Case No. 2600556/2021

EMPLOYMENT TRIBUNALS

Claimant: Miss C Lewis

Respondent: Joy2Care Ltd

FINAL HEARING

Heard at: Nottingham (in public; partly via CVP)

On: 14 to 17 & (deliberations in private; parties not attending) 18 November 2022

Before: Employment Judge Camp **Members**: Mrs JM Bonser
Mr A Greenland

Appearances
For the claimant: Mr P Ennis, non-legal representative (claimant's partner)
For the respondent: Ms Y Barley, non-legal representative (Peninsula consultant)

RESERVED JUDGMENT

The claimant's claim fails and is dismissed.

REASONS

Introduction & claims

1. The respondent is a home care company specialising in providing care to the over-65s with dementia. The claimant was employed by the respondent as a carer from 1 February 2020 until her dismissal on 21 June 2021, ostensibly for "*some other substantial reason*", namely an irreconcilable breakdown in the employment relationship. She went through early conciliation from 19 January 2021 until 2 March 2021 and presented two claim forms, on 19 March 2021 and 1 October 2021.

2. The claims the claimant is making and the issues arising in relation to those claims were confirmed at a preliminary hearing that took place on 10 March 2022 before Employment Judge Clark and are recorded in the written record of that hearing, to which we refer. Within that written record, from paragraph 10, Judge Clark stated that the claimant was making:

   2.1 complaints of detriment under section 44(1)(d) of the Employment Rights Act 1996 ("section 44"; "ERA");

2.2 a complaint of automatically unfair dismissal under ERA section 100(1)(d) (there is no so-called 'ordinary' unfair dismissal complaint, because the claimant was employed by the respondent for less than two years);

2.3 complaints of unfavourable treatment because of something arising in consequence of disability under section 15 of the Equality Act 2010 ("section 15"; "EQA"), which mirror the ERA section 44 and section 100 complaints;

2.4 a reasonable adjustments claim under EQA sections 20 and 21;

2.5 a disability-related harassment claim under EQA section 26, which largely mirrors the ERA and section 15 complaints;

2.6 a complaint that no statement of employment particulars was provided in accordance with ERA section 1.

3. As to the issues, we adopt the list contained in the written record of the hearing before Employment Judge Clark, which should be deemed to be incorporated into these Reasons and which we shall refer to as the "list of issues".

4. At the start of the present hearing, both sides agreed that the complaints and issues were accurately set out by Employment Judge Clark. We note that he made an order to the effect that if the parties thought he had inaccurately or incompletely set out the issues, they should write within 14 days saying so; and that neither side did.

5. Both sides also agreed near the start of the hearing that at this stage we would deal with liability issues only with, potentially, the exception of one remedy issue: the so-called Polkey issue. However, we did not deal with that issue because the claim was wholly unsuccessful.

6. There were a handful of other issues set out by Employment Judge Clark that we did not deal with because it was not necessary for us to do so.

The law

7. Relevant law did not feature to any significant extent in either side's submissions and this is a case where factual as opposed to legal issues predominate.

8. Our starting point – and almost our end point – is the relevant legislation, which is reflected in the wording of the list of issues, in particular: ERA sections 44(1)(d)[1], 48(2) and 100(1)(d); EQA sections 15, 20, 26, 123 and 136.

9. In terms of case law:

9.1 as to the section 44 and unfair dismissal complaints, since we made our decision, but before these written reasons were prepared, the Court of Appeal gave judgment in Rodgers v Leeds Laser Cutting Ltd [2022] EWCA Civ 1659.

[1] This provision has since been repealed, but it was in force at the time of the events that give rise to the section 44 complaints.

The relevant law set out in it, in paragraphs 15 to 22, is what we thought it was when we deliberated;

9.2 in relation to detriment and unfavourable treatment, we referred to paragraphs 48 to 51 of Warburton v Northamptonshire Police [2022] EAT 42 and to Williams v The Trustees of Swansea University Pension & Assurance Scheme & Another [2018] UKSC 65;

9.3 as to the section 15 and reasonable adjustments complaints, it has not been necessary for us to look beyond Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265;

9.4 in relation to the harassment claim, we have noted paragraphs 7 to 16 of Richmond Pharmacology v Dhaliwal [2009] ICR 724, read in conjunction with paragraphs 86 to 90 of the judgment of Underhill LJ in Pemberton v Inwood [2018] EWCA Civ 564;

9.5 in relation to the burden of proof in the EQA, we have applied the law as set out in paragraphs 36 to 54 of the decision of the Court of Appeal in Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913.

The facts

10. The evidence before us consisted of written and oral evidence from the claimant herself; from Mr P Farrell, the part-owner and director of the respondent; from a Mrs C Mackenzie, the respondent's bookkeeper; and from Miss L Stapleton, Care Manager for the respondent. Two Mr Farrells were involved in the events with which this claim is concerned: Mr P Farrell and his son Mr G Farrell. Mr G Farrell worked in a relatively junior administrative capacity and wrote some relevant correspondence to the claimant. He was not one of the respondent's witnesses at this hearing. We will refer to Mr P Farrell as "Mr Farrell" and to Mr G Farrell as "Mr G Farrell".

11. There was a file or 'bundle' of documents running to some 729 pages. During the course of the hearing one or two further documents were produced by the parties and by the Tribunal. The documents produced by the Tribunal were potentially relevant, publicly available documents which the parties had not provided and were unable to locate: various versions of the Government guidance on shielding and protecting people who are clinically vulnerable from Covid, produced during 2020 and 2021. The only document not in the bundle that was produced by the parties during the course of the hearing and to which we are going to refer to is a photograph of the part of the first page of a letter dated 22 June 2020 from the Department of Health and Social Care ("DHSC") that was sent to the claimant. It is a 'shielding letter', telling the claimant that guidance on shielding was changing and suggests that the claimant was on the list of people who were 'shielding' due to Covid at that point in time. It had not been provided to the respondent during the claimant's employment.

12. We are going to go through the facts roughly chronologically. But before we do so, we need to say a few things about the claimant as a witness. Unfortunately, the claimant's witness evidence was not helpful and was unsatisfactory. This was not because she was dishonest; we do not think she was. It is because the majority of what was supposedly 'her' evidence seemed to us not to be hers at all.

13. The claimant was not professionally represented. She has been represented throughout by her partner, Mr Ennis. Mr Ennis has some experience of dealing with Employment Tribunal claims, having himself brought three claims and had a number of hearings in the Employment Tribunal, including a final hearing, and at least one hearing in the Employment Appeal Tribunal. Because she was not professionally represented, the Employment Judge, after administering the oath, helped the claimant to introduce herself as a witness and took her to her written statement. When the claimant was asked whether she had read her statement recently she initially said that she had. She was then interrupted by Mr Ennis who said to her that she had not and she agreed. After reminding Mr Ennis, not for the last time, that he shouldn't interrupt the claimant when she was giving evidence, the Employment Judge then put to the claimant that she had presumably read her statement at some stage and she said, "*Some of it*". At that point, we adjourned for the day, telling the claimant to read her statement carefully overnight and make a note of any errors in it, so that in the morning she could make any necessary corrections to her statement and confirm that, subject to them, it was true.

14. The following morning, the claimant said she had read her statement and that she had no corrections to make. However, during the course of her evidence the following things because clear:

    14.1 every single document in the file – every letter or email or other communication (including Tribunal documentation) – nominally from the claimant had in fact been written for her by Mr Ennis;

    14.2 the claimant did not understand parts of her statement; she did not understand the words used or what they meant;

    14.3 as the claimant and Mr Ennis themselves told us, the claimant does not have a particularly extensive vocabulary and there are some limitations to her literacy. She could not have written many of the things sent in her name;

    14.4 when questioned on points of detail, the claimant appeared to have no or almost no recollection of the relevant events;

    14.5 although, in answer to a specific question posed by Tribunal Member Mrs Bonser, the claimant suggested that she had seen all of the letters and emails that were sent on her behalf by Mr Ennis, we think she had probably not both read and understood most or almost all of what was written for her and to her;

    14.6 in summary, it appeared to us that the correspondence ostensibly between the claimant and the respondent during her employment was in reality correspondence between Mr Ennis and the respondent; and the case presented to the Tribunal as the claimant's case was in reality a case created for her by Mr Ennis in relation to most of which, although it is possible that the claimant both understood it and agreed with it, we are not satisfied she did.

15. In the circumstances we are afraid we attach no significant weight to the claimant's evidence on matters in dispute, except where it has substantial support from contemporaneous documents or other evidence.

16. Finally, we note that the claimant's evidence was (with the considerable limitations we have just described) what she said when she was giving evidence and what is in her written statement. She was the only witness who gave evidence on her behalf; Mr Ennis, for example, was not a witness at this final hearing. We mention this in particular because in his oral submissions on the claimant's behalf, in comments he made during the hearing, and in questions he asked of the respondent's witnesses and of Mr Farrell in particular, Mr Ennis put forward a number of factual propositions which were completely unsupported by the written or oral evidence of the claimant.

17. Accordingly, we shall throughout these reasons be referring to correspondence "from the claimant" and to the "claimant's" case and so on, but it should be borne in mind that when doing so, unless otherwise expressly indicated, we are referring to the case put forward by Mr Ennis on the claimant's behalf and to things written by Mr Ennis on her behalf.

18. The only point we make at this stage in relation to the respondent's witnesses is that the limited concerns we had about them were insignificant compared to those we had about the claimant as a witness.

19. More generally in relation to what happened, there are very few disputes of fact of any importance. Almost everything is documented and the parties' positions at particular times are set out in contemporaneous documents.

20. The claimant had been working for the respondent for less than 6 weeks, incorporating 29 days of work, when the Covid pandemic hit and she went off sick, from 20 March 2020 onwards. She did not return to work before her dismissal, over a year later. It is not in dispute that at all relevant times the claimant was disabled in accordance with the EQA because of asthma and type 2 diabetes. Her type 2 diabetes is not relevant to these proceedings. This case is all about the claimant shielding and wanting to shield. There is no evidence of the claimant ever needing to shield because of type 2 diabetes. In fact, our understanding (and we should say one of the three of us on this Tribunal is themselves a type 2 diabetic) is that type 2 diabetes was never a condition for which people needed to shield. It is also irrelevant because it makes no difference whatsoever to our decision or to the claimant's claim more generally whether she was a disabled person because of asthma alone or because of asthma and type 2 diabetes.

21. On 31 March 2020, the claimant's GP surgery wrote a Covid shielding letter of sorts to the claimant. Our understanding is that it was prepared using a template which had been hastily drawn up by the DHSC. We say "of sorts" because it did not use the word "shielding" or "shield" nor, unlike later letters, did it use the word "vulnerable" or the phrase "clinically extremely vulnerable". It stated that the claimant was at: "*higher risk than normal patients*" because she suffered with "*Asthma-higher dose steroid inhaler*". The letter included the following: *"Due to the current pandemic and pressure on General Practice, we are prioritising the urgent medical needs of our patients and will not be providing a medical certificate for this absence. … Should you decide on taking disciplinary action against an employee purely on the grounds of being unable to provide the sickness medical certification relating to Covid-19 pandemic we would make it very clear in any disciplinary/grievance/tribunal reports that under the circumstances we would deem your action inappropriate.*"

22. The claimant was furloughed with effect from 4 April 2020. This was confirmed in a letter from the respondent of 14 April 2020. The letter of 14 April 2020 included this: "*We have been able to furlough you in line with Public Health Guidance that you should remain at home due to the shielding advice you have received as you are at high risk. We will be accepting your letter as certification for a 12 week isolation period commencing from the 4/4/20.*"

23. Twelve weeks was a Government-mandated period. We believe it reflected how long it was at the time thought, or at least hoped, that the need for significant Covid-related restrictions would last.

24. On 10 May 2020, the Prime Minister announced that things were going to start opening up. From the beginning of June 2020 onwards restrictions began to be lifted. On 16 June 2020, the respondent's Office Manager, Mr G Farrell, sent an email to the claimant (and, as we understand it, others who had been on furlough since April 2020) with the subject line "*Coming back to work*". The email was to arrange a meeting by telephone, the claimant's meeting being scheduled for 18 June 2020, for, "*a discussion on what you will be doing, potentially what hours you will be working and when you will be starting.*"

25. The claimant responded on 17 June 2020 in an email stating: "*As per my medical submission stating I am on a higher dose steroid based inhaler and therefore clinically vulnerable. I ask that you renew my furlough from the 1st July*".

26. The claimant had a telephone conversation with Mr [P] Farrell on 18 June 2020. The outcome of that discussion, recorded in a letter from Mr Farrell of the same date, was the extension of furlough until 31 July 2020.

27. There are two factual disputes about what was discussed on 18 June 2020. The first is over whether the claimant mentioned her diabetes at that point. This is not relevant, for reasons we have already explained, but we are not satisfied that it was mentioned by the claimant. We understand from Mr Ennis (although this was not actually part of the claimant's own evidence) that the claimant was diagnosed with diabetes a week or so before this meeting. In those circumstances, if the claimant deemed it important, she would surely have mentioned it in her email of 17 June 2020 and she did not.

28. The other factual dispute relates to whether the claimant demanded (to quote from her witness statement), "*prior to any proposed return the undertaking of a personal risk assessment*". We do not accept that the claimant asked for this either. It, too, was not mentioned in her email of 17 June 2020, nor in Mr Farrell's letter of the 18th. In addition, we do not see why she would have mentioned it. Her sole concern at that point was to have furlough extended. The suggestion that she had at this point asked for a personal risk assessment was not mentioned until very much later in the year. It would have been premature on 18 June 2020 to be talking about individual risk assessments. Conditions in relation to the pandemic were changing rapidly at that point in time and no one, including the claimant, had any idea when, if at all, she might come back to work.

29. This is a convenient point to highlight what the claimant's overarching case is. She confirmed this was indeed her own case, and not merely something that had been

written on her behalf by Mr Ennis, in answer to questions asked by the Employment Judge at the end of her evidence. It is this:

29.1 from 20 March 2020 onwards, the claimant should have been placed on furlough and should have remained on furlough for an indefinite period, certainly continuing up to and beyond the date of dismissal;

29.2 because she had, at some stage at least, been given the status of "clinically extremely vulnerable" it was never, and would never be, safe for her to return to work for an indefinite period lasting at least until termination of her employment, whatever risk assessments were done and whatever precautions were taken. This was because her role involved providing personal care and that role, in turn, required her to be in close physical contact with the respondent's service users;

29.3 the GP's letter of 31 March 2020 was sufficient by itself to support her being put on furlough, as above, for an indefinite period – up to and beyond the end of her employment in June 2021 – and to prove that she was unable, also as above, to return to work for an indefinite period.

30. On 22 June 2020, the Government announced that it was planning on relaxing shielding guidance with effect from 6 July 2020, with a further relaxation planned from 1 August 2020. Initial guidance was issued in June 2020, with further guidance being issued around 14 July 2020.

31. Also on 22 June 2020, the claimant was sent a letter by the DHSC informing her of these changes as somebody who had previously been shielding. This is the document referred to earlier, of which we only have a photograph of the first page. It included a statement that, "*Over the course of the last three months, you have been identified as someone who is clinically extremely vulnerable …*". The first time this document was provided to the respondent was part of the way through this final hearing. Why it was never provided to the respondent during the claimant's employment, nor disclosed as part of disclosure, remains unexplained.

32. On 21 July 2020, Mr Farrell wanted to speak to the claimant by telephone. Having failed to do so, he wrote her a letter, which was sent that day by email. The letter included the following, "*We have been informed that shielding is being paused, as from 1/8/20*". We understand that shielding was indeed due to be paused from that date and was in fact paused from that date. The letter continued: "*Therefore, we will be stopping your furlough payments, with the last date being 31/7/20. It is our expectation that you will be returning to work here at Joy2care on the 1/8/2020. Can you please contact us ahead of this date so we can arrange to meet to discuss any anxieties you may have about returning to the workplace*".

33. The claimant never replied to that letter. In fact, the claimant did not write to the respondent between 17 June 2020 and 7 October 2020, except to provide fit notes (as we shall explain shortly). There was, however, a telephone call from the claimant to Mr G Farrell on 28 July 2020. This telephone call is not mentioned in her statement and she gave no oral evidence about it. However, it is common ground that such a telephone call took place and Mr Ennis cross-examined Mr [P] Farrell about it. The

only version of the telephone call we have is the hearsay version of it we got from Mr Farrell's evidence. In the absence of other evidence on point, we accept what he told us. According to Mr Farrell, all that happened was that the claimant said she would not be back at work on 1 August 2020 because her mother had died, and she would be going on sick leave because of bereavement.

34. On or about 4 August 2020, the claimant submitted to the respondent a fit note of that date indicating she would not be fit for work for a period of 3 weeks, to 21 August 2020, because of "*bereavement*". A relevant factual dispute that arises is: was that indeed the reason for her absence at that point? Her case, as put forward by Mr Ennis on her behalf, was to the effect that:

    34.1 bereavement was no part of her reasons for being off work at that point in time;

    34.2 she was not in fact unfit for work as such;

    34.3 the real reason she was off work was that she was shielding because of Covid;

    34.4 on 28 July 2020 she had told Mr G Farrell that this was why she would be off work;

    34.5 her GP had – for reasons she was unable to explain – agreed to put something which they knew to be untrue in the fit note;

    34.6 possibly (this part of the claimant's case was particularly unclear), the reason the fit note did not mention shielding, or anything like that, was because at that point in time people who were off work because they were shielding were not entitled to statutory sick pay.

35. We do not accept any of that. Putting to one side the lack of evidence from the claimant herself on this point, we have already made findings about what was discussed with Mr G Farrell in the telephone conversation on 28 July 2020. More importantly, the idea that a GP would falsify a fit note, potentially with a view to facilitating payment of statutory sick pay to someone who was or might not be entitled to it, is fanciful, to say the least. We assume it is not the claimant's case – and it does not seem to be – that she lied to her GP, falsely alleging she was unable to work because of bereavement, in order to facilitate a potentially fraudulent claim for SSP. We see no good reason in the evidence to make any decision other than: the reason the claimant was off work at this point in time was that she was unfit for work because of bereavement, as indicated by her GP in the fit note.

36. A further factual dispute that arises in relation to events of late July and early August 2020 is as to the reasons for the respondent stopping making further furlough payments to the claimant.

37. The claimant's own case, as advanced during this hearing, is not in accordance with the issues that are before us. Her case on paper, as set out in the list of issues, is that the reason her furlough pay was stopped was that she was shielding and had refused to return to her workplace because there were relevant "*circumstances of danger*", because of Covid, in accordance with section 44. However, what was put forward at this hearing as the reason was that in late July/early August 2020 there

was a proposal to reduce the amount of furlough pay that might be paid by the Government from 80 percent of wages to 60 percent, potentially meaning that the respondent would have to make or increase its contribution towards what those on furlough, like the claimant, were being paid. This was also suggested by the claimant as being the reason in correspondence during her employment.

38. Of course, if that was the reason for the respondent stopping furlough pay, the claimant's complaints about it under section 44 and section 15 would necessarily fail. However, that was not the reason for respondent stopping furlough pay; there is no evidence of substance to support the allegation that that was the reason.

39. In addition: the Government proposal to reduce furlough pay, perhaps from 80 to 60 percent, was reported in the news around the start of May 2020 as potentially taking effect from the beginning of July 2020 onwards; on 12 May 2020, the Government announced that the furlough / job retention scheme was being extended, still with 80 percent of pay, to 31 October 2020; in fact, there was a requirement for employers using the furlough scheme to contribute to wages before then, but not until September 2020. The only relevant change that came in from the beginning of August 2020 was a requirement for employers to pay employers' national insurance and pension contributions, which would have been very small amounts in the claimant's case. The introduction of that financially insignificant requirement does not readily explain why the respondent would stop furlough pay at that point.

40. We have already found that the reason the claimant was off work at the time when her furlough pay was stopped was bereavement. In other words, the reason was not that she was refusing to return to work in circumstances of danger which she "*reasonably believed to be serious and imminent and which* [she] *could not reasonably have been expected to avert*" in accordance with section 44, nor was it that she was shielding due to her disability. Any section 44 or section 15 complaint about this relating to the period when she was off sick with bereavement – August to 11 November 2020 – is therefore a non-starter.

41. Even if either or both of these was the reason the claimant was off work at the start of August 2020, it would not be the reason furlough pay was stopped. The claimant had been off work and receiving furlough pay from April 2020. She did not suddenly go off work because of "*circumstances of danger*" at the end of July 2020 or because she suddenly started shielding then; her case is that she was off work because of them and because of her need to shield the whole time. There was no change connected with the claimant being off work, or with any circumstances of danger, or with her disability, that would explain her being put on paid furlough by the respondent up to the end of July 2020 and taken off paid furlough from the end of July 2020 onwards. Logically, the explanation for why the respondent did this must lie elsewhere.

42. The only realistic candidate we can find in the evidence for why the respondent decided to stop the claimant's furlough pay at the end of July 2020 is the reason the respondent has put forward. This is that it received advice from its HR advisers that because it had work for the claimant to do it was not allowed to take advantage of the furlough scheme in relation to her any more.

43. It is entirely plausible that such advice might have been given at that time. We know from our own knowledge that at or around July/August 2020 things were confused and that that kind of advice was being given to employers by some advisers.

44. Whether the advice was at the time right or wrong is not the point. The point is that the reason furlough pay was stopped was that that advice was given and not any reason falling within section 44 or section 15.

45. In paragraphs 8 and 9 of her witness statement, the claimant states: *"the respondent went on beyond the 1 August 2020 to demand additional evidence for my continued absence … in order to pacify Mr Farrell I was able to provide a fit note following my mother's recent passing …*". However, even on the claimant's own evidence, there was no contact between her and Mr [P] Farrell between 21 July 2020 and her providing her fit note on 4 August 2020. Mr Farrell did not demand anything and the reason the fit note was provided was plainly not the reason given in her witness statement.

46. The claimant seems to be suggesting that the emails that were sent to her by Mr G Farrell of 12 and 27 August 2020 were not appropriate. In those emails, he reminded her when her fit notes ran out, asked her whether she would be obtaining a further fit note or would instead be returning to work, and reminded her when any new fit note had to be submitted to the respondent. We can see nothing wrong with the wording or substance of the emails. Mr G Farrell, in his capacity as Office Manager, was merely going through a standard practice with workers who were off sick, with a view to ensuring that he had the number of staff that he needed in order to fulfil the respondent's obligations to its clients.

47. We note that the respondent had received no information from the claimant other than the contents of the telephone call of 28 July 2020 and of the fit notes since her email of 17 June 2020 and meeting with Mr Farrell on 18 June 2020. Neither Mr G Farrell, nor his father Mr Farrell, nor the respondent more generally, could reasonably have known or even suspected that the claimant was off work in August 2020 for any reason other than the reasons given in her fit notes, nor that (assuming this was how the claimant did indeed feel) she felt unable to return to work at all because of concerns about her health and safety at work related to Covid.

48. The claimant provided further fit notes at two-to-three weekly intervals covering the period up to 28 September 2020. All of them cited "*bereavement*" as the reason for her unfitness for work.

49. On 1 September 2020, possibly in response to Mr G Farrell's email of 27 August 2020, the claimant telephoned the respondent. The only evidence we have as to what was said on that occasion is that contained in Mr [P] Farrell's witness evidence (see paragraph 22 of his witness statement), which is that the claimant: "*contacted us to inform us that she would be going to see her GP the following day. However, she did not mention anything of Covid 19 or furlough*". We have been given no good reason to doubt the accuracy of that evidence.

50. On or about 1 October 2020, Mr G Farrell wrote to the claimant what appears to us to be an entirely conventional and unobjectionable letter inviting the claimant to an

informal welfare meeting on 8 October 2020 at 11 am, "*either at our premises, your home address or elsewhere if you prefer* …". The letter continued: "*The purpose of this meeting is to establish the nature and extent of your illness, how long it's likely to be before you are well enough to return to work and what arrangements we might need to make for your safety*".

51. The claimant's reply, by an email of 7 October 2020 sent after normal office hours, was the first time the claimant had told the respondent that she was, "*in the extremely clinically vulnerable category*" and that that, rather than bereavement, was the reason for her "*continued absence*". In the email, the claimant also suggested that she was unable to attend the meeting, "*either at my place of work or at home*", that she allegedly remained "*in serious and imminent danger of exposure* [to Covid infection] *should I resume my previous front line role*", and that, "*Unless an alternative can be undertaken I see no other alternative than to continue with my current absence*".

52. In response to that email, Mr G Farrell, on 8 October 2020, wrote to the claimant inviting her to a telephone meeting – seemingly the same informal welfare meeting that had been proposed for 8 October 2020 – on 14 October 2020. The respondent's case is that the telephone meeting, with Mr [P] Farrell, took place as planned on 14 October 2020. The claimant's case is that there was no such meeting. We think the claimant is wrong about that. At 10:37 am on 14 October 2020, Mr Farrell sent an email to the claimant which included the following: "*It was good to talk to you and I hope that we have been able to offer some reassurance as to your position with Joy2care and your role.*" That would be a very peculiar thing for Mr Farrell to have written if he had not just spoken to the claimant. Given Mr Ennis's tendency to react to correspondence he did not like by writing back with objections and complaints, it would be even more peculiar for Mr Ennis not to have replied within days highlighting the fact that Mr Farrell had just referred to a non-existent telephone conversation if there had indeed not been one.

53. Returning to 7 October 2020 for a moment, on that date the claimant had emailed Mr G Farrell stating: "*I am in the shielding group subsequently tomorrow you will receive a government sick certificate specific to shielders*". Presumably, what was being referred to was an NHS shielding letter. The one and only shielding letter, or part of one, that the claimant provided to the respondent during her employment was that dated 29 September 2020. However, she did not provide that to the respondent as promised on 8 October 2020. She did not in fact provide it until 12 November 2020.

54. The only account of the meeting on 14 October 2020 in the evidence is that given by the respondent in paragraph 32 of Mr Farrell's statement, to which we refer. Once again, we have no good reason to reject Mr Farrell's account, which is consistent with the contents of his email of 14 October 2020 referred to above. Mr Farrell states that the claimant: "*was requested to give our conversation some thought and … she would contact me by telephone so we could develop a risk assessment together. Unfortunately, she did not respond to this request and did not make the return telephone call.*"

55. Because of the claimant's failure to follow up on the conversation of 14 October 2020, Mr G Farrell wrote to her on 26 October 2020 inviting her to attend a medical

capability meeting on 4 November 2020. The invitation letter is evidently a standard letter produced by the respondent's HR/legal advisers. It included the following: "*I have to inform you that if the meeting indicates that there is little likelihood of a return to work within a reasonable timescale and there are no reasonable adjustments that can be made or alternative employment available, then the outcome may be notice of the termination of your employment on the grounds of ill health.*"

56. That is the kind of sentence that almost invariably appears in letters of this kind, albeit we can see how (if she read this letter of 26 October 2020 at the time) it might have come as a shock to the claimant. It probably was premature to mention dismissal. However, the appropriateness and reasonableness of sending that letter with that wording at that stage is not relevant to the claimant's claim, because the claimant was not dismissed for medical incapability; and, anyway, there is no so-called ordinary unfair dismissal claim before the Tribunal.

57. As part of her claim, the claimant alleges that she went off work with stress because the respondent threatened her with dismissal for incapability in that letter. However, the claimant's first GP fit note signing her off with stress (instead of bereavement) ran from 12 October 2020 onwards. Prior to the 12 October 2020, the only relevant thing that had been sent by the respondent to the claimant was the unobjectionable invitations to welfare meetings of 1 and 8 October 2020, mentioned earlier.

58. The response sent in the claimant's name to the letter of 26 October 2020 was an email of 2 November 2020. In that email, amongst other things:

58.1 for, as best we can tell the first time, the claimant complained about being taken off furlough;

58.2 there is a threat of a Tribunal claim for discrimination and an implicit reference to a potential harassment complaint;

58.3 the claimant stated that "*as previously outlined in that letter dated the 31 March 2020 from my GP … I am someone who is at increased risk of severe illness should I contract Covid 19*", and that, "*My role is clearly not one in which I am able to work from home, nor is it one in which I can reasonably be protected from potential exposure. I am not sure how we can move forward in terms of assigning a suitable role, whilst mitigating any risk.*"

59. A pattern of correspondence developed that ran through to the end of the claimant's employment. It consisted of: the respondent writing, in a broadly reasonable and measured fashion, the kind of letter or email that we would expect an employer to be writing to an employee in the circumstances; the claimant responding inappropriately and rather wildly, threatening legal action and making serious allegations against the respondent and Mr Farrell. As time progressed, what was written in the claimant's name became increasingly rude and unreasonable in tone and content.

60. Mr Farrell's response – an email of 4 November 2020 – to the claimant's email of 2 November 2020 included a slightly clumsily worded paragraph in which Mr Farrell explained that the reason why the claimant was removed from the furlough scheme on 31 July 2020 was that the respondent had work available and "*therefore, any further claims under the Job Retention Scheme would have been fraudulent.*". Mr

Farrell also confirmed in his email that, further to requests the claimant had made for a copy of relevant risk assessments, "*any individual risk assessment would be conducted with you and would be tailored to your particular circumstances in order to facilitate a return to work.*" He also offered a further opportunity to meet in person or by telephone on 6 November 2020.

61. The claimant's position at this time is set out in an email of 5 November 2020:

61.1 she should be put back on paid furlough and furlough pay should be backdated to the end of July 2020;

61.2 she would not enter into any further discussion with the respondent until shielding was paused or "*any financial support is withdrawn*" (by which she appears to have meant the financial support provided to businesses under the furlough scheme);

61.3 the claimant did not see how she could return to her substantive role in any capacity;

61.4 if she did not get what she wanted, a Tribunal claim was threatened.

62. In a letter and an email respectively of 6 and 9 November 2020, Mr Farrell extended a further invitation to the claimant to attend, by phone if she wanted, a capability meeting and sent the claimant a copy of the respondent's generic Covid risk assessment. The claimant has sought from around this time onwards to criticise Mr Farrell for not completing and sending to her an individual, tailored risk assessment. Any such criticism was and is misplaced. Mr Farrell wanted to carry out an individual risk assessment for the claimant with her. He repeatedly told her so in correspondence. He explained in his evidence that in his experience risk assessments were best carried out in conjunction with the individual to whom they were going to apply, and that this was how the respondent did individual risk assessments as a matter of policy. This was reflected in the respondent's generic Covid risk assessment in which it was specifically stated that individuals in the clinically extremely vulnerable category would be given the opportunity to review their individual risk assessments to ensure that they were tailored to their specific needs.

63. We think that the respondent's and Mr Farrell's approach to individual risk assessments was not just a reasonable one but was exactly what we would expect a company like the respondent to do. On the basis of our collective experience, we agree with what Mr Farrell said about the benefits of drawing up individual risk assessments with the individual in question rather than simply imposing something on them.

64. The claimant's next email – of 10 November 2020 – was not constructive and could fairly be described as antagonistic and, in parts, disingenuous.

64.1 In it, the claimant suggested that the respondent was demanding she attend her place of work, which the respondent was not doing, and she stated that a telephone meeting was not suitable without explaining why not.

64.2 The clear impression given from the email is that the claimant did not want to have any discussions at all of any kind with the respondent.

64.3 The email was explicitly to the effect that any alternative employment was a non-starter from the claimant's point of view ("*unless there is a specific role I can undertake from home*", which, given the nature of the respondent's business and the claimant's skill-set, there wasn't).

64.4 The only concrete suggestion made by the claimant in the email was that the respondent should pay furlough, by implication for an indefinite period.

64.5 The email contained further threats to take the respondent to an Employment Tribunal – an ET1 claim form was "*now inevitable*".

64.6 Although the claimant suggested in the email that she might in the future want a meeting with the respondent with her trade union representative in attendance, she gave no information as to who her trade union representative might be, nor is there any evidence before us of any discussions between any trade union representative and the claimant, or even of the existence of any trade union representative for the claimant.

65. On 12 November 2020, the respondent sent a further email to the claimant. The email was constructive in tone and content and in particular invited the claimant to provide a date for a meeting with her and her trade union representative – an invitation the claimant did not take up.

66. As part of her claim, the claimant has taken exception to the third paragraph of this email, in particular its first two sentences: "*Regarding being classed within the clinically extremely vulnerable category, we are yet to receive the note from your GP confirming this. Perhaps this is something you can forward on?*". The suggestion being made on her behalf is that in those two sentences Mr Farrell was denying receipt by the respondent of the letter from the claimant's GP of 31 March 2020.

67. That suggestion is little short of ridiculous. In the context, Mr Farrell was plainly referring to the "*government sick certificate specific to shielders*" that the claimant had promised to provide in her email of 7 October 2020, mentioned above. As the claimant was well aware, the respondent had never denied receipt of the GP letter of 31 March 2020 and, indeed, had referred to it in their letter to the claimant of 14 April 2020 confirming that she was being furloughed. We also note that the GP letter of 31 March 2020 did not provide confirmation of the claimant's clinically extremely vulnerable status (see paragraph 21 above).

68. Mr Ennis invited us to find that because Mr Farrell referred in his email of 12 November 2020 to a "*note from your GP*" whereas the claimant in her email of 7 October 2020 had referred to "*a government sick certificate*", Mr Farrell could not have been referring to the same thing as the claimant. We do not accept this. Bearing in mind the demands on Mr Farrell's time, particularly in November 2020 when the country was returning to lockdown, it is unsurprising to us that he might have used language a little loosely. A reasonable employee who genuinely misunderstood what Mr Farrell was referring to would have dealt with that misunderstanding by sending an email saying some like, "I have already sent you the GP letter of 31 March 2020;

what do you mean?" Had the claimant done that, she would no doubt have received a reply to the effect that Mr Farrell meant the document the claimant had referred to in her email of 7 October 2020. However, that was not what the claimant did.

69. It was only following this, on 12 November 2020, that the claimant provided the shielding letter of 29 September 2020. Even then, it was provided with apparent reluctance, under cover of an email that did not seek constructive engagement with the respondent. We note that prior to 12 November 2020, the only evidence the respondent had to corroborate what the claimant was saying about her being clinically extremely vulnerable and needing to shield was the 31 March 2020 GP letter, which was by that stage more than six months old. We cannot understand why the claimant, if a good-faith actor, would not have provided the shielding letter dated 28 September 2020 at the time, nor why she failed to provide a copy of the similar letter she had received in June 2020.

70. The three of us on this Tribunal have between us personal knowledge of these shielding letters, which were generic. What was provided to the respondent was a scan of the first nine lines of the letter dated 29 September 2020. We have never been given a satisfactory explanation for why a scan or photograph of at least the first page of the letter could not have been provided to the respondent. We know that the full version of the letter would have said something to the effect that it could be shown to the employer. In any event, one of the main purposes of these letters was to enable the individuals receiving them to use them as proof to an employer of clinically extremely vulnerable status.

71. If an employee had received such letters and was wanting the employer to accept that they had clinically extremely vulnerable status:

    71.1 it would be entirely reasonable for the employer to ask the employee to provide copies of them;

    71.2 it would be wholly unreasonable for the employee not to provide copies of them to the employer.

72. In accordance with the chronological version of events provided by both sides, the next relevant document is a letter from the respondent to the claimant with the date "*15/11/21*" at the top of it, but with the "*21*" changed to "*20"* in manuscript. Both sides suggested that this letter was sent on 15 November 2020. In fact, as is obvious from its first substantive paragraph and final paragraph, it is actually a letter that was sent on 15 January 2021 and we shall return to it when we come to consider events around that date.

73. The actual response of the respondent to the claimant sending a scan of part of the first page of her shielding letter dated 29 September 2020 was a letter dated 19 November 2020 from Mr Farrell. In that letter, Mr Farrell made the respondent's position clear, providing answers to specific questions the claimant had posed. In particular, Mr Farrell again explained why the respondent had taken the view that the claimant could not be furloughed: "*The JRS* [the Coronavirus Job Retention Scheme; the furlough scheme] *is available if employers 'cannot maintain [their] workforce because your operations have been affected by coronavirus … Our operations have*

not been effected [sic] *by coronavirus, and work remains available for you. … With this in mind, a claim for furlough may be deemed fraudulent, and we are not prepared to take this risk.*"

74. That letter of 19 November 2020 was copied to the respondent's HR advisers, Bright HR. From this point onwards, if not before, it seems that the respondent was being advised on wording and contents of every letter, or almost every letter, being written to the claimant.

75. What is said in the letter about the position in connection with furlough and the JRS is coherent. It is evidently what Bright HR had advised the respondent and, as we stated earlier with reference to the position as it was in July/August 2020, this is to our knowledge what many businesses were doing and were being advised at the time. We again underline the fact that we are not here concerned with whether the respondent was right or wrong about how the JRS operated, but with why the respondent did what it did. This is because, however unreasonably or unfairly the respondent behaved, the claimant can only win her claim if she shows that the reason the respondent acted as it did was a reason falling within section 44 or 15, or that there was disability-related harassment or a breach of the duty to make reasonable adjustments.

76. We also note that if the claimant believed the respondent was wrong about the workings of the JRS, she could reasonably be expected to have a constructive discussion with the respondent about it. Unfortunately, that was not the claimant's approach – we refer to her email of 20 November 2020.

77. On 25 November 2020, the respondent, not unreasonably in our view, sought to bring the dialogue with the claimant/Mr Ennis to an end by inviting the claimant to raise a grievance if she wanted to, or failing that to present the Employment Tribunal claim she had been threatening for over a month.

78. As the November 2020 lockdown was coming to an end, the Government issued fresh guidance on shielding on 26 November 2020, to take effect from 2 December 2020. On 8 December 2020, Mr Farrell duly wrote to the claimant noting that the shielding guidance had changed and asking the claimant to provide some form of medical certificate to justify her continuing absence from work. The claimant did not respond.

79. Once again, it is puzzling that she did not provide to the respondent the shielding letter she would have received in late November / early December 2020, assuming she was still deemed clinically extremely vulnerable. Her case is that she did not need to provide it because the fact that she had previously been deemed clinically extremely vulnerable, as was shown by her shielding letter of 29 September 2020, meant that she was necessarily clinically extremely vulnerable forever. That is not, however, right – the guidance being issued by the Government was being updated regularly because things were changing all the time.

80. Even though the claimant had not responded to the letter of 8 December 2020, the respondent unilaterally wrote to her on 16 December 2020 because (as was set out in the letter): "*As you may be aware, on Friday 14th December 2020 the Government*

announced that employees who were currently shielding can now be placed on furlough whether work is available or not. This has been backdated to the 2nd December 2020." The letter continued: "*Before we can place you on the job retention scheme, we require an updated letter to evidence why we are claiming for 80% of your wages. Once received, should you agree to be placed on furlough, we will arrange for your placement on the scheme and confirm this in writing to you. You therefore should have received a letter highlighting that you meet this* [sic] *criteria post 2/12/20. Previous letters do not suffice. … you were previously placed on furlough when work was not available. This is now no longer the case. We have never questioned your shielding period. We will require this information by 24/12/20*".

81. This letter again demonstrates that the reason the claimant had not been on paid furlough after 31 July 2020 was nothing to do with her absence from work *per se*, whether that arose from a need to shield, circumstances falling within section 44, or something else. Instead, she had been put on paid furlough from April 2020 when the respondent understood the position to be that she was entitled to it; she was then taken off it when the respondent understood the position to be that she was no longer entitled to it because the respondent had work available for her to do; and the respondent was now proposing to put her back on furlough, because the advice it had received had changed. To reinforce the point made earlier in these Reasons: the claimant continued to be absent from work at all relevant times; this did not change ether at the point she stopped being on paid furlough, nor at this point in December 2020 when the respondent was offering to put her back on paid furlough; there was no connection between the claimant's willingness or unwillingness to return to work and the respondent furloughing or not furloughing her.

82. Requesting the claimant's latest shielding letter was what we would have expected a reasonable employer in the respondent's position to do. The respondent was claiming Government money and there was always a possibility that it might be audited and have to account for why it had paid furlough money to the claimant. It would not have been safe for the respondent to assume that just because the claimant had received a letter in September 2020 stating that she had "*previously been identified as someone who may be considered clinically extremely vulnerable*" (which is what the shielding letter said), she was in December 2020 someone who was clinically extremely vulnerable and was being advised to continue to shield at that point in time.

83. By an email of 18 December 2020, the claimant refused to provide what the respondent had asked her for.

84. We can only speculate as to why the claimant chose such an uncooperative, unconstructive, and self-defeating approach. However, looking at the whole of the evidence, and in particular the claimant's correspondence, we are satisfied that by the end of 2020, if not before, the claimant had no intention of ever returning to work for the respondent. Her only interest was to attempt to persuade the respondent to put and keep her on paid furlough and backdate it to the end of July 2020, using the threat of legal action as leverage. This did not change between then and the end of her employment, except that from the start of 2021 she developed a further interest, which ultimately overtook everything else: as an alternative to being on paid furlough indefinitely, for her employment to be terminated by mutual consent with a pay-off. In

other words, by this stage what was keeping the claimant away from the workplace was not circumstances falling within section 44 or any need to shield – she would not be returning to the workplace come what may.

85. On 23 December 2020, Mr Farrell wrote to the claimant requiring her to contact him no later than 31 December 2020 to discuss the situation. He did so in light of the claimant's refusal to comply with the respondent's reasonable instruction to her to provide evidence that she was still being required to shield or some other doctor's note covering her absence from work from 2 December 2020 onwards. He stated in the letter that SSP would not be paid with effect from and including 2 December 2020 and advised her that if she failed to contact the respondent providing acceptable reasons for her absence – which he accurately described as "*unauthorised absence*" – the respondent might proceed with disciplinary action against her.

86. The letter of 23 December 2020 did not say that the claimant was expected to go back to work. Instead, it told her that she needed to provide a shielding letter or a doctor's fit note.

87. We note that at the date the letter was written, Nottingham was not in lockdown but was in tier 3, and that the letter accurately stated that when it was written "*shielding is now only applicable to tier 4 areas*".

88. Predictably, but regrettably, the claimant's response, also of 23 December 2020, was to threaten legal action and to refuse to comply with Mr Farrell's reasonable request. Mr Farrell then wrote to the claimant on 29 December 2020 requiring her to attend a disciplinary hearing on 7 January 2021.

89. As we shall explain in a moment, the respondent subsequently decided against taking disciplinary action against the claimant. But the fact that the respondent got 'cold feet' does not mean it would have been unreasonable for the respondent not to have backed down. In our view, disciplinary action would have been reasonable in circumstances where the claimant was refusing to comply with her employer's reasonable instructions.

90. On 1 January 2021, in response to the disciplinary hearing invitation, the claimant sent Mr Farrell another email that was unconstructive, rude and inappropriate in its use of language. It contained unwarranted personal allegations against Mr Farrell of a kind that could legitimately have lead to disciplinary action for gross misconduct, including that Mr Farrell had made "*false claims of compassion*" and had "*consistently lied*".

91. The claimant also sought in her email of 1 January 2021 to invoke ERA section 111A. This is a convenient point to mention the fact that throughout the proceedings and in their evidence, both sides have referred to matters that would on the face of them potentially be covered by the rule of evidence often called 'without prejudice privilege'. (ERA section 111A is not applicable because the claimant has no 'ordinary' unfair dismissal complaint). Neither side has at any stage raised any objections to the other side relying on, or us looking at, such material; nor has anyone suggested that there is any controversy about any of the documents in the hearing bundle. Given that the respondent has been professionally represented at all relevant times and

that Mr Ennis has reasonably significant experience of Tribunal proceedings, and that – as just mentioned – both the claimant and the respondent have been inviting us to look at things covered by the without prejudice rule, we consider ourselves entitled to assume, and we have assumed, that any so-called 'without prejudice privilege' that might otherwise have applied has by implication been 'waived'[2] by agreement between the parties.

92. On 4 January 2021 there was a further email from the claimant in a similar vein. In this instance, the attempt to trigger section 111A was overt rather than implicit and for the first time an offer of settlement in a particular sum was put forward.

93. We look at all this correspondence from the claimant and ask ourselves: is this written by someone who wishes to maintain an ongoing employment relationship and at some stage return to work? The answer to that question is indubitably: no.

94. The respondent backed down from taking disciplinary action by a letter of 11 January 2021, which included the following: "*In light of the new Government guidance, now law, and your assertion of your right under Section 44 the hearing did not go ahead, as we accept your assertion, and therefore no outcome will be provided.*"

95. It is not entirely clear what was meant by "*we accept your assertion*". The claimant's understandable interpretation of it was that the respondent accepted that she was away from work because of reasonable safety concerns falling within section 44. Mr Farrell's evidence on this point was a little confused, probably reflecting the fact that the letter was drafted by his advisers and that he did little more than put his name to it.

96. It is obvious the respondent decided not to proceed with disciplinary action because it was advised not to. We are unsure as to the reasons behind this advice, but we assume they were tactical.

97. Our reading of the claimant's response, an email of 15 January 2021, is that it was nothing more than an attempt to bully the respondent into agreeing to the termination of employment in return for payment of a sum of money. It included a reference back to the GP letter of 31 March 2020. Mr Farrell's reply was also sent on 15 January 2021. It was the letter we referred to earlier, which was dated "15/11/21" and was put in the hearing bundle as if its actual date was 15 November 2020. It included this: "*We did get written confirmation from your GP in March regarding notification of your physical status, this have* [sic] *never been disputed. However, as you are likely aware the guidance and eligibility for shielding has changed several times throughout the year. This is why we have asked for additional evidence. As we have outlined, the evidence has been requested for us to access the current tranche for funding for furlough we need a copy of the letter you will have received from the Government dated 7/1/21. Once we have received this, we can process you onto furlough from 4/1/21.*"

---

[2] We are well aware that technically it is incorrect to refer to what happened as waiving privilege; but it is a convenient shorthand.

98. In the letter, Mr Farrell also reiterated the respondent's position in relation to the provision of an individual risk assessment: "*We sent you a copy of an individual risk assessment that was to form to support the development of a bespoke individual risk assessment developed in partnership between employer and employee. This is considered best practice but unfortunately and for whatever personal reasons you have had you have consistently not engaged.*"

99. The claimant could not reasonably have been under any misapprehensions as to what the respondent's position was, nor as to why the respondent was adopting it. Any objective person looking at the situation would have told her that the respondent was acting reasonably and that the sensible thing for her to do would be to do as the respondent asked. That was not, though, what she did. Instead, she once again sought to persuade the respondent to buy her off, in an email of 19 January 2021 containing extraordinary language for an employee to use to their employer. Amongst other things, she accused Mr Farrell of using "*fallacious language*", of being a "*deceitful disingenuous* [liar] *and a bully*", and of being "*a despicable employer and it would appear compulsive* [liar]".

100. The claimant followed that up with an email of 20 January 2021 along similar lines to her previous correspondence, but which included a suggestion that she was making a grievance: "*you can consider all our previous correspondence to formulate part of an ongoing grievance.*"

101. In light of that letter, the respondent wrote to the claimant seeking to get her to engage in a formal grievance process. The claimant chose not to participate and the respondent accordingly proceeded in her absence. The respondent had organised a grievance meeting on 2 February 2021 via Microsoft Teams. The claimant did not attend. After the claimant failed to attend, the respondent gave her the option of engaging with the grievance process in writing. She would not do that either. The respondent's Mrs C Mackenzie then gave her decision on the grievance in a letter dated 11 February 2021. She did not uphold any part of the grievance.

102. The claimant appealed by an email of 13 February 2021. The appeal letter followed the pattern of previous letters: essentially it was a push to try and get the respondent to agree to meet the claimant's demands for a substantial settlement and termination payment.

103. The fact that the claimant appears not to have been genuinely interested in having her grievance resolved and continuing in the respondent's employment is illustrated by her refusal to engage with the grievance appeal process which the respondent then embarked upon. There was an appeal hearing. She did not attend. The appeal was dealt with in her absence.

104. The claimant has complained about the alleged fact that the grievance was not dealt with by somebody independent of the respondent. Putting to one side the fact that there is no ordinary unfair dismissal claim and no requirement as to procedural fairness, it was completely impracticable to have somebody dealing with the grievance who was both part of the respondent and yet completely independent of it. An employer is not obliged to have grievances dealt with by third parties.

105. The grievance appeal decision was given in a letter of 5 March 2021 by a Ms Kenny. The letter speaks for itself. The response to that outcome was a long and rather extraordinary letter from the claimant culminating in a demand for payment of £34,000 – just less than 2 years' gross wages – as an "exit package". It seems to us that by this stage at the latest, the claimant was no longer really interested even in the option of remaining in the respondent's employment on indefinite furlough.

106. The end of the grievance process marks the end of, as it were, a chapter in the claimant's employment. The next chapter began with an email of 17 March 2021 from Mr Farrell to the claimant in which he emphasised that the grievance process was at an end, that shielding for those who were clinically extremely vulnerable was due to be reviewed on 31 March 2021 (and that it might cease on that date), and asking the claimant for her, "*thoughts on when you feel you can return* [to] *the business.*"

107. It was an objectively reasonable and inoffensive letter, but sadly the claimant's response to it was to refuse to engage, to insult Mr Farrell, and at the end of the letter, to say "*See you in court Paul*".

108. We bear in mind that the claimant was still employed by the respondent and that Mr Farrell was the claimant's boss. Anyone who spoke to their boss in the way in which the claimant was writing to Mr Farrell would in all likelihood be summarily dismissed, particularly if, like the claimant, they had less than 2 years' service.

109. If the claimant genuinely wanted and intended to return to work but thought it was too dangerous to do so at that point in time, she would have done exactly what the respondent was wanting her to do, namely discuss her concerns with the respondent with a view to the creation of an individual risk assessment tailored to her specific needs and taking into account her specific concerns. This was not something that could be achieved without her input.

110. Alternatively, if her position was as it has been said to have been at this hearing, namely that no risk assessment would do and that there were no precautions that could be taken that would enable the claimant (or anyone clinically extremely vulnerable) to return to her role in safety, the claimant would have said so and would have asked for possible alternative employment.

111. The claimant did not do either of these things.

112. We note that in submissions, Mr Ennis asserted on the claimant's behalf that she had asked about alternative employment. But assertions made by Mr Ennis are not part of the evidence that is before us – see paragraph 16 above. The claimant did not tell us she had done this and beyond passing mentions of it in 2020, she appears not to have mentioned it in correspondence either. If somewhere in the 2021 correspondence there is a letter in which the claimant expressed an interest in alternative employment rather than in indefinite paid furlough or a compromise agreement, we were not taken to it by Mr Ennis during this hearing. Much of what was said on the claimant's behalf in submissions appeared to us to be based on what Mr Ennis would have liked the claimant to have said during her oral evidence but which she did not in fact say.

113. On 28 April 2021, Mr Farrell wrote to the claimant inviting her to an informal welfare meeting. In the letter he highlighted the stark fact that the claimant had been off work since 21 March 2020. He could also have legitimately mentioned, but did not mention, the fact that the claimant had done less than six weeks work for the respondent in total and that the date of the last evidence she had provided to account for her absence from work was 28 September 2020, that being the extract from the shielding letter that had been sent to the respondent in November 2020.

114. From the claimant's response of 28 April 2021 and the follow up email of 4 May 2021, it appears that Mr Ennis had undertaken some internet research into the effectiveness of vaccines and into Covid risks generally. This had caused him, and presumably the claimant too, to believe that, irrespective of any Government advice and guidance, the Covid risk remained very considerable to anyone clinically extremely vulnerable, whether vaccinated or not, and to the claimant in particular.

115. In the email of 4 May 2021, amongst other things, there is a suggestion that Mr Farrell had admitted "*to having had direct access to the shielding patients list … enabling you to verify this at any time*", "*this*" being the claimant's clinically extremely vulnerable status. This suggestion was either a misunderstanding or a fabrication. The idea that Mr Farrell, or employers generally, had access to a list of clinically extremely vulnerable patients is fanciful, to say the least.

116. The email of 4 May 2021 also included: "*Do you really want to go to court, aside the ongoing tribunal claim, have you considered the ramifications of your actions in terms of your suitability to hold the position of Director and any short, medium to long term damage to your business in terms of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.*" The claimant then went on in the email to list potential offences which Mr Farrell was said to be potentially guilty of.

117. In addition, the email again referred to the claimant supposedly wanting to receive a copy of an individual risk assessment. The issue of the individual risk assessment had been dealt with repeatedly by Mr Farrell. It seems to us that the claimant was being disingenuous in continuing to refer to it in circumstances where she would not co-operate with Mr Farrell's repeated attempts to have a discussion with her about her needs.

118. The email of 4 May 2021 was yet another email that could not have been written by, or sent on behalf of, someone who had any genuine wish to return to work at any stage, or who wanted to do more than get their employer to pay them off by using threats.

119. Notwithstanding the contents of the email of 4 May 2021, there was a welfare meeting on that day between the claimant and a Ms Norris from the respondent's HR/legal representatives. What happened in relation to that meeting and immediately following it is set out in paragraphs 83 to 85 of Mr Farrell's witness statement, which were not substantially challenged in cross-examination, and to which we refer. Ms Norris produced a report and a revised risk assessment.

120. Ms Norris's report had made a number of recommendations. Those recommendations included a timetable to take matters forward to a conclusion one

way or the other. The timetable envisaged, first, a meeting between the respondent and the claimant to engage in a discussion on the draft risk assessment and of what adjustments the claimant might want to facilitate a return to work. The next step that was envisaged was finalisation of an individual risk assessment for the claimant and putting into place whatever measures or adjustments might be reasonably practicable. The third step was: "*If, after the measures have been put in place, or in the event that* [the claimant] *continues to refuse to engage in discussion with* [the respondent] *about the risk assessment,* [the claimant] *continues to refuse to attend work,* [the respondent] *should consider, following an appropriate process, the possibility of terminating the contract of employment with* [the respondent]".

121. Mr Farrell sought to arrange a meeting with the claimant on 21 May 2021 to discuss a way forward. This was the first step in the process outlined in Ms Norris's report.

122. The claimant's response to that invitation included the following: "***you ar* a pathological lier untrustworthy, a dangerto myself, only to willing to put me in harms way for your own self serving reasons**" [sic; with original emphasis].

123. The respondent could legitimately have reacted to that letter by dismissing the claimant for the language she was using towards her employer. It did not, however, do so. Instead, Mr Farrell sent a series of temperate messages in which he again explained the purpose of the proposed meeting. He did emphasise that at the meeting the claimant would have to speak for herself as she was the respondent's employee, and that Mr Ennis could not speak for her.

124. In an email of 25 May 2021, Mr Farrell did show some annoyance, understandably so in our view, at the tone and content of the correspondence that was coming from the claimant's side. Amongst other things, he stated: "*I am afraid you are expected back into the work place and your ongoing communications around the general risks of COVID-19 and its various strains are not relevant to your return to work. As a business we are fully confident that all health and safety measures are in place as we have outlined to you on numerous occasions. There is no further discussion to be had other than arranging your return to work. … Should you continue to accuse me of lying, amongst other things, I may be forced to look at other procedures such as disciplinary. Please cease all language of this tone.*"

125. Taken out of context, that email could be seen as Mr Farrell suggesting that he did not intend to have any discussion with the claimant about adjustments, or about the individual the risk assessment, or anything else that was supposed to be discussed at the meeting if he were following Ms Norris's recommendations. However, in its full context, it is clear that that was not what Mr Farrell was saying. What he was saying was that he did not intend to get bogged down in discussions about effectiveness of vaccinations and overall Covid risks and so on that Mr Ennis had evidently found out about from the internet. Instead, it was to be a discussion with the claimant about how her returning to work could be facilitated.

126. A meeting took place between, amongst others, the claimant and Mr Farrell on 26 May 2021. It was a Teams meeting but the claimant used audio only. There are minutes of the meeting, to which we refer. Within the meeting, the claimant simply refused to engage with the respondent in discussing the draft risk assessment or with

anything else to do with the suggestion that she might return to work. The reason for this was that from her point of view there was nothing that could be done in order to make her role safe. Her and Mr Ennis's position was that she could not come back to work whatever the respondent did.

127. Immediately following the meeting, Mr Farrell sent a letter to the claimant dated 26 May 2021 proposing a phased return to work starting from 7 June 2021. The claimant's response of 27 May 2021 included allegations against Mr Farrell of "*ongoing deceipt* [sic] *and lies*" as well as this: "*Mr Farrell I have nothing further to say to you and respectfully submit that you refrain from any further communication, unless it is to initiate any of your aforementioned ongoing threats based on my disclosure of the truth.*"

128. The allegations made by the claimant against Mr Farrell in that email and in previous emails are detailed in Mr Farrell's witness statement in paragraph 115. We refer in particular to sub-paragraphs xxxi. and xxxii. The respondent's response to the claimant's increasingly abusive emails was a measured email from the respondent's Care Manager, Ms Parrott, of 1 June 2021 which included: "*I have been considering what the best way forward is within the business, as from your last email it is clear there is a significant relationship breakdown between yourself and the company. … What I would like to suggest is we have a meeting to establish if there is a way we can rectify the employment relationship and, ultimately, aid your return to work ready for the 7th June 2021. Please do let me know if this is something you would like to engage with and confirm a suitable date and time for this to take please this week, prior to your scheduled return date.*"

129. The claimant's reply, given about 2 hours later, was effectively to invite the respondent to pay her off. There was no other constructive suggestion and no apparent willingness to discuss anything at all.

130. The claimant did not attend work on 7 June 2021, nor did she confirm to the respondent that she would not be attending work. A meeting with Ms Parrott was scheduled for 8 June 2021 but the claimant did not attend, nor did she say she would not be attending.

131. On 11 June 2021, the claimant sent a lengthy email to Mr Farrell and Ms Parrott amongst other things accusing Mr Farrell of lying, fraud and of dishonesty. It was obviously written for the purposes of the by then ongoing Employment Tribunal proceedings and was really nothing to do with the employment relationship. What it does confirm is that the claimant had no interest in repairing the employment relationship; that her only interest was, to quote from the final paragraph of the email: "*a mutual exit package*". Apparently on advice from the respondent's HR/legal advisers, at some stage between 11 and 21 June 2021, Mr Farrell prepared a document described as an "*Impact Statement*". We refer to that document, which is at pages 484 to 489 of the bundle.

132. The impact statement was a chronological narrative of the respondent's, and Mr Farrell's, interactions with the claimant, with particular reference to the claimant's more unreasonable correspondence. In its "*conclusion*" section, Mr Farrell stated: "*The above is just some highlights of the e-mail correspondence between Ms C.*

Lewis and Mr P. Farrell. … it would seem that she has no interest in resolving any workplace relationship difficulties. …The extent of the accusations and strength of some of the language used within the email correspondence from C.Lewis would we believe make it very difficult for C.Lewis to return to work for Joy2care. As such we believe that there has been an irreconcilable breakdown in the relationship and therefore we will terminate her contract on this basis."

133. The claimant's employment was duly terminated by a letter of 21 June 2021. It was signed by Ms Parrott, but in Mr Farrell's witness statement, in paragraph 97, he referred to this as his letter ("*I wrote to the claimant informing her of my decisions to dismiss her*"). Within that letter, substantial parts of the impact statement were reproduced or paraphrased. Whether the dismissal letter and the decision it contained were solely Mr Farrell's, or mainly his, or it was a joint venture between him and Ms Parrott, he was a party to that decision. We think it was probably wholly or mainly his decision.

Decisions on the issues – section 44 & section 15

134. We start by taking the section 44 and section 15 complaints together, because the claimant is relying on the same things as detriments under the former and unfavourable treatment under the latter sections.

135. We shall refer to issues by the numbers of the paragraphs of the written record of the Preliminary Hearing before Employment Judge Clark on 10 March 2022 in which they are set out.

136. Issue 12.4, relating to the section 44 claim, is: "*Whether, while the danger persisted, she refused to return to her place of work or any dangerous part of her place of work*". We think the claimant's section 44 claim fails at this first hurdle because the claimant did not refuse to return to her place of work. Instead, she was invited to return to work, and she went off sick. Even if we are wrong about that, the complaints fail for other reasons, principally that in so far as the claimant was subjected to any detriment, it was not by any act or deliberate failure to act done by the respondent on the grounds that she refused to return to her place of work in accordance with that section.

137. For all the section 15 complaints, the "*something*" said to arise in consequence of disability is a need to shield and a consequent need to be absent from work "*providing personal care to clients in their own homes*". For present purposes, we shall assume that the claimant is right about this issue, i.e. that she did need to shield in consequence of her disability at all relevant times. However, we are not saying we assume she was off work because any need to shield. In accordance with our earlier findings, the reason for the claimant's absence from August 2020 to the expiry of a fit note on 11 November 2020 was bereavement rather than anything else. Potentially she was absent from work because of something arising in consequence of disability from 11 November 2020 to late December 2020, but if she was that was not the reason for any of the alleged unfavourable treatment about which she makes her claim.

138. Issue 14.1 is an allegation of detriment and unfavourable treatment that, "*From 1 August 2020 she was removed from furlough leave and lost pay. She was not returned to furlough leave at a later stage when the guidance reintroduced the concept of its use for CEV employees shielding"*.

139. In accordance with our earlier findings of fact, the reason the claimant was removed from paid furlough leave and was not returned to it later was not that she refused to return to work in accordance with section 44, nor was it any need to shield. See paragraphs 40 to 44, 75, 81 and 84 above.

140. Issue 14.2 is an allegation of detriment and unfavourable treatment, "*That the respondent failed to undertake a suitable risk assessment before expecting her to unconditionally return to work on 1 August 2020 or at any later time*".

141. These complaints fail for a number of reasons. First, as a matter of fact, the respondent never expected the claimant "*to unconditionally return to work*" at any time. Between August 2020 and March 2021 the respondent did not expect or require even a conditional return to work. At that time, the respondent had no problem with the claimant not working, so long as there was proper justification for it, backed up by suitable evidence. Secondly, there was no detriment or unfavourable treatment here. The respondent repeatedly offered to prepare an individual risk assessment but, reasonably and understandably, it wanted to prepare it in conjunction with the claimant and she simply refused to co-operate. We are not satisfied that the claimant herself considered this to be to her detriment. All of the relevant correspondence came from Mr Ennis and not from her and we are not satisfied that she even knew what was being written on her behalf in this respect. Also, insofar as she did consider this to be to her detriment, it was not reasonable for her to consider it as such. Further and in any event, the reason that an individual risk assessment was not prepared was not the claimant's refusal to return to work or any need to shield but was instead her refusal to engage with Mr Farrell and to co-operate with him in the preparation of one.

142. Issue 14.3 is the following allegation of detriment and unfavourable treatment: "*On 11 November 2020 the respondent denied having previously received medical evidence from the claimant's GP identifying her as being at an increased risk of developing serious illness, hospitalisation or even death should she contract Covid 19 due to the high levels of community transmission of the coronavirus disease.*"

143. There was no such detriment or unfavourable treatment and this complaint fails on the facts. This allegation is based on Mr Ennis's almost wilful misunderstanding of an email from Mr Farrell of 12 November 2020 (not the 11th): see paragraphs 66 to 68 above. Moreover, the suggestion that this email was sent by the respondent because the claimant was refusing to return to work defies logic. The reason the relevant part it was sent was that: the claimant had recently written to the effect that she would provide something to the respondent and she had not done so; the claimant had not provided any medical evidence of clinical vulnerability since 31 March 2020; the claimant had never provided evidence that she was in the clinical extremely vulnerable category (see paragraph 21 above).

144. Issue 14.4 is the allegation of detriment and unfavourable treatment that, "*In November 2020 the respondent falsely asserted that the claimant had previously been on furlough leave for other reasons not related to her CEV status.*"

145. These complaints fail on the facts too. From the claim form, it appears that this issue concerns not anything from November 2020 but the final paragraph of the letter from Mr Farrell of 16 December 2020 (see paragraph 80 above) and in particular: "*To address your previous email, you were previously placed on furlough when work was not available. This is now no longer the case. We have never questioned your shielding period.*" In paragraph 63 of the claim form details of claim, it was alleged that the respondent was in this letter insisting, "*that the claimant had been originally furloughed due to a lack of work … This was a further untruth … the claimant was in fact furloughed due to her clinically vulnerable status*". This was a misinterpretation of the letter that is so strange it is difficult to believe it was genuinely read in this way. All that Mr Farrell was saying was that it had been lawful to furlough the claimant at a time when the respondent did not have work and that it ceased – or at least so the respondent was advised – to be lawful to furlough her when it had work going spare. Neither that letter nor any other related correspondence from the respondent denied that the claimant was originally furloughed because of her condition as described in her GP's letter of 31 March 2020, nor was any of it written because the claimant was shielding and/or refused to return to the workplace. This letter of 16 December 2020 was written because of the claimant's failure to do as asked in the respondent's letter of 8 December 2020 and her failure to provide an up to date shielding letter.

146. Issue 14.5 is an allegation that the respondent subjected the claimant to a detriment or detriments and unfavourable treatment by, "b*etween August and December 2020, the respondent sent various threats to the claimant that she would be subject to capability or disciplinary procedures in particular as set out at paragraphs 26, 26, 40 and 44 of the original ET1 grounds of complaint*."

147. Paragraph 26 of the ET1 grounds of complaint is: "*On the 1 October 2020 the respondent wrote to the claimant raising concerns regarding her continued absence.*" This is a reference to Mr G Farrell's letter of 1 October 2020 requesting the claimant's attendance at an informal welfare meeting (see paragraph 50 above). No reasonable person in the claimant's situation would consider such a letter to be to her detriment. All Mr Farrell was doing was following the respondent's normal process in relation to someone who was believed to be off sick as a result of bereavement. The letter was not sent because the claimant was refusing to return to work in relevant circumstances of danger, nor because the claimant was shielding. Instead, it was sent because the claimant had been off sick for a period of time. Mr Farrell would have sent a similar letter to anyone in a similar position. In short, there was no detriment or unfavourable treatment and the reason for what was done was not one falling within section 44 or section 15.

148. Paragraph 36 of the ET1 grounds of complaint refers to the respondent's letter to the claimant of 26 October 2020 inviting her to attend a capability meeting on 4 November 2020 (see paragraph 55 above). The reason that the letter was sent was not that the claimant was refusing to return to work or was (allegedly) shielding but that she had not responded to Mr Farrell's email of 14 October 2020 or to what had been discussed at the telephone meeting on that date, as referred to in that email.

149. Paragraph 40 of the ET1 grounds of complaint contains another reference to Mr Farrell's letter of 1 October 2020.

150. The reference to paragraph 44 of the ET1 grounds of complaint appears to be a typographical error. We think it should in fact be a reference to paragraphs 58 and 65. In those paragraphs, the claimant refers to the respondent's letters of 8 and 23 December 2020 (see paragraphs 78 and 85 above). The reasons those letters were sent were the reasons given in them: the Government's shielding guidance had changed on 2 December 2020 and there had been no appropriate communication from the claimant since then and, in particular, no up to date shielding letter or fit note.

151. Issue 14.6 is the following allegation of detriment and unfavourable treatment: "*After 1 August 2020, the respondent repeated its requirement that the claimant provide additional explanation/justification for her continued absence from work.*" What appears to be being referred to here is:

    151.1 the claimant being reminded of the need to provide fit notes. The reminders that were sent out were entirely reasonable and no reasonable employee might consider them to be detrimental. If anything they were helpful reminders. In addition they were sent because the claimant was off sick with bereavement, not because of anything falling within sections 44 or 15 (see paragraph 40 above);

    151.2 on 12 November 2020, the respondent asking the claimant to provide something she had promised on 7 October 2020 to provide "*tomorrow*" (see paragraphs 65 to 68 above). This request was reasonable and could not reasonably be considered to be a detriment. The respondent asked for this for the reasons given in paragraph 143 above;

    151.3 on 8, 16 and 23 December 2020, the respondent asking the claimant to provide up to date fit notes and/or shielding letters (see paragraphs 78, 80 and 85 above). If the claimant considered the letter of 16 December 2020, which simply asked for a shielding letter, to be to her detriment she was being irrational. See paragraphs 70, 71 and 79 above. The reasons these three letters were sent were: (for the letter of 8 and 23 December 2020) as set out in paragraph 150 above; (for the letter of 16 December 2020) as set out at the end of paragraph 145 above.

152. In relation to all of the correspondence the claimant is complaining about here, the critical point for the respondent was not that she was refusing to return to the workplace. We repeat that the respondent had no problem with her not working, so long as there was proper justification for it, backed up by suitable evidence.

153. Issue 14.7, which is the final section 44 complaint and the penultimate section 15 complaint, is that "*On 31 December 2020, the respondent required her to attend a formal disciplinary hearing.*"

154. The date in the list of issues is wrong. Presumably what is being referred to is Mr Farrell's letter of 29 December 2020 requiring the claimant to attend a disciplinary hearing on 7 January 2021 (see paragraph 88 above). The reason that letter was

sent was not that the claimant was refusing to return to work or that she was shielding, it was that she had unreasonably refused to provide an up to date shielding letter or fit note.

155. In summary, all of the section 44 complaints and corresponding section 15 complaints fail. They fail for a variety of reasons, the main one being that the reason for any relevant treatment was not a reason falling within either of those sections.

Dismissal

156. The next complaint in the list of issues is the complaint of automatically unfair dismissal under ERA section 100. The final section 15 complaint is also about dismissal.

157. We refer to our findings of fact from paragraph 106 onwards. The reason the claimant was dismissed was not her refusal to return to work. We are entirely satisfied that it was because the employment relationship had broken down, which clearly it had. The claimant persistently refused to engage or respond constructively to the respondent's reasonable requests for meetings and discussions and so on. The language used in the correspondence sent by Mr Ennis in the claimant's name was completely inappropriate language for anyone to use in almost any context, but particularly in a letter that nominally came from an employee to her employer. It is actually quite surprising that the respondent did not take disciplinary action in respect of that language or even just dismiss the claimant (given her lack of service) much sooner than it did. We suspect the reason that the respondent did not do this was because it, or perhaps its advisers, were intimated by the threats of legal action that were being made.

158. We have already found that by the end of 2020 the claimant had no interest in ever coming back to work for the respondent: see paragraph 84 above. Also in that paragraph, we explained that by then, "*what was keeping the claimant away from the workplace was not circumstances falling within section 44 or any need to shield – she would not be returning to the workplace come what may*". By early March 2021, the only thing she really wanted had become for her employment to be terminated, with a substantial pay-off (see paragraph 105 above). The claimant's refusal to return to work and any need to shield was part of the background circumstances leading to the decision to dismiss, but they were neither the principal reason nor any significant part of the reason for dismissal.

159. Specifically in relation to the section 15 complaint about dismissal, the "*something*" said to arise in consequence of disability could be better put, without in our view any controversy, as the claimant's perception that she needed to shield and her perception that in order to shield effectively she had to be absent from work. Neither of those things would be a reason or a significant part of the reason for dismissal, even if they were the real cause of her not being in work at the time of dismissal rather than just part of the background that explained the situation. The claimant's dismissal was, as we have already said, because of a breakdown in the employment relationship. Given in particular the personal attacks on Mr Farrell made by the claimant in correspondence, dismissing her was a proportionate means of achieving a legitimate aim.

160. In short, the claimant's complaints of unfair and discriminatory dismissal fail.

Reasonable adjustments

161. The next complaints in the list of issues are the reasonable adjustments complaints. The alleged "*provision, criterion or practice*" or PCP is "*the requirement for the claimant to perform the personal care elements of her role in clients' homes and otherwise being in the community*". The alleged substantial disadvantage is, "*The greater risk of serious health consequences on contracting Covid 19 due to her clinical vulnerability*". Both PCP and substantial disadvantage are made out on the facts.

162. There are two particular adjustments that are proposed by the claimant. The first is: "*an adjustment to her duties to remove that element of personal care to clients*". As providing personal care to clients was the whole of the claimant's job, that element of it could not practicably be removed. Moreover, even if it was practicable for the respondent to take that step, it would not have been reasonable for the respondent to have to take it in circumstances where: it was not something the claimant wanted or had asked for; the claimant had been consistently asking for something else and only that something else, namely paying her off or keeping her on furlough indefinitely.

163. The second adjustment proposed is: "*To continue to put the claimant on furlough leave throughout the period that remained*".

164. We leave to one side the fact that we do not think it would be reasonable for the respondent to have to keep the claimant on furlough leave indefinitely, which is what she had wanted (at least before she came to want an exit payment instead).

165. This part of this complaint is flawed because alleviating the disadvantage the claimant is relying on could be achieved just as effectively by the respondent doing what it in fact did, which was to allow the claimant to be off work. Paying her or not paying her had no impact on that disadvantage.

166. In conclusion, at all relevant times the respondent made the one and only adjustment it was reasonable for it to have to make to alleviate the substantial disadvantage caused by the PCP relied on: not requiring the claimant to work.

167. Further, insofar as this reasonable adjustments claim is about what happened from 1 August 2020 onwards (which it seems to be):

167.1 the complaint has significant time limit problems because time runs from the latest date by which the respondent could reasonably have been expected to make the relevant adjustment. On the claimant's case, this is 1 August 2020. The claimant has provided no basis in the evidence for us to decide that it would be just and equitable to extend time. The claimant, through Mr Ennis, was more than capable of presenting a Tribunal claim in 2020 had she wanted to; indeed she repeatedly threatened to do so before the claim was actually made;

167.2 keeping the claimant on paid furlough from 1 August 2020 onwards would not have been a reasonable step for the respondent to have to take. The advice

the respondent was receiving at that stage was that it could not lawfully do this. Secondly, between August 2020 and 11 November 2020 the claimant was off sick with fit notes saying that she was incapable of work because of bereavement and that also precluded her being furloughed. Thirdly, it would not have been appropriate to have her to be on paid furlough when she was unreasonably refusing to provide her shielding letters. Fourthly, furlough would not have been a reasonable alternative to dismissal, in circumstances where, due to her and Mr Ennis's actions, and in particular the vitriolic correspondence, the employment relationship had been destroyed.

168. In conclusion, there was no breach of the duty to make reasonable adjustments at any relevant time and if there was the claim in respect of it would be time-barred.

Harassment

169. In relation to every single complaint of disability-related harassment, if the alleged conduct occurred:

169.1 it was not related to the claimant's disability;

169.2 it was not done with the purpose referred to in subsection (1)(b) of EQA section 26, nor did it have that effect (taking into account subsection (4)).

170. Issue 27.1 is an allegation that the respondent wrote to the claimant denying having received medical evidence from the claimant's GP. It is essentially the same as issue 14.3. The allegation is false: see paragraph 143 above.

171. Issue 27.2 is a muddled allegation that appears to be partly about the withdrawal of furlough support from 1 August 2020 and partly about the non-existent lie that the claimant had been furloughed for some other reason than her clinically vulnerable status. It corresponds with issues / complaints 14.1 and 14.4 and fails for broadly the same reasons – see paragraphs 139 and 145 – as well as because of the absence of any harassing purpose or effect.

172. Issue 27.3 relates to "*ongoing demands that the claimant unconditionally return to her substantive role*". There were no such demands. This issue roughly corresponds with issue 14.2 and we repeat what is said about that issue in paragraph 141 above. In addition, the notion that any suggestion made by the respondent that the claimant might return to work "*related to*" her disability or to the protected characteristic of disability more generally in accordance with EQA section 26(1)(a) is particularly misconceived.

173. The complaint in issue 27.4 is another version of issue 14.4 and is based on the same apparent misreading of the respondent's correspondence. See paragraph 145 above.

174. Harassment issue 27.5 is issue 14.6 in a different guise. Whenever the respondent asked the claimant for additional information and documentary evidence it acted entirely reasonably. Contrastingly, if and insofar as the claimant believed that the only evidence to support shielding and furlough she ever needed to provide to the

respondent was the GP letter of 31 March 2020, this was a wholly unreasonable belief. See paragraphs 151 and 152 above.

175. Issue 27.6 is a repeat of issue 14.5, as to which see paragraphs 147 to 150 above. The respondent acted as it did not because of anything to do with disability but because the claimant was not engaging with the respondent and was refusing to provide information which any reasonable employee would provide.

176. Issue 27.7 is a repeat of issue 14.7. The claimant was invited to a disciplinary hearing, and reasonably so, not because of anything related to disability in accordance with EQA section 26(1)(a) but because she unreasonably refused to provide her shielding letters or a suitable fit note. See paragraph 154 above.

177. The harassment complaints therefore all fail.

Employment particulars

178. Finally, there is in the list of issues a complaint under section 38 of the Employment Act 2002 for failure to provide a set of employment particulars in accordance with ERA section 1 when these proceedings were begun. That alleged failure was not mentioned in the evidence before us. There is a copy of a relevant set of employment particulars in the bundle. There is no evidence that that was not provided prior to the claimant issuing proceedings. In any event, we have not found in favour of the claimant in relation to any of her complaints or made any award in her favour. In the circumstances, this complaint is dismissed too.

7 February 2023

Employment Judge Camp