Claimant because she genuinely believed that:

- the Claimant's handling of the call of **13 December 2019** transgressed the Respondent's standards and values in that she was rude and condescending to a customer, interrupted the customer, spoke over her, refused to put her through to a manager and terminated the call.

- the Claimant had previously refused to follow management instructions,

- the coaching which the Claimant undertook with Chantelle regarding the **13 December** call was not 'proper' coaching as a result of the Claimant's refusal to listen to the call during the feedback.

- the Claimant was someone who would in the future probably continue to be challenging because of what Ms Thompson believed to be a pattern of resistance on the part of the Claimant to feedback based on what Ms Thompson believed to be a history of refusing to follow management instructions and receive feedback.

- Those beliefs held by Ms Thompson (and shared by Ms Hurman), caused her to dismiss the Claimant. In the words of Underhill LJ, they were the factors operating on her mind which caused her to take the decision to dismiss. Those things taken together relate to conduct. Therefore, the Respondent has satisfied us that it dismissed the Claimant for a reason related to conduct. This meant that the dismissal was potentially fair.

Reasonableness: section 98(4)

130. We then considered whether the Respondent acted reasonably in treating that reason as a sufficient reason for terminating the Claimant's employment. We reminded ourselves that in assessing reasonableness, the Tribunal must not put itself in the position of the employer. It is not for us to substitute our own opinion for that of the employer as to whether certain conduct is reasonable or not but to determine whether the employer acted as a reasonable employer might have acted

131. We considered firstly whether the Respondent carried out a reasonable investigation. As regards the second allegation, we conclude that it did not. There was confusion regarding the precise nature of the allegation as regards to what instruction, if any, was in fact given and refused. There were differences of view as between the investigator, Ms Barton, the decision maker, Ms Thompson and the appeal officer, Ms Hurman as to what management instruction had been given which was alleged to have been unreasonably refused.

132. That was a fundamental failure which, in principle, is likely to impact on the question of fairness. Unless an employee and a decision maker know precisely that the allegation is, it will be difficult for the employee to respond to the allegation and difficult for the decision maker to understand what she or he is being asked to decide upon. It makes it difficult to know what sanction to apply. However, it is not simply a question of difficulty. More importantly, it is a question of fairness and reasonableness. If the decision maker is not clear as to the allegation it is plainly unreasonable for an employee to be exposed to the risk of disciplinary sanction on a potentially erroneous basis.

133. The principle is one thing but what matters is what happens in practice. In this case, the failure to properly identify allegation 2 was fundamentally unfair to the Claimant. That unfairness is amply demonstrated by the evidence of Ms Thompson and Ms Hurman who accepted that they would not have dismissed the Claimant on allegation 1 alone. That is because – albeit they upheld allegation 1 – they did not believe the Claimant to have engaged in 'abusive' conduct but in behaviour which amounted to a somewhat lesser transgression by her of the company's values. Therefore, allegation 2 took on a much greater significance for the Claimant in that it was the one that tipped the scales resulting in her dismissal. A reasonable employer would have ensured from the outset of the investigation precisely what allegation 2 was so that the decision maker was in no doubt about the charge. As it happened, Ms Thompson did not in fact conclude that there had been an instruction in relation to the 13 December call but she believed that the Claimant did not follow previous management instructions, and that this was within the remit of the allegation and her decision making. Indeed, it was this history (in Ms Thompson's belief) and her view that the Claimant was unlikely to change and accept feedback that largely led to her decision to dismiss. Therefore, although the two allegations as they were stated on paper were not, in terms, made out in the mind of Ms Thompson, nevertheless she went on to dismiss the Claimant. On appeal, Ms Hurman believed the allegation to be a refusal to follow a number of management instructions – see paragraph 82 above –

which was not the subject of the allegation. Thus, the unfairness to the Claimant at the disciplinary hearing stage carried over to the appeal stage.

134. There was one other aspect of the investigation which factored into our assessment of reasonableness. The Respondent failed to obtain an OH report prior to making any decision on dismissal. The Claimant's trade union representative, and the Claimant, maintained that on **13 December 2019**, the Claimant was in severe pain and that this pain was a factor in her behaviour. The Claimant's representative implored the Respondent to obtain a report from OH. It was a fundamental part of the Claimant's defence to allegation 1 and it was plain from the material before Ms Barton and Ms Thompson that the Claimant had, in the past, mentioned to her manager that the pain and the side effects of her medication made her irritable and resulted in mood changes. However, the Respondent (by which we mean HR and Ms Thompson) took the conscious decision not to seek input from OH, or from any other medical source. In our judgement, no reasonable employer would have consciously failed to seek an OH report in such circumstances. There was no dispute that the Claimant has chronic pain syndrome and that she suffers from pain on a daily basis. In a case where an employee is charged with gross misconduct in respect of her conduct towards a customer and where that employee is advancing as an argument explaining her behaviour that her pain and/or the effects of strong medication caused or contributed towards her action, the validity of that argument must be a relevant consideration for any employer.

135. The Respondent was well versed in OH referrals and had access to medical expertise. The reasons given by Ms Thompson for not obtaining an OH report (paragraph 29 of her statement) were that the last OH report (from **January 2019**) did not recommend a follow up; that reasonable adjustments had been in place and that a further OH referral would not bring anything to light as all recommended equipment was in place following completion of the Individual Stress Risk Assessment. However, that does not even begin to address the Claimant's point. The previous OH reports were obtained for the purposes of addressing the Claimant's need for reasonable adjustments. However, at this point in time, she was faced with a charge of gross misconduct in respect of her conduct and the relevance of OH involvement as she suggested was to seek to support her argument that her behaviour was affected by her pain levels and the medication she was on. On any objective analysis, once raised and advanced, that is a relevant consideration for any employer who may end up having to make a decision on the allegation and what sanction to apply. To fail to investigate that part of the Claimant's defence deprived her of potentially valuable supportive material and the conscious decision not to investigate was, in our judgement, outside the band of reasonable responses of an employer acting reasonably.

Belief of the Respondent

136. We then considered whether the Respondent believed that the employee was guilty of the conduct complained of – again, by reference to **Burchell**. The answer to that was that neither Ms Thompson or Ms Hurman believed the Claimant to have been guilty of the first allegation: 'abusive' behaviour towards a customer. They both concluded that – whilst a poorly handled call – the Claimant did not engage in abusive behaviour. As to the second allegation, Ms Thompson concluded that there had been no instruction in relation to the feedback for the call on **13 December 2019** (see our findings in paragraph 86 above). Therefore, she did not in fact believe that she was guilty of the second allegation as it was set out. However, she did conclude that she had refused to comply with previous management instructions, which she implicitly considered to be within the remit of the allegation – as did Ms Hurman. We conclude that the Respondent did not genuinely believe that both allegations were made out but did genuinely believe that the Claimant had transgressed its standards in the way set out in paragraph 129 above.

137. Turning to address the question whether the Respondent had reasonable grounds for its belief that the Claimant was guilty of the matters complained of, we concluded that they did not. How could they, we asked ourselves rhetorically, when the actual conclusions were as we have set out and the decision maker had not in fact concluded that either allegation had been made out? This is not our view of the facts. This was the view and conclusion of Ms Thompson. She certainly had reasonable grounds for concluding that the Claimant had been rude and condescending on **13 December 2019** and that she handled the call very badly but that was not the allegation against her. They might have had reasonable grounds for believing that she had failed to comply with previous instructions (before **13 December 2019**) but that was not the allegation made against her either. Nevertheless, the Respondent communicated to the Claimant that both allegations were upheld.

Sanction of dismissal

138. The belief that the Claimant had refused previous management instructions was a major factor – if not the major factor – in the decision to dismiss and on appeal. Ms Thompson felt that she could not 'move that behaviour' on to any other department. We have had regard to the fact that the Claimant had no previous disciplinary warnings in relation to those previous 'refusals' – as the decision makers believed them to be. The Claimant had not faced any allegations of unreasonable refusal to follow previous management instructions either in the past or in relation to allegation 2. It is our judgement that no reasonable employer would have moved straight to the sanction of dismissal, let alone summary dismissal, in this case. To do so in circumstances where her own conclusions were to the effect that allegations 1 and 2 were not made out, where the Claimant had no existing disciplinary warnings and where she had not been 'charged' with any other allegations of unreasonable refusals to follow instructions is demonstrably unreasonable. No reasonable employer would have applied the sanction of dismissal in such circumstances.

139. That is not to say that the Respondent was not entitled to apply any sanction in respect of the actual conclusions reached by Ms Thompson, as set out in paragraph

129 above. However, the issue for this tribunal was whether the actual sanction was one which a reasonable employer, acting reasonably, could have applied, understanding that reasonable employers may reasonably apply different sanctions. Our judgement is that, in all the circumstances of this case, the sanction of dismissal fell outside that range of reasonable responses.

Disability discrimination: section 15 Equality Act 2010

140. The Tribunal found this aspect of the claim to be very difficult. As set out under the relevant law section above, the approach the Tribunal has to take when considering a complaint under section 15 is as follows:

- To identify the unfavourable treatment complained of.
- To identify what caused that treatment. The treatment must be 'because of something'. This requires the Tribunal to determine the 'something'.
- To identify whether the 'something' arises in consequence of the disability.

141. It is for the Claimant to establish these things.

What is the unfavourable treatment?

142. There was no dispute that the Claimant was dismissed and it was accepted that dismissal amounts to unfavourable treatment.

What was the 'something' that was an effective cause of that treatment?

143. The Claimant's case was: she suffers from chronic pain for which she takes strong medication; she was in pain on a daily basis. On **13 December 2019** she was rude and condescending to a customer. She interrupted her and talked over her. She failed to escalate the call. She terminated the call. The Claimant says this that she was in pain at the time and had taken strong medication, both of which, she says, go some way to explaining how she conducted herself. The 'thing' (i.e. the 'something' referred to in section 15 EqA) which she contends arose in consequence of her disability was the conduct towards the customer on **13 December 2019**. That something, she says, was partly why the Respondent dismissed her and therefore an effective cause of the unfavourable treatment. We reminded ourselves of the real reason for dismissing the Claimant as set out in paragraph 129 above. There was no dispute that the Claimant's conduct towards the customer on **13 December 2019** – as Ms Thompson found it to be - was a factor in the decision to dismiss – even though it would not, in and of itself, have resulted in the Claimant's dismissal. Therefore, we are satisfied that it was an effective cause of dismissal. So too, was the perceived refusal of the Claimant to follow previous management instructions and the perception of her as a person who is resistant to feedback.

Did the 'something' arise in consequence of the Claimant's disability?

144. Mr Taylor tentatively submitted that the Claimant's past behaviour was something that arose in consequence of the Claimant's disability. We say 'tentatively' because the Claimant did not accept that she had refused to comply with any management instructions or that she refused to listen to the call with Chantelle (she says Chantelle agreed that she did not have to). Nor did the Claimant accept that she is or was resistant to feedback. She does not accept the truth of these things, as she made clear in her oral evidence. Therefore, she does not directly contend that these things arose in consequence of her disability. Nevertheless, we regarded Mr Taylor's submission that the Respondent should have asked for medical evidence to consider whether there was a connection to be akin to a submission that the Claimant's conduct at least as it was perceived by the Respondent arose in consequence of her disability.

145. Mr Scott, on behalf of the Respondent, did not accept that the Claimant had established that any of her behaviour arose in consequence of her disabilities (whether that be her mental impairment or physical impairment or a combination of both). He submitted that it was insufficient to find on the say so of the Claimant that because she is a person in pain on an almost daily basis and on medication her behaviour was a consequence of her disability.

146. We first considered this dispute on the basis of principle. **If** the Claimant could show a connection, even a loose connection, between her behaviour towards the customer on **13 December 2019** – or resistance to feedback - and her disability then we considered that would be sufficient to enable us to conclude that her behaviour arose in consequence of her disability. As made clear by the authorities, this part of the analysis does not involve a strict causation test. There may be a number of connections or chains along the way between the conduct and the disability. One of those connections can be pain and another can be the effects of medication. Both of those may operate on an individual who is disabled in such a way that it affects their conduct. There is no need for the individual to prove that any of these caused these things in that sense.

147. We also recognised that it is relatively easy (even if genuinely believed) for a person to say 'my behaviour' is a consequence of (in the sense that being connected to) my disability'. As a tribunal, we considered that we must be careful to consider whether a person's conduct is in fact explained by his or her own personality or traits of character and not a disability. We considered that we must be conscious that a person may genuinely believe their conduct to be connected to disability rather than personality. Most people do not accept the unattractive or negative aspects of their character or personality and may not even be able to see them.

148. Mr Taylor, to whom we pay some tribute for his representation of the Claimant, sought to persuade us that there was sufficient evidence before us to make good the connection between the Claimant's pain and medication and thus her disability and her behaviour. That evidence was, he submitted, the Claimant's own evidence, the aux diary and the extracts from 121 meetings and other documents where there were

references to the Claimant speaking to her previous manager about the effects of her new medication and the mood changes it brought on.

149. We considered those submissions and the evidence on which they were based very carefully. It was, as we have observed, a difficult exercise. Had we concluded that the Claimant's behaviour on 13 December 2019 or any resistance to feedback was connected with her medication and/or pain levels on that day, then we would have concluded that this behaviour arose in consequence of her disability (the pain and the effects of the medication being 2 links connecting the behaviour with the Claimant's disability) and that the unfavourable treatment (dismissal) was because of that behaviour (in the sense that it was materially influenced by that behaviour). However, in the end we concluded that the Claimant had not satisfied us on the evidence that there was a sufficient connection between her pain and/or medication (in the sense described in the case of **Pnaiser**). The following factors were relevant to our conclusion:

- On **13 December 2019**, as with most if not every other day, the Claimant was experiencing <u>some</u> pain. Although the Claimant had been spoken to about her attitude in the past, she was not regularly rude or condescending to callers, even difficult callers.

- On the day in question, the Claimant did not mention to anyone in the office that her pain level was such that it was affecting or had affected her behaviour or ability to handle any calls. She did not escalate the call to a manager or even mention to a manager about her pain on the day, even though it was the worst call in 11 years and she maintains that her behaviour was attributable to her pain levels and her medication. Nor did she mention anything in her email to Lucy Seaton.

- The Claimant said in oral evidence that her pain levels were never below 7. We were not provided with anything other than a limited extract of her aux diary in which she recorded her pain levels. There was one entry at level 6, which means that she cannot say her pain levels were <u>never</u> recorded as being below 7. The Claimant did not make any entry in her aux diary for **13 December** indicating that her pain levels were severe or more than the bearable level with which she lived on a daily basis. The entries she did make did not indicate that she took pain relieving medication during the call, as she suggested in her oral evidence; or at least, we did not accept that the entries supported any such contention.

- The Claimant did not identify any issues regarding her own behaviour towards the customer until after she had become aware that it had been picked up on monitoring.

- The effect of the Claimant's medication was something upon which Mr Taylor and the Claimant heavily relied on as being the most likely explanation for her

conduct. The behaviours which were said to have been explained by or connected to the effects of medication were essentially irritability, rudeness and condescension to a customer. Those were the essential behaviours the Claimant had displayed to the customer on the day and, moreover, which Ms Thompson believed her to have displayed and which the Claimant accepted she had displayed in her evidence to the Tribunal. However, there was no medical evidence supporting any link between the medication and rudeness/condescension. At an early point in these proceedings, it had been envisaged that there would be some medical evidence obtained with a view to establishing such a connection (see paragraph 2 above). As regards any medical evidence which was in the end produced, the OH evidence on **page 473** spoke only of reduced concentration and fatigue as side effects. We considered that a reduction in concentration and fatigue might lead to condescension and rudeness but not necessarily so. The Claimant's case was not that she was not concentrating at the time (indeed she carried out some research during the call). Nor was her case that she was particularly fatigued that morning – fatigue, at least from the medical evidence, tended to come later in the day.

- The Claimant expressed her own view that her behaviour was connected to her medication but nothing much more than that. She believed that she had become irritable with a change in medication and in the past had said as much to her line manager. We took account of this. However, there was no additional evidence that the medication taken, the gel, tramadol and paracetamol, can lead to irritability and short temper. We can certainly see how being in pain may cause a person to be short tempered but equally, those who have come to live with pain on a daily basis do not necessarily become argumentative, rude or condescending – the attributes which the Claimant accepts she demonstrated on that call

- The Claimant did not accept that she was resistant to feedback, yet the Tribunal concluded that she was to a significant extent someone who was resistant to feedback in her role. In arriving at this conclusion, we considered it relevant that she was willing only to accept feedback from certain individuals whom she had come to respect, namely Emma Smalley. We inferred from her evidence on this and from her demeanour that she had a fairly dismissive opinion of the experience of other managers, akin to condescension towards the abilities of others. This was not, in our judgement, something that arose in consequence of her disability.

- The Claimant was disaffected at the time by the Respondent for having rejected – subjected to appeal – her loan application (we refer to paragraph 64 and the reference to the Claimant being 'let down'). The caller on **13 December 2019**, who was herself quite rude on this occasion, was calling about the very thing for which the Claimant had been rejected. Although the Claimant played down this aspect, we concluded, contrary to her evidence, that she was

unhappy with the Respondent having initially rejected her PTML application and we conclude that the rude caller provoked her into taking that disaffection out on the caller on the day. This was not something that arose in consequence of her disability.

- The Claimant was, generally, vexed by what she regarded as abusive customers which advisers should not have to endure and by a belief that the Respondent was not doing enough to address that issue. The Claimant regarded the caller on **13 December 2019** as an abusive caller. We found it particularly telling that the Claimant remarked '*behaviour breeds behaviour*' (see paragraph 61). From this, we inferred that the Claimant regarded the caller as rude and condescending and that she met like with like. Although this was stated in the context of talking about her pain, we did not accept that the Claimant had established such a link by sufficient evidence.

150. It is our conclusion then that it is more likely than not that the Claimant's behaviour towards the caller on **13 December 2019** was entirely to do with the combination of all those things. The Claimant has not persuaded us that there was a sufficient connection between her conduct and her disability. The things we have identified, in our judgement, came together causing the Claimant to slip into condescension and rudeness. She herself recognised this at the time, appreciating that the call was a 'risk call'. At the time and in the immediate aftermath, she did not connect her behaviour with her medication or her pain levels, which were probably at a relatively bearable level during the call. She only came to make this connection subsequently. That is not to say that we consider her to have done so mischievously. When faced with a possible disciplinary sanction, she sought to explain her own conduct and, influenced by the desire to avoid any sanction, she genuinely advanced the argument that her behaviour was connected to the medication and her pain on the day. It is one thing to genuinely believe this. However, when pursuing a complaint of discrimination within section 15 Equality Act 2010, she must establish that connection in these proceedings by adducing sufficient evidence, which in our judgement she has not. Therefore, the complaint of discrimination because of something arising in consequence of disability must fail.

151. We next turned to consider the complaint of failure to make reasonable adjustments

Duty to make reasonable adjustments

PCP 1

152. The first PCP ("PCP 1") was the requirement that the Claimant maintain a certain level of attendance at work in order to avoid the risk of disciplinary sanctions under the attendance management policy and procedure. The Claimant argued that this put her at a substantial disadvantage in that her disability increased the likelihood of sickness absence which made it more difficult for her to comply with the PCP than her non-disabled peers, thus increasing the likelihood of warnings being given under

the attendance management procedure and/or dismissal. The suggested reasonable adjustment was that the Respondent ought to have made a proportionate adjustment of the trigger points by increasing the number of periods of absence and the period of time before warnings applied.

153. The first question we had to ask was whether the Respondent applied what is referred to as PCP 1. This was not in dispute. The Respondent did apply a policy of requiring from its employees a certain level of attendance at work in order to avoid the risk of disciplinary sanctions under the attendance management policy and procedure. This was a 'PCP'.

154. The next question, therefore, was whether this PCP placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled. Substantial disadvantage was accepted by the Respondent in its amended response to the claim. In any event, there was enough evidence demonstrating that the Claimant had experienced ongoing issues with absenteeism and from our findings of fact, it was not a great leap to draw the inference that as a person with chronic pain syndrome and anxiety and depression she is more likely to be absent from work than a person who is not so disabled. That non-disabled person would be less likely to be absent for as much as the Claimant and therefore less likely to be affected by the capability procedures and sanctions.

155. In those circumstances, the Respondent was under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

156. The next question was to consider whether the Respondent had failed in that duty. Mr Taylor, in effect, argued that it had. Mr Taylor was not submitting that the Respondent was precluded from taking any action in respect of the Claimant's periods of absence, merely that it should have accounted for her disability by adjusting the trigger points. That was the suggested step. He was unable to suggest to what extent the Respondent should have increased the number of periods of absence or the period of time before warnings applied.

157. When it comes to the concept of reasonable adjustments, the substantive question is whether there were steps that could reasonably have been taken and whether such steps had been taken. In our judgement, the Respondent did take steps to avoid the PCP putting the Claimant at a substantial disadvantage compared to non-disabled persons. It exercised its discretion on four occasions not to take any action in the Claimant's case in respect of her absence record: on **21 June 2018, 09 August 2018, 22 August 2018** and **21 September 2018**. In our judgement, this had the same practical effect as adjusting the triggers by an unspecified number, as suggested by Mr Taylor, in that it delayed the taking of action under the absent management procedures. Further, at the point when it did proceed to a formal hearing on **09 December 2019**, it made a further adjustment of resetting the clock (paragraph 31 above) by recommencing the period of absence monitoring afresh from that point. Again, this had the practical effect of extending the period of time during which action

might be taken under the capability or absence management policy. It is not the Claimant's case that she should not have been subjected to any absence monitoring and it would be unreasonable to expect any employer not to monitor the sickness absence of a disabled employee. In practical terms, we conclude that the Claimant had been given the adjustment she contended for in all but name.

PCP 2

158. The second PCP was the application of an informal intense performance plan aimed at improving the Claimant's performance. It was argued that this put the Claimant to a substantial disadvantage by putting additional pressure on her at a time when her mental health was deteriorating. As a reasonable adjustment, it was suggested that the Respondent ought to have implemented a formal performance improvement plan or 'PIP'.

159. The first question was whether the PCP was applied. The authorities emphasise the need to identify the PCP with precision – that is why we took some time at the outset of the hearing to identify precisely what they were. Considering how the case was put, we are satisfied that the Respondent did not apply the PCP of an 'informal intense performance plan'. It is right to say that the Claimant's performance was managed informally but there was no 'intense' performance management as put. There was certainly nothing that could be described as intense management of the Claimant and there was no plan. On the contrary, we considered that the Respondent acted reasonably in holding off proceeding to formal management procedures for as long as it did. Therefore, the Claimant has not established that the actual PCP relied on in these proceedings was in fact applied.

160. In our deliberations we applied some leeway to the Claimant's definition of this PCP, without altering the essence of the claim, in that we considered whether the Claimant's case really was that the PCP was simply "informally managing her performance" (i.e. leaving out any reference to that management being 'intense' or a 'plan'). It was, after all, not in dispute that her performance was managed informally. The Respondent had been contemplating putting the Claimant on to a formal PIP and it was likely that this was going to happen. However, it did not do so. We concluded that the Respondent did apply the slightly differently worded PCP of informally managing the Claimant.

161. We then considered whether the Claimant had shown that this slightly altered PCP put her to a substantial disadvantage. We were satisfied that she had not shown this. In the tribunal's experience, employees usually argue the reverse: that a formal management process (with the ultimate threat of sanctions including dismissal) placed them at a substantial disadvantage by increasing anxiety and that the adjustment would have been to refrain from formal processes by managing in a more informal manner. In these proceedings, the Claimant's argument was somewhat 'back to front' when compared to the usual argument. Indeed, the Claimant's trade union representative sought to persuade the Respondent not to commence a formal PIP and at the meeting on **27 September 2019**, the Claimant had said that PIP was often used

to beat someone over the head [**page 426]** (see findings in paragraph 64 above). Whilst an unusual argument, we nevertheless gave it due consideration.

162. Having done so, we concluded that the Claimant did not satisfy us that she was placed at a substantial disadvantage by the practice of managing her performance informally. The Respondent was entitled to – and would be expected to - manage her performance. This can be done in one of two ways: formally or informally. The Claimant has not satisfied us that managing her performance informally placed more stress on her than managing it formally. Given the 'back to front' nature of the argument, we would have expected to see some evidence of this and there was none aside from the Claimant's asserted belief in these proceedings. However, as can be seen from our findings, at the time, the Clamant herself regarded a formal PIP as a negative thing, to beat her with, as did her trade union representative.

163. Even if she had persuaded us that she had been put to the substantial disadvantage, there was the additional issue of the Respondent's knowledge to consider. As set out under the relevant law above, there is no duty to make any adjustment if the Respondent shows that it did not know and could not reasonably have known that the PCP was likely to place the Claimant at the substantial disadvantage. The Claimant did not ask for a PIP and in fact expressed to her employer the view that a formal PIP was used to beat someone over the head. In addition, her union representative had asked the Respondent not to implement a PIP. Given this, and in light of the general understanding that an informal approach to performance management is likely to be considered less stressful for employees than a formal process the Respondent satisfied us that it did not know and could not reasonably be expected to know that a PCP of managing performance informally was likely to put the Claimant to the substantial disadvantage of putting additional pressure on her at a time when her mental health was deteriorating.

164. For these reasons the claim of failure to make reasonable adjustments must fail and is dismissed.

Summary of liability conclusions

165. The Complaint of unfair constructive dismissal is well-founded and succeeds. The complaints of disability discrimination (section 15 and sections 20-21 Equality Act 2010) fail and are dismissed.

Issues relating to remedy

166. The Respondent raised two substantive issues which, in light of our conclusions, pertain to the finding of unfair dismissal. The first issue was what is known as the 'Polkey' issue and the second was the question of contributory conduct. We take those in turn.

Polkey

167. We understood from the authorities that the Polkey exercise involves speculation and that Tribunals must consider whether to reduce the compensatory award where the matter is raised, as it was in this case, by the Respondent. We did consider it in this case but we concluded that it would not be just and equitable to reduce the compensatory award by any percentage to reflect the chance that the Claimant would have been fairly dismissed. We arrived at this conclusion because the failures of the Respondent were, in our judgement so fundamental. We had regard to the evidence of both Ms Thompson and Ms Hurman that they would not have dismissed had they been looking at allegation 1 only. We also had regard to the fundamental confusion or lack of clarity around allegation 2 and in particular the understanding that it encapsulated 'previous' alleged failures to comply with management instructions. We also had regard to the fact that it is for the Respondent to advance some evidence in support of its 'argument that the Claimant might have been unfairly dismissed – which may, of course, consist of evidence which has come out during the proceedings in any shape or form. Although it was indicated as an issue in paragraph 2.6 of the list of issues [**page 72**] Mr Scott did not address us on any such reduction or highlight any evidence in support of a 'Polkey' reduction.

168. That made it difficult for the tribunal to address the hypothetical question in percentage terms by investigating evidence that would warrant a reduction on a just and equitable basis. Indeed, we came back to the findings that the Claimant would not have been dismissed on allegation 1 alone and what tipped the scales was allegation 2. Based on the evidence we heard and on our findings, had the investigator and the decision makers been clear that the allegation was a single refusal to follow a management instruction, and had the Respondent obtained OH advice which would have confirmed that the Claimant was in daily pain and may have assisted the Respondent understand the effects of her medication, our judgement is that the Respondent would not have dismissed but would have issued a written warning to the Claimant. Therefore, we concluded that it would not be just and equitable to reduce the compensatory award by any 'polkey' percentage.

Contributory conduct

169. We then turned to consider whether it was appropriate to reduce the basic and/or compensatory awards by a percentage to reflect pre-dismissal conduct of the Claimant.

170. We had found that the Claimant was rude and condescending towards the caller on **13 December 2019**, which she admitted to. This conduct unarguably, causally, contributed to her dismissal. We found that she did not report or escalate any problems with the call, or mention that she was in pain at the time or in the immediate aftermath of the call to anyone in management and that she understood from the Respondent's policies that she could and should do this. This failure causally contributed to the suspicion of management that pain and/or medication was not a factor in her behaviour towards the caller, which contributed to the decision to dismiss her. We found that the Claimant was dismissive of the opinions of other managers and

to an extent was indeed resistant to feedback, being willing to listen to the views only of her previous manager, Emma Smalley. This led to the perception that she was resistant to feedback, which also causally contributed to the decision to dismiss.

171. The Claimant would not listen to the call with Chantelle Currah when asked, which also causally contributed to the decision to dismiss. Although we accepted the Claimant's evidence that Chantelle did not insist on her listening to the call, she certainly asked her to do so and this must be looked at in the context of an environment where that was the expectation. We conclude that the Claimant was probably very rigid in her refusal to listen to the call, partly because it would have upset her to listen to the call but also partly out of a degree of stubbornness, in the sense that she knew she had not handled it well and she believe there was little to be gained from listening to the call, having accepted that it was a 'risk' call. While we could understand her reaction in this respect, we also considered there to be an element of stubbornness on her part, in that she did not personally see how this could have helped improve her approach. It was, in our judgement, a foolish stance to take in light of the overall culture of the organisation which ordinarily involves listening to calls as part of a coaching session.

172. All of the above conduct of the Claimant – in respect of which she did not satisfy us arose in consequence of her disability – can be described as culpable or blameworthy in the sense described by the court in the case of **Nelson**. It was, therefore, appropriate to consider making a reduction of the basic and compensatory award. Unlike the position with the 'compensatory' award, when considering a reduction of the basic award it is not necessary to consider whether the conduct in question caused or contributed to the dismissal. The distinction is academic in this case because we are satisfied that there was a causal connection between the Claimant's conduct and the dismissal.

173. We considered a just and equitable reduction of the compensatory award to be 40%. This, in our judgement, reflects that the Claimant's own conduct played a significant part in her dismissal but that the major cause of the dismissal was the Respondent's failings. Although the Claimant had not received any disciplinary warnings, she had been made aware in the past that her attitude was on occasion wanting. We considered that the Respondent had positively managed the Claimant, on an informal basis in the past and that her manager, Ms Smalley, in particular, had put given her considerable support. The Claimant understood the importance of good call handling and knew that she had fallen considerably short of the Respondent's standards and values.

174. We did not consider it appropriate to distinguish between the basic and compensatory awards in this case absent any special reason for doing so.

Remedy Hearing

175. The parties must inform the Tribunal within 21 days of receipt of this reserved judgment whether they will be able to resolve all matters of remedy or whether they require a remedy hearing to be listed.

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Employment Judge Sweeney

Date: 21 March 2023

APPENDIX

LIST OF ISSUES

1. Background

1.1. In terms of the Tribunal's Case Management Order of 5 October 2020, the Parties have identified the following issues which the Tribunal is required to determine:

2. Unfair dismissal

2.1. Did the respondent have a fair reason for dismissal pursuant to Section 98 (2) of the Employment Rights Act 1996?

2.2. Did the respondent have a reasonable belief that the claimant had committed an act of gross misconduct; was that based on reasonable grounds and did the respondent undertake a reasonable investigation?

2.3. Did the respondent fully consider the claimant's medical conditions and the effect of any medication she was taking for those conditions?

2.4. Did the respondent act reasonably in dismissing the claimant for gross misconduct and did it follow a fair procedure?

2.5. Was the claimant's dismissal a reasonable response in the circumstances of the case?

2.6. If it is determined that the respondent did not follow a fair procedure (which is denied by the respondent), if a fair procedure had been followed, would the claimant have been fairly dismissed in any event?

2.7. Did the claimant's conduct contribute in any way to her dismissal?

3. Section 15 of the Equality Act 2010 – discrimination arising from disability (dismissal)

3.1. Did the respondent treat the claimant unfavourably by dismissing her?

3.2 Whether there is a causal link between the unfavourable treatment and the "something arising in consequence of her disability". Specifically, whether the claimant's conduct, which led to her dismissal for gross misconduct, arose as a result of her disabilities of muscular skeletal disorder, chronic pain syndrome, anxiety and

depression.

3.3. Was the claimant's dismissal for gross misconduct a proportionate means of achieving
a legitimate aim?

4. Section 20 – 21 of the Equality Act 2010 – failure to make reasonable adjustments [as refined at the start of the hearing]

4.1. Whether the acts complained of in relation to the Attendance Management Policy and Performance Policy, as set out in the claimant's further and better particulars of claim dated 19 October 2020, have been presented to the Tribunal within the statutory time limits set out at section 123(1) of the Equality Act 2010. If not, whether it would be just and equitable to extend the applicable time limits.

PCP 1

4.2. Did the Respondent require the Claimant to maintain a certain level of attendance at work in order to avoid the risk of disciplinary sanctions under the attendance management policy and procedure?

- Did this put the Claimant to a substantial disadvantage in comparison to persons who are not disabled? in that the Claimant's disability increased the likelihood of sickness absence which made it more difficult for her to comply with the PCP than her non-disabled peers, thus increasing the likelihood of warnings under the attendance management procedure and/or dismissal?

4.3. Did the respondent take such steps as were reasonable to avoid the disadvantage?

- As a reasonable adjustment, ought the Respondent to have made a proportionate adjustment of the trigger points by increasing the number of periods of absence and the period of time before warnings applied

4.4. Did the respondent not know or could the respondent not be reasonably be expected to know that the claimant was likely to be placed at the disadvantage?

PCP 2

4.5. Did the Respondent apply an informal intense performance plan aimed at improving the Claimant's performance (referring to

paragraph 1.1.2.1 of the Claimant's further particulars on page 56)?

4.6. If so, did this put the Claimant to a substantial disadvantage in that it put additional pressure on her at a time when her mental health was deteriorating?

4.7. Did the respondent not know or could the respondent not be reasonably be expected to know that the claimant was likely to be placed at the disadvantage?

- As a reasonable adjustment, ought the Respondent to have implemented a formal performance improvement plan or 'PIP' (this was, on discussion, the only suggested adjustment)?

5. Remedy

5.1. If the claim is successfully made out (which is denied by the respondent), what financial loss (if any) has the claimant suffered as a result.

5.2. If a claim for discrimination is successfully made out, whether the claimant is entitled to compensation for injury to feelings.

5.3. Whether any reductions should be made to any award due to the claimant's conduct and/or failure to mitigate losses