# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms Cathy Paxon**

**Respondent:** **Care UK Community Partnerships Ltd**

**Heard at**: **East London Hearing Centre (by video)**

**On:** **3, 4 & 5 January 2023 and on 30 January 2023 (in chambers)**

**Before:** **Employment Judge P Klimov**

**Members:** **T Brown**
**M Legg**

**Representation**
For the Claimant: Mrs L Mankau (Counsel)
For the Respondent: Ms Genn (Counsel)

# RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent (s.100(1)(e) Employment Rights Act 1996 ("**ERA**")).

2. At the material times the Claimant had a disability by reason of Asplenia within the meaning of s.6 of the Equality Act 2010 ("**EqA**").

3. The Claimant's claim for discrimination arising from disability (s.15 EqA) is well founded and succeeds.

4. The Claimant's claim for failure to make reasonable adjustments (ss. 20, 21 EqA) is well founded and succeeds.

5. The Respondent must pay to the Claimant compensation for discrimination arising from disability (s.15 EqA), failure to make reasonable adjustments (s.20&21 EqA), and for automatically unfair dismissal (s.100(1)(e) ERA) to be determined by the Tribunal at a remedy hearing, if not agreed by the parties.

# REASONS

## The background and issues

1. By a claim form dated 9 April 2021 the Claimant brought complaints of: (i) automatically unfair dismissal under s.100(1)(c) and (in the alternative) s.100(1)(e) ERA, (ii) discrimination arising from disability (s.15 EqA) and failure to make reasonable adjustments (ss.20, 21 ERA). All complaints arise from the Claimant's dismissal by the Respondent on 9 November 2020. The Claimant contends the decision to dismiss was caused by the Claimant telling the Respondent that she was likely to have to be shielding pursuant to the government directions as a person clinically extremely vulnerable ("**CEV**") to coronavirus, and therefore having to work from home.

2. The Claimant contends each of her conditions of Ehlers Danlos Syndrome ("**EDS**") and Asplenia amounts to a disability within the meaning of s.6 EqA.

3. The Respondent entered a response denying all the claims. The Respondent avers that the Claimant was dismissed for a reason related to her capability for performing work of the kind she was employed to do. In its response, the Respondent did not admit that the Claimant's conditions amounted to disability. However, following the Claimant's providing her disability impact statement and medical evidence, the Respondent conceded that at the material times the Claimant had a disability by reason of EDS, but maintained its position of not admitting disability by reason of Asplenia.

4. The Respondent denies treating the Claimant unfavourably because of something arising from her disability, namely dismissing the Claimant because of her request to work from home. In the alternative, the Respondent contends that that the treatment was a proportionate means of achieving a legitimate aim, "*namely the effective working of a newly formed team supporting a care home business during the Coronavirus pandemic, which required the team members to work together in an office, which the Respondent took all reasonable steps to ensure was Covid secure*".

5. The Respondent also denies breaching the duty to make reasonable adjustments. It contends that to allow the Claimant to work from home was not a reasonable adjustment because her "*role was an office based role, working alongside colleagues in a team environment. Had the Claimant's performance been such that her employment could have continued, the Respondent would have supported working from home 1-2 days a week, on a review basis. It could not support the Claimant, or any member of the team, working from home on a full time basis, as requested by the Claimant without detrimental impact on the effectiveness of the team*".

6. The Claimant was represented at the hearing by Mrs Mankau, and the Respondent by Ms Genn. The Tribunal is grateful to both Counsel for their submissions and other assistance to the Tribunal.

7. There was an agreed list of issues, reproduced as Annex A to this judgment. The Tribunal clarified with Mrs Mankau that the substantial disadvantage relied upon by the Claimant (paragraph 2.7 on the list of issues) was her inability to work from the Respondent's office due to having to stay at home ("shield") on the government's advice as a CEV person.

8. The parties prepared a joint chronology and a cast list. Following the evidence, the parties submitted an agreed legal framework document containing the relevant principles of law and legal authorities ("**the Legal Framework**"). It is reproduced as Annex B to this judgment.

9. During the closing submissions, I clarified with the parties that since the Claimant did not have two years of continuous service, the burden of proof with respect to the reason for dismissal was on her (see *Maund v Penwith District Council* [1984] ICR 143). Therefore paragraph 5 of the Legal Framework was incorrect. Mrs Mankau accepted that.

10. Furthermore, the issue of separability in whistleblowing cases established in the cases quoted at paragraph 6 of the Legal Framework (as recently confirmed by the Court of Appeal in *Kong v Gulf International Bank (UK) Ltd (Protect intervening)* 2022 ICR 1513) does not appear to be relevant on the facts of this case.

11. Finally, at paragraph 8 of the Legal Framework the parties' quotation of Underhill LJ in *Rodgers v Leeds Laser Cutting Limited* [2022] EWCA Civ 1659 at [19] that "*the perceived danger must arise at the workplace"* is not complete and taken out of context. It is misleading in so far as it purports to suggest that the circumstances of the danger must be specific to the workplace.

12. The lengthy quotation from that judgment at [47] is of no assistance as it deals with the analysis of the employment judge's reasoning in that specific case. When read together with the preceding paragraph 46 and the opening sentence in [47] (for some reason omitted by the parties), what the passage really says is that Underhill LJ did not accept the appellant counsel's submission that the employment judge had erred in law by restricting s.100(1)(d) ERA to circumstances of danger that were specific to the workplace.

13. Underhill LJ rejected that submission on his reading of the employment judge's reasons. However, more importantly, he went on to say at [59] (***emphasis added***):

> "*It may, however, be useful if I say that if, contrary to my view, the Judge had proceeded on the basis alleged by Mr Kohanzad, I agree with him that she would have erred in law.* ***I can see nothing in the language of section 100 (1)(d) that requires that the danger should be exclusive to the workplace. All that matters is that the employee reasonably believes that there is a serious and imminent danger in the workplace.*** *If that is the case, it is the policy of the statute that they should be protected from dismissal if they absent themselves in order to avoid that danger. It is*

> *immaterial that the same danger may be present outside the workplace – for example, on the bus or in the supermarket*."

14. We also note that at [17] Underhill LJ said:

> "*…the subsection should indeed be construed purposively rather than literally and that it is sufficient that the employee has a (reasonable) belief in the existence of the danger as well as in its seriousness and imminence.*"

15. Finally, at [20] Underhill LJ did not say that Lindsay J statement at [28] in *Von Goetz v St George's Healthcare NHS Trust* EAT/1395/97 that:

> "*We see no reason … to limit the ambit of, for example, 1(c) and 1(e), so that they should be concerned only with harm or possibilities of harm at the dismissed employee's place of work ….*"

was wrong as a matter of law, but simply distinguished it as having no application to section 100(1)(d).

16. Therefore, for s.100(1)(d) ERA to be engaged, it is not necessary that the circumstances of danger be generated by the workplace itself, nor that the harm or possibility of harm arises at the employee's workplace or in respect of any employees. We see no principled reason why the same conclusions should not apply to s.100(1)(e), considering the identical language in both sub-sections.

17. With these corrections and observations, in reaching our decision we applied the statutory provisions, legal principles and authorities cited in the Legal Framework. Additional statutory provisions, legal principles and authorities applied by the Tribunal are set out in the Law section of the judgment.

18. Both parties submitted written closing submissions supplemented by oral submissions.

## The evidence

19. The parties submitted a joint bundle of documents of 510 pages they introduced in evidence. Additional documents were added during the hearing. The final bundle had 547 pages. The Tribunal accepted additional documents in evidence.

20. The Tribunal heard from the Claimant, and for the Respondent - Mrs Sharon Quinn ("**SQ"**), Head of Reward and Employment Policy and the Claimant's direct manager until 12 October 2020, Mr Alex Boardley ("**AB**"), Employee Relations and Policy Manager and the Claimant's direct manager from 12 October 2020 until her dismissal, and Ms Nikki Evans ("**NE**"), Head of Learning and Development and the Claimant's appeal hearer. All witnesses gave sworn evidence and were cross-examined.

21. At the end of the closing submissions there was no time left for the Tribunal's deliberations. The Tribunal listed the case for an additional day for deliberations

on 30 January 2023 in chambers. Following the deliberations, the Tribunal has reached this decision unanimously on all issues.

## The facts

22. The Tribunal made the following findings of fact. The findings were made on the balance of probabilities. Where there was conflicting evidence, the Tribunal preferred the Claimant's evidence, because the Tribunal found the Claimant to be a more credible witness, and her evidence more cogent and plausible than those given by the Respondent's witnesses. Our reasons for that are set out in the Analysis and Conclusions section of this judgment.

*Claimant's disability*

23. The Claimant has EDS, a genetic condition which affects the connective tissues throughout her body, causing them to become over stretchy, which in turn causes subluxation or full dislocation and chronic and acute pain. She was born with EDS and first diagnosed with this condition when she was 12 years old. The condition causes the Claimant the chronic pain and injuries. Due to that she is significantly restricted in her daily activities, such as walking, exercising, lifting and carrying things of moderate weight, doing normal household chores, doing repetitive activities, such as typing, staying in one position for too long. The EDS also negatively affects her body's ability to heal due to low blood pressure caused by overstretched connecting tissue in the veins. It also causes the Claimant to have migraines, cluster headaches and nauseousness.

24. Her EDS fluctuates and when it "flares up" the Claimant is in severe pain and cannot mobilise unaided or use her arms. She manages the condition by medications, physiotherapy and a diet. She wears a custom-made upper body compression brace for joints support and stability. Without medications, physiotherapy and other protective measures, such as the diet and the brace, the Claimant would not be able to function. If the Claimant were to spend a prolonged period of time inactive, for example due to an infection or other illness, the symptoms of her EDS would become much worse.

25. In 2013 the Claimant was diagnosed with Asplenia. She underwent a surgery to remove a tumour from her pancreas and the whole of her spleen. As a result of that her immune system is materially compromised, and the Claimant is vulnerable to catching infections and viruses and struggles to fight them off.

26. To manage the risk of catching infections and viruses the Claimant takes various antibiotics, and medications to control side-effects of the antibiotics. She also takes other precautions, such as limiting her social activities and not mixing with people. If the Claimant were not to take the prescribed medications or other precautions, she would be at a serious risk of catching an infection or a virus with grave consequences for her health, including death. The fear of catching an infection or a virus causes the Claimant anxiety, which became particularly acute during the Covid-19 pandemic.

27. During the first wave of the pandemic, on 26 March 2020, the Claimant received a letter from the NHS identifying her as someone at risk of severe illness if she caught Covid-19 and advising her to stay at home at all times and avoid face-to-face contact for at least twelve weeks. During the second wave of the pandemic, on 5 November 2020, the Claimant received a similar letter, identifying her as a CEV person and telling her to stay at home at all times.

*Start of the Claimant's employment with the Respondent*

28. In March/April 2020 the Respondent made a decision to restructure its HR function and move from HR generalists who were based remotely across the country, to Employee Relations ("**ER**") specialists who all were to be based at the Respondent's headquarters in Colchester, Essex.

29. As part of that plan the HR generalists staff based in the regions were to be made redundant, and new ER staff recruited to be based in the headquarters. The new ER staff would be providing HR/ER support to regional managers through a help line, which was due to open on 2 November 2020. Recruitment of the new ER staff took place over summer 2020.

30. The Respondent released a job advert detailing the role and the necessary attributes for successful candidates to have. The description stated, *inter alia*:

> **"Job Summary**
> o To support Care UK operations (leaders and managers) through the provision of reactive, proactive and follow up Employee Relations (ER) advice.
> o Identify trends and opportunities to improve Care UK policies, systems and processes and as a team in order to ensure that we make improvements and continuously develop.
> o *Based at our Head Office in Colchester*
> o *We are building out a brand new team. Previous ER experience is a necessity."*
>
> **Key Responsibilities**
> *Provide ER Helpdesk telephone service to managers and leaders to advise on Employee Relations and other related HR policies and procedures.*
> o Provide detailed advice on specific ER issues to managers e.g. discipline, grievance, work capability, short term and long term absence
> o Following on from telephone advice, provide checking service on letters and where necessary provide written advice for managers and leaders to use
> […]
> *Dealing with grievance responses/liaise with line managers*
> o Keep up to date and accurate records of employment matters to ensure that the company case is as strong as possible
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[…]
*Ad-hoc project work as required*

31. Person specifications for the role stated what Knowledge and Qualifications, Experience, Technical Skills and Personal Qualities successful candidates should possess. The first on the list of Technical Skills was: "*Strong attention to detail*".

32. The Claimant applied for the job on 19 August 2020. SQ reviewed the Claimant's CV and put her forward for the recruitment process. This involved the Claimant first undergoing a skill-based role play test on 24 August 2020 moderated by Ms Alison Watkins ("**AW**"), HR Consultant.

33. Somewhat ironically, considering how the Respondent has dealt with the Claimant's dismissal, the test was based on a scenario where a care home manager was asking for support to prepare a letter of concern to be put on personnel file of a manager who had mishandled a probation performance review meeting, by not setting up a performance improvement plan and not giving the putative underperforming employee targets and timescale to improve.

34. The feedback from the Claimant's test was positive. AW noted in her feedback form:

***"Ability to extract Information- Technical Skills***

*Asked for names, dates, details and confirmed that policies were required. Where I did not provide information, she did prompt and came back to the issues in an organised way. Had a clear plan of the information she needed to obtain and gained this quickly."*

35. The Claimant was progressed to the second stage, and on 26 August 2020 she was interviewed via Zoom by SQ and one of the outgoing HR managers. The Claimant was successful and was offered a job to start in the middle of September 2020.

36. On 3 September 2020, the Claimant completed a health questionnaire provided by the Respondent's occupational health provider ("**the OHP**"). She declared her EDS and Asplenia.

37. Based on the Claimant's questionnaire, the OHP sent to SQ a report in which it confirmed that the Claimant was fit for the role, however, because of her medical conditions the OHP advised the Respondent:

*"Adjustments & Comments*
*o The Equality Act is likely to apply.*
*o A Workstation Assessment is recommended.*

*o A workplace risk assessment is recommended."*

38. The report went on to say (***emphasis added***):

> "*Further Notes: Musculo-skeletal Assessed Fit but has reported a musculoskeletal condition with ongoing treatment. A workstation assessment is recommended. Further information for your reference: Workstation assessment - http://www.nhs.uk/Livewell/workplacehealth/Pages/howtositcorrectly.aspx. A workplace risk assessment is recommended to identify with the employee what if any workplace risks may need to be controlled e.g. manual handling risks. A documented conversation regarding mutual concerns and an action plan to minimise identified risks should suffice. For further guidance on conducting risk assessments please see the link: http://www.hse.gov.uk/risk/faq.htm* ***Assessed fit but reported a weakened immune system . A workplace risk assessment is recommended to identify with the employee what if any workplace risks may need to be controlled due Covid 19 pandemic****. Please refer to the latest advice from Public Health England, as the employee may need to be particularly stringent in following social distancing and hand washing measures. PHE advice is to keep at least 2 metres apart from others..*"

39. On 7 September 2020, the Claimant had a telephone conversation with SQ. Before the conversation SQ had read the OHP's report. SQ asked the Claimant about her medical conditions and what adjustments she needed. The Claimant explained her EDS and Asplenia. With respect to the former, she asked for an ergonomic chair and dictation software. The Claimant also said that because of her Asplenia she needed to be very careful not to catch infections, that she was taking antibiotics and was given flu jabs. SQ took a note of that conversation. The start date of 21 September 2020 was agreed.

40. In the first week of the Claimant's employment SQ was on annual leave. During that week the Claimant was given induction by an HR Manager, Gill Sanford ("**GS**"). The induction involved GS showing the Claimant a PowerPoint presentation about the Respondent and arranging IT equipment for the Claimant. The Claimant was also allowed to sit on a support call GS had with one of the care home managers. That took two days. The rest of the week the Claimant spent reading the Respondent's policies.

*Review of the pandemic plan*

41. On 5 October 2020, SQ asked the Claimant to review and update the Respondent's pandemic plan to reflect the changes introduced by the governments in England and Scotland and to review a draft email communication to the staff about these changes ("**iCommunicate**").

42. The plan was over 100 pages long with additional supporting documents and charts. Due to rapidly changing Covid-19 regulatory landscape at that time the plan was quite outdated. Conscious of the negative press surrounding Covid protective measures in care homes, the Claimant sought to make as a thorough job as possible to bring the Respondent's pandemic plan up to date and in compliance with the regulatory framework both in England and Scotland. Consequently, the Claimant made a significant number of changes to the document.

43. On 13 October 2020, AB, who joined the Respondent a day earlier and became the Claimant's direct line manager, reported to SQ that the Claimant had made a substantial number of changes to the plan. SQ had an impromptu telephone meeting with the Claimant and Sharnna Coates ("**SC**"), another ER Consultant, who had been recruited in the ER team on 5 October 2020.

44. In referring to the Claimant's re-draft of the pandemic plan, SQ told the Claimant and SC "*we need to make sure that we are not trying to boil the ocean*". The Claimant and SC were unfamiliar with this idiom. The Claimant interpreted the comment as meaning that she should not be as thorough in her review and condense her changes to the critical issues.

45. On 14 October 2020, the Claimant sent to SQ a revised draft of the pandemic plan. In her covering email she wrote:

> *"Please find attached reviewed pandemic plan. Alex, Sharnna and I have gone through it this morning and attempted to "unboil the ocean". We've condensed comments and decided to wait for feedback on these proposed amendments before submitting the supporting documents with amendments, as this could change dependant on feedback on the pandemic plan itself. Therefore, on the main document we now only have 47 comments.*
> *We plan to review the FAQ section this afternoon*."

46. SQ and AB thanked the Claimant for her work on updating the pandemic plan. Neither of them expressed any dissatisfaction or criticism of the Claimant's work on the plan.

47. However, it appears (see paragraph 11 of the AB's witness statement and p.332 of the bundle) that AB thought that the Claimant doing a thorough job on reviewing and amending the pandemic plan was an indication that she was not being "objective" and may have a conflict of interest because her father was a resident in one of the Respondent's care homes. In particular AB was concerned that the Claimant had raised the issue of possibility of contracting Covid-19 twice and how in such a situation the Respondent's employee at care homes would be paid. AB thought the risk of contracting Covid-19 was very low and dismissed that concern. He was also unhappy about the Claimant's amendments extending to issues related to the safety of residents and not only the Respondent's staff. AB discussed that with SQ. SQ agreed with the AB's concerns. However, neither of them talked to the Claimant about these concerns.

*Review of social media policy*

48. On 30 September 2020, SQ agreed with Peter Pender ("**PP**"), Head of Business Systems and Information Security Management, that the Claimant would assist with reviewing the Respondent's Social Media policy. The review was prompted by the Respondent discovering that some of its staff were posting photos on social media showing them not complying with the social distancing guidelines.

49. On 6 October 2020, SQ, PP, Joanna Bailey ("**JB**"), external data protection specialist, and the Claimant had a Zoom meeting to discuss the social media policy and what changes to it were needed. The Claimant was tasked to review the policy from the HR perspective and also to cross-check it against the Respondent's disciplinary policy.

50. Following the call JB sent to SQ, PP and the Claimant updated versions of the Social Media policy, Computer User policy and Mobile Device Acceptable Use policy.

51. As the Social Media policy cross-referenced other policies, which were "owned" by other departments of the Respondent, the Claimant sought clarification from SQ about the scope of her review task. SQ said that she would arrange a meeting with the Claimant to discuss.

52. On 8 and 12 October 2020, the Claimant sent to SQ her suggested changes on a draft iCommuicate about changes to the social media policy, which had been prepared by PP. SQ responded saying that the Claimant's suggestions "*ma[de] sense*" and suggesting a further "*little tweak*".

53. On 15 October 2020, the Claimant wrote to SQ asking for directions on the next step with respect to iCommunicate draft and whether it was "*sitting with Peter [Pender] or [ER team]*". SQ did not reply.

54. On 23 October 2020, SQ and the Claimant had a meeting, arranged by SQ, to clarify the scope of the Claimant's review.

55. On 26 October 2020, the Claimant emailed SQ her comments on the Social Media policy, the other two policies sent by JB on 6 October 2020 and iCommunicate prepared by JB.

56. SQ replied an hour later clarifying the purpose of the review and outstanding actions. Actions included SQ setting up a meeting with PP to discuss expanding the Social Media policy to cover recent examples of unacceptable use, SQ agreeing the content of iCommunicate, as proposed by the Claimant, SQ liaising with the Respondent E-learning people to include the policy in the induction and learning and development programmes. The Claimant's action was to liaise with "ATC" to check if the policy was included as part of on-boarding process. SQ's email confirmed that the action of updating the Respondent's disciplinary policy was done.

57. Neither at the meeting on 23 October 2020 or in her email of 26 October 2020, did SQ express her dissatisfaction with the Claimant's performance or otherwise criticised her work on updating the Social Media policy.

*Regional call issue*

58. On 28 October 2020, Dianna Coy ("**DC**") Regional Director emailed SC asking whether anyone from the ER team would be able to attend her team call the following day. DC asked what time would be best for the ER's attendee. A few minutes later the Claimant responded for the ER team saying that she would be happy to attend the call and that she had already a meeting booked between 10am and 12pm, but otherwise was free any other time. DC replied thanking the Claimant and saying that she would let her know.

59. DC then sent a meeting invite for 10.30am. The Claimant replied saying that she would not be able to attend at that time as she had already a meeting booked between 10am and 12pm. DC replied apologising for misreading the Claimant's earlier email and saying that she would change the time of her meeting unless anyone else from the ER could attend instead of the Claimant. A couple of minutes later at 11:56am DC emailed again saying that other invitees had accepted the meeting and asking whether SC or anyone else from the ER team could join the meeting at that time.

60. The Claimant then discussed the matter with SC. The 10am to 12pm meeting the Claimant was due to attend was the Respondent's "Stop the Floor" meeting, which was a regular bi-monthly meeting where the Respondent's executives gave an update on the Respondent's business and notable things that happened in the update period. SQ had previously told the Claimant that it would be good for her to attend the Stop the Floor meetings to better understand the Respondent's business and what was happening.

61. Accordingly, the Claimant thought that the Stop the Floor meeting was more important to attend than the DC's team meeting. SC disagreed. Meanwhile, at 12:49am, DC emailed SQ asking whether anyone from the ER team could attend her team call just for 15 minutes. She said that it was her fault for scheduling the meeting at the slot that the Claimant could not do, but because other invitees had accepted, she did not want to move it.

62. SQ thought that it was important that someone from the ER team attended the DC's team call to build the relationship. SQ telephoned DC to let her know that someone from the ER would be attending. She then telephoned AB and told him that it was important that someone from the ER team attended the DC's team call, and that DC would be unhappy if no one attended her call.

63. AB then discussed this with SC and the Claimant. It was agreed that the Claimant should attend the Stop the Floor meeting and AB and SC would join the DC's call. Neither AB, nor SQ told the Claimant that the DC's team call was a priority and that she should attend it instead of the Stop the Floor meeting.

*Working from home issue raised*

64. With the rapid increase of Covid-19 cases and deaths in October 2020, the Claimant became increasingly more concerned about her safety. She was concerned because although the Respondent's office was certified as Covid-secure, she had noticed that not everyone in the office was following the rules. She saw a cleaner wearing a mask on her chin, the absence of cleaning wipes at the temperature measure station at the entrance (meaning that people were passing the thermometer to each other without having it wiped), people in the office standing less than two meters apart.

65. On one occasion a member of staff approached the Claimant's desk, not wearing a mask, then leaned over the Claimant and started typing on the Claimant's keyboard. The same member of staff then told the Claimant that her son who lived with her had been in sustained contact with a person who had tested positive for Covid-19.

66. On another occasion, SQ, not wearing a mask, reached over the Claimant to pin something on a wall behind the Claimant, while saying: "*I know I shouldn't be this close, but I'll be quick*". The Claimant was also concerned of poor ventilation in the office, which increased the risk of virus transmission.

67. The Claimant was also concerned for her parents, both of whom, as the Claimant, were in the clinically extremely vulnerable group, and for whom the Claimant was the main carer. The Claimant's father was in residential care (in one of the Respondent's care homes) with a terminal illness.

68. The Claimant was extremely careful to minimise all risks of contracting Covid-19 and only once went outside her "support bubble" by attending on 17 October 2020, a hair appointment. In doing so she took all the necessary precautions and did not break any Covid-19 rules.

69. In early/mid-October 2018, the Claimant raised the issue of lax Covid-19 compliance in the office with SQ and AB. They did not tell her to raise the matter with a health and safety representative, or that the Respondent had a health and safety representative or a committee. The Claimant also told AB about her Asplenia, and that during the first wave of the pandemic she had been told that she needed to stay at home due to her vulnerability to catching an infection.

70. At the beginning of the week commencing 26 October 2020, SC told the Claimant about her plans to travel to London the following Friday to meet her boyfriend, who had flown in back from a holiday abroad with some friends. SC said that she was planning on staying with him over the weekend. SC said that she did not want Covid-19 to impact her social life, even if that meant breaking the Covid-19 rules. SC also told the Claimant that she was sharing a house with a friend who regularly had different people visiting her, and that SC also regularly visited her family on weekends for dinner.

71. That conversation caused the Claimant to become extremely concerned for her safety. However, she did not say anything at that time to SC, because she did

not wish to cause an issue in the office. Following that conversation, the Claimant became frightened to be in the office, and appeared very quiet and withdrawn, not joining in conversations with SC and AB.

72. On 28 October 2020, AB asked the Claimant if everything was OK. The Claimant said that she was fine. AB said that if the Claimant wanted to talk, he was available.

73. On 29 October 2020, the Claimant again appeared quiet and withdrawn, and AB asked her if she was OK. The Claimant said that she was fine, but there was a lot going on in her personal life and she wanted to keep it separate from work. AB asked the Claimant to let him know if that was also affecting her work.

74. On 30 October 2020, the Claimant asked AB for a meeting. At the meeting the Claimant explained that she did not feel safe in the office and was terrified about catching Covid-19 in the office. She said that the reason for her being quiet and withdrawn was because she was "*scared rigid*" to the point that at times she could not find the words to respond. She told AB about her previous experience with shielding and the impact it had on her and her personal life. She said that she had not left the house at all during the first national lockdown, not even to put the bins out.

75. We pause here to say that we reject the Respondent's submissions that the change in the Claimant's behaviour was due to her realising that she was not up to the job and, as it were, saw "the writing on the wall". There is no credible evidence to support that supposition. We accept the Claimant's evidence that the change in her behaviour was due to her becoming increasingly scared about the Covid-19 situation and the risk she was getting exposed to when in the office.

76. AB asked the Claimant what had caused her to become suddenly so scared. The Claimant explained that it was caused by what SC had told her earlier that week about not letting Covid-19 affecting her social life. The Claimant also reiterated her concerns about lax compliance with the Covid-19 rules by some people in the office.

77. AB said that although the role was office based, he was happy to explore the option of the Claimant working from home 1-2 days a week. The Claimant said that she did not see how that would help. It was agreed that AB would organise a meeting with SC to discuss the Claimant's concerns and try to find a way forward. AB also said that he would discuss with SQ and Paul McGuiness ("**PMcG**"), the Respondent's Facilities Manager, what further measures could be taken to make the Claimant feel safe in the office.

78. Following the meeting with the Claimant AB spoke with SC about the Claimant's concerns. SC reacted badly. She felt offended because she considered that she was supportive of the Claimant, and that she was not breaking any rules because her boyfriend lived alone, and she was in his "support bubble".

79. The meeting between the three of them, which took place later the same day, was confrontational with the Claimant telling SC that she felt that SC was lacking compassion for her situation, and the SC saying that the Claimant was being rude in ignoring her. The meeting finished without a positive resolution, with SC leaving the room upset and angry, and the Claimant feeling upset and distressed.

80. Following the meeting AB spoke with SQ. AB relayed his conversations with the Claimant and SC and what happened at the meeting between the three of them. They discussed whether it would be appropriate for them to challenge SC's behaviour outside work. Both agreed that it was not their place to do so because SC was not a member of staff with caring responsibilities for vulnerable care home residents.

81. AB and SQ discussed the possibility of the Claimant working from home. SQ indicated to AB that if the Claimant could not come to the office, she (the Claimant) did not have the job. They, however, agreed that AB could offer to the Claimant 1-2 days a week working from home as a temporary measure.

82. AB also discussed with SQ and PMcG additional Covid-19 safety measures for the Claimant. They agreed to move the Claimant's desk to a far corner, add additional dividing boards, lay a hazard style tape around the desk, install a sanitising station in the office, offer the Claimant to wear a mask or visor, offer the Claimant the possibility to work from home 1-2 days a week.

83. AB relayed the content of his conversation with SQ to the Claimant and asked her to consider over the weekend whether with these additional measures she would feel safe working from the office. AB prepared an email to send to the Claimant to confirm that. Before sending it to the Claimant, AB sent a draft to SQ to get her approval. The email confirmed the additional measures the Respondent was prepared to put in place and said (***emphasis added***):

> "*As agreed, please take some time over the weekend, as a first step I need you to consider whether you yourself are comfortable and feel safe with the working conditions taking into account the additional steps above, please let me know on Monday morning. If the answer is yes, then we will work together with Sharnna to address the working relationship difficulties that have arisen between the two of you.* ***If you decide you cannot work in the office as a COVID secure environment, then we would view this as a resignation.***"
>
> *It is important that your decision is not based on your relationship with Sharnna,* ***but purely around whether you feel you are able to cope with your anxieties and feel safe enough to work within the office****.*
>
> ***Please know that I absolutely want you to stay and will be committed to working with you and Sharnna to get things back on track****.*

84. AB was about to send this email to the Claimant, when the Claimant received a call from her father's care home. Her father was taking a turn for the worse

and there was a real risk of him passing that weekend. The Claimant was asked to decide whether an ambulance should be called for her father, or he was to be left to die in the care home. She told that to AB. AB was empathetic and supportive. With assistance from SQ it was arranged for the Claimant to visit her father at the care home.

85. Through that evening and over the weekend the Claimant and AB exchanged several text messages about the situation with the Claimant's father.

86. On 31 October 2020, a second national lockdown in England was announced with effect from 5 November 2020 until 5 December 2020.

87. On Sunday, 1 November 2020, AB texted the Claimant asking her whether she was coming to the office on Monday. The Claimant replied asking if she could take a day off to look after her father. She also mentioned the new shielding guidance coming in that Thursday, and asked AB whether in light of that SQ would reconsider the Claimant's request to work from home.

88. AB agreed that the Claimant should take two days off and said that he would speak with SQ about the Claimant's request to work from home.

89. The Claimant replied including a copy of the guidance, which stated that CEV people should work from home over the lockdown period and if they could not work from home they should still not go to work, and they might be eligible for statutory sick pay and employment support allowance. The guidance said that the government would write to all CEV people to set out detailed advice while the restrictions remained in place. The Claimant said that she was in the CEV group before and was expecting to receive a letter advising her to shield the following week.

90. AB replied asking the Claimant whether she was intending on shielding in light of the new lockdown, because if she did, a discussion needs to be had about "*what this may mean for your role*."

91. The Claimant replied saying that if she received a shielding letter, she hoped that something could be worked out so that she could work from home. She asked if that option was "*completely off the table, even in lockdown*"?

92. AB replied saying that he had discussed working from home with SQ and "*aside perhaps once a week temporarily, [it] just [wasn't] a viable option*". He said that the Claimant's role could not be effectively delivered from home.

93. The Claimant replied saying that she was panicking and asking whether that meant that if she had to shield, she would lose the job. AB replied telling the Claimant not to panic and focus on her father, and that "we" would be in touch tomorrow.

*Claimant's dismissal*

94. On Monday, 2 November 2020, the Respondent's ER helpline desk went live. It was also the start date of the third ER Consultant, Debbie Harvey ("**DH**"), who joined the AB's team.

95. That morning AB spoke with SQ and relayed his exchanges with the Claimant over the weekend about the shielding announcement and that the Claimant was likely to receive a letter from the government advising her to stay at home and work from home, if possible. SQ said that although she was content with the Claimant working from home 1-2 days a week on a temporary basis, AB needed to convince her that it would work on a full-time basis.

96. Following that conversation, later that day, SQ emailed AW with the subject line: "Help!" In that email SQ detailed her rationale as to why the Claimant's role could not be done from home, listed Covid-safety measures in the office, additional reasonable adjustments the Respondent was proposing to implement, and why the Claimant's job cannot be left open if the Claimant were to be on sick/unpaid leave during the lockdown. The draft also included three bullet-points about the Claimant's behaviour on 29-30 October 2020 because of her fear of Covid. There was no mention of any issues concerning the Claimant's performance.

97. SQ listed the following reasons as to why the job required the Claimant's presence in the office:

> **"*Why this job cannot currently be done from home:***
> *· It is a new team providing a new service (ER Helpdesk) to Care UK, following a restructure in the Summer*
> *· The ER Helpdesk went live today, 2 Nov 2020 so even though the Advisors have been in place for a number of weeks, there is no experience or pattern of working 'live'*
> *· There is a need to build the team, ways of working, sharing and checking in on advice in the early stages of the service, ensuring calls are answered and work is shared fairly*
> *· Significant historic policy challenges that need identifying by working together and sharing knowledge and experience of calls and challenges that the managers face*
> *· It was made clear at the interview, on the basis of the above, that the job would need to be carried out from the office, the question was asked and answered in the affirmative: 'The role is based on Connaught House/Colchester from start (with social distancing) – is that ok?"*"

98. Notably, under the reasonable adjustments heading, SQ wrote, *inter alia*:

> "*I am happy to agree for you to work from home 1-2 days a week on a temporary basis, let me know if you want to discuss this further*".

99. This email was essentially a draft script SQ planned to use for conversation with the Claimant about the Claimant's request to work from home. SQ wanted AW to review it and give her advice.

100. On 3 November 2020, SQ had conversations with AW and AB about how to handle the situation with the Claimant. SQ knew that the Claimant was very likely to receive a shielding letter. SQ must have realised that in the circumstances it would be very difficult to convince the Claimant to ignore it and continue to come to and work from the office. She must have also realised that the Respondent could not force the Claimant to resign (despite what the AB's draft letter said that the Claimant's failure to return to the office would be viewed as her resignation). SQ decided against the furlough option or placing the Claimant on statutory sick leave.

101. SQ then decided that the way to resolve the situation was to dismiss the Claimant under the pre-text of poor performance. She knew that the Claimant was still on her probation period and could be dismissed on a week's notice for failing her probation. However, by that stage the Claimant had been employed for less than six weeks and had no formal probation review meetings or other performance review or discussions[1].

102. SQ told AB that she would hold a probation meeting with the Claimant the following day. SQ prepared a script for the probation meeting, listing performance issues she wanted to use as justification for the Claimant's dismissal. She asked AW to review the script, which she did and suggested some changes.

103. The script contained the following concerns:

> *You get into detail and it prevents you from acting at pace and getting to pragmatic solutions, for example, the Social Media Policy and the Pandemic Plan*
> *- Social Media Policy – you did not have clarity on the brief, you spent a long time reviewing the policy documents and I then took the actions back (my email on 28 Oct) as I found that you were not concluding the matter /*
> *- Pandemic Plan – I asked you to update the plan, the version I had back had a lot of questions outstanding, so I needed to get Alex involved to go through the comments so that you could pull out key questions for me rather than present the document with questions*
> *- I presented the solution to prepare 2 versions with different colours so that we had 2 ready if needed (which we did need in the end)*
> *- I used the expression 'let's not boil the ocean' as I could see that you were getting lost in the detail.*
> *This role is effectively a pacey Call Centre and supporting the managers to manage their cases – acting at pace and not spending too much time on the detail. I am not convinced that this is your skill set for the reasons described*.

104. It went on to make a further complaint:

> "*I have concerns about you being too literal and needing to be told what to prioritise – for example, I said that Stop The Floor was great and then found*

[1] The reason for these factual findings and the factual findings in the preceding paragraph will be explained in the Analysis and Conclusions section of the Judgment.

*that you had said to Dianna that you could not attend her Home Managers Regional meeting – despite the critical focus on building relationships.*"

105. It also contained a complaint about the Claimant being quiet in the office on 28-30 October 2020 and not interacting with SC and AB, and that the Claimant had not tried to rebuild the relationship with SC following the meeting on 30 October 2020. It concluded with:

"*Is the job as you expected?*

*Where do you see the challenges?*

*Let me reflect on this and come back to you later today.*"

106. At the bottom of the page the script had an additional item under the heading "Consider", which read:

"*Consider:*
*I also specifically requested you to talk to me when following up but you like to send emails, and to save the pandemic plan in the shared folders – which you did not do meaning that I had to go looking for the correct version when needed.*"

107. On 3 November 2020, SQ sent to the Claimant a letter inviting her to a probation meeting on 4 November 2020 at 4.30pm by Zoom. On the Claimant's request the meeting was re-arranged for 5 November 2020, because the Claimant was planning to visit her father in the hospital that evening.

108. On 4 November 2020, the Claimant returned to the office. Her desk had not been moved to the corner and no other proposed reasonable adjustments put in place. That evening the Claimant received a shielding letter from the government advising her not to leave home. She informed AB immediately, who in turn informed SQ before the probation meeting.

109. The Respondent's probation policy states, *inter alia (**emphasis added**)*:

***"Our policy***
***It is Care UK RCS's policy that all new starters, regardless of role, will undertake a 6 month probation period. The line manager will undertake regular reviews with the colleague to ensure that they understand their role and are given adequate training and support to achieve company standards. All colleagues on probation will have a final probation meeting with their line manager, the outcome of which will be confirmed in writing. If any shortfall in performance is identified during the probation period the process in this policy will be followed.***

***Accountabilities***

***Line Managers are responsible for:***
*• Ensuring that all new colleagues are aware of this policy;*

• ***Ensuring that the probationary process is followed for all new starters****;*
• ***Providing the colleague with the opportunity to attend training and coaching as necessary for their role****;*
• *Ensuring the colleague receives an induction and that this is monitored and signed off;*
• ***Ensuring that all new colleagues have regular feedback regarding their performance during their probationary period, meeting at least monthly to ensure realistic and measurable standards of performance are set and explained carefully****;*
• *Establishing and judging the standard of performance demonstrated by the colleagues they manage and taking the appropriate action;*
• ***Raising any problems or concerns with the colleague as soon as possible with the aim of resolving any issues****;*
• *Carrying out the colleague's final probationary review meeting on or before the probationary period is due to come to an end and confirming the outcome in writing;*
• ***Ensuring this policy is adhered to when dealing with new colleagues who do not meet the required performance level for their role****;*
• *Ensuring that colleagues whose performance does meet Company standards despite coaching, training and supervision, are not retained by the Company;*
• *Retaining copies of relevant documentation for the colleague's personal file.*

*[….]*

***Process***

 ***Discuss and agree objectives when the colleague starts work explain the induction process and ensure the colleague has a job description and understands how to log in to the training portal****. Form PB1 can be used to record objectives and development needs.*

 ***Meet with the colleague at regular intervals during the probation period providing day to day feedback as well as meeting formally to ensure the employee is being provided with the training and support that is required****.*

 *Keep accurate records of agreed actions,* ***as these will form the basis of any subsequent probationary review meeting****.*

 *Use Form PB2 [Probationary Period Assessment] at the end of the probation period to assess performance.*

*[…]*

***Probation not successful***

*If performance or conduct is not satisfactory,* ***despite training and coaching being provided****, and the manager is not happy to sign off the probation period,*

*they should invite the colleague to a formal probationary review meeting.* ***The colleague should be given 48 hours' notice****, together with a reminder of the right to be accompanied by a colleague or trade union representative. The Line manager should use letter PB3 which also advises the colleague that dismissal may be a potential outcome of the meeting.*

*The aim of the review meeting will be to:*

*• Review* ***any actions agreed during the colleague's probationary period****;*
*• Explore in detail any shortfall between the colleague's performance and the required Company standard;*
*• Identify, where possible, the cause(s) of the poor performance and ask the colleague whether they acknowledge the shortfall between their performance and the required Company standard;*
***• If appropriate determine what, if any, remedial action (further training or other relevant support) could be given if the Company were to consider extending the colleague's probationary period as an alternative to dismissal****;*

*The line manager will consider any information put forward by the colleague and then decide if the probation period should be extended or if the colleague should be dismissed. Dismissal will normally be with notice, or with pay in lieu of notice, Letter PB6 should be sent to the colleague to confirm the dismissal.*"

110. The probation meeting took place at 9am on Thursday, 5 November 2020, by Zoom. SQ told the Claimant that she was aware that the Claimant had received a shielding letter, but this would not be discussed at the probation meeting. SQ said that ordinarily she would not call a probation meeting so early into the probation period, but she did that because she had some concerns. SQ then proceeded to read out the performance issues from her script. The Claimant was shocked because before that meeting neither SQ, nor AB had raised any performance concerns with her. The Claimant denied the allegations of poor performance and said that SQ's criticism of her performance was unfair. The Claimant was very upset. The Claimant said that although she disagreed with the allegations, she would take SQ's comments on board. She said that she needed more guidance and support. SQ said that she needed to reflect and then would make a decision, which could be dismissal.

111. Immediately after the end of the probation meeting SQ spoke with the Claimant about the shielding letter. SQ said that it was not possible to do the Claimant's job from home, but she was aware that AB had offered the Claimant to work 1-2 days a week from home, but she was not sure that it would work. SQ also said that she was aware of the extension of the furlough scheme but was still waiting for details.

112. Later that day SQ wrote to AB asking what work the Claimant could do from home. AB responded with various tasks that in his view the Claimant could do

from home and associated limitations and challenges. AB confirmed that the Claimant "*could potentially cover the following from home:*

- *Email queries coming through to the ER Helpdesk mail box (although I would have concerns about Cathy being fully able to do this with more complex queries/situations without others being immediately on hand to help – see below).*
- *Policy work (specifically the pandemic plan as Cathy is familiar with this)*
- *Training sessions via zoom*
- *Joining the rest of the team on meetings with RD's/Home managers via zoom in terms of relationship building and the new service*.

113. With respect to limitations/challenges, AB said that he had concerns with the effectiveness of the Claimant working independently, and that it would be easier for the Claimant to ask for help/support if she was in the office. He also said that it would be harder for him to monitor the quality and accuracy of advice being given by the Claimant. Finally, he said it could be difficult for the Claimant to be fully integrated in the new team and build relationships with peers given the team was at an early stage of development.

114. Later this afternoon the Claimant wrote to SQ explaining how vulnerable she felt in the office and the added emotional difficulties caused by the situation with her father. She said that the negative feedback was a shock for her and that she wanted to work together with SQ to set up some objectives so that she could better understand SQ's expectations and against which her performance could reviewed.

115. In the evening of the same day, SQ called the Claimant and said that she was still thinking whether to terminate the Claimant's employment and would let the Claimant know the outcome by the following evening, Friday, 6 November 2020.

116. Following the meeting with the Claimant on 5 November 2020, and during the next day SQ spent time preparing a note with her rationale for terminating the Claimant's employment and a script of a verbal termination message she intended to convey to the Claimant.

117. In the evening of 6 November 2020, SQ tried to contact the Respondent's IT department to request them to disable the Claimant's access to the Respondent's computer systems. However, they had left for the weekend. SQ then called the Claimant and left a message that she had not had time to make her final decision and wanted to reflect on the matter over the weekend.

118. In the morning, on Monday, 8 November 2020, SQ instructed the Respondent's IT department to disable the Claimant's access to the Respondent's computer systems. She then telephoned the Claimant and informed her that she was dismissed with immediate effect. That was followed by a formal letter of dismissal stating performance issues as the reason for the dismissal.

*Claimant's appeal*

119. On 12 November 2020, the Claimant appealed her dismissal. The essence of her appeal was that the Respondent dismissed her because of her disability which required her to work from home and disguised that as a performance related dismissal.

120. On 16 November 2020, without awaiting the outcome of the Claimant's appeal, the Respondent posted a job advertisement seeking candidate for the Claimant's role.

121. NE was appointed by the Respondent's HR director, Leah Queripel ("**LQ**") to hear the Claimant's appeal. NE was assisted by AW in the appeal process. AW did not tell NE that she had helped SQ to prepare the Claimant's dismissal.

122. As part of her investigation, NE prepared a set of questions, which she sent to SQ to answer ("**the Q&A Document**"). When SQ answered the questions, NE forwarded the Q&A Document with the SQ's answers to the Claimant, and the Claimant commented on the SQ's answers. After the Claimant's appeal meeting on 8 December 2020 and the interview with SQ on 10 December 2020, NE sent the Q&A Document with the Claimant's comments to SQ, who provided further commentary.

123. SQ did not answer all the questions truthfully. In particular, she said that it was not her but AB's decision that the Claimant could not work from home, and that she did not tell AB that if the Claimant could not come to the office, she did not have the job. She also said that she had made her decision to terminate the Claimant's employment over the weekend on 7-8 November 2020, when in fact she had made that decision much earlier once she had realised that the Claimant would have to be shielding. She also tried to downplay her knowledge of the Claimant's disability and the Claimant's concerns about the office not being Covid-19 safe.

124. On 8 December 2020, NE held the Claimant's appeal meeting via Zoom. AW was present and the Claimant attended with Beverly Wood, her trade union representative. The questions and answers provided by SQ and the Claimant were reviewed. The Claimant provided further details about the performance issues which had never been raised with her until the probation meeting on 5 November 2020, and why she believed it was her having to work from home that caused her dismissal. NE said that she would look into that further and come back as soon as she could.

125. On 9 December 2020, NE interviewed AB. AW was present. AB was also not entirely truthful in his answers. He did not tell NE that he had told the Claimant that she should attend the Stop the Floor meeting and he and SC would go to the DC meeting. He denied knowledge that the Claimant had been shielding during the first lockdown. He also denied that SQ told him that she was against the Claimant working from home.

126. Following the interview, AB sent NE an email chain where on 4 November 2020 the Claimant asked AB whether she should pick up an enquiry received by the ER helpdesk while she was on leave, or someone else was already dealing with

that. In his covering note he said that it was an example of the Claimant not communicating with SC.

127. On 10 December 2020, NE interviewed SQ. AW was present. When NE asked SQ how much support was given to the Claimant to help her to perform in her role, SQ said that the Claimant was just not the right person for the job and "*not good at reviewing docs, not good at judgements, not good at policy review, not good prioritisation, working at pace and cold and detached from team. It's the layering effect and there comes a point with someone who has multiple failings we say enough is enough*".

128. SQ also said that she had many conversations with the Claimant about her performance, but the Claimant "*never made any changes*." SQ said that the Claimant "*couldn't be dynamic and work in the ambiguity*" and that was never going to change and SQ did not have time to devote to the Claimant to change that. SQ also said that she "*had no idea*" the Claimant was vulnerable.

129. SQ, however, admitted that had she known at the interview stage that the Claimant was vulnerable and was at risk of having to shield that would have had to be discussed in detail as the job was office based, and if the Claimant could not come to the office a discussion would have needed to take place to "*understand what that means*".

130. Following the meeting, SQ sent to NE her further comments on the Claimant's comments in the Q&A Document and two WhatsApp messages between the Claimant and SC with photos of the Claimant at the hairdressers'.

131. On 11 December 2020, NE sent the Claimant an outcome letter dismissing her appeal. The letter was drafted by AW. NE found that there was no correlation between the Claimant's request to work from home and her dismissal, which NE found was based on the Claimant's performance.

## The law

132. As stated above, with the cited corrections and observations, the tribunal gratefully adopts the Legal Framework (see Annex B). In addition, in reaching our decision we applied the following legal principles, statutory provisions and the case law.

*Reason for Dismissal*

133. In *Abernethy v Mott, Hay and Anderson* [1974] ICR 323 the Court of Appeal held:

> "*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*".

134. This requires the Tribunal to consider the mental processes of the person who made the decision. To discover the real reason behind the dismissal the

Tribunal must examine all the facts and beliefs that caused the dismissal. The Tribunal is not obliged to accept the employer's stated reason where supporting evidence is poor or where the Tribunal suspects that there was a different motive. Based on the established facts the Tribunal is entitled to draw permissible inferences in finding the real reason which caused the employer to dismiss the employee. Furthermore, even where the employer establishes that there were circumstances that would have provided it with a fair reason for dismissal, the Tribunal is not obliged to accept that that was indeed the reason for which the employer dismissed - see *Associated Society of Locomotive Engineers and Firemen v Brady* 2006 IRLR 576, EAT and *Kuzel v Roche Products Ltd* 2008 ICR 799, CA.

*Disability*

135. The relevant point in time to be looked at by the tribunal when evaluating whether the employee is disabled under s. 6 EqA is not the date of the hearing, but the time of the alleged discriminatory act(s) - see *Cruickshank v Vaw Motorcast Ltd* [2002] I.C.R. 729.

136. Whether an impairment has a substantial adverse effect is for the tribunal to decide, taking account of the statutory Guidance on matters to be taken into account in determining questions relating to the definition of disability (the "**Guidance**"). The Guidance sets out a number of factors to consider including: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5 and B6]; the effect of behaviour [B7]; the effect of environment [B11] and the effect of treatment [B12].

137. Appendix 1 to the EHRC Employment Code of Practice also provides guidance on the meaning of "substantial". It stated at [6]: "*Account should… be taken of where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation*."

138. "*Day to day activities*" encompass activities which are relevant to participation in professional life as well as participation in personal life, and that the tribunal should focus on what the employee cannot do, not what he or she can do.

139. The Guidance provides the following examples of what is meant by "normal day to day activities". "*In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities"*.

140. In the Appendix to the Guidance, an illustrative non-exhaustive list of factors is set out which, if experienced by a person, would be reasonable to regard as

having a substantial adverse effect on normal day to day activities, which includes:

> *• Difficulty entering or staying in environments that the person perceives as strange or frightening;*
> *• Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder*;

141. Schedule 1, part 1, para. 2 of the EqA 2010 defines "long-term" as follows:

> *"The effect of an impairment is long-term if –*
> *it has lasted for at least 12 months,*
> *it is likely to last for at least 12 months, or*
> *it is likely to last for the rest of the life of the person affected"*.

*Knowledge*

142. The ECHR Code of Practice at [6.21] states:

> "*When can an employer be assumed to know about disability?*
>
> *6.21 If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act."*

*Burden of proof in discrimination cases*

143. Section 136 EqA states:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision*."

144. The guidance set out in *Igen v Wong* [2005] ICR 9311 (approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054) sets out the correct approach to interpreting the burden of proof provisions. In particular:

    a. it is for the employee to prove on the balance of probabilities facts from which the tribunal could conclude that the employer has committed an

act of discrimination, in the absence of an adequate explanation (para 79(1), see also *Ayodele v Citylink Ltd and anor* [2018] ICR 748 at paras 87 - 106);

b. it is unusual to find direct evidence of discrimination and '[*i*]*n some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in*"' (at para 79(3));

c. therefore, the outcome of stage 1 of the burden of proof exercise will usually depend on '*what inferences it is proper to draw from the primary facts found by the tribunal*' (para 79(4));

d. in considering what inferences or conclusions can be drawn from the primary facts, '*the tribunal must assume that there is no adequate explanation for those facts*' (para 79(6));

e. where the employee has satisfied stage 1 it is for the employer to then prove that the treatment was "*in no sense whatsoever*" on the grounds of the protected characteristic and for the tribunal to '*assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question*' (para 79(11)-(12));

f. '[*s*]*ince the facts necessary to prove an explanation would normally be in the possession of the Respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof*' (para 79(13)).

145. In *Pnaiser v NHS England and anor* [2016] IRLR 170 EAT Mrs Justice Simler (as she then was) said at [38] that:

> "*Although it can be helpful in some cases for Tribunals to go through the two stages suggested in* ***Igen v Wong****, as the authorities demonstrate, it is not necessarily an error of law not to do so, and in many cases, moving straight to the second stage is sensible*".

*Drawing permissible inferences*

146. Employment tribunals have a wide discretion to draw inferences, however, inferences must be drawn from the established facts - see *Anya v University of Oxford and anor* 2001 ICR 847, CA. Tribunals are not restricted at looking at specific facts and incidents alleged by the claimant and must consider the entire factual background, including the respondent's conduct before and after the acts complained of - see, for example, *Rihal v London Borough of Ealing* 2004 IRLR 642, CA.

147. In *Igen*, the Court of Appeal cautioned against too readily inferring unlawful discrimination merely from unreasonable conduct. However, discrimination may

be inferred if there is no proper explanation for unreasonable treatment - see *Bahl v Law Society and ors* 2004 IRLR 799, CA.

148. In *Talbot v Costain Oil, Gas and Process Ltd and ors* 2017 ICR D11, EAT, HHJ Shanks, having reviewed the relevant authorities, gave the following guidance to tribunals to consider when deciding what inferences of discrimination may be drawn:

> *"….Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination. It seems to me that the principles to be derived from the authorities are these:*
>
> *(1) It is very unusual to find direct evidence of discrimination;*
> *(2) Normally the Tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;*
> *(3) It is essential that the Tribunal makes findings about any "primary facts" which are in issue so that it can take them into account as part of the relevant circumstances;*
> *(4) The Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;*
> *(5) Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there are a number of allegations of discrimination involving one personality, conclusions about that personality are obviously going to be relevant in relation to all the allegations;*
> *(6) The Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors which point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;*
> *(7) If it is necessary to resort to the burden of proof in this context, section 136 of the Equality Act 2010 provides in effect that where it would be proper to draw an inference of discrimination in the absence of "any other explanation" the burden lies on the alleged discriminator to prove there was no discrimination.*"

149. The employer's failure to follow its policies or EHCR Code of Practice, or inconsistent or untruthful evidence given by the employer's witnesses are relevant factors for the tribunal to consider when deciding whether adverse inferences should be drawn. However, the tribunal must look at the whole picture, including explanations given by the employer for failure to follow the policies or the EHCR Code of Practice - see *Teva (UK) Ltd v Goubatchev* EAT 0490/08, and *Madarassy v Nomura International plc* 2007 ICR 867, CA.

## Analysis and Conclusions

### *Credibility*

150. In her closing submissions Ms Genn raised the issue of credibility of the Claimant as a witness. We shall deal with this issue first and give our general assessment of the credibility of all witnesses and cogency of their evidence before turning to deal with the substantive issues in the case.

151. Ms Genn submits that the Claimant was not a credible witness, and the Tribunal must treat her evidence with caution. Ms Genn says that the Claimant's evidence at paragraph 39 of her witness statement, where the Claimant says her desk had not been moved despite the Respondent promising to do so as part of the proposed adjustments, "*is part of a pattern in [the Claimant's] evidence of not responding or not truthfully responding*". This submission, however, omits the important matter that it was in fact true, the Claimant's desk had not been moved before she returned to the office, as can be clearly seen from the AB's text message to the Claimant on page 107 of the bundle.

152. Ms Genn then makes several other attacks on the Claimant's evidence, which we find equally misplaced and unpersuasive. In short, Ms Genn's submission that the Claimant was not a credible witness is unmerited and unmeritorious. We found the Claimant a reliable and honest witness, who gave full and plausible evidence to the Tribunal.

153. Regrettably, we cannot say the same with respect to the Respondent's witnesses. Their evidence was often inconsistent and their answers in cross-examination often did not tally up with what they said in their witness statements.

154. We find that the evidence of SQ was particularly unpersuasive and unreliable. Her evidence that she did not know that the Claimant had a weakened immune system by reason of Asplenia is hard to believe considering that it is written in black and white in the OHP report, which is only a page long. The report also recommends a workplace risk assessment as an adjustment. SQ says that she somehow missed all that, although picked up workstation assessment and reference to musculoskeletal conditions. She blames the OHP for not highlighting the former. It would seem very unlikely that in reading the OHP report SQ would have read the second bullet point, but not the first and the third and would have stopped reading the report halfway through the following paragraph (see paragraphs 36 and 38 above).

155. SQ's evidence that she was not aware that the Claimant was likely to be required to shield until AB told her on 2 November 2020 does not sit well with her evidence that on 30 October 2020 AB told her about the content of his meeting with the Claimant, at which (as AB admits in his evidence) the Claimant had told him that she had not left her house during the first national lockdown. AB also pre-warned SQ in his email of 29 October that the Claimant "*may ultimately ask to work from home*". Also, SQ's evidence on this issue does not

sit well with the draft email AB prepared following his conversation with SQ in which he clearly says that if the Claimant were to decide that she could not work from the office this would be viewed as a resignation. Finally, NE in her appeal outcome letter also says that she found that AB had informed SQ on Friday, 30 October 2020, that the Claimant had been shielding in the past.

156. SQ's evidence on the question of when she decided to dismiss the Claimant is contradictory and does not add up with her and AB's evidence that they were prepared to allow the Claimant to work from home 1-2 days a week. When it was put to SQ in cross-examination, her answer was that she was prepared to allow that "on a temporary basis", meaning until the Claimant's dismissal, where the same phrase ("on a temporary basis") used by AB meant a different thing – over a longer period of time.

157. This artificial explanation further undermines her credibility as a witness. If SQ had decided, on or before 30 October 2020, as she claims, (see paragraph 45 of her witness statement) that the Claimant was not the right person for the job and wanted to dismiss the Claimant at the earliest opportunity, allowing the Claimant to work from home 1-2 days a week until her dismissal makes no sense. The Claimant only came back to work on 4 November 2020, after the weekend of 31 October -1 November and two days of leave for personal reasons. That is when SQ wanted to have the probation meeting with the Claimant to set the dismissal process in motion. SQ dismissed the Claimant with immediate effect. The dismissal date was delayed until Monday only because SQ could not get IT to disable the Claimant's access on Friday. Therefore, there would simply be no opportunity for the Claimant to work from home 1-2 days a week "on a temporary basis" until the dismissal.

158. This also makes little sense considering what SQ said in response to NE's question, namely that she had left it to AB to decide whether the Claimant should be allowed to work from home full time. In cross-examination she, however, said that AB had to persuade her that the Claimant's working from home full time was a viable option.

159. Also, SQ saying that she had decided to dismiss the Claimant on or before 30 October 2020 (and thus before being told that the cCaimant would be shielding) does not tally up with SQ's evidence (paragraph 70 of her witness statement) that she "*made the decision that [the Respondent] would be terminating [the Claimant's] employment*" on 6 November 2020.

160. SQ was also untruthful in her answers to NE during the appeal process. See our findings of fact on that at paragraph 122. Many of her statements to NE significantly exaggerated or wholly misrepresented the real situation. For example, she said that the Claimant had "*worrying judgements and was constantly asking basic questions and needing direction*." However, except for the DC's regional call issue, which in circumstances cannot be sensibly said to be an example of poor judgment by the Claimant, there are no other credible examples of the Claimant making "*worrying judgements*". There are also no credible examples of the Claimant "*constantly asking basic questions*".

161. When asked by NE why SQ was not following the Respondent's probation policy, instead of answering the question, she says: "*I wear my heart on my sleeve and she [the Claimant] knew exactly whether I was pleased or displeased"*. Then she gives an example of "*a very serious meeting*" with the Claimant and SC when SQ "*needed to get the whiteboard and pens and write everything down with what needed (sic) to happen and as do them you tick them off*".

162. SQ told NE that she had "*many conversations*" with the Claimant about the Claimant not doing a good job, where in fact, before the probation meeting on 5 November 2020, SQ had only a few meetings/conversations with the Claimant, and none of them were about the Claimant not doing a good job. We reject the Respondent's submission that the conversation about "*not boiling the ocean*" was in fact SQ criticising the Claimant's performance.

163. None of what SQ told NE was answering the question why SQ had not followed the proper process under the Respondent's probation policy, nor explaining how the use of a whiteboard and pens, in what appears to be essentially an allocation of tasks to two employees, showed that the Claimant's performance was poor. Surprisingly, NE chose not to probe SQ further on this.

164. In short, we find SQ's evidence self-serving and unreliable, and where they came in conflict with the Claimant's evidence, we prefer the Claimant's evidence.

165. Albeit being more forthcoming in his answers, AB's evidence was also unsatisfactory. He claimed that he did not know until 30 October 2020 that the claimant was vulnerable and had to shield during the first lockdown, only to admit in cross-examination that he did "wonder" whether the Claimant had shielded because he knew that the Claimant's Asplenia had made her immunity system compromised.

166. In his witness statement AB criticises the Claimant for not attending the DC's meeting as showing the Claimant's lack of insight and prioritisation. He goes on to say that he "*informed Ms Paxon that it was really important that we attended the Regional calls, such as that one, rather than the other meeting she had, which she initially disagreed with*". However, when cross-examined on that, AB admitted that he had himself authorised the Claimant to attend the Stop the Floor meeting instead of the DC's meeting.

167. Finally, in his witness statement (at paragraph 33) he claims that the Claimant working from home was not operationally feasible because it would have impacted on building internal relationships and "*it was very important for the ER team to have consistency between handling matters, so being able to discuss with each other "live" what had been advised previously as well as bounce ideas off each other was crucial and not something that would be possible if Ms Paxon worked from home*".

168. In cross-examination, however, he said that he did not think it was impossible ("*I am not saying it was impossible*"), but merely not as effective as it would be if everyone were in the same room.

169. NE's evidence, although of less significance to the issues in the case, did not add credibility to the Respondent's overall case. She claims that what led her to the decision to dismiss the Claimant's appeal and conclude that the reason for the dismissal was the Claimant's unsatisfactory performance was that "*the concerns around performance had been ongoing following a number of incidences*". However, except for "*not boiling the ocean*" example, it appears that NE did not have any other real examples where SQ provided the Claimant with any critical feedback about the Claimant's performance.

170. NE also says that she believed that SQ would have made all necessary adjustments for the Claimant's health had she known that the Claimant needed adjustments. She does not, however, explain what caused her to believe that, considering the evidence in front of her clearly showed that the Claimant needed to self-isolate because of her health issues, and that was precisely what SQ and AB were not prepared to accommodate.

171. In her letter dismissing the Claimant's appeal, NE writes:

> "*I accept that some of these issues resulted from your concern of being in the office. However, I genuinely believe that both Sharon and Alex thought this was due to general Covid anxiety, which unfortunately is heightened for a number of people at present, rather than anxiety of Covid due to your medical condition. I am satisfied that whilst Sharon knew that you had had your spleen removed and had a need to avoid infections, she did not know of the severity of your condition until you informed Alex, on the Friday that you had been shielding in the past*."

172. In answering the Tribunal's question, NE admitted that the letter was written for her by AW. She could not satisfactorily explain on what basis she concluded that SQ and AB thought that the Claimant's request to work from home was "*due to general Covid anxiety*", when both of them clearly knew that the Claimant was likely to be advised by the government to shield due to her extreme vulnerability to catching Covid-19.

173. Furthermore, there is an apparent contradiction in the appeal outcome letter and NE's evidence, where, on the one hand she says (***emphasis added***):

> "*Whilst, there is no dispute that you have had your spleen removed and have a need to avoid infection and have a muscular skeletal condition, EDS,* ***I do not believe that these health issues have had any bearing on the decision to terminate your employment by reason of failure of probation period***."

but, on the other:

> "*In your probationary review meeting with Sharon you informed her that you had received a letter identifying as someone who is clinically extremely vulnerable.* ***As such, Sharon did take this into consideration when determining her outcome of the probationary review as she detailed to you in your outcome lett****er.* ***In particular she considered whether it would be possible to support a performance management process if you were working at home for some or part of the week and concluded that it would not be possible****. It is my reasonable belief that you being identified as someone who is clinically extremely vulnerable was not the reason for the failure of your probationary period.*"

174. If, as NE found, SQ did consider the fact that the Claimant was a CEV person and had to shield "*when determining her outcome of the probationary review*", and in particular, whether it would be possible to support a performance management process if the Claimant were to work from home, it cannot be said that the Claimant's health issue had no bearing on the decision to dismiss her. Clearly, the implication here is that the Claimant's inability to come to the office because of her health issues was at least a factor (and quite possibly the key factor) in the decision to dismiss her, rather than to put her on a performance improvement plan.

175. In short, it appears that NE (no doubt ably assisted by AW) was trying to justify the SQ's decision to dismiss the Claimant, rather than approaching the appeal in a truly independent and open-minded way.

176. All of the above observations not only go to the credibility of the Respondent's witnesses and explain why the Tribunal prefers the Claimant's evidence when there is a conflict of evidence, but also form part of the overall picture which the Tribunal needs to look at in deciding whether, and if so what inferences it should draw when answering the principal question in these proceedings, namely - what was the true reason for the Claimant's dismissal?

177. However, before turning to this question, we shall first deal with the issue of disability and the Respondent's knowledge of the Claimant's disability.

***Discrimination arising from disability (s.15 EqA)***

*Did the Claimant have a disability by reason of Asplenia?*

178. The Respondent accepts that the Claimant had a disability at the material times by reason of EDS, however, it does not admit that she also had a disability by reason of Asplenia. Ms Genn states in her written closings:

> *"There are no examples of her succumbing to 'overwhelming infection'. There are no hospital or other clinical entries pertaining to this condition. Save that it is recorded throughout her medical notes that C underwent removal of her spleen (and a section of her pancreas) in 2013, the only substantive reference to the impact on her day to day activities is to the "possibility" of overwhelming infection in relation to a hospital admission for dislocation and neuropathic pain both consequent on her EDS."*

179. The Claimant's evidence in chief, which Ms Genn did not challenge, was that she had been told by her doctors that if she were not to take the medications prescribed to her following the spleen and pancreas surgery, she would be at high risk of infection that could result in death. We accept this evidence. This is more than sufficient to show that applying the so-called deduced effects (i.e., disregarding the medical treatment) the Claimant's impairment clearly had a substantial impact on her normal day-to-day activities at the material times.

180. Essentially, without such medical treatments the Claimant would have had to avoid any contact with other people and self-isolate in her house. Not only she would be unable to socialise with other people, but she would also be unable to undertake such daily activities, as using public transport, shopping, going for a walk, without putting her life at risk.

181. We also note that even with her taking the prescribed medications she was still classified by the NHS as a CEV person. The fact that to her credit she was cautious and avoided "succumbing to overwhelming infection", cannot be sensibly said to be the evidence showing that she did not have a disability. To follow Ms Genn's logic, a person with an amputated leg is not disabled, unless following the amputation he could show hospital admissions for trips and falls.

182. We also observe that the relevant hospital record (p. 264 of the bundle) does not merely say "possibility" of overwhelming infection, it states that the Claimant is required fast admission to hospital for Splenectomy "*due to increased possibility of Overwhelming Infection*".

183. For completeness, we accept the Claimant's evidence that contracting an infection would have had an adverse knock-on effect on her disability by reason of EDS, because the resulting period of immobility would have worsened her EDS and would have made her ability to carry out normal day-to-day activities already substantially affected by EDS reduced even further. Therefore, the cumulative effect of both EDS and Asplenia would be substantial.

184. In summary, the Claimant has a physical impairment (Asplenia), which has adverse effect on her ability to carry out normal day-to-day activities. Those effects are substantial.

185. The Claimant had Asplenia since 2013. She became vulnerable to overwhelming infection after the surgery and was put on antibiotics to mitigate this risk. The substantial effects of Asplenia were clearly present at the time of her dismissal (she was told by the government to self-isolate). Therefore, the effects lasted more than 12 months before the dismissal (the act complained of). On the evidence the effects were likely to last for 12 months after that, and, without wishing to discount the possibilities of the modern medicine - probably for the rest of the Claimant's life.

186. Therefore, all four conditions in ***Goodwin*** are clearly satisfied, and we find that the Claimant did have a disability by reason of Asplenia at the relevant times.

*Did the Respondent know about the Claimant's disability?*

187. It should be noted that the relevant point to consider the knowledge is the time of the alleged discriminatory treatment. Ms Genn in her closings focused on what SQ knew or did not know when she spoke with the Claimant on 7 September 2020. However, when SQ dismissed the Claimant, on her own evidence, she knew not only of the Claimant's underlying medical condition (Asplenia) and that it made the Claimant vulnerable to infection and that to control that risk the Claimant was taking antibiotics (all that the Claimant told SQ on 7 September 2020 as SQ accepted in her evidence), but also that as a result of the Claimant's condition she was classified as a CEV person and was told to stay at home.

188. Therefore, even on the Respondent's own case, it had the full knowledge of the Claimant's disability at the time of her dismissal.

189. In any event, we find that the Respondent knew from the start of the Claimant's employment that she had a disability by reason of Asplenia. She disclosed all relevant information to the Respondent's OHP and that, in our judgment, was sufficient to impute actual knowledge on the Respondent.

190. Furthermore, the OHP's report recorded the Claimant's conditions and their effects. SQ read the report. Even accepting SQ's evidence that she somehow did not notice the phrase "*weakened immune system*" in the report, this is insufficient for the Respondent to establish that it did not know and could not have been reasonably expected to know that the Claimant had a disability. The report is only a page long and deals with both Claimant's medical conditions. It recommends a workstation assessment and a workplace assessment. The former to accommodate the Claimant's EDS, the latter – for her Asplenia. SQ did not deny seeing those recommendations. For some reason, she chose to ignore them, apparently because the Respondent was doing that for high-risk individuals (BAME and certified as CEV), and SQ did not think the Claimant was a high-risk individual. At least that is the explanation SQ gave NE during the appeal interview.

191. The Claimant told SQ on the call on 7 September 2020 that she was vulnerable to infection and was taking antibiotics. That, together with what was written in the OHP report (even accepting that SQ somehow missed the phrase "*weakened immune system*") was enough for SQ to realise that the Claimant's Asplenia had substantial effects and to make further enquiries.

192. In her witness statement, SQ appears to try to justify her inaction by the fact that the Claimant said that she was susceptible to "*bacterial infection*" and that "*did not sound alarm bells*" for SQ, because Covid-19 is a viral infection. It is not clear on what medical basis SQ had made her determination that someone who is susceptible to bacterial infections cannot be equally susceptible to viral infections, however, in our judgment, that information was more than sufficient for the Respondent to make further necessary enquiries, or at any rate, for SQ to re-read the OHP report and contact the OHP provider for further clarifications, if necessary.

193. Therefore, even if we are wrong on our conclusion at paragraph 188 above, we find that the Respondent knew or could reasonably be expected to know that the Claimant had a disability by reason of Asplenia by 7 September 2020.

194. For the sake of completeness, we also note that the Claimant further disclosed the effects of her condition to AB when he joined. Although denying that the Claimant told him that she had been shielding during the first lockdown, AB accepted that he "wondered" that might be the case because he knew that the Claimant's Asplenia had made her immune system compromised. That means that AB had the knowledge of both the Claimant's underlying medical condition and its effects on her ability to carry out normal day-to-day activities.

*Was the Claimant unable to work in an office environment in consequence of her disability?*

195. The Claimant's pleaded case is that "something" arising from her disability is her inability to work from the office and the unfavourable treatment because of that "something" was the dismissal.

196. The Claimant's disability by reason of Asplenia is a direct cause of her being classified as a CEV person and advised to stay at home. Of course, the Claimant was free to ignore that advice at her peril and continue to come to the office. However, that would have placed the Claimant's health and possibly life at the grave risk. Therefore, although physically the Claimant could still come to and work from the office (unless and until succumbing to infection), it would be unreasonable and illogical to say that in those circumstances she was "able" to work from the office. Accordingly, and applying the guidance in *Pnaiser* at [31(d)] (see paragraph 16 in the Legal Framework) we find that there is a clear causal link between the Claimant's disability (Asplenia) and her inability to work from the office.

197. Ms Genn submits that "*it is not accepted that [the Claimant] could not work in a Covid secure office environment*". She then criticises the Claimant for not learning or nor learning quickly enough the Respondent's Covid policy. This, however, is of no relevance to the issue of causation.

198. Rather surprisingly Ms Genn says that the Respondent does not accept that the Claimant was "*as vulnerable as she maintains*". Ms Genn did not challenge the Claimant's evidence that she had received a letter from the government telling her to stay at home as a CEV person. Therefore, it seems absurd to argue that the Claimant's vulnerability to Covid was not sufficiently serious to prevent her from coming and working from the office.

199. Ms Genn's argument that the Claimant has failed to establish the Respondent's lax approach to Covid security is again not on the point. The Claimant was told by the government that she must stay at home and work from home if she could, and if she could not, she must still stay at home. Therefore, whether the Respondent's office was Covid secure or not secure is neither here nor there. The danger for the Claimant was everywhere outside her home. Unless the

Claimant was prepared to "play Russian roulette" with her health and potentially life, she was unable to work from the Respondent's office by the simple reason of not being able to leave her home.

200. Also, it is somewhat ironic that the Respondent argues that there was nothing for the Claimant to worry about because of Covid security measures it had in the office, and at the same time giving the evidence that DH, who started on 2 November 2020, shortly after that had to self-isolate for two weeks, presumably because either she had contracted Covid-19 or had been in close contact with someone who had Covid-19.

201. If, as the Respondent insisted, the Claimant continued to work from the office there was a real risk of the Claimant coming into contact with DH before DH knew that she must self-isolate. This, of course, does not mean the Claimant would have necessarily contracted Covid-19 from DH, but nonetheless the risk was present and real. Considering the grave consequences for the Claimant in contacting Covid-19, it would have been foolish and irresponsible in extreme for her to ignore it.

202. In short, we are satisfied that in consequence of the Claimant's disability (Asplenia) she was unable to work from the office from the date she was told that she had to self-isolate, i.e., from 5 November 2020.

*Did the Respondent dismiss the Claimant because she not able to work in an office environment?*

203. Turning to the key question in these proceedings, namely what was the reason/cause of the Claimant's dismissal? We remind ourselves that the causation test is different for the purposes of s.15 EqA claim and for the purposes of s.100(1) ERA. For the purposes of the former, "something" need not to be the sole or indeed the principal reason for the dismissal. It must have a significant (in the sense more than trivial) influence on the SQ's decision to dismiss the Claimant. However, for the purposes of s.100(1)(e) ERA claim the Claimant's working or proposing to work from home must be the reason, of if more than one, the principal reason for the SQ's decision to dismiss the claimant.

204. Ms Genn argues that the decision to dismiss was because the Claimant was underperforming in her role. She primarily relies on SQ's evidence in support of this contention. Ms Genn also submits that SQ had decided to dismiss the Claimant before she got to know that the Claimant would be required to shield. Finally, she submits that SQ did not know that the request to work from home was because of the Claimant's disability.

205. Dealing with the last point first. We do not accept that and find as a fact that SQ knew that the Claimant would have to stay at home (and hence her request to work from home) because of her CEV status arising from Asplenia. She was told all that by AB on 30 October 2020, after the Claimant's meeting with AB. AB also pre-warned her of that possibility in his email of 29 October 2020. In

any event, the Respondent's knowledge that "something" is arising from the Claimant's disability is irrelevant for the purposes of s.15 EqA claim.

206. We also reject Ms Genn's submission that SQ did not know that the Claimant would have to shield before she had decided to dismiss her. On the contrary, we find AB's pre-warning SQ on 29 October 2020 by email and telling SQ on 30 October 2020 that the Claimant would likely to ask to work from home was what caused SQ to decide to dismiss the Claimant. In other words, we find that the fact that the Claimant would have to shield, and as a result not being able to come to the office, was not only a factor which had a significance influence on the SQ's decision to dismiss the Claimant, but in effect was, if not the sole, certainly the principal reason for that decision.

207. We say that for the following reasons:

    a. As already explained above, the Respondent's witnesses inconsistent and contradictory evidence expose implausibility of the Respondent's case that the Claimant's performance was the reason for the dismissal (see paragraphs 152-175 above).

    b. Secondly, the timing of the Claimant's dismissal and the events leading up to it, show that the trigger point was the Claimant's conversation with AB when the issue of the Claimant having to shield was first raised (see our findings at paragraphs 79-92 above).

    c. Having learned that the Claimant was very likely to be told to shield, on 2 November 2020, SQ sends her "Help!" email to AW with her reasons why the Claimant cannot perform her role from home. Nowhere in that email does she even once say that the Claimant was not performing her role satisfactory.

    d. We reject the Respondent's submission that SQ or AB had raised the issue of the Claimant's performance before the probation meeting on 5 November 2020. The examples given are wholly unconvincing. Saying "*we need to make sure that we are not trying to boil the ocean*", or drawing something on a white board, cannot on any reasonable account be said to be stating that the Claimant's performance was poor, especially considering that SQ is a senior and experienced HR person and knows how performance discussions should be handled.

    e. AB makes no criticism of the Claimant's performance at any stage, and he is her direct manager and knows best how the Claimant performs on a day-to-day basis. In fact, both AB and SQ thanked the Claimant for her work on the pandemic plan. SQ wrote that the Claimant's comments on the iCommunication on the social media policy "*made sense*". She did not include any critical remark in that email. We do not accept SQ's evidence that in thanking the Claimant she was doing no more than if she were to thank someone for "holding a door". SQ, as an experienced HR manager, will know all too well that if a manager is not happy with his/her employee's performance, such issues need to be

raised and addressed as promptly as possible. Therefore, if SQ was unhappy with the Claimant's work on the pandemic plan or the social media policy, while being polite and thanking the Claimant for her work on those documents, most likely she would have used that opportunity to provide her critical feedback on the quality of the Claimant's work.

f. The Respondent's post-factum desperate attempts to unearth any examples, which could be used as performance issues against the Claimant are also telling. The Respondent goes as far as blaming the Claimant for attending the Stop the Floor meeting when her direct manager (on his own evidence) told her to do that. Their further scramble to find more evidence of "poor performance" for the appeal stage (SQ sending the Claimant's photo at the hairdressers' and AB sending the Claimant's completely innocuous email asking whether she should deal with a particular case) only show the weakness and implausibility of the Respondent's case.

g. SQ completely ignores the Respondent's probation policy and dismisses the Claimant in a way that drives a coach and horses through the whole policy. SQ's explanation that she did not have time for that is unconvincing. She was not the Claimant's line manager, AB was. If SQ felt that the Claimant needed to improve her performance, the obvious step would have been to tell AB to set the Claimant's performance improvement targets, have regular review meetings, give the necessary feedback, all in accordance with the probation policy. There is no evidence that AB was ever instructed by SQ to do that, or that AB did not have time for that either.

h. The whole urgency with which SQ proceeded to dismiss the Claimant makes little sense if it was truly a performance issue:

i. The Help Desk was going live on 2 November 2020. There was no criticism, even from SQ, about the way the Claimant handled helpdesk enquiries or the quality of her ER/HR advice.

    i. The only two post-factum examples given by the Respondent are: (i) some vague hearsay by AB about GS telling him that the Claimant was focusing too much on a matter (a complaint by an employee about his manager emailing him outside the working hours) than what GS thought was justified, and (ii) the Claimant according to AB spending too much time sorting out an electronic file. Neither of the two matters were ever raised with the Claimant at the time, including at the probation meeting.
    ii. On the contrary, AB writes to SQ clearly stating that the Claimant could deal with Helpdesk enquiries (see paragraph 111 above) remotely.
    *iii.* On 29 October 2020, AB in his draft email to the Claimant (see paragraph 82 above) writes that he "*absolutely want[s] [the Claimant] to stay and will be committed to working with [the*

*Claimant] and [SC] to get things back on track*", and that the only issue is whether the Claimant "*feel[s] safe enough to work within the office".*

iv. Therefore, when SQ tells NE during her appeal interview "*enough is enough*", it flies in the face of the reality of the situation. SQ tries to present the situation as if there were a whole history of past attempts to get the Claimant's performance back track, when in reality there were none, and that is because SQ never in the past had raised the Claimant's performance as an issue.

v. The urgency of the dismissal can only be sensibly explained by the fact that SQ had realised that from 5 November 2020 she would have no option but to let the Claimant to work from home, and if she did not want to do that, the only other solution (discounting furlough and sick leave, which SQ was not prepared to offer) was to dismiss the Claimant.

vi. SQ, as an experienced HR manager, plus being advised by AW, knew that dismissing the Claimant for the reason of her having to shield and consequently not being able to come to the office, would be against the law. Hence, she devised the plan to dress it up as a performance related dismissal and push it through regardless of the probation policy requirements, knowing that the Claimant did not have the required continuous service to bring a complaint of "ordinary" unfair dismissal.

j. SQ's attempt to seize on the Claimant's saying that she found at times things confusing and difficult (that was by reference to the handover process of cases from local HR managers to the ER team and back) as showing that the Claimant was a wrong person for the job betrays the SQ's intention to find any way to get rid of the Claimant. Firstly, the Claimant's "admission" is taken out of context. It is not surprising that a newly joined employee (or any employee, for that matter) would find things confusing if one day they are handed over a case to deal with, just to be told the next day to hand it back to the person who had just handed it to them. Furthermore, while focusing on this "admission" as to the Claimant "*getting to same place*" (see p. 336 of the bundle), SQ completely ignores the Claimant disagreeing with her assessment of the Claimant's performance and indicating the desire to continue to work for the Respondent and improve her performance.

k. SQ's attempt on 4-5 November 2020 to "paper" the Claimant's file by retrospectively documenting the issues with the Claimant's performance is another example of her trying to present the dismissal as performance related, when no such "issues" had been raised with the Claimant at any time in the past, and consequently no contemporaneous documents about the Claimant's "poor performance" SQ could point to.

l. The apparent inconsistency and contradiction between the Respondent being prepared to allow the Claimant to work 1-2 days from home on a temporary basis (that is despite her alleged poor performance) and SQ's evidence that she had decided to dismiss the Claimant before she knew that the Claimant would be asking to work from home. See further on this issue at paragraphs 155-157 and 172-174).

m. The fact that the Respondent was prepared to re-arrange the Claimant's desk and take other steps to make the Claimant feel safe in the office (see paragraph 81) does not sit well with SQ's evidence that she had decided to dismiss the Claimant for poor performance as early as 30 October 2020.

n. SQ's and AB's criticism of the Claimant for being too detailed and thorough seems to contradict what the Claimant's role description required of her (see paragraphs 29, 31 above)

208. For all these reasons, we find that the real reason for the Claimant's dismissal was her having to shield and consequently not being able to work from the office (and accordingly the Claimant proposing not to come to the office and work from home), and "poor performance" was no more than a made-up pre-text to dismiss the Claimant.

209. The Claimant has certainly done enough to establish a *prima facie* case of discrimination, and the burden of proof has shifted to the Respondent. We find the Respondent has failed to discharge that burden, that is to show that the decision to dismiss the Claimant was in no sense whatsoever because of the Claimant's inability to work from the office in consequence of her disability.

210. However, even without referring to the burden of proof statutory provisions, on the facts as we found them, we are satisfied that we can make the positive finding as to the true reason for the Claimant's dismissal, as we did above.

*If so, was it unfavourable treatment?*

211. Dismissal is clearly an unfavourable treatment. The Claimant did not welcome her dismissal. She appealed it, and indeed brought these proceedings.

*Was the Respondent's treatment of the Claimant a proportionate means of achieving a legitimate aim pursuant to section 15(1)(b) EqA?*

212. We accept that the Respondent's desire to organise its HR/ER support function in a way it considers best suited for its business is a legitimate aim, and it is not for this Tribunal to tell the Respondent whether it should have its staff in the office or allow them to work from home. However, in the circumstances, we find that dismissing the Claimant as a means of achieving that aim was wholly disproportionate.

213. Ms Genn submits that:

> "*it was proportionate to require work to be undertaken in the office to achieve the legitimate aim of ensuring the effective team working of a newly formed HR function supporting regional directors and care home managers in the care home sector during the pandemic, a time of particular high demand and resistance to the restructuring the HR function. It was necessary and proportionate in all the circumstances to members of the team, the ER Advisors to be working together in the office*".

214. The question, however, is not whether it was proportionate to require the ER advisors to be working together in the office, but whether, in the circumstances, it was proportionate to dismiss the Claimant when she could not meet that requirement, at least during the period when she had to shield.

215. Ms Genn also submits that it was an office-based role, and the Claimant had accepted that when applied for the role. This, however, ignores the circumstances of the case. The Claimant did not ask to be home based when she joined the Respondent, she asked for that when she was told by the government that she needed to stay home as a CEV person. Therefore, the question of proportionality of the Respondent's treatment of the Claimant (dismissal) must be assessed against that background.

216. The Respondent accepts that it was not impossible for the Claimant to work from home, but that would not be optimal, because, as Ms Genn put in her written submissions, "*dynamism, nuance and subtlety can all be lost when working via remote means*".

217. These, however, are just general phrases, and the Respondent's evidence on how exactly the effectiveness of the ER Helpdesk operations, or the Claimant's other duties would be adversely affected, was less than convincing.

218. SQ appears to suggest that when a call comes to the ER Helpdesk, the ER adviser taking the call would wave to others and shout across the floor that he/she has a so and so on the phone and ask whether anyone else spoke to that person before. Apparently, that is needed because managers might ask the same question more than once and of more than one ER adviser, for instance, if they did not like the first answer given to them.

219. We find this method of operating a helpdesk quite unusual. However, even accepting that this is the way the Respondent's ER helpdesk was organised, the Respondent has failed to provide good reasons as to why an acceptable solution could not have been found to accommodate the Claimant's home working on a temporary basis without causing material disruption to the ER helpdesk operations.

220. First, the Claimant could simply ask the person on the phone whether he/she has spoken to any other ER adviser on this subject. If, however, the manager on the phone cannot be trusted with giving a truthful answer, there are numerous ways of instant electronic communications (from group WhatsApp to Instant Messager) which could be as effective as shouting across the office floor. Furthermore, if the Respondent was so concerned about "repeated

enquiries" coming in and duplicate advice given, it could have asked the ER advisers to keep a simple log of all enquiries received and advice given. The Respondent did not explore any such possible solutions.

221. Also, it appears that telephone was not the only means of communications with the ER team and many enquiries were coming in by email. Dealing with such enquires would not require instantaneous oral communications with other ER team members, as suggested by SQ.

222. AB's evidence is that physical presence in the offices was necessary to "*have consistency between the handling the matters, so being able to discuss with each other 'live' what had been advised previously as well as bounce ideas off each other was crucial and not something that would be possible if [the Claimant] worked from home*" is equally unconvincing. He does not explain why with the use of modern technology it would not be possible to discuss issues "live" or bounce ideas off each other with the Claimant working remotely.

223. AB admitted in cross-examination that the Respondent did not examine technical solutions which would allow calls to the ER helpdesk diverted to the Claimant's home phone or mobile phone or computer.

224. The Respondent accepts that all internal clients of the ER team were remote, and for them it did not matter whether the ER advisers were in the office or at home.

225. We accept that remote working could be less effective when it comes to team building, however, that was the reality that many organisations, including the Respondent, had to live with due to the pandemic. Furthermore, the Claimant's request was not to work from home indefinitely, but only because she was told to shield. The second national lockdown was announced only until 5 December 2020. Therefore, it was quite probable that the Claimant would be able to return to the office in a month's time. It does not appear the Respondent has given that any thought. AB's evidence that the Respondent could not predict how long the lockdown would last ignores the fact that the announced lockdown had the end date, the experience of the first lockdown, and the general temporary nature of pandemics.

226. Equally, even if there were any performance issues that needed to be managed, the Respondent's evidence as to why these could not be managed with the Claimant working from home is highly unsatisfactory. It appears the Respondent was content to use Zoom for other communications. The Claimant's probation meeting was conducted via Zoom too. AB does not explain in his evidence why the Claimant's physical presence was required for him to deal with any performance issues, that is if there were any to deal with.

227. AB's email to SQ of 4 November 2020 (see paragraphs 111 and 113 above) essentially confirms that the Claimant working from home, whilst not ideal, was possible and feasible.

228. We remind ourselves that the test of proportionality requires the Tribunal to balance the discriminatory effect of the requirement against the legitimate aim in question (see paragraph 21 of the Legal Framework). In the present case, the discriminatory effect is as extreme as it could be in the employment context – the Claimant loses her job because of "something" arising from her disability.

229. On the other, it is not clear how the Respondent's aim of effective organisation of the ER helpdesk work would be achieved by the Claimant's dismissal. Even if it could be argued (and it was not so argued by the Respondent) that having the Claimant working from home would have somehow negatively impacted on the "gelling together" of the rest of the ER team, or made AB's job more difficult, having to manage the Claimant remotely, we find that in the circumstances the Respondent responding to that by dismissing the Claimant was wholly disproportionate.

230. It follows that we find that the Claimant's claim for discrimination arising from disability is well founded and succeeds.

***Failure to make reasonable adjustments***

231. Much of what we have said with respect to the s.15 EqA claim equally applies to the Claimant's claim for failure to make reasonable adjustments. However, there are a couple of other issues we need to address before giving our overall conclusion on this claim.

*Did the Respondent have PCP requiring the Claimant to work from the office?*

232. Somewhat surprisingly Ms Genn submits in her written closings:

> "*For the avoidance of doubt to the extent that it is contended that there was a PCP that [the Claimant] worked from the office that, the evidence does not bear that out because accommodation was offered albeit on the more limited basis than that sought by [the Claimant]*".

233. It was common ground that the Respondent was prepared to allow the Claimant to work from home 1-2 days a week on a temporary basis, but not more. The PCP accordingly was the requirement that the Claimant worked in the office, except for 1-2 days a week on a temporary basis.

*Did the Respondent know that the Claimant had a disability and that the PCP put the Claimant at a substantial disadvantage?*

234. What we have said about the relevant timing of the knowledge (see paragraphs 187 above) equally applies to this question. On the evidence in front of us we find that when she decided to dismiss the Claimant, SQ knew that the Claimant would receive the shielding letter. She also knew that the requirement to work from the office would put the Claimant at a substantial disadvantage, because the Claimant would not be able to meet that requirement, unless, of course, she would be prepared to gamble her health and potentially life.

*Was the Claimant put at a substantial disadvantage by the PCP?*

235. The same reasoning applies to this question. The Claimant was clearly put by the Respondent's PCP in an impossible situation when she had to decide whether to risk losing her job or risk losing her health and potentially life.

236. The Respondent trying to downplay the risk for the Claimant contracting Covid-19 in the office with potentially very grave consequences for her is both surprising and worrying, considering the nature of the Respondent's organisation, as a large provider of care home services for elderly and vulnerable.

237. Our findings and conclusions at paragraphs 195-201 support our conclusion on this question too.

*Did the Respondent fail to take such steps as it was reasonable to have taken to avoid the disadvantage?*

238. We find that in the circumstances it was reasonable for the Respondent to allow the Claimant to work from home full time, at least until the end of the announced second lockdown.

239. Our findings and conclusions at paragraphs 212-228 equally apply to our analysis of this question.

240. It is also telling that the Respondent's own pandemic plan for office based staff (pp 511 – 542 of the bundle) generally, and indeed specifically for the Claimant's place of work (p532), says that working from home must remain as the norm until 1 March 2021, and that "*this decision will only be reviewed if this arrangement is causing significant interruption to the delivery of service and introducing operational risk*". It goes on to say: "*No colleague is permitted to work at Connaught House unless this is deemed business critical and authorised by their Exec member*". The Respondent's evidence falls far short of demonstrating that in the case of the Claimant her working from home would have caused significant interruption to the delivery of the Respondent's services and introduced operational risk.

241. Furthermore, the Respondent's pandemic plan states that the employer must "*support colleagues to work from home where able to do so*", and that "*extra consideration*" must be given "*to people at higher risk*". The Respondent did not do any of that before deciding that it was not "feasible" for the Claimant to work from home.

242. The fact that SQ had authorisation that her staff could work from the office does not mean that in the specific circumstances applicable to the Claimant, the pandemic plan guidance was irrelevant and could be ignored, as it appears SQ has done. The guidance deals with "Colleague specific risks" (p524 of the bundle) and specifically refers to employee who are required to shield.

243. Further, considering the factors at [6.28] of the ECHR Code of Practice (see paragraph 30 in the Legal Framework), all of them support our conclusion. Allowing the Claimant to work from home would have eliminated the substantial disadvantage. For the reasons explained above, we find it was a practicable step for the Respondent to take. There is no evidence adduced by the Respondent that allowing the Claimant to work from home would have had negative financial consequences or would have caused material disruption. Considering the size and resources available to the Respondent, any possible additional cost associated with enabling the Claimant to take the ER helpdesk calls from home is unlikely to be prohibitive for the Respondent. In any event, it does not appear the Respondent ever investigated this issue.

244. As Mrs Mankau summarised in her written submissions: "*The Respondent's reasons for stating that working from home full time was not feasible were in reality, statements that it was not as convenient or easy for them as office working. This is not sufficient to show that the adjustment sought was not reasonable*". We agree, certainly considering the temporary nature of the adjustment required.

245. For completeness, the adjustments proposed by the Respondent (see paragraph 81 above) were clearly inadequate, as these would still require the Claimant to come to the office, which she was plainly unable to do.

246. The Respondent's evidence on how allowing the Claimant to work 1-2 days a week from home was a reasonable adjustment makes no sense. The Claimant needed to work from home not to, as NE puts in her witness statement, "*help her nerves with Covid-19*". She needed to work from home because otherwise she would be exposed to the grave risk of catching Covid-19 with extremely severe consequences for her health and potentially life. On a purely probability basis, allowing the Claimant to work from home 1-2 days a week might have somewhat reduced the risk of catching Covid. However, it cannot be sensibly said to be a reasonable adjustment in the circumstances when the Claimant was at risk of catching Covid on any day of the week if she were to leave her house.

247. Therefore, we find that the Respondent breached its duty to make reasonable adjustments under s.20 and 21 EqA and the Claimant's claim for the same is well founded and succeeds.

***Unfair Dismissal***

<u>What was the reason for the Claimant's dismissal?</u>

248. We have already answered that question (see paragraphs 203- 208 above). We shall now deal with other constituent elements of the Claimant's s.100(1)(c) and s.100(1)(e) ERA claims.

249. On the balance of probabilities, we find that the Claimant has established that there was no health and safety representative or committee at the Claimant's place of work. The Respondent has failed to adduce any positive evidence on

this issue. Ms Genn simply put it to the Claimant that PMcG was such a representative, and the Claimant said that she did not know that and thought he was a facilities manager. None of the Respondent's witnesses gave evidence that PMcG was indeed a health and safety representative, and the Respondent did not submit any documents to demonstrate that, and that is despite that being a relevant issue known to the Respondent from the Claimant's ET1.

250. SQ's evidence that there were some posters in the kitchen area about Covid security measures are not sufficient as the evidence that PMcG was the Respondent's health and safety representative. SQ did not say in her evidence that the posters named PMcG as such a representative. She did not say that the Respondent had a health and safety representative or committee.

251. We also find that the Claimant brought to the Respondent's attention by reasonable means circumstances connected with her work, which she reasonably believed were harmful or potentially harmful for her health and safety. She had done that at her meeting with AB on 30 October 2020 her subsequent communications with him over the weekend (see paragraphs 73-88). She also communicated that to SQ (see paragraph 68).

252. We find that the Claimant's genuinely believed that the Respondent's lax Covid-19 security measures were harmful or potentially harmful for her health, considering her vulnerability to infection. We also believe that in the circumstances and considering the incidents when the Claimant observed various employees breaching social distancing and mask rules and what SC told her about her plans to travel to London to see her boyfriend, the Claimant's belief was reasonable.

253. However, we find that the Claimant's communicating her concerns about the lax Covid-19 security measures was not the principal reason for which the Respondent dismissed the Claimant. See our findings at paragraphs 203- 208 above. Therefore, the Claimant's claim under s.100(1)(c) ERA fails on causation.

254. However, our findings and conclusions at paragraphs 203- 208 above establish the necessary causation with respect to her s.100(1)(e) ERA claim, meaning that we find that the principal reason for the Claimant's dismissal was the Claimant telling the Respondent that she would have to shield and work from home and would not be able to work from the office during the period when she was told to shield. But before this claim can be determined, we need to consider the following three issues.

*Were there the circumstances of danger?*

255. We have already dealt with this question to a large extent (see paragraphs 196-200 above). We remind ourselves of the dicta by Underhill LJ in Rodgers on this issue (see paragraphs 10-16 above).

256. In our judgment, it is unarguable (despite Ms Genn still not conceding the point) that there were clear and present circumstances of danger for the Claimant. She was told so much by the government. Such circumstances of danger were present for her in the office, on the way to the office, on the way back home – essentially everywhere outside her home. We have already observed the absurdity of the Respondent's position that the office was Covid-19 secure when one of the Claimant's colleagues had to self-isolate due to Covid shortly after she had started (see paragraph 199).

*Did the Claimant reasonably believe such circumstances of danger to be serious and imminent?*

257. In those circumstances and knowing her medical conditions, the fact that she had been told to shield during the first lockdown, and her observations about the Covid-19 security measures compliance by the Respondent's staff in the office, it was more than reasonable for the Claimant to believe that the circumstances of danger for her were serious and imminent. That was further confirmed to her by the announcement of the lockdown and by being told by the government to stay at home from 5 November 2020.

*Did she take (or propose to take) appropriate steps to protect herself or others from the danger?*

258. In those circumstances it is hard to imagine what else the Claimant could have done to protect herself from the serious and imminent danger of contracting Covid-19. Following the government's advice and staying at home was the most sensible and appropriate step she could take.

*Overall Conclusion on Unfair dismissal*

259. Therefore, we find that all the relevant elements of the statutory test under s.100(1)(e) are made out. It follows that the Claimant's claim for automatically unfair dismissal under that section is well founded and succeeds.

## Remedies

260. The Respondent must pay to the Claimant compensation for discrimination arising from disability (s.15 EqA), failure to make reasonable adjustments (s.20&21 EqA) and for automatically unfair dismissal (s.100(1)(e) ERA) to be determined by the Tribunal at a remedy hearing, if not agreed by the parties.

261. The Tribunal's preliminary view is that it will be minded to make recommendations pursuant to s.124(2)(c) EqA. In light of our findings and conclusions in this judgment, the Respondent is encouraged to consider specific steps it would be willing to take to obviate or reduce the adverse effect on the Claimant of the matters to which these proceedings relate. The Claimant may also propose her recommended steps if she wishes to do so.

**Employment Judge P Klimov**

**1 February 2023**

**Annex A**

**AGREED LIST OF FACTUAL AND LEGAL ISSUES**

**1. Unfair Dismissal**

Reason

1.1 What was the reason for the Claimant's dismissal? The Claimant contends that she was dismissed for an automatically unfair reason contrary to section 100(1)(c) and section 100(1)(e) Employment Rights Act 1996 ("**ERA**"). The Respondent denies this allegation and relies on capability as its potentially fair reason for dismissing the Claimant pursuant to section 98(2) ERA.

1.2 The Respondent contends that the burden is on the Claimant to establish that dismissal was for an inadmissible reason pursuant to section 100(1)(c) and 100(1)(e) ERA.

1.3 The Claimant alleges that:

(a) she had raised concerns about the behaviour of her colleagues in respect of failing to comply with governmental guidelines relating to Covid-19;

(b) she had requested to work from home following raising concerns that she was at risk of catching Covid-19 and subsequently needed to shield; and

(c) she was dismissed for doing so.

1.4 The Respondent denies that the Claimant was dismissed for the reasons set out in paragraph 1.3.

**2 Disability Discrimination**

Disability

2.1 Was the Claimant disabled within the meaning of section 6 Equality Act 2010 ("**EA**") at the material time by virtue of Ehlers Danlos Syndrome and / or Asplenia?

2.2 If yes, did the Respondent know, or should it reasonably have known of such disability/ies?

Discrimination arising from disability – s15 EA

2.3 Did the Claimant's alleged disability/ies cause, have the consequence of or result in "something", namely was the Claimant unable to work in an office environment?

2.4 If so, did the Respondent treat the Claimant unfavourably by dismissing her because of that "something" or was the Claimant dismissed for a different reason relating to her performance in the role?

2.5 If the Claimant was dismissed because of the alleged "something", was the Respondent's treatment of the Claimant a proportionate means of achieving a legitimate aim pursuant to section 15(1)(b) EA?

Failure to make reasonable adjustments – s20 EA

2.6 Did the Respondent have the following provisions criterions or practice (PCP): the Claimant relies on the alleged PCP of requiring Employee Relations Advisors to work from the office?

2.7 Did the PCP's, if proven, place the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The Claimant alleges that she was unable to adhere to this requirement and was dismissed.

2.8 If yes, did the Respondent fail to take such steps as it was reasonable to have taken to avoid the disadvantage? The Claimant alleges that it would have been a reasonable adjustment to allow the Claimant to work from home. The Respondent contends that working from home was not feasible.

**3 Remedy**

3.1 If the Claimant was unfairly dismissed and / or subjected to discrimination, what compensation should be awarded to the Claimant?

3.2 Should any deduction be made to take in account the prospect of the Claimant having been dismissed in any event?

**Annex B**

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## AGREED STATEMENT OF APPLICABLE LAW

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1. It is submitted by both the Claimant and the Respondent that the applicable law relating to the Claimant's claims (as per the List of Issues at [46-48]) is as follows.

### (1) Section 100(c) & (e) – Health and Safety Dismissal

2. Section 100 of the Employment Rights Act 1996 ("ERA") provides, where relevant:

***100.— Health and safety cases.***

*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—*

*(c) being an employee at a place where –*

*(i) there was no such representative or safety committee, or*

*(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*

*He brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.*

*…*

*(e) in circumstances of danger which he reasonably believed to be serious and imminent, he took ( or proposed to take) appropriate steps to protect himself or others from the danger.*

3. In *Oudahar v Esporta Group Ltd* [2011] IRLR 730, ERA, HHJ Richardson held that a two stage approach should be taken in cases concerning section 100(1)(e) ERA:

   *"24. In our judgment employment tribunals should apply s.100(1)(e) in two stages.*

   *25. Firstly, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or (if the additional words inserted by virtue of Balfour Kilpatrick are relevant) did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, s.100(1)(e) is not engaged.*

   *26. Secondly, if the criteria are made out, the tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair."*

4. The same approach applies with equal force to claims under section 100(1)(c).

5. Under the second stage, the burden is on the Respondent to show the reason for the dismissal – *Kuzel v Roche Products Ltd* [2008] ICR 799 (§56-59).

6. In *Panayiotou v Chief Constable of Hampshire Police and Anor* [2014] IRLR 500, Mr Justice Lewis discussed the issue of causation and separability in a claim of "whistleblowing" detriment and dismissal pursuant to section 47B, and section 103A ERA (which contains the same causation test as that within section 100(1)(a)). He stated:

   *"54. The Employment Appeal Tribunal in Woodhouse suggested that, in such cases, it would only be exceptionally that the detriment or dismissal would not be found to be done by reason of the protected act. In my judgment, there is no additional requirement that the case be exceptional. In the context of protected disclosures, the question is whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and if so, whether those factors were, in fact, the reasons why the employer*

*acted as he did. In considering that question a tribunal will bear in mind the importance of ensuring that the factors relied upon are genuinely separable and the observations in paragraph of 22 of the decision in Martin v Devonshire Solicitors [2007] ICR 352 that:*

> *"Of course such a line of argument is capable of abuse. Employees who bring complaints often do in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purposes to object to "ordinary" unreasonable behaviour as that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle."*

7. Most recently, the Court of Appeal has undertaken its first consideration of the application of s100 in *Rodgers v Leeds Laser Cutting Limited* [2022] EWCA Civ 1659 (decision handed down on 22nd December 2022) on appeal from the decision of HHJ James Tayler [2022] EAT 69 upholding both his and the judgment of the ET dismissing a claim of automatic unfair dismissal pursuant to section 100 (1)(d) or (e) ERA 1996.

8. Underhill LJ giving the lead judgment determined that "*the perceived danger must arise at the workplace*" [19]. Further the question of the employee's "belief" (applicable to both subsection (c) and (d)) is a question of fact. At para 47 Lord Justice Underhill said this

   "*Reading the Reasons as a whole, it seems to me adequately clear that the distinction intended by the Judge depended not on a proposition of law but on a factual finding about what the Claimant thought was the risk of infection at the workplace, as opposed to what it might be elsewhere in the community. That is the clear focus of her detailed findings at paras. 18-39, as summarised above, and in particular of her consideration of the Claimant's evidence about "his level of concern over Covid-19" (see para. 39), about which she was sceptical for the*

*reasons that she gives, including the absence of any contemporary complaint. Those findings suggest a factual finding that, in short, the Claimant did not feel seriously at risk in the workplace, and that that is all that is meant by her references to a danger "directly attributable to the workplace" or to "working conditions". It is fair to say that that begs the question why he decided on 28 March to self-isolate, especially as the Judge acknowledges the genuineness of his concern about the risk of infection, in particular to his children: there may be answers to that question, but the Judge does not give them. However, that point does not go to the nature of the exercise that she was carrying out. At most it might be said to be a factor to which she did not give sufficient weight in making her finding of fact about what the Claimant thought – though in fact, as we shall see, there is no challenge on that basis. 48. My conclusion about the nature of the distinction relied on by the Judge is reinforced by her statement at para. 64 that her decision was specific to the facts of this particular case. If she had decided it on the basis of the proposition of law which Mr Kohanzad attributes to her the outcome would be the same in any case where an employee was dismissed for leaving the workplace because they believed that the risk of infection with Covid-19 was a serious and imminent danger; that is an outcome which she disapproves at para. 63. I also believe that if the Judge was relying on such a proposition of law she would have explained explicitly what it was and on what she based it*."

## (2) Disability Discrimination

### (a) Definition of Disability

9. Section 6(1) EqA 2010 provides that *"a person, "P", has a "disability" if he or she "has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities".*

10. In *Goodwin v Patent Post Office* [1999] IRLR 4, the EAT identified the correct approach required by EqA 2010 in determining whether a person has a disability is to consider the following:

    a. Does the person have a physical or mental impairment?

    b. Does the impairment affect the person's ability to carry out normal day-to-day activities?

c. Are those effects on such activities more than merely trivial?

d. If so, are the effects long term?

11. When determining if an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities, the effects of any measures used to treat it – including any medical treatment – are to be disregarded Schedule 1, Paragraph 5.

12. A "long term" effect of an impairment is one where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months (Schedule 1, paragraph 2(1)(a) EqA).

**(b) Discrimination Arising from Disability**

13. Section 15 EqA 2010:

*'"(1) A person (A) discriminates against a disabled person (B) if –*

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

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

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

14. "Unfavourable treatment" is discussed in the EHRC Code of Practice on Employment (2011), §5.7, and states:

*"For discrimination arising from disability to occur, a disabled person must have been treated "unfavourably". This means that he or she must have been put at a disadvantage…"*

15. There is a double causation test in s.15(1)(a): the unfavourable treatment must be "because of" the relevant "something" and that "something" must itself "arise in consequence" of the disability. The distinction between the two limbs of the test should not be elided and it is not a question of whether the complainant was treated less favourably because of their disability (*Basildon and Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/397/14).

16. The EAT provided guidance on the correct approach to *s.15* cases in *Pnaiser v NHS England* [2016] IRLR 170, at paragraph 31:

*"(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

*(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*

*(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant ....*

*(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act …, the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

*(e) … However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

*(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

*…*

*(h) … the statutory language of s.15(2) makes clear … that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so.*

*(i) … it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."*

17. Further in *A Ltd v Z* (2019) UKEAT/0273/1 HHJ Eady endorsed the following agreed principles of law in relation to the proper approach to knowledge of disability in relation to section 15

*"23.In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:*

*(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.*

*(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long- term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.*

*(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.*

*(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at paragraph 31.*

*(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:*
*"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.*
*5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."*
*(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).*
*(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code"*

18. Further, it would be insufficient for an ET to conclude that an employer has constructive knowledge merely on the basis that it has been put on notice by certain factors; the ET must go further and determine whether it was objectively reasonable to have made further enquiries as a result (see *Mutombo-Mpania v Angard Staffing Solutions Limited* UKEATS/0002/18).

Justification

19. It is for the employer to show that the treatment of a claimant is *"a proportionate means of achieving a legitimate aim".* The test to be applied by the tribunal is an objective one.

20. Legitimate aim: to be a legitimate aim, the aim must correspond to a real need on the part of the employer's business – this is not the same as a necessity. There is no limitation on the aims that may be regarded as legitimate for the purposes of justifying discrimination arising from disability, though for any aim to be legitimate, it must itself be legal and not be discriminatory in itself (§4.28 EHRC Code).

21. Proportionality: the requirement that a measure be proportionate means that ETs must seek to balance the discriminatory effect of the requirement or condition against the legitimate aim in question (*Hardys & Hansons Plc v Lax* [2005] EWCA Civ). The CA stated that in deciding whether or not there has been objective justification, ETs should take account of the reasonable business needs of the employer. An employer does not have to show that the legitimate aim was an absolute 'must', but rather that it was reasonably necessary. The ET must consider both the quantitative and the qualitative effects of the discrimination. A measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in so doing (*Homer v Chief Constable of West Yorkshire Police* [2012] IRLR 601).

**(c) Failure to make reasonable adjustments**

22. The duty is set out at Section 20 EqA 2010 and is supplemented by a detailed schedule: EqA 2010, Sch 8. Section 20 imposes a "requirement" on an employer:

    a. whose provisions, criteria or practices puts a disabled person at a *"substantial disadvantage"* in relation to a relevant matter in comparison with persons who are not disabled (*s.20(3)*);

    b. to *"take such steps as it is reasonable to have to take to avoid the disadvantage"*.

23. A failure to comply with any of the requirements set out in s.20(4)-(6) is treated as a failure to comply with a duty to make reasonable adjustments (EqA 2010, s.21(1)) which, in turn, amounts to an act of discrimination (EqA 2010, s.21(2)).

24. The EqA does not define the phrase *"provisions, criteria or practices"*. The EHRC Code suggests that the terms should be construed widely and would include: *"any formal or informal policies, rules, practices, arrangements or qualifications including one-off decision and actions"* (*§6.10*).

25. In order for the duty to arise the employee must be subjected to a *"substantial"* disadvantage in comparison with persons who are not disabled. *"Substantial"* is defined at EqA 2010, s.212(1) to mean *"more than minor or trivial"*.

26. Schedule 8, Paragraph 20(1)(b) provides that an employer is not subject to the duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that that the disabled employee in question has a disability and is likely to be placed at the disadvantage relied upon.

*27.* In *Wilcox v Birmingham CAB Services Ltd* EAT 0293/10, Mr Justice Underhill held in relation to the similarly worded equivalent section of the Disability Discrimination Act 1995 that *"…an employer is under no duty under section 4A unless he knows (actually or constructively) both (1) that the employee is disabled and (2) that he or she is disadvantaged by the disability in the way set out at in section 4A (1) . As Lady Smith points out, element (2) will not come into play if the employer does not know element (1)."* (§37)

28. Content of the Duty: the employer must take such steps as it is reasonable to have to take to avoid the disadvantage (EqA 2010, ss.20(3) to (5)).

29. Whether or not any adjustments were reasonable will be determined by the ET objectively.

30. Whilst making clear that the reasonableness of any step is ultimately dependent on all of the facts in any particular case, paragraph 6.28 of the EHRC Code of

Employment lists factors that the tribunal may consider when making the assessment:

a. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

b. The practicability of the step;

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

d. The extent of the employer's financial or other resources;

e. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

f. The type and size of the employer.

31. Burden of Proof: Elias J has suggested (see *Project Management Institute v Latif* [2007] IRLR 579, EAT) that a claimant is required, at the first stage: (a) to establish the provision, criterion or practice relied upon; and (b) to demonstrate substantial disadvantage. The burden then shifts to the respondent to show that no adjustment or further adjustment should be made.

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4.1.23