EMPLOYMENT TRIBUNALS

Claimant: Ms K Green

Respondent: Harrogate and District NHS Foundation Trust

Heard at: Newcastle **On:** 1-4 August 2022
And on 25 August and 29 September 2022 (in Chambers)

Before: Employment Judge Aspden
Miss B Kirby
Mrs P Wright

REPRESENTATION:

Claimant: In person
Respondent: Mr Campion, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that Ms Green's complaints are not well-founded and are dismissed.

REASONS

Claims and Issues

1. By a claim form received at the tribunal on 2 November 2021 Ms Green is pursuing complaints that:

   1.1. The respondent subjected her to disability discrimination during her employment.

   1.2. The respondent constructively dismissed her and the constructive dismissal was:

1.2.1. unfair, contrary to the Employment Rights Act 1996;

1.2.2. in breach of contract (i.e. a wrongful dismissal); and

1.2.3. an act of disability discrimination contrary to the Equality Act 2010.

2. The claimant was represented by solicitors from the outset of these proceedings up until shortly before this hearing. At a case management hearing in January 2022, Employment Judge Sweeney directed the claimant to clarify certain elements of her claim, including the provisions, criteria or practices that were said to give rise to a duty to make reasonable adjustments. The complaints described below reflect the way in which the claims were formulated by the claimant's solicitor. Ms Green clarified some elements of the claims at the outset of the hearing. Both Ms Green and the respondent agreed that the complaints Ms Green is making are those set out below.

Ms Green's disability and the respondent's knowledge of it

3. In her complaints of disability discrimination, Ms Green relies on three conditions: sleep apnoea; anxiety and depression; and COPD.

4. Ms Green confirmed on the first day of the hearing that the acts of discrimination that she is complaining about all happened in or after August 2020. The respondent accepts that, at all material times:

4.1. Ms Green was a disabled person by virtue of the following impairments: sleep apnoea; anxiety and depression; and COPD.

4.2. it knew, or could reasonably have been expected to know, that Ms Green had a disability by virtue of sleep apnoea and that Ms Green had a disability by virtue of anxiety and depression.

5. The respondent denies that, at any material time, it knew, or could reasonably have been expected to know, that Ms Green had the disability of COPD. In light of our conclusions set out below, we have not had to determine whether the respondent lacked such knowledge.

Complaints 1 and 2: complaints of discrimination arising in consequence of disability: Equality Act 2010 s15

6. Ms Green alleges that the respondent treated her unfavourably in the ways described below for one or more of the following reasons:

6.1. because she had problems with drowsiness and sleepiness and had on occasion fallen asleep or nodded off at work (which Ms Green says arose in consequence of her sleep apnoea);

6.2. because her performance had deteriorated (which Ms Green says arose in consequence of her sleep apnoea and the anxiety element of her anxiety and depression);

6.3. because Mrs Havelock perceived Ms Green's performance to be poor (which perception Ms Green says arose in consequence of her sleep apnoea and the anxiety element of her anxiety and depression).

7. Ms Green explained on the first day of the hearing that: her sleep apnoea interfered with her ability to sleep, which in turn affected her memory, her ability to concentrate and her judgement; in addition, she had increased anxiety due to concerns about falling asleep at work; these matters caused a deterioration in her performance and/or caused Mrs Havelock to perceive her performance as poor.

8. Ms Green's case is that, for one or more of the reasons identified above the respondent treated her unfavourably in the following ways, and this was discrimination under section 15 of the Equality Act 2010:

   8.1. Complaint 1: From August 2020 Mrs Havelock reprimanded and criticised Ms Green (as described in paras 25, 29, 31, 36, 39, 41, 42, 44 of the grounds of claim).

   8.2. Complaint 2: The respondent (a) subjected Ms Green to the Respondent's capability management procedure with the risk of dismissal; and (b) put Ms Green on an action plan.

9. The respondent's position in relation to these complaints is as follows:

   9.1. At this hearing Mr Campion accepted that Ms Green had problems with drowsiness and sleepiness and had on occasion fallen asleep or nodded off at work; Ms Green's performance had deteriorated; and Mrs Havelock perceived Ms Green's performance to be poor. He also accepted that those things arose in consequence of Ms Green's disability.

   9.2. In relation to Complaint 2, Mr Campion accepted that, because of those things, the respondent (a) subjected Ms Green to the Respondent's capability management procedure with the risk of dismissal; and (b) put Ms Green on an action plan. The respondent does not, however, accept that this was unfavourable treatment (although it does accept that a potential outcome of the policy is dismissal on the grounds of capability due to ill health).

   9.3. In relation to Complaint 1, the respondent does not accept that Mrs Havelock reprimanded or criticised Ms Green as alleged for any of the reasons alleged; or that, if she did, it was unfavourable treatment.

   9.4. In any event, the respondent contends that if it did treat Ms Green unfavourably as alleged, this was a proportionate means of achieving a legitimate aims of improving the health, wellbeing, attendance and performance of the respondent's staff and providing a safe and effective service to service users between the ages of 0-19, including by ensuring employees perform satisfactorily in their posts.

Complaint 3: complaint of discrimination arising in consequence of disability: Equality Act 2010 s15

10. Ms Green alleges that the respondent treated her unfavourably after August 2020 by subjecting her to its sickness absence policy with the risk of dismissal. Ms Green claims that this was discrimination under section 15 of the Equality Act 2010. Specifically, Ms Green's case is that the respondent subjected her to the sickness absence policy in the period after August 2020 because of absences from work arising in consequence of disability as follows:

    10.1. Absence due to sleep apnoea. Ms Green's case is that her sleep apnoea led to her absence between September 2020 and April 2021 and also led to a period of (enforced) sick leave in May 2021.

    10.2. Absence due to anxiety and depression between September 2020 and April 2021.

    10.3. Absence due to COPD between October 2019 and March 2020.

11. The respondent's position in relation to these complaints is as follows:

    11.1. The respondent accepts it subjected Ms Green to the respondent's sickness absence policy due to absence from work after August 2020. The respondent does not accept this was unfavourable treatment (although it does accept that a potential outcome of the policy is dismissal on the grounds of capability due to ill health).

    11.2. Nor does the respondent admit that the absence that caused it to apply the policy to Ms Green arose in consequence of a disability. Its position is that the application of the policy to Ms Green after August 2020 was triggered by Ms Green's absence between September 2020 and April 2021, which the respondent does not accept arose in consequence of anxiety and depression or sleep apnoea. The respondent accepts that the earlier absence between October 2019 and March 2020 arose in consequence of Ms Green's COPD but does not accept that the application of the policy to Ms Green after August 2020 arose in consequence of that absence.

    11.3. Furthermore, the respondent contends that applying the policy to Ms Green was a proportionate means of achieving the legitimate aims of providing a clear framework through which attendance is managed; ensuring sick employees are treated reasonably, fairly and consistently; ensuring employees are aware of appropriate support and assistance to enable a return to work and appropriate on-going support; and ensuring the needs of the respondent are satisfied in securing attendance of employees at work.

Complaint 4: Ms Green alleges that the respondent failed to comply with a duty to make reasonable adjustments in relation to its disciplinary procedure.

12. Ms Green's case is:

    12.1. The respondent's disciplinary procedure was a provision, criterion or practice (or 'PCP').

12.2. The procedure put Ms Green at a substantial disadvantage in comparison with persons who are not disabled because if someone fell asleep at work or lost concentration and made mistakes, they might be liable to the employer's disciplinary procedure and might be reprimanded or ultimately given verbal or written warnings or be dismissed.

12.3. To avoid that disadvantage the respondent should have done the following before placing Ms Green on its procedure from August 2020 or upon receipt of subsequent reports from its occupational health department:

12.3.1. adjusted the Respondent's disciplinary procedure (in a manner that was not specified by Ms Green);

12.3.2. not resorted to reprimands in relation to lapses or mistakes resulting from her disabilities (namely loss of concentration, falling asleep or lack of mobility).

12.4. The failure to do that was a failure to comply with a duty to make reasonable adjustments.

13. The respondent accepts that its disciplinary procedure was a PCP. It does not accept that: the procedure put Ms Green at a substantial disadvantage in comparison with persons who are not disabled; that, if it did disadvantage Ms Green, it knew or ought to have known it was likely to do so; or that the adjustments contended for were steps that would have avoided the alleged disadvantage or that were reasonable for the respondent to have to take.

Complaint 5: complaint of discrimination by failing to comply with a duty to make reasonable adjustments in relation to sickness absence procedure: Equality Act 2010 s20/21

14. Ms Green alleges that the respondent failed to comply with a duty to make reasonable adjustments in relation to its sickness absence procedure. Ms Green's case is:

14.1. The respondent's sickness absence procedure was a PCP.

14.2. The procedure put Ms Green at a substantial disadvantage in comparison with persons who are not disabled because it is likely she would fail to meet the Respondent's standards of attendance and would be more likely to be dismissed.

14.3. To avoid that disadvantage the respondent should have adjusted the sickness procedure so as not to take into account periods of sickness absence brought about by Ms Green's disabilities, so that she would not have been at risk of losing her job. The Respondent should have taken this step before placing Ms Green on its procedure in or around March 2021.

14.4. The failure to do that was a failure to comply with a duty to make reasonable adjustments.

15. The respondent accepts that its absence procedure was a PCP. The respondent does not accept that: the procedure put Ms Green at a substantial disadvantage in comparison with persons who are not disabled; that, if it did disadvantage Ms Green, it knew or ought to have known it was likely to do so; or the adjustments contended for were steps that would have avoided the alleged disadvantage or that were reasonable for the respondent to have to take.

Complaint 6: complaint of discrimination by failing to comply with a duty to make reasonable adjustments in relation to capability procedure: Equality Act 2010 s20/21

16. Ms Green alleges that the respondent failed to comply with a duty to make reasonable adjustments in relation to its capability performance procedure. Ms Green's case is:

    16.1. The respondent's capability performance procedure was a PCP.

    16.2. The procedure put Ms Green at a substantial disadvantage in comparison with persons who are not disabled because it is likely that Ms Green would be at risk of dismissal because she was not able to fulfil her full range of duties, she needed periods of rest, she was less mobile, she had concentration issues and she kept falling asleep.

    16.3. To avoid that disadvantage the respondent should have adapted the capability procedure, insofar as it applied to Ms Green, to not take into account failures of performance related to Ms Green's disabilities. The Respondent should have taken this step before placing Ms Green on its procedure in or around March 2021 or upon receipt of subsequent reports from its occupational health department.

    16.4. The failure to do that was a failure to comply with a duty to make reasonable adjustments.

17. The respondent accepts that its capability performance procedure was a PCP. The respondent does not accept that: the procedure put Ms Green at a substantial disadvantage in comparison with persons who are not disabled; that, if it did disadvantage Ms Green, it knew or ought to have known it was likely to do so; the adjustments contended for were steps that would have avoided the alleged disadvantage or that were reasonable for the respondent to have to take.

Complaint 7: unfair dismissal

18. Ms Green terminated her employment on 18 August 2021. She contends that she was constructively dismissed. Specifically, Ms Green's case is that between August 2020 and August 2021 the respondent did the following things that amounted to a fundamental breach of the implied term of trust and confidence and that she resigned in response:

    18.1. The respondent failed to carry out any or any proper risk assessment and failed to implement risk assessments that were carried out.

18.2. The respondent failed to carry out a proper assessment as to how the workplace and/or how Ms Green's terms and conditions of employment might be adapted to enable her to perform her duties properly.

18.3. The respondent failed to take into account or implement the findings of the occupational health reports that it obtained.

18.4. The respondent failed to implement proposals set out in an Access to Work report obtained in March 2021.

18.5. The respondent subjected Ms Green to its sickness procedure.

18.6. The respondent subjected Ms Green to a performance action plan on the basis that Ms Green was not performing her duties to a high standard which failed to take into account any of Ms Green's disabilities and made clear to her that if her performance did not improve she would be dismissed.

18.7. Following her return to work in April 2021, the respondent threatened Ms Green with disciplinary proceedings for falling asleep at work and subjected her to capability procedures (para 31, details of complaint).

18.8. Mrs Havelock persistently reprimanded or criticised Ms Green for falling asleep. Between April and August 2021 Mrs Havelock regularly criticised Ms Green for this and other matters (see para 36, details of complaint and paragraphs 38, 39, 41, 42).

18.9. The respondent criticised Ms Green for driving and informed the Police and DVLA that she was driving.

18.10. On 21 July 2021 Mrs Havelock confronted and undermined Ms Green at a meeting that day (see para 42, details of complaint).

18.11. On Ms Green's way home from work that day, Mrs Havelock called her to say that if she returned the following day she would have a 'find and fix meeting' and that she would be taking action against Ms Green as a result of her attitude (see para 44, details of complaint).

18.12. On 22 July 2021, the respondent invited Ms Green to a sickness review meeting to be held on 10 August 2021.

18.13. The respondent discriminated against Ms Green in the ways set out above.

Complaint 8: wrongful dismissal

19. Ms Green's case is that she was constructively dismissed as set out above and that dismissal without notice was a breach of her contractual entitlement to 12 weeks' notice to terminate employment.

Complaint 9: discriminatory dismissal

20. Ms Green's case is that she was constructively dismissed as set out above; the discrimination set out above contributed to her constructive dismissal; and that, therefore, her (constructive) dismissal was a further act of discrimination.

Evidence and facts

21. Ms Green gave evidence on her own behalf. For the respondent, we heard evidence from the following witnesses:

    21.1. Mrs Havelock (the Admin Team Leader at the relevant times);

    21.2. Mrs Mudd (a Senior HR Adviser at the Trust); and

    21.3. Mrs Massiter (the Service Manager).

22. We were also referred to certain documents in a file prepared for the hearing. We took into account the documents to which we were referred.

23. We make the following findings of fact.

24. Ms Green was employed as an Administration Assistant by North Tees NHS Foundation Trust from 2007. In 2017 Ms Green's employment transferred to the respondent Trust.

Respondent's policies

Managing attendance and promoting health and wellbeing policy

25. The respondent has a detailed written policy document described as its 'Managing attendance and promoting health and wellbeing policy'. The Policy was approved or ratified by the respondent's Policy Advisory Group (which is composed of management and staff side representatives), Partnership Forum and Local Negotiating Committee. Amongst other things, the policy describes how absences from work are managed, including absence due to ill-health as well as unauthorised absences. In this judgment we refer to the elements that address ill-health absences as the respondent's sickness absence policy. We describe it here in some detail here because Ms Green contends that the policy put her at a disadvantage in comparison with persons without a disability.

26. The policy is described as being 'based on the following principles and practices':

    26.1. 'Systems are in place to provide appropriate support to employees during occasions of sickness and to promote overall wellbeing.

    26.2. A clear framework will be in place to implement an effective procedure for managing intermittent short-term absence/non-attendance and long-term absence/non-attendance to reduce absence on an individual and organisational level to below 3.9%.

    26.3. That a fair process exists to consider any mitigating circumstances in respect of absences.

26.4. Reasonable adjustments to working practices/conditions will be considered. Implementation of adjustments will be dependent on service need.'

27. The policy provides for return-to-work discussions with all returning staff, irrespective of the nature or duration of the absence. It sets out the issues to discuss at such meetings which include the reasons for absence, whether the employee is fit to attend work, whether the absence is likely to recur, whether there are any support requirements, the past absence record, and whether progression to the relevant stage of the policy is appropriate. The policy says: 'Should the reasons for absence indicate additional concerns…then further advice should be taken from Occupational Health or Human Resources.'

28. The sickness absence policy sets out four different levels of action, or 'stages', and the trigger points that determine when certain action could be taken. The four stages are as follows:

28.1. An informal support stage. This is described as 'a 12 week period where the employee is supported and their attendance is monitored' followed by a '12 month Informal Review Period'.

28.2. Formal stage one monitoring (with stage one review).

28.3. Formal stage two monitoring (with stage two review); and

28.4. Final attendance review.

29. The policy says that the informal review stage must initiated be following an episode of sickness absence if an 'Absence Indicator' is present. The Absence Indicators are: (a) the employee's sickness absence exceeds 3.25%, during a rolling 12 month period; (b) 3 episodes of absence within 12 weeks (except those covered by other Trust policies e.g. Special Leave); and (c) continuous absence exceeding 28 consecutive calendar days (defined as 'Long Term Sickness'). The purpose of the informal stage of the process is described as being 'to ensure that the employee receives all of the required support at an early opportunity in order to minimise the likelihood of further sickness absence in the future.' The policy states: 'During the discussion the following issues should be considered and actioned as appropriate.

- Is Occupational Health advice required?
- Is a workplace stress risk assessment appropriate?
- Is a workplace assessment required i.e. to identify any environmental issues affecting health and attendance?
- Is any additional training required i.e. manual handling update?
- Are any other reasonable adjustments necessary?
- Is the employee's annual appraisal up-to-date including mandatory and essential skills training; or is there a plan to complete this?'

30. If the employee has further absences of a specified number or duration during the informal review stage, the policy provides that the employee will progress to the formal stage(s) of the policy. The policy provides:

    30.1. 'At all formal stages the employee will be invited in writing to attend a meeting at which they must be informed of the right to representation by a Trade Union/Staff Side representative or work colleague. Managers may be assisted by an HR representative or by a work based peer at any formal meetings.'

    30.2. 'Employees must move through the process chronologically – it is not possible to move directly from Informal Stage to Stage 2 or from Stage 1 to a Final Attendance Review.'

    30.3. 'The employee must be informed at every formal meeting that at a Final Attendance Review meeting there are a number of possible outcomes, one of which is dismissal on the grounds of capability due to ill health.'

    30.4. 'It is not necessary to wait for the expiry of a stage before a further formal meeting is convened if one of the absence indicators has been exceeded.'

31. Formal Stage 1 begins with a 'Monitoring Meeting' to discuss 'issues of the health and capability of the employee'. The policy states that the manager 'must be in possession of full and accurate details of the employee's absences'; that, in the meeting 'all support should be reviewed and if appropriate further support actions implemented with specific focus on recommended reasonable adjustments in agreement with the employee'; and that 'consideration should be given to seeking advice and support from Occupational Health.'

32. The policy provides for the outcome of the meeting to be 'either:

- No further action – employee remains on the Informal Support stage of the process.
- Re starting the Informal Support stage of the process.
- Progression to Formal Stage 1 Monitoring.'

33. The policy also states that the manager must tell the employee of the three stage process; which stage they have progressed to and its duration; the circumstances under which they would progress to the next stage; the circumstances under which they could progress to a Final Attendance Review meeting; and that, at that meeting, a possible outcome may be dismissal on the grounds of capability due to ill health.

34. If the manager decides to progress to 'Formal Stage 1 Monitoring', the employee's absence levels are monitored for an initial 12 weeks, followed by a further 12 week 'review period'. The policy provides that further absences of a certain duration or frequency should result in progression to a meeting at Formal Stage 2, although the manager may exercise discretion not to progress to Stage 2 'in exceptional circumstances.'

35. Formal Stage 2 follows the same format as Formal Stage 1. The policy provides that further absences of a certain duration or frequency should result in progression to a Final Attendance Review Meeting, although the manager may exercise discretion not to progress to that stage 'in exceptional circumstances.'

36. The policy says that, at a Final Attendance Review Meeting, the manager and HR should 'consider the history of the case, advice received from Occupational Health and/or medical reports (if appropriate) and check that all necessary support has been considered and implemented.' It goes on to say:

> *'Full consideration will be given to any mitigating or extenuating circumstances which maybe pertinent to the case in question. If no new information or requirement for further support or action is identified then a decision regarding employment will be made. This decision may be:*
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> - *To dismiss on the grounds of capability due to ill health*
> - *To redeploy*
> - *To revert to an earlier stage of the process.'*

37. The policy also contains a section dealing specifically with long-term sickness absence, defined as absence lasting more than 28 consecutive days. It says, amongst other things:

    37.1. 'the individual should be contacted and / or met by their manager to discuss and agree appropriate levels of contact depending on the circumstances.'

    37.2. 'A referral to Occupational Health may be undertaken in preparation to return to work as an independent medical report is beneficial to confirm the employee's condition and consideration to any reasonable workplace adjustments in reference to their ability to return to full duties.'

    37.3. 'Provided that all available support and options have been fully considered, the employee will be referred directly to a Final Attendance Review meeting under the formal procedure.

38. One of the possible outcomes of a Final Attendance Review meeting is be dismissal on the grounds of capability due to ill health. However, the policy makes it clear that a manager may only consider this 'where there is no realistic prospect of a return to work within a reasonable timeframe and all options for a return to work have been exhausted.' The policy says the manager must consider the following first:

    38.1. The implementation of reasonable adjustments

    38.2. The effects of the long-term sickness at the workplace

    38.3. The likelihood of and timescale for a return to work.

    38.4. The possibility of providing alternative work- redeployment

38.5. Alternative working patterns

38.6. Exploring early retirement on the grounds of ill health.

39. The policy gives employees the right to appeal a decision to dismiss them on the grounds of capability due to ill health.

40. The long-term absence part of the policy addresses returns to work after absences, including risk assessments, adjusted duties, phased returns and alternative work.

41. The policy has sections addressing redeployment and temporary or permanent adjustments for employees who are unable to carry out their contractual duties due to ill health. It addresses the employment of disabled persons, referring to the duty to make reasonable adjustments under the Equality Act 2010. The policy says managers must consider the needs of disabled staff in consultation with HR.

42. The policy document also has a section dealing with 'attendance related misconduct'. It says 'Where concerns are raised regarding an issue of conduct that is related to attendance at work then these should, depending on the circumstances, be managed in line with the trust's Disciplinary Policy. Examples of possible attendance related misconduct include…extended breaks, leaving early without permission.'

Capability policy

43. The Trust has a policy described as a capability policy. It is 15 pages long. Its purpose is described as being to provide clear guidelines for managing performance. Trade Union representatives were involved in the development of the policy.

44. The policy says that managers should assess and discuss employees' performance on a regular basis during employment, and that nothing in the procedure is intended to 'prevent normal management of employees, including allocation of work, monitoring performance, drawing attention to errors and highlighting work well done. Such interactions are not part of this procedure, they are a normal part of day-to-day management of employees'.

45. The policy stresses the need for the manager to 'try and identify the root cause of the problem and support the employee in improving their performance'. The policy draws a distinction between 'issues of misconduct' on the one hand, and capability and poor performance issues on the other hand. It says: 'Issues of misconduct are covered in the Disciplinary Policy, it is important to be aware that misconduct usually involves a measure of personal choice i.e. they are able to undertake the requirements of the role but choose not to.' In contrast, the policy defines 'capability' as 'an employee's ability to successfully carry out the requirements of their job through the application of a skill, aptitude, physical or mental quality and/or relevant qualification'. It describes 'poor performance' as 'being unable to maintain the standard of performance required to meet the job description for the post'. And 'incapability' is said to exist where 'an employee is unable to successfully carry out the requirements of their job'. The policy says managers must consider whether a disability underlies the poor performance, and 'make reasonable adjustments to enable their performance to be supported in line with the Equalities Act 2010.'

46. The policy sets out an informal procedure (described as Stage 1) and a formal procedure (described as Stage 2) for dealing with cases of unsatisfactory performance.

47. In relation to the informal procedure the policy says this:

> *'It is important that action should be taken promptly as soon as it is noticed or reported that the employee is not performing satisfactorily. Delaying or doing nothing is likely to cause the performance problem to escalate and the result of this is that the manager will have to deal with a much more serious poor performance issue.'*

48. The Stage 1 informal procedure refers to there being informal meetings and suggests an action plan could be put in place with reviews at the end of an agreed time period.

49. The policy goes on to state that the formal (ie Stage 2) procedure should be used once a manager has ascertained, through the informal procedure, that there has been no discernible improvement in an employee's performance. The policy also provides that it may be appropriate to go straight to this stage, without going through Stage 1, 'in extreme circumstances'. In addition, the policy says it may be appropriate to suspend an employee in such extreme circumstances.

50. The formal procedure describes a process whereby the employee is invited to attend a formal meeting. The purpose of that meeting is said to be for all parties to do the following:

- *'Discuss and understand the shortfall between the employee's performance and the required standard;*
- *Identify how performance can be improved and agree actions to facilitate this;*
- *Agree a time period for improvement and how success will be measured at the next review meeting.'*

51. The policy states: 'The employee needs to understand that a potential consequence of failure to meet the required standards may result in termination of their employment with the Trust.'

52. The policy then explains that a formal review meeting must be held at the end of a review period, with progress being reviewed informally throughout the review period. At that meeting, the manager may refer the case to the Stage 3 of the procedure if the employee's poor performance has continued or recurred.

53. Stage 3 of the policy involves what is described as a 'Capability Hearing'. The purpose of a capability hearing is said to be for 'an independent panel to consider information gathered throughout the capability process and to make a decision regarding necessary action'. The policy describes possible outcomes of the capability hearing as being: no action; further reasonable adjustments; the employee being placed on the redeployment register in line with the Trust's redeployment policy; the employee's contract of employment being terminated on the grounds of capability.

54. The policy notes:

> *'Dismissal on the grounds of capability may not be considered fair under employment legislation if the manager has not taken the appropriate steps to give the employee an opportunity and sufficient time to improve to the standard required or make any identified reasonable adjustments if the individual has a disability. However, should the employee's capability place patients/colleagues etc at risk it may be inappropriate to set a period of time for improvement and immediate improvement is required and expected. It is also important that during the poor performance process, and especially during later meetings, that the employee has been informed that continued failure to meet the required standards may result in a capability hearing which may lead to their contract of employment with the Trust being terminated.'*

55. At paragraph 10 the policy addresses what it describes as 'gross substandard performance'. It says:

> *'There may be extreme circumstances under which the consequences of an employee's substandard performance are such that the informal and formal procedures are inappropriate. Such consequences include, for example, but are not exhaustive:*
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> - *A serious clinical untoward incident or near miss.*
> - *An adverse effect on the public image and confidence of the Trust.*
> - *Significant financial loss to the Trust.*
> - *Serious legal liability to the Trust.*
> - *Other cases that are considered of a highly serious nature.*
>
> *…The consequences may mean it is appropriate to move directly to the Trust's disciplinary policy…'*

Disciplinary policy

56. The Trust has a disciplinary policy. It sets out a process for dealing with disciplinary matters, in the form of a flow-chart. The first stage is described as a 'fact find completed by Line Manager'. That may result in: no further action; a support meeting; an agreed resolution or a disciplinary investigation. A disciplinary investigation may, in turn, lead to a disciplinary hearing, which may lead to a disciplinary sanction (including dismissal). Employees have the right to appeal any disciplinary sanction. The policy document we were referred to does not identify the kinds of behaviour that could lead to disciplinary action.

Background

57. In the period with which we are concerned, Ms Green was contracted to work 37.5 hours per week. She worked from 8.30am to 4.30pm or from 9.00am to 5.00pm.

58. Ms Green worked in the respondent's admin team within the Trust's '0-19 Service'. The service works with families from when a child is conceived until the child is 19 years of age (and adults with additional needs up to 25 years of age). At the time with which we are concerned the admin team consisted of 3 members of staff plus a Team Lead.

59. The admin team's work is recorded through an online clinical record system known as SystmOne. SystmOne provides an electronic health record for each patient. This digital record is shared across healthcare settings with any staff who need it during a patient's care. SystmOne is accessible by GP's, safeguarding staff and the majority of NHS services.

60. The admin team's tasks and responsibilities included the following:

    60.1. Allocations and electronic referrals. Antenatal documents need to be allocated correctly. The antenatal contact is the first opportunity for a health visitor to assess the family home and pick up risks to an unborn or new child or mother's mental health. The admin team are also responsible for updating records to ensure that information about new births and children who have moved into the area is up to date. This is so that visits by health workers are carried out within required timescales and 'flags' or risks in records are identified and drawn to the attention of the appropriate managers or professionals. When a child under the age of 5 moves into the area, health visitors need to be able to review the relevant records early on to identify any concerns. Families with older children who move to the area need to be sent a welcome letter and questionnaire, which gives them an opportunity for to contact the Trust if they need support.

    60.2. Printing and Posting. The admin team are relied on to send out appointment letters in a timely manner so families are aware of their appointment and are able to contact the service if they need to rearrange.

    60.3. Dealing with emails received into the admin team email inbox. This includes information about child protection and safeguarding issues concerning individuals and referrals from service users. It can contain very important and sensitive information, some of which needs to be actioned immediately. The admin team adds the information to the correct SystmOne record and, where relevant, tasks it to the relevant person. The admin team may also need to forward emails to the correct person.

    60.4. Answering phones and retrieving voicemails. Phone calls and voicemails need to be taken with the correct information to pass onto the appropriate health practitioner or signpost the caller to the correct department.

    60.5. Scanning of paper documents including safeguarding information, A&E admittance and hospital appointments. Documents are scanned using the scanner in the office and the paperwork is checked off against the SystmOne patient records. It is important that documents are scanned onto the correct patient's records. The paperwork then needs to be shredded to prevent the risk of any breaches of patient confidentiality.

61. In around February 2017 (before Ms Green's employment transferred to the respondent) some members of staff reported to managers that Ms Green had been falling asleep in the office. Ms Green's team leader at the time spoke to Ms Green about this. Ms Green said she had not been sleeping well and felt sleepy in the office. Ms Green said she did not know why she was not sleeping well and that she had mentioned it to her GP. The team leader offered to refer Ms Green to Occupational Health, but Ms Green declined at the time and said she would rather visit her own GP to explore why she was feeling sleepy all the time.

62. Later that year, in October 2017, Ms Green was in fact referred to Occupational Health in connection with bouts of fatigue and drowsiness that had led to her falling asleep at her desk a couple of times. The manager who referred Ms Green to Occupational Health said, on the referral form, that he would like to explore whether Ms Green's recent diagnosis of pre-diabetes was the cause of the bouts of fatigue and drowsiness and whether there were any reasonable adjustments that could be made that would help in dealing with the bouts of fatigue. In her appointment with the Occupational Health adviser at that time, Ms Green said her energy levels were now back to their normal levels and that she had not found herself feeling drowsy at work. The adviser gave Ms Green some advice about rotating tasks, staying well hydrated, getting up and moving around frequently during the day and avoiding eye strain.

63. In April 2018 Ms Green's employment was transferred to the respondent. At the time of that transfer Ms Green's previous management team at North Tees told Mrs Massiter that they had experienced some issues with Ms Green 'hiding' work that she had not managed to complete. They also told Mrs Massiter that there was an issue with Ms Green falling asleep at work.

64. When Ms Green was employed by the respondent she initially reported to a Ms Storey as Team Lead. Ms Storey had some concerns that Ms Green was not being honest about her ability to keep up with work. Ms Storey spoke to Mrs Massiter about this.

65. In around July 2019 the admin team were asked to take minutes for small team meetings. Ms Green objected to doing this (as, it seems, did other members of the admin team). Managers agreed with Ms Green that she would not need to do this task, so as to reduce her anxiety.

66. In around September 2019 Mrs Massiter became aware that Ms Green had COPD. Also around about this time Ms Storey told Mrs Massiter that Ms Green had been falling asleep at her desk and that she had had to wake her up. Mrs Massiter advised Ms Storey to refer Ms Green to Occupational Health. Ms Storey did so in October 2019, shortly after Ms Green began a period of sick leave on 2 October 2019. In her referral form Ms Storey noted that Ms Green was absent from work with suspected COPD. She also referred to Ms Green having fallen asleep at her desk over the past few months and said:

> *'The issue is becoming more frequent and is having a detrimental impact on her work. The issue has been addressed in supervisions. [Ms Green] stated that she is having difficulty sleeping due to worrying about her parents who have medical conditions. [Ms Green] also has caring responsibilities for them.'*

67. Ms Storey went on to refer to Ms Green suffering from mental health and anxiety issues and having difficulty when new changes are implemented in the team. The referral ended with Ms Storey saying:

> *'I am concerned for [Ms Green's] health and I would like to know how best to support [her] at this time and if she is fit to be at work at the moment…'*

68. Ms Green had an appointment with an Occupational Health adviser on 1 November 2019. The adviser wrote a report in which she said, amongst other things:

> *'…[Ms Green] continues to experience symptoms of chest tightness and discomfort, a productive cough and breathlessness on exertion. She is still having medical investigations into her symptoms and has yet to receive a diagnosis…[Ms Green] also has a history of anxiety and panic which is heightened currently due to her worries about her health, parents and work ongoing in the family home and also to some issues at work. The work-related issues are perceived to be a lack of parity in how team members are treated and an expectation to take minutes at meetings. [Ms Green] struggles to cope with her anxiety symptoms and ability to concentrate well in noisy or distracting environments or when attending sites which she is not familiar with. She is due to access counselling from Alliance and is being supported by her GP and is taking appropriate evidence-based treatment for her symptoms.'*
>
> *'In my opinion [Ms Green] is appropriately off work at present though I would anticipate her being able to return to some duties within the next few weeks. I would recommend that consideration is given to the following adjustments to support [Ms Green] whilst she regains her stamina and confidence in the work situation:*
>
> - *A phased return to work to the hours and duties of her role…*
> - *Avoidance or limiting of [Ms Green] being exposed to distractions at work such as noise or views out of the window…to allow her to concentrate better on her tasks.*
> - *A discussion to be held with [Ms Green] in relation to clarifying management expectations in regards to her taking minutes for meetings as this causes her a heightened level of anxiety…*
> - *Regular one-to-one meetings with her line manager to monitor her progress and address any arising issues, and admin team meetings to be arranged to ensure she feels included in the wider team information.*
> - *Support for [Ms Green] to attend medical and counselling appointments which may need to be accommodated during normal working hours.'*

69. The adviser also recommended that Ms Green ensure she stays well hydrated and moves position every 20-30 minutes and try to incorporate some physical activity during the working day to keep her energy levels up and prevent her from feeling drowsy.

70. Ms Green had submitted a fit note on 30 October 2019 which said she was not fit for work because of 'probable COPD'. The fit note said the certificate was to last three weeks.

On 19 November Ms Green submitted a two-week fit note saying she was not fit for work because of 'probable COPD'. Another fit note was submitted by Ms Green on 10 December 2019 saying that Ms Green was not fit for work for the next three weeks for the same reason.

71. On 16 December 2019 Ms Green attended a sickness review meeting with Ms Storey and Mrs Massiter. Ms Green's union representative was also present. Ms Green said she had an appointment coming up on 20 December 2019 to discuss her tiredness and falling asleep. Ms Storey or Mrs Massiter mentioned they were concerned about Ms Green possibly falling asleep at the wheel of her car. There was a discussion about Ms Green getting another sick note after her existing fit note ran out on 24 December 2019, and a further Occupational Health referral. There was also a discussion about Ms Green having a graduated return to work over four weeks.

72. On 17 December 2019 Mrs Massiter sent a letter to Ms Green following up on their meeting. In her letter she repeated much of what had been said at the meeting and explained there would be another Occupational Health referral because the previous advice had not really addressed Ms Green falling asleep.

73. Ms Green remained off work on sick leave until 9 March 2020. She submitted fit notes in December 2019 and January 2020 saying, respectively, her absence was due to 'probable COPD' and 'COPD'. In January 2020 Ms Green's GP also said Ms Green had an abscess. In a fit note in February 2020 the GP assessed Ms Green as not being fit for work due to the abscess.

74. On 9 March 2020 Ms Green returned to work on a phased basis. At that time Ms Green had been absent from work for over 40% of the past 12 months. Upon Ms Green's return to work Ms Green and Ms Storey had a discussion about her absence and her return to work. After that discussion Ms Storey sent her a letter confirming what they had discussed. Ms Storey told Ms Green she would be formally monitoring her sickness absence for a period of 12 weeks, and that if in that period she had further absences of more than two days/shifts, then a formal meeting would be arranged to discuss progression to stage one of the sickness absence policy. Ms Storey said there would then be a further 12-month review period and if Ms Green had absence in excess of 3.25% within that 12 month period then a formal meeting would be arranged to progress to stage one of the sickness absence policy. These measures were in line with the respondent's sickness absence policy.

75. Ms Green's return to duties coincided with the early stages of the COVID pandemic. Ms Green was shielding at this time so worked from home and she was given a laptop computer to do so. She worked on certain projects that were ongoing at the time.

July/August 2020 to termination of employment

76. On 1 July 2020, during the period when Ms Green was working from home, Mrs Havelock took over as Team Lead for the Admin Team. Mrs Havelock had not had any previous experience of managing somebody who was working from home. She decided to carry out an audit of the work Ms Green was doing by checking the computerised records that showed when Ms Green had logged on to SystmOne to access records and messages that the Claimant exchanged with her colleagues on SystmOne. Mrs Havelock was

concerned that there were often large gaps between the times Ms Green accessed SystmOne records and that she was frequently logging on to work out of the Trust's core business hours or on non-working days. Mrs Havelock believed (incorrectly we find) that logging on outside of core business hours had not been agreed with Ms Green (in fact Ms Storey had agreed this was permissible). Mrs Havelock was concerned about Ms Green working outside core hours because there was no one available should help or support be needed. Mrs Havelock's audit showed that Ms Green frequently contacted colleagues for support. Mrs Havelock believed this was increasing the workload on Ms Green's colleagues in the admin team and adding to their stress levels as they then had a backlog of work.

77. Mrs Havelock believed, based on her audit, that Ms Green needed further support to do her job. After discussing this with other managers (including Mrs Massiter) she decided Ms Green could not do her job effectively from home and that, once the need for shielding ended, Ms Green should return to work from the office where she could provide more support to Ms Green.

78. Ms Green was due to return to the office at the beginning of August 2020. Ahead of her return, on 15 July 2020, a risk assessment was carried out. That risk assessment referred to Ms Green having COPD and being at increased risk of infection. It recorded that 'Measures are currently being put in place to reduce the footfall into the building where [Ms Green] will be based….Admin Team Lead to ensure staff respecting social distancing and also to speak to centre staff regarding accessing the office.' On 17 July Mrs Havelock circulated an email to all relevant staff about the measures that were in place in the office to reduce the risk of transmission of Covid. It instructed staff, amongst other things, about where they may sit, the need to book a desk to work in the office, the need to adhere strictly to 2 metre social distancing, leaving windows open, sterilising office equipment, wearing masks, not eating at desks, not using the fire exit to enter and leave the building (so that Ms Green could use it as she did not want to walk through the building).

79. Because of the risk of infection, Ms Green had concerns about returning to work. On 20 July 2020 an Occupational Health referral was made. In addition, Mrs Mudd agreed with Mrs Massiter and Mrs Havelock that Mrs Massiter and Mrs Havelock would have an informal discussion with Ms Green via MS Teams to go through her concerns about returning to work.

80. Ms Green had a telephone assessment by Occupational Health on 30 July. The adviser, Dr Harris, prepared a report referring to Ms Green having increased vulnerability due to a chronic respiratory condition. He said:

> *'[Ms Green] remains very anxious about returning to work. She is concerned that adequate social distancing is not able to be implemented within the office and that procedures put in place are not necessarily being followed. [Ms Green] also has concerns as she lives with her elderly parents who too have underlying medical vulnerabilities.'*

81. Dr Harris encouraged the respondent's managers to discuss the changes that had been implemented in the workplace and make sure they complied with the latest COVID-19 guidance. He did not advise that Ms Green should not return to work at the hospital, although he did suggest the respondent consider whether she could work from home to 'help with [her] high levels of anxiety'.

82. Ms Green did return to work in the office in August 2020.

83. A member of staff told Mrs Havelock on 20 August 2020 that Ms Green had fallen asleep at her desk. On 21 August 2020 Mrs Havelock met with Ms Green for a supervision meeting. In that meeting Mrs Havelock asked Ms Green if it was true that she had fallen asleep at her desk, and Ms Green replied that she did not know. Mrs Havelock asked Ms Green if she was aware that she fell asleep and Ms Green replied, 'I probably did fall asleep, but you know about it'. They talked about Mrs Havelock being aware that it had been an issue in the past and that Ms Green had had some tests done, including for sleep apnoea. During the meeting Ms Green told Mrs Havelock that she was having blood tests. She also mentioned some other health problems and said she had been passing out at home on an evening. Mrs Havelock asked Ms Green if she had spoken to her GP about that as it could be dangerous when driving. Ms Green became upset during this meeting and suggested Mrs Havelock had been 'getting at her' and said she did not see why she could not be left alone as people were aware of her health issues and she had a lot of stress factors outside work. In her evidence to this Tribunal, however, Ms Green accepted that Mrs Havelock was being supportive of her in this meeting.

84. On 8 September 2020 Mrs Havelock had another supervision meeting with Ms Green. Ms Green told Mrs Havelock that she had fallen asleep the previous day and that she was awaiting blood test results. Mrs Havelock told Ms Green that she would ask HR for advice about her falling asleep or nodding off, as it could affect her timekeeping on a morning if she sleeps in. In her evidence to this Tribunal, Ms Green accepted that Mrs Havelock was trying to support her.

85. A few days later Mrs Havelock referred Ms Green to Occupational Health for advice about her falling asleep at her desk/nodding off. Mrs Havelock asked Occupational Health to advise if Ms Green was currently medically fit to undertake her duties or alternative work and whether there were any adjustments that could be considered which would help Ms Green in undertaking her duties.

86. On 16 September 2020 Ms Green's GP advised that she was unfit for work for two weeks due to severe iron deficiency anaemia. Ms Green then began a period of sick leave. Ms Green's GP assessed Ms Green again on 28 September 2020 and again said Ms Green was unfit for work for two weeks for the same reason.

87. Ms Green saw an Occupational Health adviser, Ms Turnbull, on 29 September 2020. The assessment was conducted by telephone. The Occupational Health adviser referred to Ms Green having 'symptoms of increased fatigue and bleeding which has understandably impacted upon her underlying condition of anxiety and depression.' She noted that Ms Green was currently off work with a sick note until 12 October 2020 but that Ms Green was 'hopeful of a return to work thereafter and will be fit to perform the duties contained within her substantive post'. With regard to adjustments, the adviser referred to Ms Green having 'persistent symptoms relating to stress and anxiety' and said Ms Green's anxiety and stress levels were being exacerbated by her perception that her working environment was not COVID-19 safe. Ms Turnbull recommended that a stress risk assessment be conducted. She did not refer to Ms Green being unfit for work due to fatigue or make any specific recommendations for adjustments regarding fatigue.

88. Upon receipt of that report Mrs Massiter sought advice from Mrs Mudd in HR. Mrs Mudd advised that a stress risk assessment be undertaken as recommended by Occupational Health and that any adjustments be implemented where possible. Ms Green was given a stress risk assessment form to complete, which she did. In her form, Ms Green said that she was anxious about working in the office she was concerned that the office was not fully COVID19 safe due to some staff not adhering to the guidance that had been emailed in July. Ms Green also said:

> *'I have been spoken to a couple of times by my team lead and manager over my nodding off at work and being late. This made me feel stressed and anxious. I appreciate that this should be done, but in this instance, I feel it was unfair as I am currently undergoing tests/procedures to find out why I am falling asleep. My team lead and manager are aware of this.'*

89. At the beginning of November 2020 Mrs Massiter contacted Mrs Mudd again by email regarding the fact that Ms Green had been falling asleep at work, that she had had three referrals to Occupational Health and that Ms Green had said her GP had found no reason for her to be falling asleep. She said Ms Green was on sick leave again and was awaiting referral for investigations into a stomach ulcer and that Ms Green was reluctant to return to the office and wanted to be able to work from home. Mrs Massiter said, 'This presents a problem to us as when she was shielding she was in no way fulfilling her role'.

90. There followed, on 12 November 2020, a meeting between Ms Green, Mrs Massiter, a Ms Small (Locality Manager) and Ms Green's trade union representative. Mrs Mudd was also present. It was a described as a long-term sickness review meeting. Ms Green said that she had anaemia and was taking iron supplements and had to have B12 injections. She was also awaiting results from an endoscopy. She was suffering with chest pain from acid reflux for which she had medication. Mrs Massiter asked Ms Green about her progress to date since her absence which began on 17 September 2020. At the meeting Ms Green said she had intended to return to work on Friday 20 November 2020. Ms Green said she was still falling asleep randomly throughout the day but there was no medical diagnosis. They discussed the concerns Ms Green had raised about working in the office during COVID. Mrs Massiter told Ms Green that the office was COVID safe and screens had been placed around desks, that there was a booking-in system for staff who wished to use the office, and that there was a separate office Ms Green could use if she wanted to (although Ms Green said she preferred to be in the main office with colleagues). Ms Green asked whether she could work from home. Mrs Massiter said that there were still concerns about her falling asleep and the support from peers she would need if she worked from home and said it would not be appropriate to allow her to work from home.

91. It was agreed that Ms Green would take a period of annual leave for two weeks at the end of her fit note, which would take her up to 2 December 2020, in the hope that she would be well enough to return to work at that time. Ms Green was advised to contact Access to Work who may be able to provide her with additional advice and support and recommend possible equipment that she could benefit from at work. Ms Green was not, however, well enough to return to work and decided not to take annual leave.

92. On 1 December 2020 Ms Green spoke with Ms Turnbull from Occupational Health again. Ms Turnbull wrote a report of that date. In her report Ms Turnbull said Ms Green had

been suffering with long-term symptoms of fatigue since 2017 and in addition had been diagnosed with other underlying health conditions including depression, COPD and osteoarthritis which had impacted upon her persistent symptoms of fatigue. Ms Turnbull noted that Ms Green had also been diagnosed with anaemia and B12 deficiency and said the symptoms of those conditions include extreme tiredness, lack of energy, problems with memory, understanding and judgement. Ms Turnbull said that it was likely Ms Green would remain unfit for all work after 17 December 2020 given her persistent symptoms. She said that if Ms Green was able to return to work in the next 1-2 months it would be helpful if she could have a phased return to allow her to gradually build on her levels of stamina and adjust to the working routine. Ms Turnbull recommended a further Occupational Health appointment to reassess Ms Green once she had a firm date of return to work.

93. On receipt of that Occupational Health report a further long-term sickness review meeting was held on 9 December 2020 (on MS Teams) between Ms Green, Mrs Massiter, Mrs Havelock, Mrs Mudd and Ms Green's union representative. Ms Green recorded what was said at that meeting without telling anybody she was doing so. On cross examination Ms Green agreed that the respondent's managers were being supportive towards her at this time and in this meeting. There is nothing in what was said that could conceivably be interpreted as a reprimand for or even criticism of falling asleep, whether by Mrs Havelock or anyone else. Mrs Havelock said very little in the meeting. Mrs Massiter took the claimant through the Occupational Health report and asked the claimant how her symptoms were at present. Ms Green said they were the same and described falling asleep two or three times a day. Mrs Mudd said she thought Ms Green should be given more time to see the effect of her treatment (iron tablets and vitamin B12 injections) and that they should meet again in January to review the situation and then refer Ms Green back to occupational health if there had been no improvement. Ms Green and her union rep said they were happy with that suggestion.

94. Ms Green remained on sick leave and a further long-term sickness review meeting took place on 18 January 2021 between Ms Green, Mrs Massiter, Mrs Havelock, Mrs Mudd and Ms Green's union representative. Again, Ms Green recorded this meeting without telling anybody she was doing so. During that meeting Ms Green said there had been no real change in her symptoms (falling asleep) and updated the respondent's managers as to the investigations that were ongoing into her health. There was mention of Ms Green being referred to a sleep specialist but first increasing the dosage of antidepressants to see if that helped. Mrs Massiter raised with Ms Green a request she had made to come back to work on a phased basis and asked her if that was what she wanted to do. Ms Green said, 'I'll have to do it won't I, I can't go on like this all the time'. Mrs Massiter replied: 'I have to be really honest with you…I'm really concerned about you coming back on a phased return because your symptoms haven't improved at all so…my honest reaction is how can we possibly bring you back to work when the symptoms are exactly the same…' Mrs Mudd said: '…From our point of view at the moment we wouldn't be allowed to let you come back to work currently…because your symptoms haven't…resolved and there's been no improvement. I think what we need to do is give you…a little further time to see if the antidepressants make a difference, but like you say they wipe you out before they start to show any improvement…' Mrs Mudd said they were just going to have to review things as they go and see what Occupational Health say, but that Ms Green was not fit for work at present. Mrs Mudd said she thought they would review things in about a month's time but

that that 'will have to be a final review meeting at that point…because ultimately we do need to start making decisions, I'm not saying any decisions will be made at that point but we need to start putting processes together so we know what we're looking at, we can always extend things after that…'.

95. During the course of that meeting Mrs Mudd asked Ms Green if her GP had said anything about her driving, with her falling asleep. Mrs Mudd asked if that was a concern from Ms Green's GP's point of view. Ms Green said her GP had not mentioned it but that she was not really driving anywhere in any event. Mrs Mudd asked Ms Green if she felt she might possibly fall asleep at the wheel and said that it was a concern. Ms Green replied that she had not really felt like she would fall asleep in the past, but she might have to bring it up with her GP the next time she spoke to her. Mrs Massiter said she thought that was a really good idea. Mrs Mudd reinforced that point. She suggested Ms Green check with her GP. On cross examination Ms Green accepted that she had no issue with Mrs Mudd raising the driving issue at that point. Mrs Havelock said very little in the meeting and what she did say could not conceivably be interpreted as a reprimand for or even criticism of falling asleep.

96. On 5 February 2021 Mrs Massiter wrote to Ms Green confirming the main points that had been discussed at that meeting. At this point Ms Green's most recent fit note had been given on 13 January 2021 and the reason for Ms Green's absence was given as 'fatigue – multifactorial'. The fit note was for four weeks and so was due to expire on 10 February 2021. Ms Green remained off work at that time and a further long-term sickness absence meeting was held on 15 February 2021.

97. The sickness absence review meeting on 15 February 2021 (on MS Teams) was between Ms Green, Mrs Massiter, Mrs Havelock, Mrs Mudd and Ms Green's union representative. Ms Green recorded this meeting without letting anybody know she was doing so. Ms Green said things were not really any better, that she had had further blood tests and that her GP had referred her to a sleep clinic. At the meeting there was a discussion of a further referral to Occupational Health. Mrs Mudd said they would be asking Occupational Health if they could give an indication of a likely return to work date and that if that was not possible to return to work in Ms Green's current role would they recommend that they explore redeployment to an alternative role. Mrs Mudd suggested that she did not think there would be anything else that Ms Green could be offered. She said if Occupational Health said, say, that Ms Green would be off for another six months then they would need to consider whether the Trust could support her absence for that amount of time. She referred to the possibility that the Trust might terminate Ms Green's employment but she acknowledged that Occupational Health may say they should wait until Ms Green had had another appointment with the sleep clinic. Again, Mrs Havelock said very little in the meeting and nothing she said could conceivably be interpreted as a criticism of the claimant for falling asleep.

98. On 1 March 2021 Mrs Massiter wrote to Ms Green asking her to attend what was described as a 'long-term sickness absence final review meeting' which was originally to take place on Tuesday 9 March 2021 but which, in the event, was delayed until 23 March 2021. Mrs Massiter said in that letter:

'The purpose of this meeting will be for us to fully review your continuing sickness absence, referrals and recommendations from Occupational Health, to consider whether a return to work can be reasonably expected in the near future and whether all reasonable options to facilitate a return to work have been explored.

As this is the final stage of the managing absence and promoting health and wellbeing policy, I wish to inform you that possible outcomes of the meeting include:

- *Termination of employment on the grounds of medical capability.*
- *Entry into the redeployment process to seek suitable alternative employment.*
- *Consideration of reasonable adjustments to enable a return to your substantive role.*
- *Consideration of adjourning a decision in order to allow for further treatment, recovery or specialist advice.'*

99. Ms Green said on cross examination that she takes no issue with those options having been explored at this meeting.

100. The next day, 2 March 2021, Mrs Mudd sent an email to Suzanne Lamb (the respondent's Head of Safeguarding, Head of Nursing Community and Children's Directorate), Ms Wilson (HR Business Partner) and Ms Whiteley (Assistant HR Business Partner) to ask for authority to dismiss Ms Green at the final review meeting. We accept Mrs Mudd's evidence that this was a routine request made, not because a decision had been made to dismiss Ms Green, but because Mrs Mudd needed to check she had authority to make that decision if it was considered appropriate. Ms Green confirmed on cross examination that she takes no issue with Mrs Mudd sending that email.

101. Ms Whiteley replied that she was meeting with Suzanne Lamb the following morning to discuss the case. Subsequently Ms Whiteley told Mrs Mudd that rather than proceed to dismissal Ms Lamb had given an instruction that Ms Green should be allowed a further opportunity to improve with continuous monitoring to establish if and how often she falls asleep and for how long, and to assess her state of alertness after any such incidents to ascertain her fitness to remain at work.

102. In the meantime, Ms Green had a further appointment with Ms Turnbull of Occupational Health on 15 March 2021 and Ms Turnbull prepared a report. Ms Turnbull advised that a phased return to work would be appropriate for Ms Green. She recommended that there be a discussion about a reduction in Ms Green's contractual hours to help 'facilitate regular and sustained attendance at work'. In response to a question about whether Ms Green was fit to return to her role Ms Turnbull said it was difficult to offer an opinion on the question as Ms Green had not had the opportunity of performing her role with adjustments. The respondent had asked if Ms Green was fit to drive. Ms Turnbull said Ms Green had not been advised to surrender her licence to the DVLA. Occupational Health had been asked to advise if Ms Green was not fit to return to work in any capacity for the foreseeable future whether an application for ill health retirement would be supported. Ms Turnbull responded that as all investigations regarding possible treatment had not yet been explored or exhausted it would not be applicable at that time. Ms Turnbull broached the

possibility of Ms Green working from home and suggested this would offer flexibility to manage Ms Green's symptoms and the caring responsibilities of her parents.

103. On 23 March 2021 the final review meeting under the respondent's sickness absence policy took place between Ms Green, Mrs Massiter, Mrs Havelock, Mrs Mudd and Ms Green's union representative. Ms Green recorded that meeting without telling anybody. At that meeting Mrs Massiter took Ms Green through the latest Occupational Health report. She asked Ms Green how she was now. Ms Green confirmed that her condition remained the same and there had been no progress. She said she was still falling asleep on an afternoon but was now able to get up before 9.00am. Ms Green told those present that her GP wanted to refer her to a sleep clinic but that had not been possible because the COVID pandemic meant the clinic was not operating. There was a discussion about working from home and Mrs Mudd and Mrs Massiter said this was not an option, referring to needing extra support from colleagues. They said that a phased return would be supported. It was agreed that Ms Green would return to work on a phased basis, following a period of annual leave, increasing her hours over a four week period. None of the managers said anything in the meeting that could be perceived as criticising or telling Ms Green off for falling asleep. Ms Green asked what would happen if she fell asleep. Mrs Mudd replied that they would need to look at the how deep the sleep is and whether they could 'put a measure in place' where somebody alerts the claimant when she falls asleep. Mrs Massiter expressed concern that such an arrangement may put pressure on work colleagues to watch the claimant. Mrs Mudd agreed but said they needed to try it to see how the claimant got on and monitor how often it happened and how alert she was afterwards.

104. During this meeting Mrs Mudd asked Ms Green if she would want to consider reducing her contracted hours (beyond the phased return to work period), as suggested by Occupational Health. Ms Green said she would want to think about that as it would mean a reduction in her pay. Mrs Mudd said if she wanted to pursue that it could be considered as a formal application. Mrs Massiter said that if such an application was made they could not guarantee that a change could be accommodated and Mrs Havelock said that they had trialled half-day working in the past and it had not worked. In the event, Ms Green decided not to ask for a change in her contracted hours.

105. Mrs Massiter followed up that meeting with a letter summarising what had been discussed. She told the claimant in this letter that the final review meeting was 'adjourned' and that the claimant's progress at work would determine whether the meeting would need to reconvene or not.

106. In light of the contents of the Occupational Health reports and fit notes to which we have been referred, and what the claimant told the respondent's managers during her absence, we find that the claimant had, since her absence began in September 2020, been experiencing extreme tiredness, lack of energy and problems with memory, understanding and judgement and these symptoms were at least part of the reason for her absence from work. Although Ms Green had not at this time being diagnosed with sleep apnoea, we find it more likely than not that these symptoms were at least in part due to that condition.

107. On 30 March 2021 a team talk took place with the respondent's Chief Executive, along with other Executive Board members. This is a Trust-wide, weekly event held on a MS Teams to cover a variety of topics and updates for colleagues and staff are able to ask

questions. During that event Ms Green said that her office environment was not COVID safe. After the meeting Mrs Havelock emailed Ms Green and said that they wanted to discuss with Ms Green what she had raised at the team talk. This was to be discussed at a meeting the following day which had already been arranged ahead of Ms Green's return to work. On 31 March 2021 Ms Green sent an email in the early hours of the morning saying she was not willing to attend the meeting because she felt the purpose of the meeting had changed and she did not have time to prepare or time to arrange for her union representative to attend. Mrs Massiter replied to Ms Green saying she wanted to reassure her that the office was safe and that Ms Green's best interests were at heart and that she wanted Ms Green to feel safe at work. Mrs Massiter told Ms Green that she was happy to talk about that with Ms Green without Mrs Mudd's involvement.

108. Before Ms Green's return to work she had a discussion with Mrs Havelock over Microsoft Teams. Ms Green recorded what was said covertly. They discussed the measures that were in place to protect against the spread of COVID. They also discussed Ms Green's phased return to work. At that time the respondent was waiting for some Perspex screens to be fixed around Ms Green's desk to protect against COVID-19. Mrs Havelock said that someone was coming in on 12 April to fix the screens and that, until then, Ms Green would work from the manager's office, which she would have for herself, and that she (Mrs Havelock) would go backwards and forwards to the manager's office to support Ms Green.

109. During the discussion about COVID safety Mrs Havelock said to Ms Green that the office was COVID secure but that she had a right to say to people, if she was uncomfortable, 'I'm not very comfortable with this, can you stand back a little bit'. Mrs Havelock told Ms Green that she should not worry about saying that to somebody and that she would '100% back you up if you're not comfortable with how close somebody is to you, because sometimes just in general life people don't sort of realise that space, do they'. Mrs Havelock asked Ms Green if she was still falling asleep. Ms Green said that she was and that the anxiety of returning to work had taken a toll on her. Mrs Havelock talked to Ms Green about getting out of the office for some fresh air from time to time.

110. During this conversation, Ms Green told Mrs Havelock that she had had an assessment from Access to Work and that the assessor had suggested she have a different keyboard because she has arthritis. Ms Green said the assessor had done a report the previous day. Mrs Havelock said '…we will do all of that, that's absolutely fine because we've got other staff who we've done the same for and we've…we sort of adjust it to your needs don't we and what's suitable for you'. Mrs Havelock said, 'we can look at whatever you need when you are back in the office'.

111. During this conversation Ms Green said that when she returned 'I'll be falling asleep again.' Mrs Havelock replied 'oh I know we'll be prodding you won't we.' She then asked the claimant whether she was still falling asleep. The claimant replied that she was. Mrs Havelock then encouraged Ms Green to take short breaks and take short walks to get some fresh air. Nothing Mrs Havelock said could reasonably be perceived as criticising or telling Ms Green off for falling asleep.

112. Ms Green returned to work on 6 April 2021 on a phased basis. Her desk was moved to a cooler position with a cooler air flow. Managers encouraged her, in line with

Occupational Health advice to keep hydrated, move position and do regular physical exertion (although MS Green said that she would not follow the advice to do regular physical exertion as she did not feel able to). On a couple of occasions during Ms Green's phased return, she arrived at work late, and said she had slept in and that she was struggling as it took her a long time each morning to take her tablets. Mrs Havelock said she could start late during her phased return so long as she made up the work at the end of the day.

113. On 16 April 2021 the respondent's managers received the report prepared by Access to Work. The person who had assessed Ms Green prepared a 'Needs Assessment Report'. In it, the report referred to Ms Green's COPD and osteoarthritis, depression, stress and anxiety. The report also said:

> 'Furthermore, due to [Ms Green]'s chronic obstructive pulmonary disease, she reports to having chronic fatigue-like symptoms. [Ms Green] mentioned that she constantly feels tired and feels like she needs to sleep. Due to this she can sometimes struggle with her workload, which makes her mental health problems worse as she feels like she can't always work to the best of her ability.'

114. In a section headed 'Barriers and Recommendations' the report said:

> '[Ms Green] explained that a large number of her colleagues and co-workers in the past have not fully understood her diagnosis of chronic fatigue, but have been eager to learn to assist where possible.'

115. In relation to this the adviser recommended that Ms Green and her colleagues/managers have 'neurodiversity disability awareness training (chronic fatigue focus)'. This, it was said, was:

> '…To raise department-wide awareness of chronic fatigue, and correct any preconceived notions and fix any misunderstandings in [Ms Green]'s peers. Specific learning difficulties and often misunderstood, and improving perceptions and broadening understanding will help colleagues who may be too embarrassed or scared to come forward with similar issues. The training will help to minimise stressors on [Ms Green] and promote the creation of a supportive and positive working atmosphere.'

116. The report also referred to Ms Green experiencing physical discomfort and recommended a number of different pieces of equipment. They included an ergonomic chair, a tilting footrest, an ergonomic keypad, keyboard and mouse, a coccyx cut-out wedge, a wrist rest, a headset and training in the use of Dragon dictation software. Access to Work said they would contribute towards the cost of this support. The report also referred to Ms Green's mental health becoming worse and recommended four half days of coping strategy training. In addition, the report said:

> 'It is beneficial for [Ms Green] to be working from home and it is recommended that this is to be discussed with her employer. [Ms Green] would benefit from working from home, as she reports to working in her own environment allows her to deal with the side effects of her condition better, which allows her to work more efficiently.

> Additionally, working from home also helps with her wellbeing as it means she is less stressed and anxious…'

117. Ms Green's managers had already explained to Ms Green that working from home would not be appropriate.

118. Mrs Havelock emailed Mrs Mudd on 26 April 2021 saying:

> 'Today is the first day I have witnessed [Ms Green] dozing on and off, I have kept a record of it, do you think I should speak to her before she leaves today or just keep a general record?'.

119. Mrs Mudd replied, saying:

> 'I would speak to her to see how she is and how she is managing and that you had noticed this. If you can, document everything so we have chronology of her progress.'

120. On 28 April 2021 a further risk assessment was carried out in relation to Ms Green. Although it referred to Covid it also covered matters relating to the claimant falling asleep, noting that Ms Green had been encouraged to take breaks from her desk and get fresh air.

121. On 4 May 2021 another Occupational Health report was received from Dr Harris. It referred to Ms Green awaiting further investigations regarding her sleepiness and said consideration should be given as to 'whether it is possible for any extra breaks to be allowed, particularly in the afternoon to try to help with her high levels of fatigue related to her possible sleep apnoea.' Dr Harris said that if Ms Green was to be diagnosed with sleep apnoea it was a condition that responds well to treatment. He also said in his report that he had advised Ms Green she should not be driving.

122. A meeting had been arranged to take place on 11 May 2021. Managers had arranged this meeting with Ms Green to discuss the Access to Work report. Ms Green's managers were perplexed by the references in the report to equipment that was recommended because Ms Green had not previously suggested that she might need such equipment. Mrs Mudd was present at this meeting as was Mrs Massiter and Mrs Havelock. Mrs Massiter asked Ms Green about the fact that the report referred to physical difficulties and said that was something Ms Green had never told Occupational Health was an issue. Ms Green said that nobody had asked her and she had just answered the questions asked by the Access to Work adviser. It was agreed that the claimant would be referred back to Occupational Health. There was also a discussion about Ms Green falling asleep at work. Ms Green confirmed that she was still falling asleep at work but said she felt fit to be at work. Mrs Massiter then moved on to say that it had been discovered that Ms Green had recently failed to undertake some work and that this had left children at risk. Ms Green was unhappy about this point being raised in a formal meeting with HR present when she had not been given advance notice. She asked for the meeting to be adjourned so that she could obtain representation. Mrs Mudd agreed at that point to leave the meeting.

123. Afterwards Mrs Massiter and Mrs Havelock discussed their concerns about the work issues with Ms Green. Ms Green had told Ms Havelock that she was suffering with memory problems and made reference to dementia. In light of that, and the fact that Ms Green had

been falling asleep at work and making errors in her work, Mrs Massiter and Mrs Havelock spoke to Mrs Mudd. Mrs Massiter and Mrs Havelock then spoke to the claimant again. Ms Green recorded this discussion covertly. Mrs Massiter was of the view that Ms Green should not remain at work because of the risks to service-users if Ms Green made mistakes. Mrs Massiter told Ms Green that they were going to 'enforce [her] to take sick leave'. Mrs Massiter said during this meeting that they could see that 'those capability issues are caused by your ill health' and that they did not want to 'push [her] down a capability route'. She added 'the choices are that we don't take this approach and say you're fit to be at work and take you down a disciplinary and a capability route, we don't want to do that because we know that there are reasons…' Ms Green left the meeting upset and left the office.

124. On 13 May 2021 Ms Green emailed Mrs Massiter asking whether she was on enforced sick leave or medical suspension, as she had been in touch with Payroll and the position seemed to be unclear.

125. Mrs Mudd drafted a reply for Mrs Massiter to send to Ms Green, and Mrs Massiter sent the email to Ms Green. In that email Mrs Massiter said: 'It was your decision to take our advice and return home…therefore you are currently considered as being on sick leave.' At this hearing Mrs Massiter acknowledged that that was not an accurate reflection of what had happened at the meeting. She said that at the time she sent the email she had not considered it to be misleading or inaccurate, but in hindsight she could see that it was. The email went on:

> *'It is your decision as to whether you feel able to return to work, however we cannot continue to allow you to fall asleep in the workplace and therefore this needs to be considered beforehand. Depending upon the outcome of the Occupational Health report will determine whether the concerns with your work will be addressed as part of the disciplinary process. If you remain on sick leave then your absence will be dealt with in accordance with the Trust's Managing Attendance and Promoting Health and Wellbeing Policy and we will arrange to meet with you following your Occupational Health appointment…'*

126. Ms Green replied to Mrs Massiter's email stating that she would be returning to work on Monday 17 May. In her email Ms Green said:

> *'It has been unfortunate that I have been unable to get a diagnosis of why I am falling asleep due to the sleep clinic not running because of COVID-19. However, they are now running again and my GP has referred me to the sleep clinic as my GP thinks I may have sleep apnoea. My appointment is on 18 June 2021.'*

127. In response to that email Mrs Massiter emailed Ms Green on 14 May saying:

> *'If you are presenting as fit for work then falling asleep at work as well as any other work issues will be treated as conduct and not health related. We cannot sustain the risk that falling asleep can cause in the workplace…'*

128. Ms Green was referred to Occupational Health again. On 18 May 2021 Mrs Mudd emailed Occupational Health in advance of Ms Green's appointment. Mrs Mudd said in her email to Occupational Health:

> *'[Ms Green] presented for work on Monday 17 May despite the discussions and her continuation of falling asleep at work and her memory difficulties which she stated will always be the case. This is a significant concern due to the potential risk of harm that such omission could result in. It would appear that [Ms Green] is of the opinion that a diagnosis of sleep apnoea will provide the rationale for her falling asleep unexpectedly throughout the day, however despite any diagnosis, falling at sleep at work remains a concern, is unsustainable and not appropriate. Unfortunately, there are no reasonable adjustments that can provide/support [Ms Green] from falling asleep at work and her memory difficulties which affect her day-to-day work duties. As [Ms Green] continues to state that she is fit to be at work she has been placed on temporary restricted duties to avoid any further errors/omissions until we receive your report.'*

129. On 18 May 2021 Mrs Mudd sent an email to Mrs Massiter saying that if Occupational Health said Ms Green was not fit to be in work, consideration should be given to terminating Ms Green's employment or redeploying her. She said that if Occupational Health said Ms Green was fit for work then a stage three capability hearing should be arranged under 'gross substandard performance element'.

130. Ms Green's Occupational Health appointment took place on 20 May 2021 with Dr Harris. Dr Harris prepared a report the following day. In that report Dr Harris said his understanding of Ms Green's situation was that the main health issue impacting work was 'due to her excessive levels of fatigue and her tendency to fall asleep at time'. He said Ms Green's history was 'very suggestive of sleep apnoea' and that her GP had referred her for appropriate specialist investigations, including an appointment on 18 June 2021. Dr Harris explained that sleep apnoea is:

> *'A condition where people stop breathing during the night. In severe cases this can occur hundreds of times. Whilst sufferers do not notice this occurring during the night, the disruption in sleep over a prolonged period of time causes a variety of symptoms including unrefreshing sleep and excessive daytime sleepiness which can subsequently affect cognitive performance.'*

131. In answer to questions asked about Ms Green's fitness for work Dr Harris said:

> *'In my opinion nodding off itself will not cause any significant risk when carrying out administrative role. The issue that would need to be considered is the effect of the excessive sleepiness on cognitive function and the ability to carry out more demanding administrative tasks…In my opinion a further period of prolonged sickness absence at this stage is unlikely to be of any benefit to [Ms Green] or her underlying health conditions. I would encourage a short to medium term solution to be found so that [Ms Green] is able to remain in work whilst undergoing investigations and hopefully successful treatment for her underlying condition. She described feeling harassed by the current situation and that it is having a detrimental effect on her underlying mental health and wellbeing.'*

132. Dr Harris added:

> *'It is the ultimate responsibility of management to carry out a suitable and sufficient risk assessment on all of their employees. If your risk assessment identifies areas of*

her work that could cause problems if she were to fall asleep than measures would need to be put in place to account for this. You may wish to look at whether allocating [Ms Green] more cognitively demanding tasks at times of day when she is feeling less tired, with less demanding duties performed at times of higher fatigue. Whilst changes to the physical environment (for example optimal temperature, good ventilation) may help to a degree with the risk of [Ms Green] having a microsleep, it is unlikely to resolve the issue itself. Allowing [Ms Green] more frequent breaks than her colleagues may also help her better manage her condition.'

133. Dr Harris also said:

'It needs to be recognised that [Ms Green]'s excessive fatigue may be contributing to potential performance issues at work.'

And:

'If [Ms Green] is diagnosed with obstructive sleep apnoea it is a treatable condition with a very good prognosis. In my opinion there is no medical reason that [Ms Green] would not be able to carry on in her current role.'

134. The respondent had asked Dr Harris to say whether Ms Green should be driving. In response Dr Harris said: 'I have gone over again the current DVLA guidance regarding patients being investigated for sleep apnoea and reiterated my advice to [Ms Green] that she is currently not fit to drive.' Dr Harris suggested the respondent may wish to allow Ms Green to work at home but acknowledged this was a management decision. He suggested approaching Access to Work for help with taxi fares.

135. As we have recorded above, the respondent's managers had already considered whether the claimant should be allowed to work from home and decided that she should not and had explained that to Ms Green on more than one occasion. We find they had good reason for not agreeing to Ms Green working from home: she was falling asleep at work and on occasion had to be prompted to wake up (the claimant's suggestion on cross-examination that her father could have woken her up if she fell asleep was patently not an appropriate solution); she had been making errors in her work and her performance was being supervised and monitored; she had herself suggested that she was having memory problems and Dr Harris had said her sleep issues could be affecting her cognitive function, making the risk of errors even more acute; the consequences of the claimant making errors in her work were potentially very serious; and the respondent's managers had valid concerns that the claimant was not as productive as she should be, something that was not necessarily linked to the claimant's health problems.

136. Although Dr Harris had suggested that the claimant falling asleep at work should not cause any significant risk in an administrative role, there is no reason to think he was well acquainted with the type of work Ms Green was doing. We have described above the importance of the tasks being carried out by the admin team. The consequences of making mistakes were potentially extremely serious. We accept the evidence given by Mrs Havelock and Mrs Massiter about this. The claimant was in fact making mistakes in her work: her own case is that her performance had deteriorated. Following the reversal of Mrs Massiter's decision to place Ms Green on enforced sick leave and Ms Green's subsequent return to work, the respondent's managers put in place an action plan for monitoring Ms

Green's performance, which was set out in a document. They also restricted some of the duties Ms Green carried out. The action plan set out agreed objectives, timescales for achievement of those objectives, success criteria and notes of 'outcomes'. The column headed 'outcomes' was for Mrs Havelock to add her notes, recording her opinion as to how Ms Green was performing.

137. The respondent's managers had also asked Dr Harris' advice on the equipment recommended in the Access to Work report. He said:

'I have read the report provided by access to work as to possible workstation adjustments you may wish to consider. As an employer you have a duty to follow the DSE guidance but ultimately it is your decision as to what amendments are implemented from the access to work report.'

138. On 1 June 2021 Mrs Havelock told Mrs Mudd that Ms Green had driven to work despite Dr Harris' advice. Mrs Mudd sought advice from the respondent's Occupational Health manager who suggested contacting DVLA to advise them of the situation. The Trust's HR Business Partner told Mrs Mudd that the Trust should 'definitely' contact DVLA and the police to inform them that Ms Green was still driving despite Dr Harris' advice. She also said that Ms Green should be told that the police and DVLA were being informed, and to check whether needed any welfare support following that conversation. On the same day Ms Green's union representative emailed Mrs Mudd saying that if Ms Green herself had not informed DVLA that she had been falling asleep then 'surely we should be reporting this fact'.

139. Consequently, Mrs Mudd contacted DVLA and Cleveland Police and Mrs Havelock spoke to Ms Green to tell her this was happening. Ms Green's response to Mrs Havelock was that she planned to drive home as she had not been diagnosed with sleep apnoea yet. Ms Green said she would phone the police herself. Ms Green subsequently told Mrs Havelock that the police had told her that she could continue to drive if her GP had said she could. Ms Green also told Mrs Havelock that if she could not drive her car then she would not come into work as she was not going to get taxis.

140. Following the implementation of the action plan Mrs Havelock continued to monitor Ms Green's work and performance. She recorded on the action plan that:

140.1. On 1 June Ms Green had made an error scanning some information, had not answered the phones very much and appeared to have been inactive at certain times during the day.

140.2. Work had been completed on 3 June but there appeared to have been no activity at certain times.

140.3. On 4 June one of Ms Green's colleagues told Mrs Havelock that Ms Green was very sleepy. On that day certain letters had been sent out incorrectly resulting in additional work which meant the work for that day was not completed on the day.

140.4. On 7 June someone reported to Mrs Havelock that Ms Green was sleepy that day. Ms Green had not completed her allocation of work for that day and there were some apparent periods of inactivity.

140.5. On 8 June Mrs Havelock noticed Ms Green 'nodding off' a few times and Ms Green had said she was feeling sleepy. Ms Green had not managed to do as many tasks as she would have expected that day.

141. On 8 June Mrs Havelock and Ms Green had a catch-up meeting at which the action plan and the matters identified by Mrs Havelock were discussed. Mrs Havelock told Ms Green she was worried about the speed at which Ms Green was working and certain periods of inactivity that Ms Green could not account for. She said these things meant they could not progress to the next stage of the action plan 'to get her to where she needs to be'. Ms Green said that it was because she was having to 'think more about what she is doing'. Mrs Havelock told Ms Green that they would be moving to a stage two meeting under the capability procedure and that she would be sent an invite in accordance with the policy. Ms Green asked Mrs Havelock what the process was for stage two. Mrs Havelock told Ms Green that she was unsure but that she would follow any advice from HR. She also referred Ms Green to the capability policy and told her where in the policy the Stage two process was explained.

142. At the meeting Ms Green asked if she could see the mistakes she had made before the action plan was put in place and mentioned that she had previously asked for these. Mrs Havelock acknowledged that Ms Green had not been provided with that information due to 'annual leave etc', and she explained to Ms Green that she would go over those matters with Ms Green when she had more time. Ms Green said she wanted to see them to ensure she does not make the same mistakes again. In response to that Mrs Havelock said that those particular mistakes had now been rectified and the purpose of an action plan was to pick up mistakes as they happened so that Mrs Havelock could go through them with her. Mrs Havelock noted in the action plan, 'In our meeting [Ms Green] was very standoffish and seemed angry/upset'.

143. On or around 8 June 2021 a decision was made to go to stage two of the respondent's capability procedure. Mrs Mudd said in evidence this was discussed in an HR operational meeting on 10 June 2021. However, it appears that Mrs Havelock told Ms Green of this decision in the 8 June meeting.

144. Managers at the respondent remained concerned about Ms Green driving to work and on 10 June 2021 Mrs Mudd emailed Dr Harris again. He replied stating that in his opinion the DVLA advice was clear regarding Ms Green's medical condition and driving. He confirmed that Ms Green should not be driving until either her condition was excluded or a diagnosis was made and her symptoms controlled, and that the respondent should make that clear to Ms Green.

145. A letter was sent to Ms Green arranging a stage two meeting under the respondent's capability procedure. The meeting was to take place on 17 June 2021. In fact Ms Green had two meetings on that date. The first meeting was a 'catch-up' meeting between Ms Green and Mrs Havelock via Teams. The second was the stage two capability meeting. Ms Green recorded both of these meetings without telling the other participants that she was doing so.

146. Ahead of the catch-up meeting between Ms Green and Mrs Havelock, Mrs Havelock had reviewed Ms Green's work on a particular date. She told Ms Green at the meeting that she had not found anything wrong with Ms Green's work on that date and had not found

any problems. She acknowledged that Ms Green had been following correct procedures regarding transfers in and new births, that Ms Green had ensured the phones were answered in a timely manner and that she was answering phones regularly, although she added, 'I suppose you could answer a little bit more'. She acknowledged Ms Green had been doing the work allocated, that her start and finish times had been fine, and she had been adhering to Trust values and behaviours at all times. She added: 'My only thing I would say is productivity. Like, we've got to get that pace up, haven't we? …and its these no activities. You know where there's no activity; they're coming up again.'

147. Mrs Havelock asked Ms Green some questions about what the records she had checked showed, for example about not coming out of records as she should. When asking about this Mrs Havelock acknowledged that if she audited anyone else in the team she would inevitably find they had done something not exactly as they should have. However, Mrs Havelock said, 'It's just getting on top of why there's so many'. In other words, Mrs Havelock was suggesting that, although nobody's performance was perfect, her monitoring of Ms Green's work revealed a greater number of problem areas. Ms Green asked if that was why she had to go to stage two. Mrs Havelock reminded Ms Green that the first week of the action plan had not been 'great' and Ms Green agreed. Mrs Havelock reminded Ms Green that certain tasks had not been actioned, saying: 'There was the letters, wasn't there. It was the lack of tasks being actioned. I think you'd been feeling more sleepy hadn't you?'. Mrs Havelock added: 'I feel as though this is going to be separate from your stage two because stage two is more about your fitness for work, like you're still falling asleep…I think from what I've read, I feel as though they've got to separate the two, but I don't know because I've never done this before…this is new for me. So, we will see what they say, is that alright?'.

148. We infer from this exchange that the decision to move to stage two of the capability process was not made by Mrs Havelock but by Mrs Massiter and Mrs Mudd, possibly in consultation with others in more senior positions.

149. After Ms Green had her meeting with Mrs Havelock, the stage two capability meeting took place. Mrs Mudd was present, as was Mrs Massiter and Mrs Havelock. Ms Green was supported by her union representative. Ms Green said in this meeting that there had not been any change to her symptoms and things remained the same. She said she was collecting a machine the following day for a sleep study for one night and that the results could take up to four months to come through. There was a discussion about the action plan. Mrs Mudd said that the action plan was now being formalised, with the dates extended to six weeks and the objectives remaining the same, albeit with some aspects being removed. Mrs Mudd said in the meeting that there were certain things referred to in the action plan that were 'separate to capability'. She appeared to be suggesting that these were unconnected with Ms Green falling asleep and were about, as she put it, 'conduct'. Mrs Mudd referred to the 'Outcomes' column of the action plan and specifically the issues about information being scanned incorrectly, phones not being answered much and periods of inactivity. On the latter point Mrs Mudd said: 'When you add it all up…you're not doing a lot of work in the time that you're at work, so that's a conduct issue, not capability. The capability is the role itself, the duties themselves, but this is separate, this is conduct, but we do need to look at that.' Mrs Mudd went on to ask if Ms Green could give any reasons for the 'time missing when you're not doing any work'. She said: 'If there are gaps throughout the day [Mrs Havelock] will pick that up and she will look into that as part

of conduct rather than capability because it is, it's not a capability issue it's about your time, your time and not doing work when you should be working.'

150. Mrs Mudd went on to refer to Ms Green having sent letters incorrectly when she was sleepy on 4 June. She said:

> '…If you're making mistakes as a result of falling asleep, we need to be careful around that [Ms Green], because then it's whether you're fit to be at work, because we don't want the mistakes to be made because obviously that's a conduct issue as well.'

151. During the meeting the respondent's managers encouraged the claimant to take regular breaks to get fresh air and a drink and not to sit at her desk all day without a break. The Claimant agreed.

152. At the meeting Mrs Mudd also asked Ms Green about her driving and referred to the advice from Dr Harris, saying 'Occupational Health advice always overrules a GP's advice'. She expressed concern that Ms Green would not be insured if she had an accident and said the Trust has a duty of care to remind Ms Green of that. Mrs Massiter added that she was really concerned not just about Ms Green's safety but about the safety of other people on the road. There followed a discussion about Access to Work and the possibility of obtaining funds for taxi fares. Mrs Mudd asked Ms Green if Access to Work had been in touch with her, saying she knew Ms Green had completed a form with them. Ms Green responded that she had completed a form, but she cancelled it because she was driving. Mrs Mudd encouraged Ms Green to go back to Access to Work about this matter.

153. After the meeting Ms Green and Mrs Havelock spoke. Mrs Havelock tried to encourage Ms Green to view matters positively.

154. On 18 June, the day after the meeting, the respondent sent a letter to Ms Green summarising what was discussed, attaching the amended capability action plan and telling Ms Green that there would be a review in six weeks. The review was scheduled to take place on 29 July, although it was subsequently postponed.

155. On 6 July 2021 there was a meeting between Ms Green and Mrs Havelock. Ms Green recorded this meeting without Mrs Havelock's knowledge. Mrs Havelock raised some issues about Ms Green's work. For example Mrs Havelock said, 'I feel you're a bit hit and miss with the phones'. She sought to discuss these with Ms Green, asking her for her views. Mrs Havelock's approach was constructive. During this meeting Mrs Havelock also mentioned Access to Work, saying, 'that's all been done with hasn't it?' The claimant replied 'yeah'.

156. On 15 July 2021 Ms Green learned that her driving licence had been revoked by DVLA. Ms Green was upset about this. Her perception was that it was the Trust's fault that her licence had been revoked because the Trust had contacted the DVLA.

157. Ms Green told Mrs Havelock about the loss of her licence. Mrs Havelock asked Ms Green how she was managing to get into work. Ms Green told Mrs Havelock her dad would be driving her. It is Ms Green's case, set out at paragraph 42 of her grounds of complaint, that she was 'confronted by Cheryl Havelock who insisted on asking her information about

how she had managed to get to work'. Ms Green suggests that Mrs Havelock thereby reprimanded or criticised her. We do not accept that this allegation accurately reflects what happened. We find Mrs Havelock, on learning from Ms Green that she could no longer drive, simply asked the claimant how she had travelled to work. That was an entirely natural question to ask and carries no hint of criticism.

158. It is Ms Green's case, set out at paragraph 42 of her grounds of complaint, that Mrs Havelock 'again insisted on pursuing the issue about the Claimant driving' on 20 July 2021. Again, we find this does not accurately reflect what happened. We are assisted in reaching this conclusion by a note of events prepared by Mrs Havelock soon after they happened. We find that, on 20 or 21 July 2021, Ms Green fell asleep several times at work and Mrs Havelock had to call her name out to wake her up at her desk. Mrs Havelock spoke to Ms Green about this. She was concerned that Ms Green had been working on patient records at the time she fell asleep, and she said to Ms Green that this was 'unsafe practice'. Ms Green responded that it was due to the stress the Trust had caused her through losing her driving licence. Mrs Havelock responded that the Trust had a duty of care to follow. Ms Green then became annoyed, saying 'you know I've got a problem', and walked out of the office they had been in. Mrs Havelock asked Ms Green not to leave and said if that she did she would need to speak to HR. Ms Green said she would speak to HR herself and left the office. We find that, contrary to what is alleged, Mrs Havelock did not 'insist on pursuing the issue about the claimant driving.' It was Ms Green, not Mrs Havelock, who raised the subject of her driving licence. Mrs Havelock simply sought to explain to Ms Green, in response to that, why the respondent had contacted the DVLA about her driving. That was not a criticism of Ms Green and nor was it a reprimand as alleged.

159. A short while later Ms Green asked Mrs Havelock if she was giving her permission to leave work. Mrs Havelock replied that she was not and that if she did leave work it would be unauthorised absence. Ms Green then left work. She did not say at the time she was not well enough to work.

160. Ms Green's evidence was that she had a telephone call from Mrs Havelock on her way home when Mrs Havelock said that if she returned to work the next day she would have a 'find and fix' meeting with Mrs Massiter, and that Mrs Massiter would be taking action against her as a result of her attitude. This allegation is complained at paragraph 43 of the grounds of complaint. Ms Green says that she assumed Mrs Havelock meant there would be disciplinary proceedings. Mrs Havelock's evidence on this issue differs. In her witness statement Mrs Havelock said she contacted Ms Green and told her that they would need to arrange a fact-finding meeting once she came back to work to understand why she left work early. Mrs Havelock denies saying that the respondent would be taking action against Ms Green as a result of her attitude. We were referred to a note of the discussion prepared by Mrs Havelock. In that note Mrs Havelock said she made contact with Ms Green and told her they would 'look at conduct on her return to work'.

161. Looking at all the evidence in the round we find that, on 20 or 21 July 2021, before Ms Green submitted the fit note referred to below, Mrs Havelock told Ms Green that there would be a fact-find meeting upon her return to work. That is the wording used by Mrs Havelock in her note and reflects the wording used in the disciplinary policy. Mrs Havelock also made it clear that she considered Ms Green leaving work without permission was misconduct. We find it unlikely that Mrs Havelock said Mrs Massiter 'would be taking action'

against Ms Green as a result of her attitude; Mrs Massiter was senior to Mrs Havelock and so Mrs Havelock was not in a position to dictate how she should deal with the matter. Nor could Mrs Havelock know how Mrs Massiter might perceive Ms Green's behaviour in leaving work without permission and whether or not Mrs Massiter would decide to take action under the Trust's disciplinary policy.

162. On 21 July 2021 Ms Green submitted a fit note from her GP. Ms Green had seen her GP on 21 July 2021 and her doctor had decided on that date that she would be unfit for work for four weeks until 17 August 2021. The reason given on the fit note was 'under investigation for sleep problems/fatigue'.

163. Ms Green's Stage 2 capability review meeting had been due to go ahead on 29 July 2021. However, it had been postponed because Ms Green's union representative was on sick leave. On 28 July 2021, with Ms Green now on sick leave, a further referral was made to Occupational Health. The referral form asked Occupational Health to advise whether Ms Green was currently medically fit to undertake her duties or any alternative work, and whether there were any adjustments that could be considered which would assist her in undertaking her duties. The adviser was asked to provide a likely timescale for Ms Green's return to her substantive role.

164. A sickness review meeting was arranged to take place on 10 August 2021, three weeks into Ms Green's latest period of absence. However, it was postponed because Mrs Mudd was on sick leave.

165. On 18 August 2021 Ms Green resigned with immediate effect by letter of that date. In that letter she said:

> *'I have finally reached the end of my tether and feel that I have no option but to resign my employment as a result of the way that I have been treated by you. I believe that the way in which I have been subjected to capability proceedings and threatened with disciplinary proceedings, in circumstances when you are aware that I am suffering from a disability, have caused a complete breakdown in our relationship…Instead of carrying out any assessments, you have chosen to ignore the obvious step that could be taken of allowing me to work from home, as I did during the early part of the pandemic. You have not carried out any proper assessment and instead have subjected me to capability proceedings, making clear to me that my job was in jeopardy and threatened me with conduct proceedings, making clear to me that if I am subject to disciplinary proceedings then, again, my job may be in jeopardy. Instead of undertaking the steps set out clearly by Dr Harris to enable me to perform my duties, you have made a further referral back to Occupational Health and seem intent on obtaining a different opinion from Dr Harris that I am unfit and unable to carry out my work rather than making the adjustments that he has repeatedly suggested. This entire process is causing me a huge amount of stress and anxiety which has impacted on my personal life and I do not feel that I can take any more.'*

166. On 26 August 2021 Mrs Massiter wrote to Ms Green giving her an opportunity to retract her notice. Ms Green did not take up that offer.

167. In her complaints of discrimination and constructive dismissal, Ms Green alleges that Mrs Havelock reprimanded and criticised her on a number of occasions as described in paras 25, 29, 31, 36, 39, 41, 42, 44 of the grounds of claim. We have dealt with the allegations at paragraphs 42 and 44 above (they concern the events of 20 and 21 July 2021). Our findings on the other factual allegations are set out in the following paragraphs.

168. At paragraph 25 Ms Green alleges that from August 2020 Mrs Havelock 'would take the Claimant to one side and tell her off for falling asleep'. At paragraph 29 Ms Green alleges she was 'repeatedly being taken to one side and told off for falling asleep', as a result of which she was absent from work from September 2020 until April 2021. At paragraph 31 Ms Green alleges that, following her return to work in April 2021 Mrs Havelock threatened the claimant with disciplinary proceedings tor falling asleep at work and subjected her to an 'absence from work capability procedure' and made it clear to her that if she continued to be absent from work then she was likely to be dismissed. At paragraph 36 Ms Green alleges that, throughout the period of her return to work in April 2021 until her resignation in August 2021, she was 'regularly criticised verbally by Cheryl Havelock. She was told off [and] criticised for individual pieces of work. At paragraph 39 Ms Green alleges that Mrs Havelock made comments to her 'on occasions too numerous to particularise. She would accuse the Claimant of "nodding off a couple of times" despite the fact that this was a recognised condition suffered by the Claimant and one that was referred to in Occupational Health. At paragraph 41 the claimant alleges that she attended a meting with Mrs Havelock on 6 July 2021 at which she was 'again criticised by Cheryl Havelock for not meeting her full range of duties and for making mistakes.

169. We have had the advantage of reading transcripts of several meetings that took place between the claimant and Mrs Havelock because the claimant recorded them surreptitiously. Looking at the content of what Mrs Havelock said to Mrs Green, there is nothing in those meetings that could reasonably be interpreted as a reprimand. The common theme of those meetings is that Mrs Havelock appeared to be dealing with Mrs Green with sensitivity and empathy. Those notes reveal that, rather than suggesting Mrs Green was somehow at fault for falling asleep, Mrs Havelock was indicating that she understood that her falling asleep appeared to have a medical cause. For example in the 17 June one to one meeting Mrs Havelock distinguished the claimant falling asleep at work from other concerns about productivity.

170. Looking at the evidence in the round we find that Mrs Havelock did not reprimand or 'tell the claimant off' for falling asleep on any occasion. She did make it clear to the claimant that she had concerns about the claimant falling asleep at work because of the implications for the service. That cannot reasonably be characterised as reprimanding the claimant or telling her off. Similarly, Mrs Havelock monitoring the frequency of the claimant falling asleep, waking her up when she fell asleep, and asking the claimant if she was aware she had fallen asleep cannot be characterised as reprimanding the claimant or criticising her, in the sense of suggesting her behaviour was somehow blameworthy. The allegation that Mrs Havelock treated the claimant unfavourably by reprimanding her or telling her off or criticising her for falling asleep is not made out on the facts.

171. Mrs Havelock did draw to the claimant's attention shortcomings in her performance after Ms Green returned to work in April 2021. The reason she did that was because the claimant had made mistakes in her work and, in addition, an audit of the claimant's work

showed that there were periods during which the claimant appeared not to be working as productively as was expected. This led to the claimant's performance being monitored on an informal action plan under the respondent's capability procedure and then subsequently a formal action plan under that procedure. Again, having the benefit of transcripts of meetings, the clear impression we have is of a line manager who was being supportive, trying to understand the cause of the claimant's underperformance and trying to help the claimant to improve where this was possible. There is nothing in what Mrs Havelock (or any other managers) said or did that could be construed as a 'reprimand'. Mrs Havelock did highlight mistakes made by Ms Green, and that could be construed as criticism. However, Mrs Havelock had reasonable and proper cause for doing so and we find the way Mrs Havelock addressed those matters with Ms Green was appropriate and in line with the respondent's capability procedure.

172. Similarly, other managers (Mrs Massiter and Mrs Mudd) discussed those shortcomings at the stage 2 capability meeting. Again, they had reasonable and proper cause to do so given the fact that the claimant's performance (which the claimant admits had deteriorated) was continuing to give cause for concern.

173. One of the allegations made by the claimant is that the respondent breached the implied term of trust and confidence by failing to implement proposals set out in the Access to Work report obtained in March 2021. In that report the adviser recommended a number of aids that could help the claimant with certain physical difficulties outlined in the report. It is true to say that the respondent did not provide the claimant with those pieces of equipment. Mrs Havelock had made it clear to the claimant when they first discussed the recommendations that there would be no difficulty providing the equipment. At no time after that did any of the respondent's managers tell Ms Green that the equipment could not or would not be provided. For her part, Ms Green did not chase up the equipment and when, in July, Mrs Havelock referred to the Access to Work report and asked 'that's all been done with hasn't it?' Ms Green agreed. Looking at the evidence in the round, we find that it more likely than not that the reason the respondent did not provide the equipment is that it was simply overlooked.

174. Ms Green alleges that the respondent failed to carry out any or any proper risk assessment and failing to implement risk assessments that were carried. However, we have found that the respondent did carry out risk assessments both in respect of Covid and stress. Ms Green has not identified which of the steps recommended in those assessments were not implemented. We have not found that allegation well founded.

175. Ms Green alleges that the respondent failed to carry out a proper assessment as to how the workplace and/or how Ms Green's terms and conditions of employment might be adapted to enable her to perform her duties properly, and failed to take into account or implement the findings of the occupational health reports that it obtained. We do not accept that was the case. The respondent's managers discussed the findings of the occupational health reports with Ms Green in numerous meetings. They acknowledged in meetings that the occupational health advisers had indicated there may be a medical cause for the claimant's sleepiness and memory problems. In light of what was said in the medical reports, they held off from terminating the claimant's employment in the final sickness review meeting in March 2021 when she had been absent on sick leave for some 6 months.

176. It is not clear what Ms Green means when she says that the respondent failed to 'implement the findings' of the Occupational Health reports. What is clear, however, is that the respondent made changes aimed at assisting Ms Green to deal with her fatigue, including those recommended by Occupational Health. This included allowing her to return to work on a phased basis in April 2021 to assist her to build up her stamina, allowing her, and indeed encouraging her, to take regular breaks, encouraging her to keep hydrated and take exercise, changing the location of her desk, allowing her flexibility with regard to late starts during her phased return to work, asking the claimant if she wanted to reduce her contracted hours, as suggested by occupational health. The respondent's managers did not agree to the claimant working from home. In so far as this is what the claimant means when she refers to a failure to 'implement the findings' of occupational health, we have found – as recorded above – that the respondent had good reason for not permitting Ms Green to work from home.

Legal Framework

Equality Act 2010

177. It is unlawful for an employer to discriminate against an employee by subjecting them to a detriment: section 39(1)-(4) of the Equality Act 2010.

178. For the purposes of section 39, a detriment exists if a reasonable worker (in the position of the claimant) would or might take the view that the treatment accorded to them had, in all the circumstances, been to their detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. However, as was made clear in Shamoon, an "unjustified sense of grievance cannot amount to 'detriment'".

179. The Equality and Human Rights Commission has issued a Code of Practice containing guidance as to the application of the Equality Act 2010. By virtue of section 15(4) of the Equality Act 2006, the code should 'be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant'.

Failure to make reasonable adjustments

180. Under section 39(5) of the Equality Act 2010 a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination: Equality Act 2010 s21.

181. Section 20 of the Equality Act 2010 provides that the duty to make reasonable adjustments comprises three requirements, set out in s 20(3), (4) and (5). This case is concerned with the first of those requirements, which provides that where a provision, criterion or practice of an employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the

disadvantage. Section 21(1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

182. In considering whether the duty to make reasonable adjustments arose, a Tribunal must consider the following (Environment Agency v Rowan [2008] IRLR 20):

182.1. whether there was a provision, criterion or practice ('PCP') applied by or on behalf of an employer;

182.2. the identity of the non-disabled comparators (where appropriate); and

182.3. the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

183. In Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43, [2015] ICR 169, the EAT held that 'It is unsatisfactory to define a PCP in terms of a procedure which is intended at least in part to alleviate the disadvantages of disability. The PCP should identify the feature which actually causes the disadvantage and exclude that which is aimed at alleviating the disadvantage.'

184. The difficulties inherent in defining a PCP in terms of such a procedure was highlighted by the Court of Appeal in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, [2016] IRLR 216. That was a case concerning the formulation of the PCP in a case where an employee is said to be disadvantaged by the application of a sickness absence policy. The Court of Appeal held that, if the correct formulation of the PCP is the general policy itself, then the conclusion that the disabled are not disadvantaged by the policy itself is inevitable if the policy provides that special allowances can be made for those with a disability. The mere existence of a discretion to modify the policy in the disabled worker's favour would prevent discrimination arising even though the discretion is not in fact exercised and the failure to exercise it has placed the disabled person at a substantial disadvantage. However, the Court of Appeal went on to hold that:

> *'formulating the PCP in that way fails to encapsulate why a sickness absence policy may in certain circumstances adversely affect disabled workers – or at least those whose disability leads to absences from work.*
>
> *'…[T]he appropriate formulation of the relevant PCP in a case of this kind was … the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That was the provision breach of which might end in warnings and ultimately dismissal.'*

185. That case illustrates the point that the concept of a 'provision, criterion or practice' is a broad one, which is not to be construed narrowly or technically: Carrera v United First Partners Research UKEAT/0266/15 (7 April 2016, unreported).

186. A duty to make reasonable adjustments does not arise unless the PCP in question places the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial (ie more than minor or trivial) and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

187. Simler P in Sheikholeslami v Edinburgh University [2018] IRLR 1090 held:

> *'The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. …'*

188. In Griffiths, the Court of Appeal analysed how someone with a disability might be put at a comparative disadvantage by a PCP of having to maintain a certain level of attendance in order not to be subject to the risk of disciplinary sanctions. It held:

> *'Once the relevant PCP was formulated in that way, it was clear that a disabled employee whose disability increased the likelihood of absence from work on ill health grounds, was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirement relating to absenteeism and therefore be disadvantaged by it. … The nature of the comparison exercise under s.20 is clear: one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able-bodied. Of course, if the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability. But if the disability leads to disability-related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by that category of disabled employees.'*

189. In the case of Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651 the House of Lords analysed how the duty to make adjustments operates in the case of someone who can no longer meet the requirements of their job description because of a disability. The House of Lords held that the comparator was a person without a disability who was not at risk of dismissal because they were able to carry out the duties of the job. As Lord Rodger pointed out (paragraphs 42–43), the substantial disadvantage is that the disabled person is at risk of dismissal (and the purpose of the reasonable adjustment is to prevent the employee from being placed at that substantial disadvantage).

190. An employer is not subject to a duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know either that the employee has a disability or that that the employee is likely to (ie could well) be placed at a substantial disadvantage by the PCP relied on.

191. The predecessor to the Equality Act 2010, the Disability Discrimination Act 1995, contained guidance as to the kind of considerations which are relevant in deciding whether it is reasonable for someone to have to take a particular step to comply with the duty to make adjustments. Although those provisions are not repeated in the Equality Act 2010, the EAT has held that the same approach applies to the 2010 Act: Carranza v General

Dynamics Information Technology Ltd [2015] IRLR 43, [2015] ICR 169. This is also apparent from Chapter 6 of the EHRC's Code of Practice, which repeats, and expands upon, the provisions of the 1995 Act. The 1995 Act provided, as does the Code of Practice, that in determining whether it is reasonable for an employer to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—

191.1. the extent to which taking the step would prevent the substantial disadvantage;

191.2. the practicability of the step;

191.3. the financial and other costs of making the adjustment and the extent of any disruption caused;

191.4. the extent of the employer's financial and other resources;

191.5. the availability to the employer of financial or other assistance to help make an adjustment; and

191.6. the type and size of the employer.

192. The duty to make adjustments necessarily requires the disabled person to be treated more favourably in recognition of their special needs: Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651.

193. The adjustment contended for need not remove entirely the disadvantage: Noor v Foreign and Commonwealth Office [2011] ICR 695, EAT. Nor must the claimant prove definitively that the adjustment will remove the disadvantage: provided there is a prospect of removing the disadvantage, the adjustment may be reasonable: Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10, [2011] EqLR 1075.

194. In Royal Bank of Scotland v Ashton [2011] ICR 632, the EAT emphasised that when addressing the issue of reasonableness of any proposed adjustment the focus has to be on the practical result of the measures that can be taken. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment. It will not extend to matters which would not assist in preserving the employment relationship.

Discrimination arising from disability

195. A person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of their disability and they cannot show either (a) that they did not know, and could not reasonably have been expected to know, that the employee had the disability; or (b) that the treatment was a proportionate means of achieving a legitimate aim: Equality Act 2010 s15.

196. 'Unfavourably' must be interpreted and applied in its normal meaning; it is not the same as 'detriment' which is used elsewhere but a claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable: Williams v

Trustees of Swansea University Pension and Assurance Society [2018] UKSC 65, [2019] IRLR 306.

197. For an employer to show that the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment.

198. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. The Tribunal must weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure or treatment and make its own assessment of whether the former outweigh the latter: Hardys & Hansons plc v Lax [2005] IRLR 726, CA. In doing so the Tribunal must keep the respondent's workplace practices and business considerations firmly at the centre of its reasoning (City of York Council v Grosset UKEAT/0015/16, upheld by the Court of Appeal [2018] EWCA Civ 1105, [2018] IRLR 746) and in appropriate contexts should accommodate a substantial degree of respect for the judgment of the decision-taker as to the respondent's reasonable needs (provided he or she has acted rationally and responsibly): O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145, [2017] IRLR 547; Birtenshaw v Oldfield [2019] IRLR 946. To be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim: Birtenshaw v Oldfield [2019] IRLR 946.

199. The Code of Practice referred to above states at paragraph 21: '5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. …'

Burden of proof

200. The burden of proof in relation to complaints under the Equality Act 2010 is dealt with in section 136, which sets out a two-stage process.

200.1. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the claimant. If the Tribunal could not reach such a conclusion on the facts as found, the claim must fail.

200.2. Where the Tribunal could conclude that the respondent has committed an unlawful act of discrimination against the claimant, it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed, that act.

Unfair dismissal

201. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed.

Dismissal

202. A claim of unfair dismissal cannot succeed unless there has been a dismissal as defined by section 95 of the Employment Rights Act 1996. It is for the claimant to prove, on the balance of probabilities (ie that it is more likely than not), that she has been dismissed within the meaning of that provision.

203. In this case, the claimant claims she was dismissed within the meaning of section 95(1)(c), which provides that termination of a contract of employment by the employee constitutes a dismissal if she was entitled to so terminate because of the employer's conduct. In colloquial terms, the claimant says she was constructively dismissed.

204. For a claimant to establish that there has been a constructive dismissal, she must prove that:

204.1. there was a breach of contract by the employer;

204.2. the breach was repudiatory ie sufficiently serious to justify the employee resigning;

204.3. she resigned in response to the breach and not for some other unconnected reason; and

204.4. she had not already affirmed the contract before electing to leave.

Repudiatory breach of contract

205. Its established law that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or serious damage the relationship of confidence and trust between employer and employee: Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666, EAT; Lewis v Motorworld Garages Ltd [1986] ICR 157, CA; Mahmud v Bank of Credit and Commerce International SA (often cited as Malik v BCCI) [1997] ICR 606, HL.

206. The test is not whether the employer's actions fell outside the range of reasonable actions open to a reasonable employer: Buckland v Bournemouth University [2010] IRLR 445, CA. However, case-law shows that the conduct does need to be repudiatory in nature in order for there to be a breach of the implied term of trust and confidence (see Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT). This was emphasised by the Court of Appeal in the case of Tullett Prebon Plc & ors v BGC Brokers & ors [2011] EWCA Civ 131; [2011] IRLR 420. There, the Court of Appeal cited the case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 and stressed that the question is whether, looking at all the circumstances objectively, from the perspective of the reasonable person in the position of the innocent party, the conduct amounts to the employer abandoning and altogether refusing to perform the contract.' The High Court in the Tullett case held (in a judgment subsequently upheld by the Court of Appeal) that 'conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough'; Tullett Prebon v BGC [2010] IRLR 648, QB.

207. When assessing whether conduct was likely to destroy or seriously damage the trust and confidence, it is immaterial that the employer did not in fact intend its conduct to have that effect: Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT. Similarly, there will be no breach of the implied term simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held (Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The question is whether, viewed objectively, the conduct is calculated or likely to destroy or seriously damage the trust and confidence. The employee's subjective response may, however, be of some evidential value in assessing the gravity of the employer's conduct (see the Tullett Prebon case above in the High Court).

208. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually would not constitute a breach of the term (United Bank Ltd v Akhtar [1989] IRLR 507). In Lewis v Motorworld Garages Ltd [1986] ICR 157, CA, Glidewell LJ said: '… the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?'

209. In Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35, CA the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series, the cumulative effect of which was to amount to the breach. Those acts need not all be of the same character but the 'last straw' must contribute something to that breach. Viewed in isolation, it need not be unreasonable or blameworthy conduct but the Court of Appeal noted in Omilaju that will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test.

Wrongful dismissal

210. At common law an employee is wrongfully dismissed if their dismissal was in breach of the contract of employment. A 'dismissal' for these purposes includes a constructive dismissal.

Conclusions

211. Rather than address the specific complaints in the order we have numbered them at the start of this judgment, we shall deal first with the discrimination complaints concerning the application of the respondent's policies, before moving on to the remaining complaints.

Complaint 5: complaint of discrimination by failing to comply with a duty to make reasonable adjustments in relation to sickness absence procedure: Equality Act 2010 s20/21

212. Ms Green complains that the respondent failed to comply with a duty to make reasonable adjustments in relation to its sickness absence procedure. She contends that the respondent should have adjusted the sickness procedure so as not to take into account periods of sickness absence brought about by her disabilities, so that she would not have been at risk of losing her job. She submits that the respondent should have taken this step before placing her on its procedure in or around March 2021. We take the reference to the

respondent putting Ms Green on its procedure in March 2021 as being a reference to the decision to hold a 'final review meeting' with Ms Green on 31 March 2021 under the 'long term sickness absence' section of the sickness absence policy.

213. In response to EJ Sweeney's direction to identify the PCP relied on as causing a substantial disadvantage to Ms Green, her then representative said the PCP was 'the respondent's sickness absence procedure' and that this PCP put Ms Green at a substantial disadvantage in comparison with persons who are not disabled because it is likely she would fail to meet the Respondent's standards of attendance and would be more likely to be dismissed.

214. The respondent accepts that its absence procedure was a PCP. We take that to mean that it is common ground between the parties that it was the respondent's practice to deal with absences from work in accordance with the provisions of the sickness absence policy that we have described in our findings of fact.

215. However, neither Ms Green, nor her representatives, identified any specific provisions of the sickness absence policy that are said to have put Ms Green at a substantial disadvantage in comparison with persons who are not disabled. Although the sickness absence policy set out four different levels of action, or 'stages', and the trigger points that determine when certain action could be taken, it does not dictate or recommend any particular outcome. It is clearly designed to ensure that managers deal with employees who are absent from work fairly and consistently. Furthermore, a number of the policy's provisions are directed at alleviating disadvantage to those whose performance may be affected by a disability. In the long-term absence section of the policy, it is made clear that dismissal may only be considered this 'where there is no realistic prospect of a return to work within a reasonable timeframe and all options for a return to work have been exhausted.' Furthermore, the policy says the manager must consider the following first: the implementation of reasonable adjustments; the effects of the long-term sickness at the workplace; the likelihood of and timescale for a return to work; the possibility of providing alternative work- redeployment; alternative working patterns; and exploring early retirement on the grounds of ill health. The final review meeting is an opportunity for those matters to be discussed.

216. The difficulty inherent in Ms Green's case, with the PCP defined as the sickness absence policy itself, is that highlighted in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, [2016] IRLR 216. As was said in that case, the conclusion that a disabled employee is not put at a comparative disadvantage by the policy itself is inevitable if, as here, the policy provides that special allowances can be made for those with a disability.

217. For those reasons, if the PCP is the general sickness absence policy itself, then we are not persuaded that it put Ms Green at a disadvantage in comparison with those without a disability.

218. Notwithstanding the way in which Ms Green's then representatives articulated Ms Green's claim before this hearing, when they identified the PCP relied on, the courts have stressed that the concept of a 'provision, criterion or practice' is a broad one, which is not to be construed narrowly or technically. It seems to us that Ms Green's case – in substance - could be said to be that the PCP is the requirement or expectation that the employee to

maintain a certain level of attendance in order not to be subject to the risk of dismissal. This is the alternative formulation identified in Griffiths. Although that is not how Ms Green formulated her case, mindful of the authorities that require us not to construe the concept of a PCP technically, we have analysed Ms Green's case on the basis that that the PCP is formulated in this alternative way.

219. If the PCP is formulated in this way, we accept (as described in Griffiths) that a disabled employee whose disability increased the likelihood of absence from work on ill health grounds, was disadvantaged in more than a minor or trivial way in comparison with someone without a disability. Both disabled and non-disabled employees would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to dismissal, but the risk of this occurring would be greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences.

220. We have accepted that Ms Green's absence from work between September 2020 and April 2021 arose at least in part because of her sleep apnoea. We conclude that this disability meant that Ms Green was more likely to be absent from work than a non-disabled colleague. In the circumstances, if the PCP is the requirement or expectation that the employee perform their duties to a satisfactory standard in order not to be subject to requirement or expectation that the employee to maintain a certain level of attendance in order not to be subject to the risk of dismissal, we accept that that put Ms Green a disadvantage that was more than minor or trivial in comparison with persons without a disability because she experienced the stress and anxiety of knowing her job was at risk.

221. Ms Green's case is that the respondent should have adjusted the sickness procedure so as not to take into account periods of absence brought about by her disabilities so that she would not be at risk of losing her job.

222. We do not accept that this is a step that it was reasonable for the respondent to have to take. We accept Mr Campion's submission that the sickness policy provides a clear framework through which attendance is managed; ensuring sick employees are treated reasonably, fairly and consistently; ensuring employees are aware of appropriate support and assistance to enable a return to work and appropriate on-going support; and ensuring the needs of the respondent are satisfied in securing attendance of employees at work. We recognise that the cause of Ms Green's ill health was still under investigation. However, by the time the respondent held the final review meeting in March 2021, Ms Green had been absent for some six months. Employers cannot be expected to tolerate employee absences indefinitely. It was appropriate for the employer at that stage to hold a final review meeting with Ms Green. It did not inevitably follow from the fact that the meeting was being held that Ms Green would be dismissed (indeed it is apparent from emails between managers that a decision had been taken not to dismiss Ms Green at that time). Avoiding holding discussions with Ms Green about her absence would not have enabled her to return to work. On the contrary, it would have severely restricted the respondent's ability to consider whether adjustments could and should be made.

223. Similarly, we consider it was appropriate for the respondent to arrange a sickness absence meeting after Ms Green's later period of sick leave that began in July 2021 and continued until her resignation in light of the fact that Ms Green had already had a recent lengthy period of absence and the fit note provided at the time of the July absence was

somewhat vague as to why Ms Green was not able to work. It was not reasonable to expect the respondent to have to effectively overlook that absence. Again, had the respondent not followed its own sickness policy by arranging to discuss Ms Green's absence with her that would have done nothing to increase the likelihood of a return to work and the risk of dismissal would have remained.

224. For those reasons we reject this complaint that the respondent failed to comply with a duty to make reasonable adjustments.

Complaint 3: complaint of discrimination arising in consequence of disability: Equality Act 2010 s15

225. It is common ground that the respondent subjected Ms Green to its sickness absence policy with the risk of dismissal during the period of her absence from work between September 2020 and April 2021 and then again when Ms Green took a period of absence from July 2021.

226. We have found that the September to April absence was something that arose in consequence of Ms Green's disability. However, we are not persuaded that the action taken by the respondents under the policy (holding review meetings, including a final review meeting in March 2021) was unfavourable to Ms Green. Similarly, even if the July to August 2021 absence arose in consequence of Ms Green's disability, we are not persuaded that applying the sickness absence policy by requiring Ms Green to attend a sickness review meeting at that time was unfavourable treatment of Ms Green. The steps taken by the respondent's managers were in line with the respondent's policy. That policy was agreed with worker representatives and struck a balance between and ensuring the needs of the respondent were satisfied in securing attendance of employees at work and providing a clear framework through which attendance are managed; ensuring sick employees are treated reasonably, fairly and consistently; ensuring employees are aware of appropriate support and assistance to enable a return to work and appropriate on-going support. The application of the policy ensured decisions about Ms Green's future employment were taken in a considered way, taking into account advice from Occupational Health, and bearing in mind the duty to make reasonable adjustments. Ms Green herself accepted on cross examination that she took no issue with the respondent following its policy during her absence between September 2020 and April 2021, including holding a final review meeting in March.

227. If we are wrong about that, and the respondent treated Ms Green unfavourably by taking steps under the sickness policy we are satisfied that taking those steps were ways of achieving the legitimate aims of securing attendance of employees at work while providing a clear framework through which attendance are managed; ensuring sick employees are treated reasonably, fairly and consistently; ensuring employees are aware of appropriate support and assistance to enable a return to work and appropriate on-going support. We have explained that above that adapting the sickness absence procedure to not take into account absences related to disability was not a step that it was reasonable for the respondent to have to take (complaint 5 above). For the same reasons we are also satisfied that it was appropriate and reasonably necessary to achieve those aims for the respondent to take steps under the sickness absence procedure, including by holding meetings with Ms

Green to discuss her absences and arranging Occupational Health assessments to inform those discussions.

228. For those reasons, this complaint fails.

Complaint 6: complaint of discrimination by failing to comply with a duty to make reasonable adjustments in relation to capability procedure: Equality Act 2010 s20/21

229. Ms Green complains that the respondent failed to comply with a duty to make reasonable adjustments in relation to its capability procedure. She contends that the respondent should have adapted the capability procedure, insofar as it applied to her, to not take into account failures of performance related to her disabilities. She submits that the respondent should have taken this step before placing her on its procedure in or around March 2021.

230. In response to EJ Sweeney's direction to identify the PCP relied on as causing a substantial disadvantage to Ms Green, her then representative said the PCP was 'the respondent's capability procedure' and that this PCP put Ms Green at a substantial disadvantage in comparison with persons who are not disabled she was likely to be at risk of dismissal because she was not able to fulfil her full range of duties, she needed periods of rest, she was less mobile, she had concentration issues and she kept falling asleep.

231. The respondent accepts, that the respondent's capability performance procedure was a 'provision, criterion or practice' of the respondent's. We take that to mean that it is common ground between the parties that it was the respondent's practice to deal with concerns about an employee's performance and/or their capability to perform their job in accordance with the provisions of the capability procedure that we have described in our findings of fact.

232. However, neither Ms Green, nor her representatives, identified any specific provisions of the capability policy that are said to have put Ms Green at a substantial disadvantage in comparison with persons who are not disabled. Although the capability policy provides 'guidelines' for managing performance, the capability policy itself does not set out performance standards and nor does it dictate or recommend any particular outcome. Indeed, it is clearly designed to ensure that managers deal with employees fairly and consistently. There are, we accept, certain provisions of the policy that, when viewed in isolation, could be considered disadvantageous to employees who are underperforming. Specifically, the policy says 'managers should assess and discuss employees' performance on a regular basis during employment' and, in relation to the informal, stage 1, procedure: 'It is important that action should be taken promptly as soon as it is noticed or reported that the employee is not performing satisfactorily'; under the stage 1 procedure, an employee's performance is monitored more closely that would be the case for those not undergoing the procedure and, if there is no discernible improvement, the policy says the formal (ie Stage 2) procedure should be used, which involves further close monitoring of the employee with an expectation of improvement and a warning that a failure to improve may result in dismissal. However, the policy also recognises that failing to address performance concerns at an early stage can exacerbate problems. In other words, failing to address performance concerns promptly can disadvantage employees (a point which Ms Green made herself to Mrs Havelock during her employment, when she asked Mrs Havelock for further information about errors she had made so that she could avoid making the same

mistakes in the future). Furthermore, a number of the policy's provisions are directed at alleviating disadvantage to those whose performance may be affected by a disability. The policy specifically directs managers to 'try and identify the root cause of the problem and support the employee in improving their performance' and to consider whether a disability underlies the poor performance, and 'make reasonable adjustments to enable their performance to be supported in line with the Equalities Act 2010.'

233. For those reasons, if the PCP is the general capability policy itself, then we are not persuaded that it put Ms Green at a disadvantage in comparison with those without a disability.

234. Notwithstanding the way in which Ms Green's then representatives articulated Ms Green's claim before this hearing, when they identified the PCP relied on, the courts have stressed that the concept of a 'provision, criterion or practice' is a broad one, which is not to be construed narrowly or technically. It seems to us that Ms Green's case – in substance - could be said to be that the PCP is the requirement or expectation that the employee perform their duties to a satisfactory standard in order not to be subject to action, or the risk of action, under the capability policy that might result, ultimately, in dismissal. Alternatively, the PCP, simply put, could be formulated as it was in Archibald v Fife Council ie a requirement to carry out the duties of the job. Although that is not how Ms Green formulated her case, mindful of the authorities that require us not to construe the concept of a PCP technically, we have analysed Ms Green's case on the basis that that the PCP is formulated in this alternative way.

235. If the PCP is formulated in the way we have suggested we can see that a disabled employee whose disability increases the likelihood of underperformance would be disadvantaged in more than a minor or trivial way. Both disabled and non-disabled employees would, to a greater or lesser extent, suffer stress and anxiety if they were incapable of performing their job and at risk of dismissal as a result, but the risk of this occurring would be greater for those disabled workers whose disability adversely affects their ability to carry out their role to expected standards and who are, therefore, unable to improve. Those in this category would find it more difficult to comply with the requirement or expectation to perform their duties to a satisfactory standard and therefore be disadvantaged by that requirement or expectation.

236. At this hearing Mr Campion accepted that Ms Green had problems with drowsiness and sleepiness and had on occasion fallen asleep or nodded off at work; Ms Green's performance had deteriorated; and Mrs Havelock perceived Ms Green's performance to be poor. He also accepted that those things arose in consequence of Ms Green's disability and it is clear that they led to the respondent taking action under its capability policy. If the PCP is the requirement or expectation that the employee perform their duties to a satisfactory standard in order not to be subject to action, or the risk of action, under the capability policy that might result, ultimately, in dismissal we accept that Ms Green was more likely to be at risk of dismissal than a non-disabled colleague. That put Ms Green a disadvantage that was more than minor or trivial in comparison with persons without a disability because she experienced the stress and anxiety of knowing her job was at risk.

237. Ms Green's case is that the respondent should have adapted the capability procedure, insofar as it applied to her, to not take into account failures of performance

related to her disabilities. She says the respondent should have taken this step before placing her on its procedure in or around March 2021 or upon receipt of subsequent reports from its occupational health department. Her case is that the failure to do that was a failure to comply with a duty to make reasonable adjustments.

238. We do not accept that this is a step that it was reasonable for the respondent to have to take. The respondent had a duty to provide an effective service to service users. To do that, the respondent needed to ensure employees performed satisfactorily in their posts. A failure to do the job to the required standard could have extremely serious consequences for service users. Making sure all staff were performing satisfactorily was also necessary to ensure other team members were not overburdened. Ms Green was not performing satisfactorily: she admits that her performance had deteriorated. At that time, whilst the medical evidence indicated that there may be an underlying (treatable) medical cause for Ms Green falling asleep, there was no firm diagnosis. Furthermore, the performance issues identified by Ms Green's managers were not limited to her falling asleep at work. They had concerns about errors in Ms Green's work and periods of apparent inactivity. Without monitoring and discussion with Ms Green, the respondent's managers cannot have known which of those matters might have been caused by a (possibly treatable) disability and which might not. In addition, the occupational health advisers had identified steps that could be taken by both the respondent (allowing breaks for example) and Ms Green (exercise and fresh air) that might reduce drowsiness. Without monitoring Ms Green's performance and discussing such matters with her it is difficult to see how the respondent could gauge whether those steps were having any effect, or indeed whether Ms Green was doing what she could to help herself.

239. In those circumstances, it was entirely appropriate for the respondent to monitor Ms Green's performance, to discuss with her the shortfall between what she was achieving and what was expected, to set objectives and keep her performance under review, and to warn Ms Green that her job was at risk. Furthermore, it was entirely proper for the respondent to do that, as it did, in the manner described in the capability policy, by engaging the Stage 1 (informal) process and then moving on to the formal Stage 2 process. As noted above, the policy and the procedure outlined in it was agreed with representatives of employees. It ensured employees in Ms Green's position were treated fairly and consistently. It required the respondent to try to establish the root cause of the problem, to ensure that Ms Green knew what the shortcomings were, to support her to improve and give her an opportunity to do so, and to consider and discuss any adjustments that might be appropriate. Those were important safeguards for Ms Green. Had the respondent not followed its own capability policy that would have done nothing to improve Ms Green's performance and the risk of dismissal would have remained.

240. For those reasons we reject this complaint that the respondent failed to comply with a duty to make reasonable adjustments.

Complaint 2: complaint of discrimination arising in consequence of disability: Equality Act 2010 s15

241. It is common ground that the respondent (a) subjected Ms Green to its capability management procedure with the risk of dismissal; and (b) put Ms Green on an action plan; and that it did so because of things that arose in consequence of a disability of Ms Green's

ie because she had problems with drowsiness and sleepiness and had on occasion fallen asleep or nodded off at work; because her performance had deteriorated; and because Mrs Havelock perceived Ms Green's performance to be poor.

242. A potential outcome of following the capability policy is that an employee will be dismissed. That notwithstanding, we are not persuaded that the action taken by the respondents under the policy (monitoring and reviewing Ms Green's performance, informally under stage 1 and then formally under stage 2) was unfavourable to Ms Green. The steps taken by the respondent's managers were in line with the respondent's policy. That policy, which was agreed with worker representatives, is designed to ensure that managers deal with employees fairly and consistently when (as here) there performance is giving cause for concern. The policy specifically directs managers to 'try and identify the root cause of the problem and support the employee in improving their performance' and to consider whether a disability underlies the poor performance, and 'make reasonable adjustments to enable their performance to be supported in line with the Equalities Act 2010.' The stage 1 and stage 2 processes enabled those investigations and discussions to take place. The policy also recognises that failing to address performance concerns at an early stage can disadvantage employees and exacerbate problems. Furthermore, by taking action under the policy Ms Green benefited from having a clear understanding of what was expected of her and what she needed to do to improve.

243. If we are wrong about that, and the respondent treated Ms Green unfavourably by taking steps under the capability procedure, including by placing her on an action plan, we are satisfied that taking those steps were ways of achieving the legitimate aims of (a) improving the health, wellbeing, attendance and performance of the respondent's staff and (b) providing a safe and effective service to service users between the ages of 0-19, including by ensuring employees perform satisfactorily in their posts.

244. We have explained that above that adapting the capability procedure to not take into account failures of performance related to Ms Green's disabilities was not a step that it was reasonable for the respondent to have to take (complaint 6 above). For the same reasons we are also satisfied that it was appropriate and reasonably necessary for the respondent to take steps under the capability procedure, including by placing Ms Green on an action plan, in order to achieve the aims identified above. The potential consequences of Ms Green's underperformance meant the respondent's need to take action to discuss and address those concerns far outweighed any disadvantage to Ms Green (such as stress and anxiety) of having those matters drawn to her attention in the appropriate manner set out in the respondent's policy and agreed with employee representatives.

245. For these reasons we reject this complaint.

Complaint 4: Ms Green alleges that the respondent failed to comply with a duty to make reasonable adjustments in relation to its disciplinary procedure.

246. Ms Green complains that the respondent failed to comply with a duty to make reasonable adjustments in relation to its disciplinary procedure.

247. In response to EJ Sweeney's direction to identify the PCP relied on as causing a substantial disadvantage to Ms Green, her then representative said the PCP was 'the respondent's disciplinary procedure (particularly insofar as it relates to the reprimanding or

censuring of staff' and that this PCP put Ms Green at a substantial disadvantage in comparison with persons who are not disabled because 'if someone fell asleep at work or lost concentration and made mistakes, they might be liable to the employer's disciplinary procedure and might be reprimanded or ultimately given verbal or written warnings or be dismissed.'

248. The respondent accepts, that the respondent's disciplinary procedure was a 'provision, criterion or practice' of the respondent's. We take that to mean that it is common ground between the parties that it was the respondent's practice to deal with concerns about an employee's conduct in accordance with the provisions of the written disciplinary policy that we have described in our findings of fact.

249. However, neither Ms Green, nor her representatives, identified any specific provisions of that disciplinary procedure that are said to have put Ms Green at a substantial disadvantage in comparison with persons who are not disabled. The policy document itself is relatively short. It does not identify the kinds of behaviour that could lead to a disciplinary investigation or disciplinary action. Nor does it provide any guidance as to the sort of behaviour that might warrant action being taken under the policy. It simply identifies a process to be followed where managers consider disciplinary action may be appropriate and sets out what the responsibilities are of individuals who may be involved in the process.

250. We are not persuaded that there is anything in the disciplinary procedure that put Ms Green at a substantial disadvantage in comparison with persons who are not disabled. That conclusion is supported by the fact that, although Ms Green's case was that the procedure should have been adjusted, she has not at any stage said what specific adjustments should have been made to the procedure. It seems to us that that is because the procedure itself did not disadvantage her.

251. It follows that this complaint is not made out.

Complaint 1: complaints of discrimination arising in consequence of disability: Equality Act 2010 s15

252. Ms Green alleges that from August 2020 Mrs Havelock reprimanded and criticised her (as described in paras 25, 29, 31, 36, 39, 41, 42, 44 of the grounds of claim) and that she did so for one or more of the following reasons: because she had problems with drowsiness and sleepiness and had on occasion fallen asleep or nodded off at work; because her performance had deteriorated; and/or because Mrs Havelock perceived Ms Green's performance to be poor.

253. We have found as a fact that Mrs Havelock did not treat Ms Green unfavourably by reprimanding her or telling her off or criticising her for falling asleep. Nor did she criticise Ms Green for falling asleep, in the sense of suggesting Ms Green was at fault for falling asleep. And although Mrs Havelock discussed Ms Green falling asleep, that was not unfavourable treatment of Ms Green.

254. Mrs Havelock did draw to Ms Green's attention shortcomings in her performance in the period after she returned to work in April 2021 and before her sickness absence from July 2021. She did that because Ms Green's performance had deteriorated, she was making mistakes and Mrs Havelock had genuine concerns about Ms Green's productivity.

Mrs Havelock acted in accordance with the respondent's capability procedure. Although highlighting Ms Green's mistakes and shortcomings in performance could be construed as criticism, we are not persuaded that it was unfavourable to Ms Green for Mrs Havelock to draw those matters to Ms Green's attention. As the respondent's capability policy says, assessing and discussing employees' performance and drawing attention to errors is a normal feature of the day-to-day management of employees. Furthermore, again as the capability policy says, failing to address performance concerns may cause a problem to get worse. Ms Green herself recognised this when she asked Mrs Havelock for further information about mistakes she had made. Discussing performance issues with Mrs Green also gave managers the opportunity to try and identify the root cause of the problem and support Ms Green in improving her performance.

255. As it was not unfavourable to raise these matters with Ms Green, the complaint under section 15 must fail.

256. Even if it could be considered unfavourable to raise these issues, for reasons already explained we are satisfied that doing so was a proportionate means of achieving the legitimate aims of improving the health, wellbeing, attendance and performance of the respondent's staff and providing a safe and effective service to service users between the ages of 0-19, including by ensuring employees perform satisfactorily in their posts.

257. As for the allegation at paragraphs 42 and 44 of the grounds of claim, we have found that Mrs Havelock did not reprimand or criticise Ms Green in the manner alleged. Mrs Havelock did, however, make it clear that she considered that Ms Green leaving work early without permission had been misconduct. In that regard she did impliedly criticise Ms Green's behaviour. The reason she did so was that Ms Green had in fact left work, without giving any reason, when Mrs Havelock had told her she did not have permission to do so. That was not something that arose in consequence of Ms Green's disability.

258. We conclude for those reasons that this complaint fails.

Complaint 7: unfair dismissal

259. Ms Green terminated her employment on 18 August 2021. She contends that she was constructively dismissed.

260. Ms Green alleges that the respondent did a number of things between August 2020 and August 2021 that amounted to a breach of the implied term of trust and confidence. We have outlined those allegations in the opening section of this judgment.

261. One of the allegations is that the respondent breached the implied term of trust and confidence by discriminating against Ms Green. We have rejected the complaints of discrimination. Therefore this allegation is not well founded.

262. Ms Green also complains that the respondent breached the implied term of trust and confidence by subjecting her to its sickness procedure when she was absent between September 2020 and April 2021, placing her on an action plan upon her return to work, and inviting her to a stage 2 sickness review meeting following her absence that began on 21 July 2021. We reject this allegation. For reasons already explained, the respondent had reasonable and proper cause for taking those steps. We also reject the allegation that Mrs

Havelock persistently reprimanded or criticised Ms Green for falling asleep and for other matters: this is not made out on the facts as we have found them. And insofar as Mrs Havelock highlighted performance concerns might be perceived as criticism, for reasons already explained, Mrs Havelock had reasonable and proper cause for doing so.

263. Ms Green alleges that the respondent failed to carry out any or any proper risk assessment and failing to implement risk assessments that were carried. However, we have found that the respondent did carry out risk assessments both in respect of Covid and stress. Ms Green has not proved that the recommendations made in those assessments were not implemented.

264. We have also rejected, in our findings of fact, the allegation that the respondent failed to carry out a proper assessment as to how the workplace and/or how Ms Green's terms and conditions of employment might be adapted to enable her to perform her duties properly, and failed to take into account or implement the findings of the occupational health reports that it obtained. In so far as this allegation concerns the respondent's decision not to allow Ms Green to work from home, we have found the respondent had reasonable and proper cause for that decision.

265. A further allegation made by Ms Green is that the respondent breached the implied term of trust and confidence by criticising Ms Green for driving and informing the Police and DVLA that she was driving. The respondent's managers did criticise Ms Green for driving and they did inform the police and DVLA that Ms Green was driving. The respondent's managers had reasonable and proper cause for doing those things. Ms Green was driving at a time when occupational health advisers said she should not be. As such, the respondent's managers had reasonable grounds to be concerned that she could be a risk to other road users (and, as was said in evidence, those using the Trust carpark). The fact that the DVLA withdrew Ms Green's licence demonstrates that the respondent's managers' concerns were justified. The fact that Ms Green was not driving as part of her work responsibilities does not render the respondent's actions unreasonable. They acted in a way that was perfectly proper.

266. Ms Green further alleges that, on 21 July 2021, Mrs Havelock confronted and undermined Ms Green. We have found that that did not happen. Nor is the allegation made out that, later that day, Mrs Havelock called Ms Green to say that if she returned the following day she would have a 'find and fix meeting' and that she would be taking action against Ms Green as a result of her attitude. We have found as a fact that that is not what happened.

267. One of the allegations is that the respondent breached the implied term of trust and confidence by failing to implement proposals set out in the Access to Work report obtained in March 2021. We have found that the respondent did not provide Ms Green with the equipment referred to in the report. We have found that the reason for this is that it was overlooked. There was no reasonable and proper cause for that. However, we find that it was not something that was calculated or likely to destroy or seriously damage the relationship of trust and confidence with Ms Green, whether when looked at in isolation or together with the matter referred to in the following paragraph. Ms Green knew that Mrs Havelock had made it clear to Ms Green when they first discussed the recommendations that there would be no difficulty providing the equipment. She had not been told otherwise.

The fact that Ms Green did not chase up the equipment, agreed with Mrs Havelock in July that it had been 'done with' and made no mention of this issue in her resignation letter suggests to us that the absence of this equipment was not a matter of much concern to Ms Green. Indeed, in cross examination she accepted that she did not particularly want any of the equipment recommended in the report other than an ergonomic keyboard.

268. Finally, Ms Green alleges that the respondent threatened her with disciplinary proceedings for falling asleep at work.

269. We have found that Mrs Massiter said to Ms Green on 12 May that an alternative to placing the claimant on enforced sick leave was to 'take [her] down a disciplinary and a capability route'. She added that they did not want to do that 'because we know that there are reasons.' The context of that comment was a discussion about mistakes the claimant had been making in her work. In our judgement, that was not, on a reasonable construction, a threat of disciplinary proceedings for falling asleep. Nor was Mrs Massiter's subsequent comment in an email when she said 'Depending upon the outcome of the Occupational Health report will determine whether the concerns with your work will be addressed as part of the disciplinary process.' The email, again, referred to concerns about the claimant's work. It was made against a backdrop of concerns not just about errors that the claimant had made but also about her productivity. As Mrs Massiter explained in evidence, and as Mrs Havelock had discussed with the claimant in meetings, quite apart from the concerns managers had about Ms Green falling asleep, there were concerns that the claimant was not as productive as she should be; for example it was thought that – when she was awake- she was not working at times when they believed she should be, or was not doing as much as she should be (such as answering phonecalls). It was not inevitable that these issues were related in any way to the claimant's sleep problems. As such, the respondent's managers considered that this might be a 'conduct' issue rather than a capability issue: in terms of the capability policy, they thought that the claimant's unsatisfactory productivity (as opposed to her falling asleep and possible cognitive impairment and errors resulting from that) might involve a measure of personal choice. The respondent's capability policy explains that such matters would be dealt with under the Disciplinary Policy.

270. In an email on 14 May Mrs Massiter did, however, say to Ms Green: 'If you are presenting as fit for work then falling asleep at work as well as any other work issues will be treated as conduct and not health related. We cannot sustain the risk that falling asleep can cause in the workplace…'. That was, we find, an implicit threat that disciplinary action would be taken against the claimant if she fell asleep at work. As events unfolded, the respondent did not in fact carry out that threat. Disciplinary action was not taken against Ms Green. Rather, the respondent dealt with matters under its capability policy, which we have found was a reasonable and proper approach to take. Nevertheless, the threat was made on 14 May. In our judgement, there was no reasonable and proper cause for Mrs Massiter to say, at that stage, that falling asleep would be treated as conduct rather than health related. Mrs Massiter knew the possible causes of the claimant's fatigue was being investigated and that a medical cause was suspected. She knew it was too soon to rule out the possibility of a medical cause at that stage.

271. We are not persuaded, however, that this email from Mrs Massiter was calculated or likely to destroy or seriously damage the relationship of trust and confidence with Ms Green, whether the email is looked at in isolation or together with the failure to provide the

equipment recommended in the Access to Work report. Mrs Massiter was not suggesting that the respondent would ignore its policies. She was implying that the matter would be dealt with under the respondent's disciplinary policy. She wasn't implying that the outcome of that action was that some sort of disciplinary sanction would inevitably be imposed. That policy itself offered procedural safeguards to Ms Green that would have enabled her to put her case before any decision was taken. In all the circumstances, we find that although this ill-judged email by Mrs Massiter did some damage to the relationship with Ms Green, the damage did not go to the heart of the relationship, either on its own or in conjunction with the failure to provide the equipment recommended in the Access to Work report.

272. In light of the above conclusions we find that the respondent did not breach the implied term of trust and confidence. It follows that the claimant was not dismissed and her claim of unfair dismissal fails.

Complaint 8: wrongful dismissal

273. This claim fails because, for the reasons already explained, we have found that Ms Green was not constructively dismissed.

Complaint 9: discriminatory dismissal

274. This claim fails because, for the reasons already explained, we have found that Ms Green was not constructively dismissed (and nor was she discriminated against).

Employment Judge Aspden

Date: 1 November 2022