EMPLOYMENT TRIBUNALS

Claimant: Mrs L Johnson

Respondent: Manchester City Council

Heard at: Manchester **On:** 9-13 March and 19 June 2020 (in chambers)

Before: Employment Judge McDonald
Mr M C Smith
Mr D Lancaster

REPRESENTATION:

Claimant: In person (assisted by her daughter Ms A Johnson)
Respondent: Miss Nowell, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint that she was unfairly dismissed fails and is dismissed.

2. The claimant's complaint that the respondent treated her unfavourably because of something arising from disability in breach of s.15 of the Equality Act 2010 fails and is dismissed.

3. The claimant's complaints that the respondent failed to make reasonable adjustments as required by the duty in s.20 of the Equality Act 2010 fail and are dismissed.

4. The respondent concedes that it made unlawful deductions and breached the claimant's contract of employment by failing to pay her at the correct rate of pay required by her contract and by failing to pay her holiday pay in lieu of untaken holiday and the claimant's complaints that it did so succeed.

REASONS

Introduction

1. This was the final hearing of the claimant's claim against the respondent. The claims arose from the claimant's dismissal for gross misconduct on 29 April 2019. The claimant claimed unfair dismissal, disability discrimination and had claims relating to alleged underpayments of pay. The full issues are set out in the List of Issues below at paragraph 5..

Preliminary Matters

2. On the morning of the first day of the hearing we dealt with the following preliminary matters:

(1) The addition of three documents to the agreed bundle for the hearing ("the Bundle") which consisted originally of 513 pages. The additional documents were added by agreement and consisted of the claimant's completed individual risk assessment form (added at 267A-C); a letter dated 27 September 2019 relating to the claimant's appeal hearing (added at pages 418A-B); the Government factsheet explaining how the Access to Work scheme works (added at pages 514-520). For completeness, The following further documents were added during the course of the hearing: a supervision case note (p.301A), the respondent's calculation of arrears of pay (p.49A), the complete version of the claimant's written particulars of employment dated 12 April 2016 (pp.150A-G) the version at pp.143-150 being incomplete, the respondent's pay Protection Policy (pp.521-525) and Miss Nowell's handwritten note of the legitimate aim relied on by the respondent in relation to the claim under s.15 of the Equality Act 2010 and why it said dismissal was a proportionate means of achieving that aim (p.65A).

(2) An application by the claimant to admit in evidence revised witness statements for the claimant and for her daughter, Ms Alison Johnson. Briefly, witness statements had been exchanged in accordance with directions on 20 December 2019. However, on 24 February 2020 the claimant had sent revised witness statements. The respondent objected to those statements being admitted in evidence. After hearing brief evidence and submissions we decided to admit those revised statements. We gave oral reasons at the hearing and explained to the parties that written reasons would not be provided unless requested. Neither party requested written reasons. As a result of our decision, the statements we used for the claimant's witnesses were those dated 24 February 2020.

(3) In the Case Management Order made in July 2019 the Employment Judge had suggested that the respondent would give their evidence first. Since this was a discrimination claim, it would be more usual for the claimant to give evidence first. The Employment Judge explained this to the claimant and gave her an opportunity to consider whether she

wanted to give her evidence first or begin by cross examining the respondent's witnesses. Having considered the matter in the break while the Tribunal considered the application to admit the revised witness statements, the claimant indicated that she wanted to give her evidence first. Miss Nowell for the respondent confirmed that she had no objection to that.

(4) The claimant's claim includes a complaint that she was not paid at the correct rate from September 2015 when she commenced working as a social worker for the respondent and a complaint that she had not been paid in lieu of untaken holiday. The parties indicated that they were some way towards resolving those complaints between them. Miss Nowell indicated that the respondent conceded that the claimant was not on the correct spine point but needed further time to clarify the position in relation to the pay protection. We agreed that it would be sensible for the parties to seek to resolve these pay complaints between themselves if at all possible. In those circumstances, we agreed that we would not hear evidence about the pay part of the claim until the end of the cross examination of the claimant's witnesses. That would provide the maximum opportunity for those pay issues to be resolved. For the reasons given at para 7 and 8 we did not in the end hear that evidence,

(5) The final matter arose after the Tribunal had retired to begin reading the witness statements and documents in the case on the first morning of the hearing. On looking through the index of the bundle, the Employment Judge noticed that there was correspondence between Matthew Maitland, Senior HR Officer, and the claimant. Mr Maitland is known to the Employment Judge because they sit together on a Scouts Executive Committee. The Employment Judge explained this to the parties and asked whether, in those circumstances, they had any objective to his continuing to hear the case. The parties were agreed that since Mr Maitland was not going to be giving evidence and that his involvement in the case was not a matter for dispute, the parties did not object to the Employment Judge continuing to hear the case. The Employment Judge explained that since Mr Maitland's involvement did not give rise to any disputes of fact and since there was no objection from the parties he considered that there was no reason for him to recuse himself from the case.

3. Having dealt with those preliminary issues the Tribunal indicated that given the length of the statements and the amount of documentation it needed to read it would spend the remainder of the first day reading the statements and the evidence. The hearing of evidence would start on the second day with the claimant's evidence. We checked with the claimant whether there were any reasonable adjustments we needed to make to the way we conducted the Tribunal hearing. We agreed that if she felt more comfortable she could give evidence from her seat at the representatives table rather than at the witness table. She did not need to do so but did at points use her walking chair rather than sit on a standard tribunal chair.

4. We heard evidence from the claimant and her daughter. For the respondent we heard evidence from Michelle Bernasconi, the dismissing officer ("Ms

Bernasconi") and from Julie Heslop, who heard the final appeal against dismissal ("Ms Heslop"). Each witness had provided a written witness statement and were cross examined and answered questions from the Tribunal. We also had before us a written witness statement for Jason Grimshaw for the respondent. However, as his evidence related solely to the arrears of pay issue which was conceded by the respondent, we did not need to hear from him.

The Issues

5. The issues in the case were identified by Employment Judge Slater at the preliminary hearing held on 17 July 2019. By the time of the final hearing the respondent that conceded that the claimant was a disabled person by reason of her osteoarthritis and by reason of depression. The issues identified at the preliminary hearing were:

Unfair dismissal

(1) Has the respondent shown a potentially fair reason for dismissal? The respondent relies on conduct. In accordance with **BHS v Burchell**: did the respondent have a genuine belief in the claimant's guilt?

(2) If the respondent has shown a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in all the circumstances (including the size and administrative resources of the employer's undertaking)? In accordance with **BHS v Burchell**: was the belief in the claimant's guilt: (a) based on reasonable grounds; and (b) formed after a reasonable investigation?

(3) If the dismissal was unfair, how much compensation should be awarded?

3.1 Should a reduction to the compensatory award be made for the chance the claimant would have been fairly dismissed, had a fair procedure been followed, if such an assessment can properly be made? (a "**Polkey**" type reduction).

3.2 Should the basic and/or compensatory award be reduced because of the conduct of the claimant?

Disability discrimination

Discrimination arising from disability

(4) Was the claimant's dismissal in October 2018 and/or April 2019 unfavourable treatment because of something arising in consequence of her disabilities? The "something arising" is the claimant's failure to arrange a strategy meeting for a missing child. The claimant argues that this arose in consequence of her disabilities because the pain she was in due to osteoarthritis and her state of mind, due to depression, contributed to the oversight in failing to arrange the meeting.

(5) If the dismissal was unfavourable treatment because of something arising in consequence of the claimant's disabilities, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent must identify clearly the legitimate aim relied upon in its amended response.

(6) Did the respondent know or could they reasonably be expected to know that the claimant had the disabilities?

Failure to make reasonable adjustments

(7) Did a provision, criterion or practice (PCP) of the respondent's put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

(8) The PCPs relied upon are as follows:

8.1 That employees have to make their own transport arrangements to get to and from work and to and from meetings and other work appointments.

8.2 Having to work with standard office equipment.

(9) The claimant says that the first PCP put her at a substantial disadvantage because she had difficulty walking to and from the bus due to pain from her osteoarthritis which also caused her to drag her leg (the claimant does not drive). She says that reasonable adjustments would have been:

9.1 To provide taxis to transport the claimant through the Access to Work scheme (to which the employer would have to contribute financially);

9.2 To allow the claimant to work at home when she did not have any specific meetings to attend.

(10) The claimant says that the second PCP put her at a substantial disadvantage because her osteoarthritis caused her pain when sitting on a normal office chair and at a normal workstation. She says that reasonable adjustments would have been:

10.1 To provide the claimant with a special chair and adjusted work station; and

10.2 To allow the claimant to work from home on non-duty days.

(11) Could the respondent reasonably be expected to know that the claimant had a disability and was likely to be placed at the disadvantage?

(12) If so, did the respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage?

Time limits relating to discrimination complaints

(13) Were all the complaints presented within the relevant time limit? If not, would it be just and equitable to consider the complaint out of time?

Remedy for discrimination

(14) If the claims success, what remedy should be awarded?

Unlawful deduction from wages/breach of contract

(15) Did the respondent fail to pay the claimant at the rate of pay to which she was entitled from April 2016 until the termination of her employment?

(16) In relation to the period 15 October 2018 to 29 April 2019, was the claimant paid the right amount?

(17) In relation to pay in lieu of accrued but untaken holiday pay, was the claimant paid the right amount?

Failure to provide a written statement of employment particulars – section 38 Employment Act 2002

(18) If one or more of the claimant's complaints succeed, did the respondent fail to comply with its obligations to provide a written statement of employment particulars or a statement of changes to particulars?

(19) If so, should the Tribunal award 2 or 4 weeks' pay for that failure?

6. A further issue which emerged during the hearing which was the effect of the claimant's reinstatement after the dismissal on 15 October 2018. The claimant says that it was an effective dismissal so we must consider her unfair dismissal claim in relation to that first dismissal. The respondent says that the effective dismissal was that in April 2019, the claimant having been reinstated and the October 2018 therefore being null and void.

7. During the hearing the respondent conceded that it had underpaid the claimant. We have set out the terms of the concession in the Discussion and Conclusions section of this judgment at para 216. It was not possible to confirm during the hearing by how much she had been underpaid.

8. With regards to the claim that the claimant had been underpaid her holiday, the respondent agreed to pay (and the claimant agreed to accept) an additional five days' holiday pay in settlement of her claim for ten days' holiday not taken in the year April 2017 to 2018. Confirmation of the amount to be paid is dependent on

confirmation of the pay to which the claimant would have been entitled during that year.

9. At the end of the evidence both parties submitted written submissions. Miss Nowell also made oral submissions. In fairness to the claimant and her daughter, we allowed them until 17 April 2020 to make any further written submissions they wanted the Tribunal to consider. They did send in further written submissions on 17 April 2020 and we have taken those into her account in reaching our decision.

10. We also ordered that the respondent had until 1 May 2020 to send in any further written submissions it wanted the Tribunal to consider. In the event, it decided not to make further written submissions. We have taken into account all those submissions in reaching our decision. We have not referred to the submissions in full but have referred to them where relevant to a particular point or dispute.

Relevant Law

Unfair Dismissal

11. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service, which the claimant has in this case.

12. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal. In this case the respondent says the reason for dismissal was the claimant's (mis)conduct which s.98(2)(b) says is a potentially fair reason for dismissal.

13. Where an employer has shown a potentially fair reason for dismissal, whether the dismissal was fair or unfair depends on whether in the circumstances of the case the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. The tribunal has to decide that in accordance with equity and the substantive merits of the case. (S.98(4) ERA).

14. In relation to conduct dismissals the leading authority on fairness is the case of **BHS v Burchell [1978] IRLR 379**, which sets out a three part test namely –

(1) Did the employer have a genuine belief in the employee's guilt?
(2) Was that belief based on reasonable grounds?
(3) Were those grounds formed from a reasonable investigation?

15. The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** makes it clear that the test which the tribunal must apply is whether dismissal was within the band of reasonable responses that a reasonable employer in the circumstances might have adopted.

16. That "band of reasonable responses test" also applies in assessing the reasonableness of the investigation carried out into a conduct matter (**Sainsbury's Supermarkets v Hitt [2003] IRLR 23**).

17. In assessing fairness, the question is whether having regard to the substance of the matter, it can be said that a fair procedure has been adopted overall **Taylor v OCS [2006] EWCA Civ 702; [2006] ICR**. A dismissal will still be fair if errors made at the first stage of a disciplinary procedure are remedied at the appeal stage. It does not matter whether the appeal is a rehearing or a review.

Remedy if the dismissal is unfair

18. If a tribunal finds that a dismissal was unfair the compensation it should award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

19. A just and equitable reduction can be made where the unfairly dismissed employee could have been dismissed at a later date if a proper procedure had been followed (the so-called Polkey reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd 1988 ICR 142**).

20. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

21. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) 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 (s122(2) ERA).

The effect of "reinstatement"

22. One of the issues in this case is the legal effect of the "reinstatement" of the claimant following her dismissal in October 2018.

23. We were not referred to any cases on the effect of reinstatement following dismissal. There is legal authority on the question of the impact of an appeal on a previous dismissal. In **Patel v Folkestone Nursing Home Limited [2019] ICR 273**, the Court of Appeal considered a case where an employee had been dismissed for two acts of gross misconduct but whose internal appeal was successful. The claimant, however, did not want to return to work, arguing that the appeal had not dealt with one of the allegations of which he had been found guilty, namely falsifying residents' care records. The contractual provisions in that case made no reference to what would happen in the event of a successful appeal. The Court of Appeal held that it is clearly implicit in a contractual term confirming a right to appeal against dismissal that if such an appeal succeeds the effect is that both the employer and the employee are bound to treat the employment relationship as having remained in existence throughout.

24. In the absence of an express term in a contract specifying what will happen on reinstatement the Tribunal may need to imply a term. A Tribunal will not imply a term simply because it is a reasonable one. Nor will it imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the Tribunal can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made.

Disability Discrimination

25. The claimant brought two complaints under the Equality Act 2010 ("the 2010 Act"). These were a complaint of discrimination arising from disability and a complaint that the respondent had failed to make reasonable adjustments.

26. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

"(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."

27. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention.

Time limits for 2010 Act claims

28. A claim concerning work-related discrimination or harassment must usually be made to the Tribunal within the period of three months beginning with the date of the act complained of (S.123(1)(a) of the 2010 Act). However, The Tribunal may accept a claim outside that usual time limit if it is made within such other period as it considers just and equitable. The three month time limit is also extended in some circumstances to take into account compliance with the Early Conciliation procedure.

29. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, the Court of Appeal stated that when a Tribunal considers exercising the discretion under what is now S.123(1)(b) of the 2010 Act, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

30. In **British Coal Corporation v Keeble [1997] IRLR 336** the EAT suggested that in deciding whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. Those factors are in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or

she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

31. In **Southwark London Borough Council v Afolabi [2003] ICR 800, CA**, the Court of Appeal confirmed that, while that checklist in S.33 provides a useful guide for tribunals, it need not be adhered to slavishly. There are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

32. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed. Section 123(1)(a) of the 2010 Act says:

> **"(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

Discrimination arising from disability ("a s.15 claim")

33. Section 15 of the 2010 Act states:

> (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.

34. There is a need to identify two separate causative steps in order for a s.15 claim to be made out (**Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT**):

- the disability had the consequence of 'something';
- the claimant was treated unfavourably because of that 'something'.

35. In **Basildon** the EAT said it does not matter in which order the tribunal approaches these two steps: 'It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was

that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability'.

36. In **Pnaiser v NHS England and anor 2016 IRLR 170, EAT**, the EAT summarised the proper approach to establishing causation under S.15:

- First, the tribunal has to 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, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.

- The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which 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.

37. For a s.15 claim to succeed the 'something arising in consequence of the disability' must be part of the employer's reason for the unfavourable treatment. The key question is whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent (**T-Systems Ltd v Lewis EAT 0042/15**).

38. A claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. In **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT** the EAT confirmed that a s.15 claim can succeed where the disability has a significant influence on, or was an effective cause of, the unfavourable treatment.

39. Where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to discrimination under S.15 of the 2010 Act even if the employer did not know that the disability caused the misconduct (**City of York Council v Grosset 2018 ICR 1492, CA)**.

40. A s.15 claim will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which the claimant has been subjected is objectively justified as a proportionate means of achieving a legitimate aim.

41. The Equality and Human Rights Commission's Code of Practice on Employment ("the Code"). sets out guidance on objective justification. In summary, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be

proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31).

42. A failure to make a reasonable adjustment will make it very difficult for the employer to argue that unfavourable treatment was nonetheless justified. The converse is not necessarily true. Just because an employer has implemented reasonable adjustments does not guarantee that unfavourable treatment of the claimant will be justified, e.g. if the particular adjustment is unrelated to the unfavourable treatment complained of or only goes part way towards dealing with the matter.

43. In **O'Brien v Bolton St. Catherine's Academy [2017] EWCA Civ 145** the Court of Appeal said that the tribunal in that case, which had found that the dismissal in question in that case was in breach of section 15 of the 2010 Act, was also entitled to conclude from this that it had been an unfair dismissal. In **City of York Council v P J Grosset [2018] EWCA Civ 1105** the Court of Appeal said that Underhill LJ in **O'Brien** was addressing his remarks to the particular facts of that case, and was not seeking to lay down any general proposition that the test under section 15(1)(b) of the 2010 Act and the test for unfair dismissal are the same.

44. This means there is no inconsistency between a Tribunal dismissing a claimant's claim of unfair dismissal but upholding a claim under section 15 of the 2010 Act in respect of the same dismissal. This is because the test in relation to unfair dismissal is whether dismissal was within the range of reasonable responses available to an employer, thereby allowing a significant latitude of judgment for the employer itself. By contrast, the test under section 15(1)(b) of the 2010 Act is an objective one, according to which the ET must make its own assessment: see **Hardy & Hansons plc [2005] EWCA Civ 846; [2005] ICR 1565 , [31]-[32],** and **Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15**.

45. The burden of proof provisions apply to s.15 claims. Based on **Pnaiser**, in the context of a S.15 claim, in order to prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show:

- that he or she has been subjected to unfavourable treatment
- that he or she is disabled and that the employer had actual or constructive knowledge of this
- a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment
- some evidence from which it could be inferred that the 'something' was the reason for the treatment.

46. If the prima facie case is established and the burden then shifts, the employer can defeat the claim by proving either:

- that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability, or

- that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

47. Section 39(5) of the 2010 Act provides that a duty to make reasonable adjustments applies to an employer.

48. That duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3)

49. Section 20(3) provides as follows:-

"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".

50. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632** (approved by the Court of Appeal in **Newham Sixth Form College v Sanders [2014]**). A Tribunal must identify:

a) the provision, criterion or practice applied by or on behalf of an employer, or
b) the physical feature of premises occupied by the employer,
c) the identity of non-disabled comparators (where appropriate) and
d) the nature and extent of the substantial disadvantage suffered by the Claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the Claimant may involve a consideration of the cumulative effect of both the 'provision, criterion or practice applied by or on behalf of an employer' and the, 'physical feature of premises' so it would be necessary to look at the overall picture.

The EAT added that although it will not always be necessary to identify all four of the above, (a) and (d) must certainly be identified in every case.

51. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards

52. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) of the 2010 Act defines "substantial" as being "more than minor or trivial".

Findings of Fact

53. We set out below our findings of fact based on the evidence we heard and read. We have only made findings about the facts relevant to the issues we have to decide. That means that not all the evidence we heard is referred to specifically in this judgment. We have not included the evidence about the claimant's pay because that issue has now been resolved between the parties (see para 216 below).

54. We have set out our findings under the following headings:

- What happened up to 13 September 2017
- What happened from 13 September 2017 to 1 November 2017
- What happened from 1 November 2017 to 22 December 2017
- What happened between 22 December 2017 and 15 January 2018
- The Disciplinary proceedings and October 2018 dismissal
- What happened after the October 2018 dismissal
- The April 2019 dismissal
- Findings relevant to the reasonable adjustment complaints

55. Where there was a significant dispute of fact between the parties we have briefly explained which party's evidence we preferred and why. References to page numbers are to page numbers in the Bundle.

<u>What happened up to 13 September 2017</u>

56. The claimant was employed by the respondent from 24 April 1995. To begin with she worked part time in roles providing care and services for adults with physical and learning disabilities. From September 2000 she worked full time as a Residential Care Worker for the respondent's Children's Services. In 2009 the claimant successfully applied for a Social Work Secondment. This involved her studying for a social work degree one day a week alongside continuing to work for the respondent. By then, the claimant was already experiencing health issues. She had been diagnosed with osteoarthritis in 2008 having experienced debilitating pains in her knees since 2002. The respondent had made reasonable adjustments for this including providing a back support chair and hand rest for her computer. The claimant took this chair with her when she started her role as a social worker.

57. The claimant successfully completed the social work degree and qualified as a social worker. She was appointed as a Level 1 Social Worker within the respondent's Children's Services Duty and Assessment Team ("the Duty Team"). The claimant's contract of employment for that role suggests it started on 1 April

2016 (pages 150A-G) but we accept the claimant's evidence that she actually started in the role in September 2015. She was on sick leave for just over three months before starting that role (29 May 2015-5 September 2015) recovering from surgery to her right hand for carpel tunnel syndrome. She had surgery on her left hand for the same reason 8 August 2016 which meant she had a further period of sick leave from 8 August 2016 until 16 September 2016.

58. When the claimant returned to work after that operation the respondent adjusted her hours so she could return on a phased basis, working 28 hours per week instead of her full contracted 35 hour week. At her supervision meeting on 13 October 2016 the claimant told her then manager, Jennifer Scott, that she was finding it difficult to do her work (including visits) within those reduced hours. She also reported that longer periods on the computer were causing her pain in her back and hands. Ms Scott discussed planning the claimant's time so she could stagger the time spend on the computer and it was also agreed that the claimant would self-refer for a health assessment (pp.152-155). There was a further supervision meeting with Jennifer Scott on 10 November 2016. During that meeting it was confirmed the claimant was to refer herself for a health assessment because she had not yet done so. The claimant in her witness statement (para 16) said that she did not know how to self-refer for a health assessment. There is no suggestion in her witness statement or in the meeting notes for 13 October 2016 or 10 November 2016 that the claimant told Ms Scott she did not know how to self-refer.

59. The claimant has been the main carer for her mother for 45 years. The claimant's mother is a disabled person with physical and mental impairments including bipolar disorder and dementia. In August 2016 the claimant's mother had significant health and social incidents which led to her being admitted to hospital. That was obviously distressing for the claimant. She discussed the situation with Ms Scott at both the October and November 2016 meetings including exploring the possibility of the claimant taking unpaid leave so she could be available to help with her mother's care (p.158).

60. By the supervision meeting with Jennifer Scott on 24 January 2017 the claimant's mother was home from hospital and being looked after by carers but with the claimant still involved in ensuring the care was running smoothly. She expressed some concerns about the medication her mother was being given.

61. That supervision meeting took place after the claimant had been on sick leave for two weeks, returning to work on 16 January 2017. The claimant at the meeting said she was feeling a little better but it the notes once again confirm that the claimant is to self-refer for a health assessment. Again, there is no suggestion the claimant raised with Ms Scott that she did not know how to do that (pp.161-166).

62. The period from April 2017 onward was a particularly challenging and distressing time for the claimant. A decline in her mother's health while she was being cared for by agency workers led to her mother being admitted to hospital in April 2017 where she remained until late September 2017. In August 2017 the claimant's daughter Alison suffered a psychotic episode and serious mental health issues which led to her being detained under the Mental Health Act. That meant that in August and September 2017 the claimant's mother and her daughter were both detained at different mental health hospitals. During this time the claimant was also

(with the assistance of her other children) caring for her daughter's three children and dealing with the police and Children's Services who were assessing the safety and needs of those grandchildren.

63. In addition, the claimant was in June 2017 emailing the respondent's Employee Life Cycle Team about her pay being wrong. The respondent at the Tribunal hearing has accepted that it did get the claimant's pay wrong but at that time had not accepted this (pp.171-173). The email correspondence about this issue continued intermittently as a background to the incidents we describe below up to and including the time of the claimant's final appeal against dismissal in April 2019.

What happened from 13 September 2017 to 1 November 2017

64. On 13 September 2017 the claimant had a supervision meeting with her line manager, Charlotte Larkin. Ms Larkin had been appointed as her line manager in August 2017. At that meeting the claimant told Ms Larkin that she was not feeling great but was able to work. She also told her that her mother and daughter were not well. Ms Larkin advised the claimant that she would be supported if she felt unfit to work and if she felt that she should not be in the workplace.

65. During that meeting the claimant advised Ms Larkin that she was struggling to complete visits and assessments in the required timescale. As a result, Ms Larkin advised the claimant that a support plan would be implemented (pages 174-183). We find that support/development plan was intended to address concerns about how the claimant was managing her workload and about her maintaining appropriate professional boundaries with the families for which she was responsible. This last concern arose from the claimant having accepted a lift from a member of a family she was visiting (p.174). The development plan in the Bundle was undated but we find it was not finalised until November 2017 (pp.234-236). However, it is clear that some of the actions in it were agreed at this supervision meeting, including for the claimant to work with Megan Mayhew, Social Worker Consultant, regarding timescales and boundaries.

66. Ms Larkin also agreed to take steps to address the concerns about the claimant's health and her management of her workload namely:

- To complete a referral for a risk assessment;
- To refer the claimant for a work station assessment;
- To look at the claimant's case load and move cases where necessary due to cases drifting or work not being completed; and
- To review the claimant's workload weekly to ensure that cases were managed safely.

67. We find that that the need for a support plan and its contents reflected a concern on the part of the respondent (one raised by the claimant herself) that the claimant was struggling to manage her workload, that some of her cases were drifting and that the respondent had some concerns about the way the claimant was carrying out her work in particular in terms of maintaining professional boundaries. It is also clear from the contents of the meeting note and the steps that Ms Larkin

agreed to take that the respondent was aware of the challenging family caring circumstances the claimant was facing and the claimant's own health problems.

68. On 18 September 2017, Ms Larkin emailed the respondent's Health and Safety team asking for advice on how to request a workstation assessment and a stress risk assessment for the claimant. We find that by that date Ms Larkin was aware that the claimant might be experiencing stress at work. That same day, Sue Daniels, a Health and Safety Officer for the respondent, replied to provide Ms Larkin with guidance on how to start a workstation assessment and a stress risk assessment. Ms Daniels attached relevant forms to assist Ms Larkin (pages 193-194):

(1) The respondent's self assessment workstation form;

(2) Guidance for workstation assessments;

(3) Advise on ordering aids and adaptations;

(4) Respondent's "Are you sitting comfortably" guidance;

(5) The e-Learning step-by-step user guide.

69. On the following day Ms Larkin emailed the claimant those forms and guidance and asked that she fill in the first document, namely the self-assessment workstation form, so it could be set off for the workstation assessment to be completed.

70. On 21 September 2017 Ms Larkin emailed the claimant details of the Employee Assistance Programme, a 24/7 support service for the respondent's employees and immediate families. The claimant acknowledged Ms Larkin's email the same day and thanked her, advising her that she would be following that up the following morning (page 195).

71. On 27 September 2017, the claimant met with Megan Mayhew, the Social Worker Consultant. Ms Mayhew followed up the meeting by email on the same day. In the email she gave the claimant practical guidance to support her with workload issues. This included trying to hold children in need visits in school where possible and only holding meetings out of hours with families who worked, i.e. only when they could not be done in work hours. She advised that late night visits be kept to a minimum and that the claimant should protect her time on the day after visits so that what happened at those meetings could be recorded. She specifically advised the claimant that if visits or meetings could not be completed in the timescale she should consult with Ms Larkin and record this on the system rather than completing visits very late in the evening. She finished the email by advising the claimant to discuss with Ms Larkin if her caseload was impacting on her health and plan around that rather than overstretching herself risking ill health and burnout (page 218).

72. On 27 September 2017 the claimant completed a workstation self-assessment checklist (pages 220-222). Ms Larkin then arranged for Back Care Solutions to carry out an advanced Display Screen Equipment Assessment ("ADSEA") for the claimant (page 229). However, that ADSEA did not go ahead.

That was because on 2 October 2017 the claimant was signed off sick with stress and depression.

73. During this time the claimant had been continuing to see her GP about back pain, sciatica and a recent diagnosis of arthritis in her hands. She was also suffering a lot of pain because of the osteoarthritis in her knees and suffering from swollen ankles. By the start of October 2017 the claimant was finding the combined pressures of managing her workload and her caring responsibilities overwhelming. We find that by then the respondent had reduced her workload to around 20 cases, it having been as high as 32 in July (p.170). By then her daughter had been discharged into the claimant's care and she and her three children were living with the claimant. The claimant was signed off sick with stress from 2 to 31 October 2017.

74. While she was off sick in October 2017 the claimant completed her Access to Work application seeking funding to help pay for her to use of taxis for work-related journeys. The claimant does not drive. Where no lift was available from colleagues she would have to use public transport to get to and from work and to attend work visits. We find that her mobility issues and the osteoarthritis in her knees made using public transport painful and difficult for her. It is accepted by the respondent that the social workers role is regarded by the respondent as an "essential car user" role.

What happened from 1 November 2017 to 22 December 2017

75. On her return to work on 1 November 2017 the claimant was invited to an Attendance Monitoring Review meeting on the 2 November 2017. The review was triggered because the claimant had been absent for more than five days within the preceding three months. The purpose was to review the claimant's level of absence, explore the reasons for those, review the advice of medical professionals, review her phased return to work and identify if there were any other work-related or personal issues that were impacting on her attendance levels (pages 232-233). The meeting was initially rearranged for the 14 November 2017 but then moved to the 15 November so that the claimant's union rep, Eddy Redmond, could attend with her (pp.246-249).

76. In the meantime, Ms Larkin referred the claimant to HeathWorks for an occupational health assessment. That appointment with the clinician from Health Works took place on 6 November 2017. The resulting report (dated 6 November 2017 at pp.243-245) confirmed that the claimant was fit for work. It reported that the claimant had longstanding osteoarthritis in both knees which limited her mobility and caused her pain which was exacerbated by longstanding back pain as a result of childhood surgery. It noted that she made regular use of painkillers to deal with the pain. The claimant reported still having pain in her hands although that had been improved by the hand operations she had had in 2015 and 2016. It reported the stress caused to the claimant by her caring commitments and that those commitments had got more demanding from August 2017. It said the claimant perceived workplace stress to have exacerbated the situation leading to her sickness absence in October 2017. In answer to the question "Are there likely to be any work based factors that have an implication in the current medical condition" the report recorded that "[the claimant] reported a number of perceived workplace concerns and stated that she does not feel that she is supported by management" (p.244).

77. In answer to the question "Are there suggested actions management could consider taking to facilitate a more effective return to work (e.g. temporarily amended duties, temporary move to an alternative role or a phased return plan)" the report advised:

- That management arrange to meet with the claimant to address her "perceived concerns" about difficulty raising her workplace concerns with management;
- That it would be helpful for her to be supported at that meeting;
- That a stress risk assessment of her role be carried out;
- That it would be helpful to look at adjustments to help with the impact of her osteoarthritis by carrying out a workstation risk assessment;
- With the same aim, that the claimant be given time to take mobility breaks away from her desk;
- That it would be helpful to limit the distances the claimant was required to walk when attending offsite visits;
- That it may be helpful to discuss with Access to Work (which the report "[understood was] something that is being explored").

78. In cross examination, the claimant accepted that she did not at the meeting raise working from home as a potential reasonable adjustment nor was it discussed.

79. The report confirmed that the option of physiotherapy and counselling had been discussed with the claimant but that she did not feel that either of these would be of benefit at that time. At the meeting the claimant was also advised about the Employee Assistance Programme, the details of which Ms Larkin had already emailed the claimant on 21 September 2017. The claimant's evidence in cross examination, which we accept, was that she could access any facilities such as counselling and physiotherapy which she needed through her GP, which is why she turned down the offer at the meeting on 6 November 2017.

80. In answer to the question "Is the employee's absence likely to be related to a condition they have that is likely to be covered by the Equality Act 2010? If so, are there any specific adjustments that should be considered by management? (e.g. changes to duties, hours, working environment or consideration of an alternative role)" the report says "This is ultimately a legal question, but in my opinion, it is likely to apply in this case". It's not clear whether that answer applies only to the claimant's osteoarthritis or to the issue of stressor depression. However, we find that by the latest when it received the report the respondent would have been aware of the claimant's osteoarthritis; the impact that was having on her mobility; the pain it was causing her; that it should be considering whether there were adjustments it could take to address those; and specific suggestions of steps it could take (i.e. those in the HealthWorks report quoted in para 77 above). In relation to depression and the impact of any workplace stress the report it seems to us is more tentative but at the least it made the respondent aware that the claimant was perceiving herself to be

experiencing workplace stress and advising it should be taking steps to explore that with her through a meeting and a stress risk assessment.

81. On 14 November 2017 the claimant had a further supervision meeting with Ms Larkin. At that point her caseload had been reduced to 3 children/2 families. The claimant confirmed to Ms Larkin that she was able to work, and that she was not feeling stressed with her current workload and it was decided that the respondent would review the claimant's reduced caseload. The claimant was to advise Ms Larkin if she needed further support with her caseload to ensure that children were seen within the required timescales and to keep her updated about her workload (p.251).

82. At that supervision meeting it was confirmed that an Action Plan would be implemented. The written version of the Action Plan (referred to at various points as the "Development Action Plan" and the "Supervision Plan") is undated (p.234-236). However, we find it dates from the time of the 14 November 2017 supervision meeting. The actions under the plan included sessions with Megan Mayhew on diary management; safeguarding training, access to policies and procedures; sessions with Sina Desai ("Ms Desai"), a grade 8 Social Worker; supervision on case notes with Megan Mayhew and supervision on the use of a planning spreadsheet and diary management with Megan Mayhew. We find that the objective of those actions was to address concerns on the part of Ms Larkin about the claimant's ways of working. Those issues had come to light during the time when the claimant was off sick from 2-31 October 2017. They included concerns about keeping records up to date and following the procedures required under s.47 of the Children Act 1989 ("s.47") (p.388). We accept the claimant's evidence that although she did not agree with everything in the plan she agreed to abide by it (p.390 and her cross-examination evidence at the Tribunal).

83. At that supervision meeting the claimant and Ms Larkin also discussed the application to Access to Work. The claimant told Ms Larkin that she had met Sharon Hawkins, the respondent's Interim Service Lead who had confirmed that the respondent did not view paying for taxis for her as a reasonable adjustment. The claimant confirmed to Ms Larkin that she had completed her Access to Work application but that she needed to send the DWP further information in support of that application. There was no suggestion at that meeting that the claimant needed any further information or support from the respondent in order to progress the application. The same is true of the re-arranged attendance monitoring review meeting which took place on the following day.

84. That Attendance Review Meeting on 15 November 2017 was with Ms Larkin and the claimant was accompanied by her trade union representative, Mr Redmond. There were no formal notes of that meeting in the Bundle but the outcome was confirmed that same day in a letter which Ms Larkin hand delivered to the claimant (pages 255-256). The Bundle also included the claimant's typed up notes of the meeting (p.257). Based on those we find that the claimant's attendance record was discussed and that she was warned that continued poor attendance could result in formal disciplinary action. The occupational health report of 6 November 2017 was referred to and reference made to the claimant's perception that workplace stress was exacerbating the impact of the stress arising from her caring responsibilities.

85. There was a discussion of the support which had been offered to the claimant. This was summarised in a series of bullet points in the letter (page 256) and included the reduction of her caseload on her return to work; an offer of counselling (which was declined); fortnightly supervision and support from Ms Larkin with both case load and wellbeing.

86. More contentiously, the letter notes that in her meeting with Sharon Hawkins the claimant Ms Hawkins had suggested she participate in the Cycle to Work scheme. That would have been in the context of their discussion about the impact on the claimant of having to use public transport and the proposal that the respondent pay for taxis. We do find it surprising, to say the least, that that offer was made to the claimant given her osteoarthritis and mobility difficulties. Although in her written submissions the claimant suggested this was itself an act of direct disability discrimination that was not part of her case as identified in the list of issues by Employment Judge Slater.

87. In terms of further steps to be taken we find it was confirmed at that meeting that:

- The claimant's reduced caseload would be reviewed but should continue to be monitored;
- Fortnightly supervisions would continue until January 2018 and be reviewed at that point;
- Ms Larkin would continue to provide assistance in relation to the claimant's cases and general wellbeing at work;
- A referral for a stress risk assessment was to be completed;
- The respondent was to attempt to keep cases allocated to the claimant as local as possible;
- A referral for physiotherapy would be completed;
- A work station assessment would be completed;
- A permanent desk would be allocated; and
- The claimant would progress the Access to Work application.

88. The claimant's notes of the meeting (p.257) also record that it was agreed that there would be a further referral to HealthWorks if the claimant's condition worsened. The claimant's notes refer in two places to "reasonable adjustments" and to the DDA, which we find to be a reference to the Disability Discrimination Act 1995, the predecessor of the 2010 Act. Although we accept that the reference is to an old piece of legislation we find that at the latest by that meeting the claimant was aware that the respondent was under an obligation imposed by equality legislation to make reasonable adjustments.

89. Ms Larkin letter (p.256) confirmed that during the attendance review meeting the claimant had stated that she did not feel she needed any further support at the

time and we note there is no reference in it to the claimant, her representative or the respondent raising the suggestion of the claimant working from home as a reasonable adjustment.

The Individual Risk Assessment

90. There is a reference to working from home in part 2 of the Individual Risk Assessment form which the claimant completed on 16 November 2017 (pages 263-267). That form consists of four parts. The first part is to record the employee's key duties. The second part, to be completed by the employee, records their "perceived work-related concerns/barriers in delivering or carrying out that work". The third part is to record "any supporting arrangements currently in place" identified by the line manager and employee. The fourth part is to record "any additional supporting arrangements that are required to carry out [the employee's duties]". The form says that "the manager and the member of staff may agree on any additional practical arrangements" and record them in that part of the form.

91. Ms Larkin emailed the form to the claimant at 11:08 on 16 November 2017 asking her to fill in box 2 saying "then we can sit together to complete the rest together". The claimant emailed it back at 12:10 that same day saying "box 2 completed". Ms Larkin acknowledged that by email 3 minutes later (p.268). At 13:48 on the 16 November 2017 Ms Larkin emailed the risk assessment form to Mike Booth, a Health and Safety Officer with the respondent (p.260).

92. The concerns/barriers identified by the claimant in part 2 of the form as at 16 November 2017were:

- Caseload being too high at any given time which makes the work difficult in meeting timescales.
- Non driver and difficulty getting to meetings at short notice or in emergency situations using public transport, i.e. the bus journey for visits 1 hour up to 1.5 hour return plus additional walking of sometimes up to 20 minutes.
- Limited mobility due to being in pain throughout the working day from long standing Osteoarthritis in both knees.
- High risk cases being prioritised and taking up time which would usually be allocated for other cases to complete visits, case recording and meetings within timescales.
- Lack of training opportunities in areas where learning developmental needs are identified, e.g. Domestic Violence course and formulating risk assessments.
- Lack of alternative work pattern or flexibility in working pattern on non-duty weeks. Insufficient opportunities to work from home for other duties other than completion of CAFAS.

- Work station and chair has not been assessed and frequent back aches from using current chair. Sometimes have difficulties seeing the screen and have to enlarge print.

- Sometimes too much time spent working on computer and not moving away from it sufficiently to take short breaks.

93. There were two versions of the form in the Bundle. The first was the form with parts 1 and 2 completed (pages 263-267). The second, added at the start of the Tribunal hearing, was the form with all 4 parts completed (pages 267A-C). Although Ms Larkin said in her email on 16 November 2017 that she and the claimant would complete parts 3 and 4 the rest of the form together, the claimant's evidence was that they never did.

94. We did not hear evidence from Ms Larkin. She left the respondent in July 2019 and it was no longer in contact with her. There is no reference to the form in the subsequent supervision meeting between her and the claimant on 22 December 2017 (pages 297-301). At the disciplinary hearing in April 2019 the claimant said that the final part of the form had not been discussed with her (p.404). The timing of the email exchanges about the form seem to us to support that with just over an hour between Ms Larkin receiving the form with part 2 completed by the claimant (p.268) and Ms Larkin sending the completed form (initially to the wrong Mike Booth) at 13:07 (p.259). That left little time for any discussion and there was no evidence of any meeting between the claimant and Ms Larkin during that hour or so. We therefore accept the claimant's evidence on this point and find that although Ms Larkin did complete the form on 16 November 2017 she did not discuss parts 3 and 4 with the claimant.

95. The information Ms Larkin put in part 3 of the form recording existing arrangements reflected for the most part what was discussed at the supervision meeting on the 14 November 2017, the contents of the Action Plan and the matters referred to in the Attendance Review Monitoring meeting on the 15 November 2017. That included the continued monitoring of the claimant's workload; support from Ms Larkin and a Grade 8 social worker; monitoring of distance between visits; the offer (and the declining by the claimant) of participation in the cycle to work scheme and of counselling. It recorded that the claimant would take regular breaks; ensure she booked on regular training and would be "open and honest" if she is struggling. It also included as an action the claimant "to progress with the access to work".

96. There was one point on which Ms Larkin contradicted what the claimant had put in part 2. The claimant had said there had been no work station assessment whereas Ms Larkin wrote in part 3 that "work station assessment has been completed" (p.267C). We find the reality was somewhere between those two positions. As we said in para 72 the claimant had completed a work station self-assessment on 27 September 2017 and although it is true that there had been no ADSEA carried out by Back Care Solutions, that was due to the claimant's absence on sick leave throughout October 2017.

97. The one matter which was included in part 3 but which had not been discussed at the previous meetings was Ms Larkin's response to the claimant's suggestion in part 2 that she had insufficient opportunities to work from home. Ms

Larkin wrote "[the claimant] to be in the workplace to ensure that she has the appropriate support in place" (p.267C). As we have said, we accept there was no discussion of that issue with the claimant before Ms Larkin included that in part 3 of the form.

98. In part 4 of the form Ms Larkin wrote that the "additional supporting arrangements" were to continue with the above actions, for the claimant to attend planned appointment with the GP and to keep Ms Larkin informed about her personal circumstances and cases. We find that at that point Ms Larkin's view was that the steps already taken and those which she viewed as already underway (the work station assessment and the claimant's Access to Work application) would address the barriers/concerns identified by the claimant in part 2 of the risk assessment form. We also find that what she wrote in part 3 about the claimant needing to be in the workplace reflected a concern to ensure both that the claimant had support and sources of advice on hand and that her caseload and her work could be regularly monitored.

The Work Station Assessment

99. On the 16 November 2017 Ms Larkin also emailed Mike Higgins, another of the respondent's Health and Safety Officers, requesting that he contact the claimant to arrange a time for a workstation assessment to be completed. On 17 November 2017 Ms Larkin emailed Back Care Solutions for a workstation assessment to be done for the claimant (p.271).

100. On 4 December 2017, Back Care Solutions conducted the ADSEA with the claimant. The claimant was on annual leave from 20 November 2017 to 1 December 2017 so that was her first day back from leave. The Back Care Solutions report recommended that the claimant would benefit from a chair more suitable for her size, with adjustable arm rests to promote a more upright posture and prevent any postural problems occurring in the future. It also said that a telephone headset to give her more freedom when speaking on the phone would help to avoid any upper body injury (pages 274-287).

101. On 12 December 2017 Ben Carroll, Sales and Marketing at Back Care Solutions, emailed Ms Larkin the completed advanced assessment and a quotation for the specially adapted chair and headset (pages 288, 289-296). He asked her to confirm the phone which the claimant used so that they could ensure that a suitable headset was supplied. As we record below, the next step taken by Ms Larkin in response was on the 2 January 2018 (p.290). That was to put Mr Carroll in touch with the claimant so she could answer his query about what phone she used. In between, the claimant's absence record (p.91) suggests she was on annual leave for the week of 18-22 December 2017 although she was clearly in the office on 22 December because she had a supervision meeting with Ms Larkin on that date (pp.297-301). Ms Larkin was on leave for the following Christmas week 25-29 December 2017 so could not progress matters that week.

<u>What happened between 22 December 2017 and 15 January 2018</u>

102. On 22 December 2017 the claimant attended a supervision meeting with Ms Larkin. The claimant pointed out at the Tribunal hearing that the supervision record for that meeting (pp.297-301) was not signed and suggested it was not an accurate

record of what was discussed with Ms Larkin. She said that as far as she could remember, the meeting had been about caseload supervision rather than personal supervision. The claimant was cross-examined about that meeting. Based on her evidence we find that the supervision meeting did focus primarily on supervision of the claimant's cases. However, we do also find that as at that date, the record was accurate when it said that the claimant was feeling ok and managing her caseload. At that point her caseload was 9 children/7 families and she told us in cross examination that she was "keeping up" with her workload. She also confirmed that, as the record says, she was getting support from Ms Desai, a senior social worker as envisaged by the Action Plan.

103. On balance we find that the supervision record at pp.297-301 does accurately reflect what was discussed at that meeting. In addition to the points above, we find that the claimant agreed to keep Ms Larkin updated on her workload and what support she needed and to complete her work with Megan Mayhew which was started in September 2017. We find she did not raise any concern about her workload or about the impact of her caring responsibilities at that point. We find that the claimant's application to Access to Work was not discussed.

104. The claimant accepted in cross examination that the record was accurate in saying that one of the claimant's cases discussed was a MFH (missing from home) case involving a "strategy meeting completed". However, in cross examination she disputed that she had been involved in arranging a strategy meeting on that case. The specific case note for that case was added to the bundle (p.301A) and based on that we accept the claimant's evidence that although a strategy meeting was being contemplated in that case one had not yet been set up.

105. One of the points made by the claimant during the disciplinary process and in her submissions to us was that the Action Plan envisaged fortnightly supervision but that this did not happen. We find that after the supervision meeting on 14 November 2017 when the plan was put in place there was only one more supervision meeting between the claimant and Ms Larkin. That was on 22 December 2017 so some 7 weeks later. It is true that the claimant's absence record (p.91) shows her as being on leave for 3 of those weeks. We heard no evidence about whether Ms Larkin was on leave during those 7 weeks and, if so, when. Even if so, we do accept the claimant's point that there was a significant gap between the two supervision meetings.

106. As we have said, we did not hear from Ms Larkin in evidence. We do not therefore have direct evidence from her about the degree of informal supervision and support (if any) that was happening outside the formal supervision meetings. Ms Larkin was asked questions by the claimant and her union rep, Mr Redmond, at the reconvened disciplinary hearing on the 29 June 2018. At that hearing she said that she and the claimant checked in every day and weekly on Friday (p.395). The claimant's response at that hearing was to "beg to differ" and to say that she had no support apart from Ms Desai. She did accept that Ms Larkin would ask if she was okay and "the usual response is yes and then get on with it" (p.396). On balance we find that although Ms Larkin did "check in" with the claimant in the sense of asking if she was okay, she would rely on the claimant to bring matters to her attention if she needed help. From the evidence we heard it seems to us that the claimant did get

support and advice from Ms Desai and that she was more likely to ask her about things she was not sure about rather than Ms Larkin.

AF's case – 27 to 29 December 2017

107. The matter which led to the claimant being suspended and, ultimately, dismissed, happened in Christmas week 2017. Ms Larkin was on leave that week and Joyce Bunting was the covering manager. The claimant was in work December 27 to December 29, i.e. Wednesday to Friday of that week. The claimant's daughter and her children were still living with her at that point. It is clear from the claimant's evidence and her daughter's evidence that there were still significant caring demands on the claimant. However, they were not of the same magnitude as they had been in the period August to November 2017. Without at all diminishing the continuing caring burden on the claimant we find that things were much improved compared to the crisis situation that existed April-October 2017. During the week the pressure would be slightly reduced because it would not have been necessary to get the claimant's daughter's children to school because of the Christmas holidays (otherwise part of the claimant's daily routine of tasks set out by Alison Johnson in her witness statement).

108. On the 28 December 2017 the claimant was allocated a new case, child AF. AF's case had been referred to the respondent by the police at 11:32 on 27 December 2017 because AF had been missing from home ("MFH") for a period of time. By the time of the referral to the respondent by the police AF had returned home (pp.305-320).

109. Ms Bunting decided to allocate the case to the claimant. Ms Bunting's "Person Case Note - Allocation" entered onto the respondent's MiCare electronic case management system at 16:19 on 28 December 2017 said that the "What Next" step required was a "MFH strategy meeting to be convened"; to arrange to see AF and her mother to discuss the ongoing concerns which had clearly escalated leading to AF going missing from home; and preparation of a Child and Family Assessment ("CAFA") making sure there was a plan to support AF (p.350).

110. We find that a strategy meeting in this context is a multi-agency meeting held where there are concerns that an investigation under s.47 of the Children Act 1989 may be needed. S.47 requires a local authority to investigate whenever there is reasonable cause to suspect that a child is suffering, or is likely to suffer significant harm. In practice, the social worker was required to organise a strategy meeting, speak to and share information with partner agencies and speak meaningfully to the child and family. The respondent's expectation was that a social worker would visit all allocated children within 5 days but if the case involved a child protection inquiry the expectation was that a visit would be carried out in 24 hours.

111. The respondent's Social Work Practice Standard 6 (p.87) says that the social worker will liaise with all professionals to ensure that at least the social worker, health and police attend the strategy meeting. That Standard includes the statement: "I know how important it is to hold a strategy meeting before the stage of section 47 as the strategy meeting will agree the thresholds and multi-agency section 47 assessment to be undertaken". We find that convening a strategy meeting was an important task undertaken where there were concerns that a child might be at risk of (or already be suffering) significant harm and that such cases were, understandably,

viewed by the respondent as urgent. In the contact screening form, AF's case was assessed as 2 on the scale of 0-10. 10 means there is no requirement for children's services involvement and 0 means the child is at significant risk of harm (p.318). This was a case, therefore, where there were significant concerns about the child.

112. The claimant accepted that Ms Bunting allocated the case to her orally at around 16:30 on 28 December 2017. We find that standard practice was that the person allocated a case would be handed a printed out copy of the contact referral note (confirmed by Ms Bunting at p.393 and Ms Larkin at p.367). The claimant and a colleague attempted a home visit. The claimant confirmed that she read the referral note before that home visit. It was agreed that when they carried out the visit there appeared to be no one at home so this was classed as a "no access visit". The claimant's colleague sent Ms Desai, the senior social worker, a message to let her know there had been a no access visit (p.370). We find that because she carried out that visit with a colleague the claimant did not have to use public transport on that occasion. The claimant recorded that no access visit on the MiCare record relating to AF at 16:12 on the 29 December 2017 (p.351).

113. There was a dispute between the parties about when that home visit was actually carried out. The claimant suggested it was 5 p.m. on the 28 December 2017, i.e. the afternoon she says the case was allocated to her. The respondent suggested it was on the 29th.. At the initial investigatory interview, the claimant said that she might have visited on the day it was allocated or on the 29th (p.360).

114. The Bundle included a printout of the claimant's activities on MiCare for 28 December 2017 to 12 January 2018 (pp.321-349). They provide a detailed chronology of what actions the claimant took on which cases on that system. Based on the MiCare records we find that the claimant spent most of the 28 December 2017 working on MiCare. She logged in at 9:16 and worked on the MiCare system (including on new cases allocated that day) until 12:26 with a break of 30 minutes or so at around 9:21. She then started working on MiCare again at 14:02, logging off at 16:03. She had logged off before Ms Bunting put the allocation note for AF on MiCare on the 28 December.

115. On 29 December 2017 the claimant logged on to MiCare at 9:19 (p.327). She spent from 9:20 to 9:39 viewing the MiCare record relating to AF. We are satisfied that by 9:39 she would have seen the allocation note from Joyce Bunting on MiCare specifying the need to convene a strategy meeting as a next step in AF's case. The claimant then worked on a previously allocated case on MiCare until 11:16 when she viewed the AF record for a couple of minutes (p.329). She continued to work on the system until 12:22, viewing the record for AF briefly just before then (p.330). There is then a long gap until 16:10 when the claimant again logged on to the MiCare record for AF and at 16:12 adds the note referring to the no access visit on AF's case. That gap seems to us consistent with the claimant having been out on a visit. The note added by the claimant to MiCare (p.351) refers specifically to a no-access visit at 15.55 on 29 December and on balance we find that is when the no access visit took place rather than on the 28th as the claimant suggested. We do accept that the claimant did carry out a visit at 5 p.m. on the 28th but find that was in relation to another case (something which Ms Johns confirms in her investigation report (p.380)).

116. The date of the no access visit is not central to this case because the matter which led to the claimant's dismissal was her failure to convene the strategy meeting. The claimant has accepted throughout that she did not arrange that strategy meeting as Ms Bunting's allocation note required. The claimant provided various explanations about why that was the case during the investigatory and disciplinary proceedings. This included that she had not had time to read the papers in the case; that Ms Bunting had not highlighted the importance of setting up the MFH the strategy meeting as the priority step; that she though it was the MFH team which set up such strategy meetings; that she did not know how to set up the meeting and there was no one to ask; that she had to prioritise getting her records up to date; that she had a high workload that week and that she was distressed due to concerns about her son's unborn child.

117. In terms of workload, we find that at the start of that duty week (27th December 2017) the claimant's case-load was 9 children/7 families. We find that Ms Larkin had agreed with Ms Bunting that the claimant could be allocated more cases during that week. We find that was in line with the process adopted by Ms Larkin since the claimant returned to work at the start of November whereby her caseload was gradually increased. We find it consistent with the fact that in her supervision meeting on the 22 December 2017 the claimant had told Ms Larkin she was managing her caseload and had not raised any concerns about feeling overwhelmed by that caseload and her caring responsibilities as she had been in October 2017. We also find that by this time the respondent was monitoring the location of cases allocated to the claimant and that all bar one was located within 2-2.5 miles of the office. There was one which was around 3.5 miles away. We find that in the Christmas week the visits carried out by the claimant were made with another social worker, NG, who gave her a lift. We find this reduced the need for the claimant to use public transport which in turn reduced the time the claimant spent out of the office.

118. We find that the claimant was allocated 4 more cases on 27 December 2017, 1 more (AF) on the 28th December and 4 more on the 29th December (pp.167-169). We accept that by the 29 December 2017 the claimant's caseload had increased to 18 and that by 4 January 2018 the claimant's caseload had been increased to 19 children (p.170). We find that was less than the full caseload for a social worker of the claimant's experience which would have been around 22 cases (p.389). We do accept it was significantly more than the claimant had been allocated since her return to work in November 2017. The claimant accepted in cross examination that she did not raise concerns with Ms Bunting about the cases being allocated to her during that week nor did she suggest to her or to Ms Desai, the senior social worker, that she was feeling overwhelmed by the case load.

119. On the 27th the claimant was very concerned about the likelihood that her son's and his partner's unborn child might be referred to her team because of the partner's previous history. We find that she spoke to Joyce Bunting about this on the morning of the 27th December and Ms Bunting agreed that steps would be taken to ensure that the case and records relating to the unborn child and parents would be "locked" and steps taken to ensure they would not be referred to any of the claimant's colleagues. We accept that the claimant also spoke to Ms Bunting about this matter on the 28th December and Ms Bunting confirmed that those steps had been taken (team (p.393 and the claimant's witness statements para 37).

120. As we have said, we found the claimant spent the morning of the 29 December in the office and had read the AF file before carrying out the no access visit in the afternoon. There was, we find, time for her to have arranged the MFH strategy meeting required by Ms Bunting before she went on leave after the 29th December. As to why she did not, the claimant gave various sometimes contradictory explanations during the disciplinary process and at the Tribunal. In addition to her workload, the claimant suggested that she did not know how to set up a strategy meeting. That evidence is contradicted by the evidence Ms Larkin and Ms Bunting gave during the investigation and disciplinary process which was that arranging such a meeting was "bread and butter" stuff for a social worker and that the process to be followed was both in the manual used by the team and on the wall of the office (p.367). We find that the setting up of a strategy meeting was something which a social worker of the claimant's qualifications and experience should have known how to do.

121. However, if we are wrong and the claimant did not know what to do, we find she did not ask Ms Bunting or Ms Desai what to do. The claimant accepted that she did not do so. in her evidence she said that Ms Bunting was not around to ask what to do. That must mean on the 29th December because the claimant's evidence was that Ms Bunting handed the case to her verbally on the 28th so she clearly did speak to her then. In her initial investigation interview Ms Bunting said that she had sat with the team for all 3 days of that week to provide day to day support and had spoken to the claimant on each of the 3 days because the claimant had approached her about "a personal issue" (i.e. her son's unborn child) (p.364-367). It is clear from the claimant's own evidence that Ms Bunting was present for at least some of the 29th because she refers to the claimant trying to catch Ms Bunting's eye that afternoon (witness statement para 40) when she overheard the conversation we describe in the next paragraph. On balance we find that Ms Bunting was present in the office on all 3 days and that the claimant would have had an opportunity to ask her about how to set up a strategy meeting had she needed to do so.

122. The claimant did not suggest that Ms Desai was not in the office on the 29th. However, she did say that she did not want to disturb her because she was busy on the duty desk. We find that hard to understand. AF's case was urgent and if the issue was the claimant not knowing what to do we would have expected that she would have thought the issue important enough to speak to Ms Desai. The claimant's own evidence made it clear to us that she was at that time working with Ms Desai on other cases and would not have had any inhibitions about approaching her.

123. The claimant also suggested during the investigatory and disciplinary process that she thought arranging the meeting was something the missing from home team did. However, she accepted that she did not contact that team to ask them to set up the meeting.

124. The claimant also gave evidence that she was distressed by overhearing a conversation which she understood to be about her son's unborn child in the office. Her evidence (witness statements para 40) was that after 3 p.m. she heard a social worker in the office discussing the mother of her son's unborn child saying that safeguarding and improvement had uploaded the information on to the wrong record. The claimant's evidence was that she was so concerned that she became very

distressed because she though the uploaded record related to her son's unborn child. She tried to catch Ms Bunting's eye but says she seemed to turn away. She then left the room to compose herself but on her return the colleagues were still discussing the case. She said that she was then called to accompany another social worker, NG, to a visit so she "quickly finished off recording on AF's case and closed the case notes".

125. As we understand it, the claimant's case is that she was going to set up the strategy meeting on AF's case but was distressed by overhearing the conversation about her son's partner's case and so left the office without doing so. The respondent investigated this matter as part of its disciplinary process and concluded on examining MiCare that it could not have been in fact the claimant's son's child's case that was being discussed (because Ms Bunting had ensured It could not be allocated to and be accessible to the claimant's team). However, we accept the claimant's evidence that on the 29th she heard discussion of a case she genuinely thought was her son's partner's. It may not actually have been her son's partner's case but we accept her evidence that she understood it to be and was upset as a result. That seems to us to be consistent with the evidence from Joyce Bunting that the claimant had discussed the matter of her son's case with her during that week and that she had been upset about it. It was something that was on the claimant's mind and thinking she heard it discussed would have upset her. In terms of the extent of the upset caused, there was no suggestion that the distress was such that the claimant had had to go home immediately or had been otherwise unable to continue working. The claimant's MiCare record for the afternoon of the 29th shows her working on MiCare from 16:10 until 16:40 when she logged off. She worked on AF's case from 16:10 until 16:13 – which we have found was when she recorded the no access visit. However, from 16:13 to 16:40 she worked on another case (case 2315535 a new case allocated to her that day). That is not consistent with the claimant's evidence that she quickly recorded the details of the AF no access visit and then had to leave to go on a visit. We find that although she was upset about hearing the conversation, she continued working on another case for around half an hour after finishing recording what had happened on the AF case.

126. The claimant also said in evidence that she had effectively handed over the case to Ms Desai. She said that before leaving at the end of the 29th December she went to Ms Desai and told her that AF was a no access visit and would need visiting again while on leave. She says that Ms Desai made a note of that on a manual tracking form she used for recording duty referrals. On the claimant's own case she did not highlight to Ms Desai the need to arrange a strategy meeting and she accepted that she did not email Ms Desai or Ms Larkin to alert them to the status of the case.

127. Ms Desai was asked about this as part of the investigation process. She confirmed that she had been told by NG about the no access visit. She said she could not remember any level of detailed conversation that would have triggered her telling the claimant to discuss the matter with her manager. (p.370). The investigation found no evidence of Ms Desai using a "manual tracker" as the claimant suggested. At the reconvened disciplinary hearing on 29 June 2018 Ms Desai was questioned by the claimant and Mr Redmond. She was not asked about a manual tracker and the claimant is recorded as saying "we had a conversation about the no action visit. We had a conversation but nothing substantial was said". We find

that was what happened – the claimant mentioned the no access visit to Ms Desai but at no point made her aware that there was a requirement to set up a strategy meeting, that she had not done so or that she did not know how to do so.

128. In summary, for the period 28-29 December 2017 we find that the claimant was allocated the AF case; read the MiCare notes, which highlighted the next step as a strategy meeting and the perceived scale of risk of harm to AF; did not take steps to set up such a meeting, e.g. by contacting partner agencies; should have known what to do but took no steps to either set up the strategy meeting or to check what she was supposed to do (with a manager, Ms Desai or the MFH team); and did not alert Ms Desai or her manager that there was a requirement to set up a strategy meeting which had not been actioned.

129. In terms of why she did not take those steps at that point we find that she had time to take them. We accept that her caseload had increased but find that it had done so from a very low level. It may have felt to her to be significantly increased. However, we find it was lower than would be expected for someone at her level and there was no indication that she was at this point overwhelmed because of it. Her caring responsibilities though still significant had eased significantly since the crisis point a few months earlier. At her most recent supervision on 22 December 2017 she did not flag up any issues about her caring responsibilities as she had done at previous meetings. We have accepted that the claimant was upset by hearing what she thought was her son's partner's case being discussed in the office but we have found that although that caused her upset it would not have been enough to prevent her from taking relevant action whether that was setting up the strategy meeting or properly briefing colleagues of the need to do so in her absence. Ultimately, we find that she simply failed to sufficiently prioritise or take responsibility for that task or approach it with the urgency which the risk scale of 2 suggested was needed.

Events in January 2018

130. It is agreed that no action was taken on AF's file until 12 January 2018 when AF's school alerted the respondent that AF had not attended school. The claimant was on leave after 29 December until Monday 8 January 2018. She accepted that she did not look at AF's case until the school's alert came in on the 12th. Her evidence was that during the period 8-12 January 2018 she was very busy on visits including cases of hers which were in crisis. The MiCare log (pp.330-349) and diary extracts (pp.303-304) do show that the claimant carried out visits on the 9-12 January 2018. However, they also show that she spent most of the mornings of that week in the office, since she was active on MiCare during those times.

131. On 3 January 2018 Megan Mayhew emailed the claimant to check her availability during the next couple of weeks so they could arrange a time to meet and discuss the claimant's progress with the development plan which had been put in place for her. The claimant replied at 10:38 on 8 January 2018 to set up that next meeting for 15 January 2018 (p.352). On 9 and 10 January 2018 the claimant closed some of her cases so that by the 11 January her caseload had reduced from 19 to 16 (pp.170-174). We find that although the claimant did still have a higher caseload than she had after her return to work in November 2017, it was decreasing rather than increasing. We accept the claimant had visits to carry out but her other activity during that week does not support her submission that she was so busy that she did

not have time to take the actions required on AF's case. We do accept that there is something in the claimant's suggestion that it might be expected that a manager would have thought to query what had happened on the case given it was now a fortnight since it had been allocated with a risk scale grading of 2. Ultimately, however, the claimant was the allocated social worker on AF's case and so it was her responsibility to check what had happened in her absence. It is clear she did not do so.

132. When the school referred AF again at 12:43 on 12 January (pp.355-357) because she was missing from school and they suspected she had been taken abroad, it became apparent to the respondent that the claimant had not arranged the strategy meeting. Ms Desai and another social worker were instructed by Ms Larkin to deal with the case. The claimant was then interviewed by Ms Larkin and Ms Bunting and, by her own evidence (witness statement paragraph 44), was not able to explain why the strategy meeting had not been set up. She was suspended with effect from 15 January 2018 pending a disciplinary investigation. That was confirmed by Ms Larkin in a letter dated 17 January 2018 (p.358-359).

133. We find that the claimant did have opportunities to set up a strategy meeting (or alert a manager she had not done so and did not know how) when she returned from leave on 9 January 2018. She took no steps to do so. The claimant did suggest to us that the refusal to allow her to work from home contributed to her failure to arrange the strategy meeting. She said that Ms Larkin had insisted that she complete recording visits within 2 days and this meant that she had to prioritise doing that rather than taking action on AF's case. We do accept tht the respondent was concerned that the claimant was not recording visits on MiCare (this was something included in the development plan and discussed with Megan Mayhew) but we do not accept that was a reason for failing to set up the strategy meeting. It seems to us that if the claimant was updating records rather than setting up that meeting it reflects a failure on her part to prioritise AF's case in the way which would have been expected given its seriousness.

134. Because the claimant was suspended the order for the special chair and headset was put on hold pending the outcome of the investigation. Before the suspension, on her return from leave on 2 January 2018, Ms Larkin had taken steps to progress that order. On 2 January she emailed Mr Carroll of BackCare Solutions confirming the quote provided was fine and asking him to contact the claimant about the model of phone she was using. She then provided him with the claimant's contact details and it is evident that he did so on the 8 January because by 11:45 he had emailed Ms Larkin a revised quote (p.292).

<u>The Disciplinary proceedings and October 2018 dismissal</u>

135. The disciplinary investigation was conducted by Heather Johns, a Team Manager at the respondent's Longsight District office. She interviewed the claimant (with Mr Redmond present), Ms Bunting, Ms Larkin and Ms Desai (pp.360-371). She also considered documentary evidence including the referral and MiCare documents relating to the AF case, supervision meeting notes, the Action Plan, the claimant's MiCare activity log and the duty diary. The documents were included as appendices to the Disciplinary Investigation presentation Ms Johns prepared (pp.419-435). It does not appear that the Health Works report (p.243-245) or the Individual Risk

Assessment (pp.267A-C) were included as appendices though the claimant's health issues and the fact that adjustments had been made (including to her workload) were referred to in the section of Ms Johns's report headed "Workload, presentation and management support" (p.433). On 25 May 2018 Ms Johns concluded there was a case to answer and sent the claimant a disciplinary hearing invite letter to attend a disciplinary hearing on 7 June 2018 (pages 372-373). We find that the investigation was a thorough one.

136. Ms Bernasconi chaired the disciplinary hearings relating to the claimant. They took place on 7 June 2018, 29 June 2018, 5 October 2018 and 17 April 2019 (pages 374-405). The allegations which Ms Bernasconi was asked to consider were:

(1) That on 28 December 2017 the claimant had failed to follow a managerial instruction from Joyce Bunting to arrange a strategy meeting for child AF;

(2) That that was a breach of section 6 of the respondent's Practice Standards for Children Social Work (p.87);

(3) That that conduct was also in breach of the professional standards set out in:

(a) Health and Care Professionals Council ("HCPC") standard 1 – be able to practice safely and effectively within their scope of practice;

(b) HCPC standard 2 – be able to practice within the legal and ethical boundaries of their profession.

137. At that first disciplinary meeting, none of the respondent's witnesses, i.e. Joyce Bunting, Ms Larkin and Ms Desai, were present because they were away on leave. Ms Johns presented the management case (pp.419-435). The claimant and her union representative, Mr Redmond, were then invited to present their case and to question Ms Johns, which they did. They also responded to questions from Ms Bernasconi. The issues of mitigation were discussed at that meeting including the claimant's concern about her son's unborn child being allocated to her office (though not her overhearing a conversation about it) (p.390). There was a discussion about the claimant's workload with the claimant suggesting that Ms Johns had got her workload wrong. In her presentation Ms Johns had noted her workload as 7 but also noted that Ms Larkin was in agreement with it being increased over the Christmas week (p380). The claimant told Ms Bernasconi that she had 9 cases rather than 7 and that she had been allocated another 10 during Christmas week. As we have recorded above, we find that the claimant's workload did increase to 19 by 4 January 2018. When asked about extenuating circumstances the claimant said that she had come back to soon after the problems with her mother and daughter in 2017 (p.392). Ms Bernasconi decided to adjourn the disciplinary hearing because she wanted to question the three witnesses who were not in attendance. Mr Redmond had also wanted this opportunity. The matter was therefore adjourned until 29 June 2018 to allow those witnesses to attend.

138. The disciplinary hearing reconvened on 29 June 2018 (pp.392-396). The three witnesses were in attendance as were the claimant, Mr Redmond, Ms Johns (as presenting officer), Ms Bernasconi (as deciding officer) and Victoria Jordan (one

of the respondent's HR officers). During that hearing the three witnesses responded to questions from Ms Bernasconi, from Mr Redmond and from the claimant. We have referred to their evidence where relevant to the findings we made earlier in this judgment and do not repeat it here.

139. During that second hearing, Ms Larkin was questioned about the support she gave the claimant and referred to the Individual Risk Assessment, the Workstation assessment, the claimant's reduced caseload, offer of referral to the EAP, co-visiting with other colleagues and asking her to be office based so that she could access support around her (p.395). During this hearing the claimant also specifically referred having overheard what she thought was her son's partner's case being openly discussed in the office by a Team 1 member. She said that the alleged information had been recorded on the wrong child's MiCare and this had caused her significant distress. Ms Bernasconi decided to adjourn the disciplinary hearing again in order to fully investigate these matters. The disciplinary hearing was therefore adjourned until 5 October 2018. Ms Bernasconi also confirmed the respondent was double checking the claimant's caseload at the relevant time on MiCare (p.394).

140. Also on 29 June 2018 the claimant was referred to HealthWorks for an occupational health report. Its report dated 17 July 2018 (based on an appointment on 10 July) concluded that the claimant was not fit for work (pp.415-416). It reported the claimant as saying that she attributed her psychological symptoms largely to perceived workplace concerns regarding the then current investigation. It also reported her as saying that she had failed to action the instruction to convene a strategy meeting "due to having a lot of personal stressors during this time and indeed on the day of the incident". The report suggested the options of counselling, CBT, physiotherapy, Occupational Health Physician appointment or a request for a GP or specialist report. None of these were actioned because the options suggested had already been proposed by the respondent during the attendance management review meeting on 15 November 2017 and rejected by the claimant.

141. On 7 August 2018 Ms Bernasconi sent the claimant a letter detailing her findings about the mitigation points that the claimant had raised at the disciplinary hearing on 29 June (pp.417-418). Ms Bernasconi's findings detailed in that letter were that she had been unable to find any evidence to support the claimant's claim that her unborn grandchild's information was uploaded onto the wrong file. Safeguards were in place to ensure the case was not accessible by any of the claimant's colleagues (pages 417-418). The letter advised the claimant that the disciplinary hearing would reconvene on Friday 31 August 2018 (pages 417-418). Unfortunately, as the respondent subsequently accepted, this letter was sent to the wrong address, one digit of the house number being wrong.

142. On 27 September 2018 Ms Bernasconi wrote to tell the claimant that the hearing had had to be adjourned and would take place on 5 October 2018 (pp.418A-C). It is accepted this letter was also sent to the wrong address. The claimant did not attend the reconvened hearing. Her trade union representative, Mr Redmond, did attend. Attempts to contact the claimant were unsuccessful (p.396). At that hearing the claimant's trade union representative, Mr Redmond, requested the matter be adjourned to allow the claimant a further opportunity to attend. Ms Bernasconi considered this request but was satisfied that the claimant had sufficient notice of the hearing and had failed to give reasons for her non-attendance.

Because there had already been two previous adjournments she declined the request. At that point Mr Redmond told Ms Bernasconi he was not prepared to stay in the claimant's absence and left the hearing (pages 374-405). We do accept Ms Bernasconi's evidence that at this point she had no idea that the letters inviting the claimant to the adjourned disciplinary hearing had gone to the wrong address.

143. Ms Bernasconi's decided that the claimant's professional conduct and practice had fallen below the standard required by the respondent. She therefore found the allegation of gross misconduct proven in relation to:

(1) The failure to follow the managerial instruction from Joyce Bunting in relation to the strategy meeting for child AF;

(2) Breaching section 6 (the strategy meeting section) of the respondent's Practice Standards for Children's Social Work.

144. She decided that the claimant should be summarily dismissed. She set out the reasons for her decision in a letter dated 15 October 2018. That letter was sent to the correct address (pp.436-440). Because the claimant accepted she had not convened the strategy meeting the focus of the letter was on the evidence as to why that had not happened. In summary, Ms Bernasconi:

- Rejected the claimant's assertion that there were competing demands on her time on 28-29 December 2017 and 8-12 January 2018. She found there were not many referrals, that communication had happened between Ms Larkin and Ms Bunting to ensure the claimant was not overwhelmed, that the duty social workers had been allocated sufficient time in the office and that the workload she had was significantly reduced against the standard for an experienced social worker.

- Rejected the claimant's assertion that she did not have time to digest the information on AF's file. She referred both to the handing over of the paper referral and the evidence from MiCare showing the claimant had accessed the file repeatedly on 29 December.

- Rejected the suggestion that it was for the MFH team to convene the strategy meeting. That was not practice and in any event advice from Ms Desai and Ms Bunting was available if she needed clarification.

- Concluded that there was unacceptable delay, drift and lack of action on the AF file with the only work done a no access visit. There was no evidence that the claimant had sought advice.

- Concluded that there was no evidence that the claimant did not have capacity to arrange a strategy meeting and that as a result of her not arranging it a young person was put at increased risk of harm.

145. Ms Bernasconi's findings took into account the mitigation put forward by the claimant including the fact that in the week of 27 December the claimant had been receiving support from Ms Bunting in relation to personal issues, that she had been on an individual action plan with a significantly reduced caseload when allocated AF

and that she had expressed some recognition of her error. In reaching her decision, Ms Bernasconi took into account the claimant's suggestion that she was distressed because of overhearing the conversation between colleagues which she understood to be about her son's partner. Ms Bernasconi said that she had made enquiries and established that that conversation could not have taken place as reported by the claimant because the children referred to had not been referred to the safeguarding unit. (p.439).

146. Ms Bernasconi considered the suitability of alternatives to dismissal but was not satisfied that a lesser sanction could be applied given the very serious nature of the allegations. Her view was that the respondent had a duty and responsibility to safeguard children and that the claimant's conduct placed a child at risk whom the respondent had a duty and responsibility to protect. Consequently, dismissal was in her view the appropriate sanction.

147. As we explain below, we found that Ms Bernasconi based her decision on the claimant's workload at this point being 7 whereas it was (by 4 January 2018) actually 19.

What happened after the October 2018 dismissal

148. The letter confirming the decision to dismiss dated 15 October 2018 informed the claimant that she had a right of appeal and that if she wanted to exercise that right she must do so in writing within ten working days of receipt of the letter (pages 436-440).

149. The claimant did appeal against the decision to dismiss by a letter dated 26 October 2018 (pages 443-446). The grounds of appeal were:

(1) There had been a failure to follow the correct procedure as indicated within the council's disciplinary procedure;

(2) That the sanction of summary dismissal was too harsh and had been made unfairly;

(3) That monies owed following dismissal on 15 October 2018 may have been calculated accordingly in terms of annual leave, and that previous enquiries regarding her pay had been incorrect and not been adequately addressed by HR. (As we have indicated earlier, the respondent at the Tribunal hearing conceded that there had been errors in calculating the claimant's pay and annual leave).

150. On the 11 January 2019 the claimant began the Early Conciliation process.

151. On 1 February 2019 the claimant was invited to a disciplinary appeal hearing on 14 February 2019 (pages 447-448). Having made the decision to dismiss, Ms Bernasconi's role at the appeal hearing was as Presenting Officer. The Head of Children's Service, Abu Siddique, was the Hearing Officer, and the appeal hearing was also attended by the claimant, her daughter Alison Johnson and by Mr Redmond. Alison Johnson was allowed to be present at the hearing in order to provide emotional support for her mother (pages 449-450). It was during the disciplinary appeal hearing that it was established that the letter inviting the claimant

to the reconvened disciplinary hearing on 5 October 2018 had been sent to the wrong address. This not only presented a data protection breach but meant that the claimant had not had an opportunity to attend the disciplinary hearing on 5 October 2018.

152. The notes of the meeting record that Mathew Maitland suggested that there should be a short adjournment to enable the claimant to identify any points she wanted to put forward and Ms Bernasconi could then have an opportunity to comment on whether those points would have had a material bearing on her decision. After the short adjournment, however, Mr Redmond indicated that the claimant was too upset to continue and asked for an adjournment. Mr Siddique granted that request. (pp.449-450).

153. It was then agreed between the respondent and the claimant's union representative that the appropriate course of action was for the claimant to be reinstated on full pay pending the outcome of the re-run final part of the disciplinary hearing (p.451). We accept the claimant's evidence that her union did not consult her about this – that seems to us consistent with her email to the respondent on 2 April 2019 saying that she is awaiting confirmation of her reinstatement "and why this has been done".

154. On 22 March 2019 the claimant issued her employment tribunal claim (pp.1-22). On 4 April 2019, Matthew Maitland, Human Resources Officer at the respondent, sent the claimant a letter confirming her formal reinstatement on payroll with effect from 15 October 2018 (p.460-461).

155. One of the submissions made by the claimant in the disciplinary proceedings and at the Tribunal hearing was that it was not permissible for the respondent to decide to "re-run" the final part of her disciplinary hearing (even with the agreement of her union representative). She submitted that when an appeal has been lodged, the only options available to the respondent were those set out in its disciplinary procedure. Those options are set out in the section of that procedure headed "Outcome of the appeal" (p.75) which says that the range of options open to the Appeal Body "will be" as follows:

- "allow the appeal and revoke the disciplinary sanction or substitute other informal action instead
- allow the appeal in part and substitute a lesser disciplinary sanction;
- disallow the appeal and uphold the original disciplinary sanction."

156. The disciplinary procedure does not include a provision enabling a decision to impose a sanction to be set aside or varied except through an appeal process. We find that the disciplinary procedure was incorporated into the claimant's contract of employment (p.150F). That page of the claimant's statement of terms and conditions includes the disciplinary procedure in a list of "other rules and local agreements made by the respondent affecting your terms and conditions of employment". There was nothing in the disciplinary procedure suggesting that it was not contractual and Miss Nowell accepted it probably was contractual.

<u>The April 2019 dismissal and after</u>

157. The rearranged disciplinary hearing took place on 17 April 2019. Present at that hearing were Ms Bernasconi, Ms Johns as the Presenting Officer, Andrew McMenemy, a respondent Human Resources Officer, the claimant and Mr Redmond. The claimant's daughter was also present to support her mother (p.399-405).

158. At that third hearing the claimant again raised in mitigation her overhearing of the conversation she thought was about her son's partner. Ms Bernasconi reiterated that this conversation could not have been about her son's child based on Ms Bernasconi's enquiries about allocation of cases on MiCare. The claimant also suggested that her osteoarthritis and carpel tunnel syndrome had been overlooked as mitigating factors. She referred to the Individual Risk Assessment she completed on 16 November 2017 and said that steps on that risk assessment had not been undertaken. The specific steps she referred to were the fortnightly review of that action plan and support from Megan Mayhew and Ms Larkin.

159. The claimant also questioned why the decision to reinstate her had been made without reference to her. She suggested that there had been concealment of the data protection breach when letters to her were sent to the wrong address. She expressed disappointment that instead of the appeal being reconvened the disciplinary hearing was resumed. Ms Bernasconi said she would consider her decision and would take into account the Individual Risk Assessment and HealthWorks occupational health reports in doing so.

160. By letter dated 29 April 2019 Ms Bernasconi confirmed her decision to summarily dismiss the claimant (pp.462-467). In that letter Ms Bernasconi repeated the reasons given in her dismissal letter from October 2018 but in addition explained that she had taken into account the HealthWorks report and Individual Risk Assessment and concluded that the evidence was that the steps set out in the Health Works report had been carried out. She also explored in some detail the mitigation relating to the conversation overheard by the claimant about her son's partner giving reasons why she did not accept that incident could have happened. The decision took effect from 29 April 2019 and informed the claimant of the right to appeal against the decision and how to do so.

161. As mentioned above, we do find that in one respect Ms Bernasconi's findings were in error to some degree. She stated that the claimant's caseload "rose to 7 in the Christmas period" (p.463). That is correct to the extent that at the start of the Christmas period the claimant's caseload was 7 families/9 children. However, it does not acknowledge that by 29 December 2017 the claimant's caseload had increased significantly from that to 19.

162. On 13 May 2019 the claimant did submit a letter of appeal. The grounds in that letter (pages 468-473) were that:

(1) The respondent had behaved unreasonably in dismissing her following a successful appeal on 26 October 2018 which included the following points:

(a) The claimant said the dismissal was unfair because the council held an initial appeal hearing that was not concluded;

(b) The respondent had stated the appeal was null and void and reinstated her only to dismiss her again. The claimant alleged she had not yet received the minutes of the appeal hearing and was not involved in the consultation and decision making to reinstate her on the payroll. She claimed that the reinstatement had been agreed to undermine her unfair dismissal claim;

(c) Despite being told it was unfair for her not to be represented at the hearing on 5 October 2018, there had been little or no consideration of her mitigating circumstances, which included elements of disability discrimination.

(2) The sanction of summary dismissal was too harsh and there were alternatives to dismissal. She repeated the mitigation evidence put forward in the previous hearings and stated that Ms Bernasconi had minimised her physical disabilities and her caring responsibilities. She asserted that the respondent had failed to suggest flexible working, failed to progress the Access to Work application and offered participation in the Cycle to Work scheme which was insulting given her physical disabilities. She pointed out that her caseload was not 7 as suggested but had risen to 18 by 29 December 2017 and 19 by 4 January 2018.

(3) Monies owed to her following her dismissal on 15 October had been paid incorrectly in relation to annual leave and pay.

163. The disciplinary appeal hearing took place on 2 September 2019 having been postponed from the 26 July 2019 due to Ms Johns not being available (p.483). The hearing in September was attended by Ms Bernasconi as the Presenting Officer; Julie Heslop, Strategic Head as the Appeal Hearing Officer; Ms Johns as a witness; and John Ip as a Human Resources officer. Neither the claimant nor Mr Redmond were in attendance. (pp.486-498). The claimant's evidence was that she had lost faith in the respondent and no longer had union representation. At the start of the hearing Mr Ip confirmed that the claimant had confirmed she was not proposing to attend.

164. The appeal hearing took the form of a re-hearing of the case albeit without in person evidence from Ms Larkin (who had left the respondent by then), Ms Bunting and Ms Desai. Ms Johns presented the disciplinary investigatory report which she had previously presented to Ms Bernasconi at the disciplinary hearings in June and October and April. Ms Bernasconi then explained the matters she had taken into consideration when reaching her decision to dismiss the claimant. Having considered the evidence and the representations provided by Ms Bernasconi and Ms Johns, Ms Heslop then decided to adjourn to consider her decision. She wrote to the claimant on 3 September 2019 strongly encouraging her to reconsider her decision not to attend the appeal hearing. She was given until 6 September to confirm that she was prepared to attend a reconvened appeal hearing. The letter told her that if she did not want to attend the hearing she could instead send in a written explanation of her appeal and/or ask her union rep or a friend to attend the hearing on her behalf (pp.499-500). The claimant emailed on 5 September to confirm she would not be attending any reconvened appeal hearing.

165. Ms Heslop decided to uphold the decision to dismiss the claimant. She confirmed that in a letter dated 20 September 2019 (pp.503-509). The letter deals in some detail with the points raised by the claimant in her appeal grounds. Most significantly, we find, it remedied the error made by Ms Bernasconi about the claimant's caseload. It correctly recorded the claimant's workload as being 19 by the 4 January 2018. Ms Heslop concluded that even at that level the claimant was carrying 3 fewer than the recommended 22 cases over what was, according to the evidence, a quiet Christmas period. The contents of the letter also demonstrate that her decision took into account the HealthWorks report from November 2017 (p.506). In summary, Ms Heslop concluded that an employee of the claimant's experience would have known how to set up a strategy meeting and, if she did not, should have raised it with a manager. Her central findings were that the claimant had not "owned" the AF case even though it was allocated to her and had failed to progress it or satisfy herself on her return from leave that AF was safe and well and that a multi-agency strategy meeting had been undertaken. The letter confirmed there was a further right of appeal to the Employee Appeals Committee but the claimant did not exercise that right of appeal.

Findings relevant to the reasonable adjustment complaints

166. As part of setting out our findings of fact about what happened in chronological order we have made findings relevant to the reasonable adjustment complaints. For convenience we summarise them here, along with those findings that did not fit into the narrative. When it comes to the reasonable adjustment claims, the list of issues confirms that the relevant disability is the claimant's osteoarthritis.

167. The respondent accepts it imposed a PCP that employees have to make their own transport arrangements to get to and from work and to and from meetings and other work appointments. We find that this PCP did disadvantage the claimant. Aside from her journey to work, the claimant's work involved carrying out visits to families, sometimes urgently and at short notice. As a non-driver, the claimant's only realistic option was public transport. She had been told (quite rightly, we find) that it was not appropriate for her to be accepting lifts to and from such visits from her own family members or from members of the families she was visiting. We accept that other non-drivers would have been in the same position as the claimant. However, we find that the claimant's osteoarthritis meant that she was additionally disadvantaged. That was, we find, in two ways. First of all, it seems to us, such journeys would be more painful for the claimant than for those non-driving colleagues not suffering from osteoarthritis. Second, those non-disabled colleagues would not have the same difficulties in walking from bus stops to the relevant homes as the claimant does because of the mobility issues arising from her osteoarthritis. There is a third disadvantage which is perhaps more speculative but, it seems to us, still at least an occasional reality, which is that the claimant's impaired mobility increased the chances that she would miss a bus or miss a connecting bus, adding time to her journey compared to non-disabled colleagues whose mobility was not impaired.

168. We find that from at the latest November 2017 that disadvantage was reduced because the respondent took steps to ensure that the cases allocated to the claimant were local to where she worked. The respondent also took steps such that in most cases visits would be carried out by the claimant with another colleague (as happened in the Christmas week) meaning that the colleague could give the

claimant a lift. The respondent's decision to reduce the claimant's workload also reduced the number of visits she had to make, reducing the disadvantage. There would still be a disadvantage in relation to the journey to and from work and for visits where no colleague was available to give the claimant a lift.

169. The parties disagreed about whose responsibility it was to apply to Access to Work for a grant. Having read the factsheet (pp.514-520) we are satisfied that it is for the employee to make the application (pp.518-519). We accept that after that application is made and the employee has explained what help and support they need the employer will be contacted by Access to Work (p.519). In this case, there was no evidence that the respondent was contacted by Access to Work. Instead, we find that as at the last time the issue was discussed (the Attendance Review Meeting on the 15 November 2017) the respondent had assumed that the claimant was progressing the application. We do accept the claimant's evidence that because Sharon Hawkins had told her that the respondent did not accept that paying for taxis was a reasonable adjustment, she did not purse the issue further with the respondent. We find that was a mistaken view but genuinely held. The claimant never communicated that view to the respondent, however, and we find that it assumed that the claimant was progressing the application and did not know she had given up on it.

170. The claimant suggested that working from home would have been a reasonable adjustment to alleviate the disadvantage due to her osteoarthritis. We found that the first time this was raised was by the claimant in the Individual Risk Assessment she filled in on 16 November 2017 (pp.263-267). We found that Ms Larkin did not discuss parts 3 and 4 with her when completing them but accept that her conclusion was that it was better for the claimant to be in the workplace to ensure that she had the appropriate support in place. We find that was founded on genuine concerns about the claimant's practice and on a genuine view that being in the workplace would provide the claimant with a ready source of support, e.g. if she did not know how to progress a case and also provide an additional level of monitoring to ensure she was managing her workload. Working from home would not have prevented the claimant having to travel to carry out visits.

171. When it comes to the second PCP, that of having to work with standard office equipment, the HealthWorks report from November 2017 (p.244) identified one disadvantage arising from the claimant's osteoarthritis as being lack of mobility, and a work station assessment as a way of identifying adjustments to help with that. That work station assessment (carried out by Back Care Solutions pp.274-287) did identify a need for a specialist chair and headset for the claimant. While acknowledging that that is not itself conclusive of a disadvantage for the claimant compared to non-disabled people we find it is indicative that the standard office equipment the claimant was required to use was not good for her posture. We find that sitting for long periods was painful for the claimant due to her osteoarthritis and find that a chair giving her a bad posture would have exacerbated that in a way that it would not have done (to the same extent) were she not a disabled person.

172. In terms of steps taken by the respondent, we found that they did initiate a work station assessment in September 2017 and it was the claimant's absence on sick leave in October 2017 which prevented that going ahead. We find that when the claimant returned to work in November, Ms Larkin again set the process in motion

and that had it not been for the claimant's suspension on 15 January 2018 the chair and headset would have been provided for her. We have considered whether there was any unreasonable period of delay in progressing matters. The only delay we can see is between 12 December 2017 (when the quote was received) and 2 January 2018 (when Ms Larkin provided the claimant's contact details). However, that delay coincided with the Christmas period when the claimant and Ms Larkin both took leave staff on leave (and Back Care Solutions on a Christmas shut down from 22 December 2017 to 2 January 2018).

173. We find that provision of the specialised chair would have alleviated the disadvantage to the claimant. We do not find that working from home would have done so in relation to PCP2 unless the claimant's home working space was also provided with equivalent specialised equipment.

174. The other findings of fact we make in relation to the reasonable adjustment complaints are in relation to time limits. We find that Sharon Hawkins's decision that the respondent paying for taxis was not a reasonable adjustment was made at a meeting with the claimant on 11 November 2017. We find that the respondent's decision not to allow the claimant to work from home (as effectively requested by the claimant when she filled in apart 2 of the individual risk assessment) was taken by Ms Larkin on 16 November 2017. We have found that the respondent did take steps to provide specialist office equipment to the claimant from September 2017 onwards so any claim for failing to do so before then would have crystallised at the latest by 27 September 2017.

175. Since we potentially needed to decide whether those claims were out of time and, if so, whether it was just and equitable to allow them to proceed, we heard evidence from the claimant about her knowledge about relevant time limits for such claims. She told us that she was not aware of the time limit provisions in relation to 2010 Act claims. We find that the claimant was aware at least of the reasonable adjustment duty on 14 November 2017. We say that because "reasonable adjustments" is cited in the claimant's notes of that meeting (page 256). Those notes also refer to "DDA" (i.e. the Disability Discrimination Act, the predecessor of the 2010 Act). At that point, therefore, it seems to us clear that the claimant was at least aware that the employer had a legal duty to make reasonable adjustments under discrimination legislation. We accept that does not necessarily mean that she knew of the relevant timescale. However, she was being advised at that meeting and subsequently by her union rep. We find it surprising that the claimant did not make enquiries of her union rep at that point about time limits given it is clear from the way that she completed the individual Risk Assessment form that she thought the respondent was failing to make reasonable adjustments. There was no evidence about why the claimant did not bring a claim at that point. We find that by the very latest in October 2018 when she contacted ACAS in the wake of her first dismissal she would have been aware of the relevant time limits.

176. Another relevant finding of fact in this context is that Ms Larkin, a key witness for the respondent left its employment in July 2019. The claimant correctly points out that at the time she filed her claim form, Ms Larkin was still employed. However, we find that she left at a very early stage in the Tribunal proceedings. She had left by the time Employment Judge Slater's case management order was sent to the parties on 2 August 2019 (p.38). She had left before the respondent would have started

preparing its witness statements for the case (given that the issues were not clarified until that case management order). She would also not have been around to ask about relevant documents in the case which were not required to be disclosed to the claimant under the case management order until 11 September 2019 (p.35).

177. Finally, we find that Sharon Hawkins left the respondent's employment in early 2018. She was a potential witness for the respondent in relation to the reasonable adjustments complaints. Miss Nowell in her submissions (para 32) very fairly acknowledged that Ms Larkin would have been able to give evidence on those issues which Ms Hawkins would have given evidence about.

Discussion and Conclusions

178. The Tribunal concluded as follows:

179. As a preliminary issue, we needed to decide which of the two dismissals was effective and needed to be considered when deciding whether the claimant had been unfairly dismissed or whether the dismissal was a breach of s.15 of the 2010 Act.

Whether the dismissal on 15 October 2018 or 27 April 2019 was the effective dismissal giving rise to an unfair dismissal claim

180. The situation in this case is unusual. The claimant was reinstated after it was found that the dismissal in October 2018 happened following a disciplinary hearing of which the claimant had no notice because the invitation letter had been sent to the wrong address. It was agreed between the claimant's union representative and the respondent that rather than the appeal against that dismissal proceeding the disciplinary proceedings would be restarted from the point before that final disciplinary hearing. Matters clearly proceeded from then on the basis that the dismissal in October 2018 was ineffective.

181. The claimant submitted that she was not part of that decision-making process and it does seem to us the union did not keep her fully informed. However, there was nothing to indicate to the respondent that the union was no longer representing the claimant. Mr Redmond of the union represented her at the first (aborted) appeal hearing on 14 February 2019 and at the subsequent "reconvened" disciplinary hearing on 4 April 2019. The respondent, it seems to us, was entitled to proceed on the basis that the union was continuing to represent the claimant and acting with her authority when it agreed to the reinstatement. If the claimant is unhappy about how the union acted that is a matter between her and the union.

182. What happened in practice was that the claimant was reinstated on the payroll and then took part in the subsequent disciplinary hearing in April 2019 which led to her dismissal and the subsequent appeal process. The respondent's disciplinary policy does not make it clear what happens when a dismissal is not overturned on appeal but rather rendered null and void by agreement between an employee's representative and the employer.

183. The claimant's submission is that the disciplinary procedure mandates that the appeal should have been allowed to proceed and should have resulted in the sanction of dismissal being revoked or varied to a lesser sanction. Since it was against natural justice that she was not given notice of the final disciplinary hearing

in October 2018, her appeal should have succeeded. If it had, she submits, the only possible options available to the respondent under its disciplinary procedure would be to allow the appeal and revoke the disciplinary sanction or substitute other informal action instead or to allow the appeal in part and substitute a lesser disciplinary sanction (p.75).

184. The position in this case is not the same as that in **Patel** because in this case there was never a successful appeal. Had the respondent decided that the process to follow was to overturn the dismissal by way of appeal, it is clear from **Patel** that she would have been treated as never having been dismissed. It does seem to us to be against commons sense, therefore, that where the parties have agreed that there should be a reinstatement it should not also result in the employee being treated as never having been dismissed.

185. There is a difference between this case and **Patel** in that the effect of reinstatement in this case was to allow the respondent to have a "second bite at the cherry" by resetting the clock, acting as if the invitation letters to the wrong address incident had never happened, and then proceeding to dismiss the claimant as it did the first time around but with her present at the disciplinary hearing. The claimant submits that is unfair to her, especially when the problem was of the respondent's own making.

186. We can see the claimant's point of view. On the other hand, the respondent's point of view is that if the claimant is correct she would benefit from an unfair windfall. The respondent would be prevented from dismissing her in circumstances which it would say a dismissal was clearly warranted because of a technical failure on its part which could be (and was) remedied by giving the claimant the opportunity to take part in the disciplinary hearing she missed because of the wrongly addressed invite. Moreover, she was not denied a further right of appeal by the reinstatement and those representing her agreed to that course of action.

187. We find the respondent's point of view more persuasive. We find that the parties' agreement to treat the final disciplinary hearing and dismissal as null and void overrode the express terms of the disciplinary procedure in this case. Legally, we find the effect was that the parties' agreement varied the contractual disciplinary procedure on this occasion. Alternatively, we find that (by analogy with **Patel**) it was implicit in the procedure that if the parties agree to re-set the clock on a disciplinary procedure it is implicit that the effect of that is to treat the employee as though she had never been dismissed. The issue of the appeal option then does not arise because the parties have agreed that they have not yet reached a final decision on the disciplinary sanction which triggers the right to appeal.

188. Our unanimous view was, therefore, that the effect of the reinstatement of the claimant was to render the October 2018 dismissal null and void. The employment relationship therefore continued and was not brought to an end until the April dismissal. It is therefore that dismissal which was effective in terminating the claimant's employment, and it is that dismissal which the Tribunal has decided gives rise to the potential for the claimant to claim unfair dismissal.

<u>Unfair dismissal</u>

(1) Has the respondent shown a potentially fair reason for dismissal? The respondent relies on conduct. In accordance with **BHS v Burchell**: did the respondent have a genuine belief in the claimant's guilt?

189. The Tribunal's decision is that the respondent has shown a potentially fair reason for dismissal, namely conduct. The Tribunal also accepts that the respondent did have a genuine belief in the claimant's guilt. We are satisfied, having heard the evidence of Ms Bernasconi (the decision maker) and Ms Heslop (the appeal officer) that they genuinely believed that the claimant was in breach of a management order to convene a strategy meeting in relation to child AF.

(2) If the respondent has shown a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in all the circumstances (including the size and administrative resources of the employer's undertaking)? In accordance with **BHS v Burchell**: was the belief in the claimant's guilt: (a) based on reasonable grounds; and (b) formed after a reasonable investigation?

190. Taking the reasonable investigation point first, the Tribunal's view is that the investigation process followed by the respondent was a diligent and thorough one. We have set out in our findings of fact the steps taken in the investigation and disciplinary process. Following the investigation report by Ms Johns, the disciplinary charges were considered at three separate disciplinary hearings. The claimant was present and represented at the first of those hearings and, at her request, the hearing was adjourned after some initial steps were taken to enable three witnesses which she and her representative wanted interviewed to attend. Those three witnesses were Ms Bunting, Ms Larkin and Ms Desai. There was an opportunity to question those witnesses at the second disciplinary hearing which was taken by the claimant's representative and by the claimant herself. We found that the respondent did investigate and take into account the mitigation put forward by the claimant, including her contention that she had been distressed at the relevant time by the case involving her son and his unborn child being discussed in the office.

191. In reaching that decision, we have taken into account the specific criticisms made by the claimant. In particular, we have taken into account that in reaching her decision Ms Bernasconi made an error about the claimant's caseload at the time she was allocated the AF case. We find that that error was corrected on appeal by Ms Heslop who did establish that the claimant had by 4 January 2018 been allocated 19 cases but concluded that this was still lower than the standard number allocated to a social worker and did not provide an explanation for the claimant's failure to arrange the strategy meeting. We remind ourselves that as explained in **OCS Group v Taylo**r we must view the disciplinary process as a whole. We conclude that the appeal hearing remedied any flaw in the disciplinary decision made at the April 2019 hearing arising from Ms Bernasconi's error about the claimant's caseload. We think that her decision that the claimant's workload did not lead to the failure to set up the strategy meeting was a reasonable conclusion for her to reach.

192. he claimant also suggested in her second appeal that Ms Bernasconi's approach to the final disciplinary hearing in April 2019 was cursory and time limited. What we understand the claimant to be saying is that Ms Bernasconi was in some

sense going through the motions having already made her decision. We did not find evidence of that. It seems to us Ms Bernasconi did take time to hear from the claimant at that hearing and then to consider her decision. The April decision letter includes findings not included in the October dismissal letter in particular when it comes to the claimant's mitigation. We find Ms Bernasconi did not simply just change the date on that October letter. We find that the April disciplinary hearing did remedy the procedural failure caused by the claimant's invitation to the October hearing being sent to the wrong address.

193. We reminded ourselves that the question for us is not how we would have investigated but whether the investigation was within the band of reasonable responses. We also remind ourselves that the question for us is whether, taken as a whole (including the appeal hearing conducted by Ms Heslop) the process followed in deciding to dismiss was a fair one and fell within the band of reasonable responses.

194. Our main pause for thought came in relation to the appropriateness of the sanction in this case. We accept the claimant's evidence that she had been a very long-serving employee of the respondent and that there was no evidence there had been previous disciplinary action in relation to her. However, on the other side, we have found that the respondent reasonably concluded after a reasonable investigation that the claimant had made a serious error in failing to organise the strategy meeting in relation to child AF. We are satisfied that although it was one single act of misconduct, it was sufficiently serious to justify the respondent dismissing summarily for gross misconduct. The claimant did suggest that an alternative to dismissal would be redeployment. We can accept that it might be that some employers would have taken that decision. However, we do not think that the respondent's failure to do so meant that its decision was outside the band of reasonable responses. As we have said, the seriousness of the incident which led to the decision to dismiss was, it seems to us, sufficient to make a decision to dismiss summarily fall within the band of reasonable responses.

195. We therefore find that the claimant's claim that she was unfairly dismissed fails.

(3) If the dismissal was unfair, how much compensation should be awarded?

3.1 Should a reduction to the compensatory award be made for the chance the claimant would have been fairly dismissed, had a fair procedure been followed, if such an assessment can properly be made? (a "**Polkey**" type reduction).

3.2 Should the basic and/or compensatory award be reduced because of the conduct of the claimant?

196. We have found that the dismissal was not unfair and so this issue does not arise.

Disability discrimination

Discrimination arising from disability

(4) Was the claimant's dismissal in October 2018 and/or April 2019 unfavourable treatment because of something arising in consequence of her disabilities? The "something arising" is the claimant's failure to arrange a strategy meeting for a missing child. The claimant argues that this arose in consequence of her disabilities because the pain she was in due to osteoarthritis and her state of mind, due to depression, contributed to the oversight in failing to arrange the meeting.

197. The respondent accepted that the claimant's dismissal was unfavourable treatment. It is accepted that the "something arising" was the claimant's failure to arrange a strategy meeting for a missing child. The question for us as a Tribunal was whether that "something" arose in consequence of the claimant's disabilities. We have in mind the guidance in the law that the disability need only be a significant influence and not the sole cause of the "something arising".

198. We have considered carefully the evidence about why the claimant failed to arrange the strategy meeting. In particular, we have considered the reasons that she and her representative put forward in her investigatory interviews and disciplinary hearings. Our view is that the reasons put forward do not arise from her disability. Those include the fact that she did not know that it was her responsibility to arrange the strategy meeting; that she had, she said, passed on the case to the senior social worker; that she thought it was for the "missing from home" team to arrange a strategy meeting; that she did not know how to arrange a strategy meeting; that she thought somebody else would do it. As we have explained in our findings of fact, we do not accept that those were relevant reasons why she did not arrange the strategy meeting. However, even if they potentially were it does not seem to us that any of them could be said to arise in consequence of either of her disabilities. They seem instead to be submissions that the responsibility for arranging the strategy meeting was someone other than the claimant's.

199. Of the reasons given by the claimant for not arranging the strategy meeting, the one that came nearest in our view to being plausibly linked to either of her disabilities (specifically that of depression) was the claimant's concern about her son's partner's unborn child and distress on hearing what she thought was her case being discussed in the office. We have found that the respondent investigated this matter and that it could not have been in fact the claimant's son's child's case that was being discussed. However, we did accept the claimant's evidence that she genuinely thought she had heard that case being discussed and that she was upset as a result. However, the claimant did not suggest that the distress as a result of overhearing the conversation meant that she was totally incapacitated. She was not sufficiently distressed to speak to her line manager about the issue. We also found that the MiCare evidence showed that the claimant had worked on another case at the end of the afternoon of the 29th before leaving to go on a visit. Even if we accepted that this incident temporarily prevented the claimant from setting up the strategy meeting (or asking someone how to do so if she did not know how) it did not explain why she did not take the necessary action on AF's case either that morning (when we found she was in the office) or when she returned to the office on 8 January 2018.

200. We do not, therefore, accept that the distress that she felt as a result of overhearing that conversation was a significant influence on the claimant's failure to set up the strategy meeting. Even if it was, our conclusion as a Tribunal was that it was not something arising from the claimant's disabilities. It seems to us to go too far to say that because the claimant was a disabled person by reason of depression, the impact of the conversation on her was that it incapacitated her to the extent that she failed to set up the strategy meeting. That does not seem to us to be consistent with the evidence. We reach that conclusion taking not account the burden of proof. We find that the claimant has not proven facts showing a link between her disabilities and the "something" giving rise to the unfavourable treatment. We do not accept that the failure to arrange a strategy meeting for missing child AF was something arising in consequence of the claimant's depression.

201. We also do not accept that the failure to arrange a strategy meeting for missing child AF was something arising in consequence of the claimant's osteoarthritis. The claimant did suggest at times during the hearing that her osteoarthritis meant that she was in pain and that this may have contributed in some way to her failure to arrange a strategy meeting. There did not seem to us to be evidence that that was the case. Our conclusion was that the pain that the claimant felt as a result of her osteoarthritis was not something which had a significant influence on her failure to convene the strategy meeting for child AF.

(5) If the dismissal was unfavourable treatment because of something arising in consequence of the claimant's disabilities, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent must identify clearly the legitimate aim relied upon in its amended response.

202. We have found that the dismissal was unfavourable treatment but it was not because of something arising in consequence of the claimant's disabilities. This means that the section 15 claim fails at that stage and we do not need to consider whether the respondent can show that the dismissal was a proportionate means of achieving a legitimate aim. For completeness, however, we accept that the respondent's stated aim of protection of the service users whom the claimant was employed to protect would be a legitimate aim and that given the evidence dismissal would have been a proportionate means of achieving that for the reasons set out by the respondent at p.65A of the Bundle given the serious consequences fo the failure to arrange the strategy meeting.

(6) Did the respondent know or could they reasonably be expected to know that the claimant had the disabilities?

203. This becomes academic since we have decided that the section 15 claim fails. For the sake of completeness, however, we record that the respondent did know or could reasonably be expected to know the claimant had the disabilities at the point when it made the decision to dismiss. Both her disabilities had been raised with the respondent by that point.

204. We deal with one further point in relation to the discrimination arising from disability claim. This was a suggestion raised by the claimant that we should also consider the initial decision to dismiss in October 2018 as being unfavourable

treatment. Even though we have found that it was the April 2019 dismissal which was effective, we do accept that a decision to dismiss (even if subsequently revoked) would be unfavourable treatment. As we have made clear above, however, we do not think that that unfavourable treatment was because of something arising in consequence of the claimant's disabilities. The section 15 claim fails, therefore, both in relation to the initial decision to dismiss in October 2018 and the subsequent (effective) decision to dismiss in April 2019.

Failure to make reasonable adjustments

(6) Did a provision, criterion or practice (PCP) of the respondent's put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

(7) The PCPs relied upon are as follows:

8.1 That employees have to make their own transport arrangements to get to and from work and to and from meetings and other work appointments.

8.2 Having to work with standard office equipment.

(8) The claimant says that the first PCP put her at a substantial disadvantage because she had difficulty walking to and from the bus due to pain from her osteoarthritis which also caused her to drag her leg (the claimant does not drive). She says that reasonable adjustments would have been:

9.1 To provide taxis to transport the claimant through the Access to Work scheme (to which the employer would have to contribute financially);

9.2 To allow the claimant to work at home when she did not have any specific meetings to attend.

205. The respondent conceded that there was a PCP of requiring employees to have their own transport arrangements to get to and from work and to and from meetings and other work appointments. In its submissions, the respondent accepted that this placed the claimant at a disadvantage. It was not clear whether the respondent conceded that it placed the claimant under a substantial disadvantage. However, given that "substantial" in this context means only "not minor or trivial", the Tribunal is satisfied that the requirement to make their own transport arrangements did substantially disadvantage the claimant, who had osteoarthritis, compared to non disabled employees. We did take into account the respondent's argument that the disadvantage stemmed more from the fact that the claimant was a non driver rather than from her disability. Even taking that into account, however, we think that it is clear that the claimant suffered a substantial disadvantage compared with others in the same circumstances as her, i.e. non disabled non drivers. The obligation to make reasonable adjustments did therefore arise.

206. In relation to paragraph 9.1, we find that the respondent placed no barriers in the way of the claimant applying for the Access to Work grant. We found that the

claimant did pursue the application but was then told by Access to Work that she needed her manager's support in order to progress it. We found that the claimant did not go back to the respondent to say that she needed their help. So far as the respondent was concerned, therefore, the position was as left after the attendance review meeting on 14 November 2017, i.e. that the claimant was to progress the Access to Work application.

207. We considered whether the reasonable adjustment duty meant that the employer should have been more proactive in assisting or supporting the claimant with her application. Ultimately, we concluded that it did not. The respondent had had no indication from the claimant that she needed help. In those circumstances we find that there were no other steps which the respondent (in ignorance of any barrier to the claimant's application progressing) was expected to take under the 2010 Act.

208. In relation to 9.2, the respondent accepted that it did not allow the claimant to work from home. We found as a fact that allowing the claimant to work from home would have reduced the disadvantage to her by reducing her journeys into work. The respondent, however, said that it was not reasonable to allow her to do so. Ultimately, we have decided that we agreed with the respondent's submission on this point. It did seem to us that some part of the claimant's job would require her to be in the office, in particular in order to access the MiCare system. As significant in this case, we found, was that the claimant was at the relevant time under an action plan because of concerns about her quality of work. This meant that both to protect the respondent and its service users and to assist the claimant, the claimant was required to be in the office so that she could be supervised and could ask for help if needs be. We find that given that factor, it was not reasonable to expect the respondent to allow the claimant to work from home, at least until concerns which gave rise to the action plan had been resolved. In the event, that never happened, because the claimant was suspended on 15 January 2018 for failing to set up the strategy meeting for child AF and never returned to work.

(9) The claimant says that the second PCP put her at a substantial disadvantage because her osteoarthritis caused her pain when sitting on a normal office chair and at a normal workstation. She says that reasonable adjustments would have been:

10.1 To provide the claimant with a special chair and adjusted work station; and

10.2 To allow the claimant to work from home on non-duty days.

209. In relation to the second PCP, which was to have to work with standard office equipment, the respondent again accepted that this PCP was applied. We accept that the requirement did place the claimant under a substantial disadvantage because of her osteoarthritis.

210. Turning to the two suggested reasonable adjustments, we have already dealt above with the issue of homeworking. It does not seem to us that different considerations apply in relation to whether that was a reasonable adjustment despite the different PCP. In each case, the disadvantage involved was the extra pain which the claimant's osteoarthritis would cause her. Indeed, if anything, it is arguable that

the disadvantage of the first PCP was greater because of the added inconvenience of having to travel on public transport in pain. In any event, our decision in relation to working from home as a reasonable adjustment in relation to the section PCP is the same as in relation to the first PCP. We do not think it was a reasonable adjustment to allow the claimant to work from home.

211. In relation to the other reasonable adjustment, which was the provision to the claimant of a special chair and adjusted workstation, our findings of fact are that the respondent was progressing an application for such a chair and a headset. It had initiated an assessment which led to a decision that a specialist chair with specialist armrests and a specialist headset was necessary. The process had reached the final stages needed to get the specialist equipment on 8 January 2018. What stopped matters progressing was the claimant's suspension on 15 January 2018. In this case, therefore, we find that the respondent had taken the reasonable step contended for. If the suspension had not happened, it seems to us that the equipment required would have been provided. The complaint that there was a failure to make reasonable adjustments therefore fails.

(11) Could the respondent reasonably be expected to know that the claimant had a disability and was likely to be placed at the disadvantage?

212. Our view is that the respondent could reasonably have been expected to know the claimant had a disability and was likely to be placed at the disadvantage. That was clear from the various risk assessments and health assessments which had been carried out.

(12) If so, did the respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage?

213. As we have made clear above our view is that the respondent did not fail to take reasonable steps to alleviate the disadvantage.

Time limits relating to discrimination complaints

(13) Were all the complaints presented within the relevant time limit? If not, would it be just and equitable to consider the complaint out of time?

214. We have decided that the reasonable adjustment complaints fail so this is not an issue we need to decide. Had we been so required we would have accepted the respondent's submission that the claimant's complaints would have crystallised at the latest when the claimant was suspended on 15 January 2018. Those claims would therefore have to have been brought by 14 May 2018. In fact the claims were not brought until 22 March 2019. There was no clear evidence about the reason for the delay in bringing the complaints particularly given that at that time of her suspension the claimant was represented by her union. What is more the issue of making reasonable adjustments (and the respondent's obligations to make them) had been discussed at the Attendance Monitoring Review on 15 November 2017. In terms of prejudice to the respondent, we accept in this case there was a genuine prejudice to the respondent in the delay in bringing claims. It meant that by the time the evidence was being gathered in preparation for the Tribunal hearing (and for the Tribunal hearing itself) Ms Larkin (who was a key witness, being the claimant's line manager) had left the respondent and was no longer contactable. There was a real

prejudice to the respondent in her absence because only she could have given direct evidence about the meetings that she had with the claimant. Had we decided that any of the reasonable adjustments complaints succeeded, therefore, we would have decided that they were out of time, and it was not on this occasion just and equitable to extend time to allow the claimant to bring those claims.

Remedy for discrimination

(14) If the claims success, what remedy should be awarded?

215. This issue does not arise because we have found that all the discrimination claims fail.

Unlawful deduction from wages/breach of contract

(15) Did the respondent fail to pay the claimant at the rate of pay to which she was entitled from April 2016 until the termination of her employment?

(16) In relation to the period 15 October 2018 to 29 April 2019, was the claimant paid the right amount?

216. As recorded above, the parties agreed that the respondent did make unlawful deductions from wages. The respondent accepted:

(1) That between 15 September 2015 and 14 September 2018 the claimant was entitled to have her salary protected. She is therefore entitled to compensation for that period in respect of the balance between what would have been paid her had her pay been protected and that which she actually received for that period. The compensation for that period will include loss of salary and pension;

(2) That from April 2016 the claimant was entitled to go up an increment annually. The failure to increase her pay grade in April 2016 had a knock-on effect for every subsequent year. It meant that she had been paid a pay grade lower than her entitlement every year since April 2016 and two grades down for the period 1 April 2019 to 29 April 2019. She is therefore entitled to compensation for the loss of net pay and pensions due in that period (save insofar as it involves double recovery with the pay protection);

(3) The claimant was paid at grade 33 for the last 29 days of her employment and not at pay grade 35. Her payments in lieu of holiday untaken were also wrongly paid at grade 33 rate rather than grade 35 rate. She is accordingly entitled to be compensated for her net loss for those days.

(17) In relation to pay in lieu of accrued but untaken holiday pay, was the claimant paid the right amount?

217. As recorded at paragraph 8 this claim was also conceded by the respondent so was not an issue which we needed to decide.

Failure to provide a written statement of employment particulars – section 38 Employment Act 2002

(18) If one or more of the claimant's complaints succeed, did the respondent fail to comply with its obligations to provide a written statement of employment particulars or a statement of changes to particulars?

218. This claim can only succeed if one of the other complaints succeeds. In this case there has been an admission of liability in relation to the making of unlawful deductions. However, we find that the respondent did provide the claimant with a written statement of employment particulars (pp.150A-G) and so this complaint fails.

(19) If so, should the Tribunal award 2 or 4 weeks' pay for that failure?

219. In view of the Tribunal finding that the respondent did provide the claimant with a written statement of employment particulars, there was no need for it to make a determination on this issue.

Next Steps

220. The Tribunal has written to the parties to ask them to confirm whether a remedy hearing is still required on 17 July 2020 to deal with the issue of remedy in relation to the conceded pay claim.

Employment Judge McDonald
Date: 9 July 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
10 July 2020

FOR THE TRIBUNAL OFFICE