EMPLOYMENT TRIBUNALS

Claimant: Mr. I. K. Harling

Respondent: Eastbourne Borough Council

Heard at: London South, Croydon
On:
Hearing dates on the 27-29 July 2016 and the 30-31 August 2016;
3-4 January 2017 (in chambers)

Before: Employment Judge Sage
Members: Ms Pollard
Dr. Fernando

Representation:

Claimant: Mr Chegwidden of Counsel

Respondent: Mr Curtis of Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is well founded

2. The Claimant's claim for discrimination because of something arising in consequence of his disability is well founded

REASONS

1. By a claim form presented on the 13 January 2016, the Claimant claimed unfair dismissal and disability discrimination. He stated at paragraph 2 of his ET1 that he had suffered a "severe head injury" and had made a "partial recovery" but was still required to take Citalopram "to control mood swings and depression". One consequence of his injury was a very poor short term memory. The Claimant was employed from the 1990 doing casual work and from 1992 to the 21 October 2015 as a full time employee. He was employed as a Pest Control and Rapid Response Worker.
2. By a response form presented on the 12 February 2016, the Respondent submitted that the dismissal was fair and on the grounds of conduct and they deny that it was discrimination arising from his disability. The

Respondent has not conceded disability so this will be a matter for the Tribunal.

The Issues

3. Did the Respondent have a genuine belief in the misconduct by the Claimant?
4. Did the Respondent have reasonable grounds for that belief and did they conduct a reasonably thorough and fair investigation?
5. Did the Respondent consider whether the conduct amounted to misconduct or gross misconduct?
6. Did the Respondent properly rely on the alleged "management instruction" of January 2014 when assessing the misconduct and sanction?
7. Did the Respondent properly take into account the Claimant's disability (memory loss) when determining whether his conduct amounted to gross misconduct?
8. Did the Respondent give adequate or any consideration to the range of sanctions available to it having found misconduct?
9. Was the Claimant disabled within the meaning of the Equality Act 2010? – the Claimant confirmed that he suffers from:
    i. Acquired Brain Injury (ABI) as from 2010 which manifests itself in discrete identifiable phenomena often treated individually, as listed at paragraphs 11-17 (especially paragraphs 14 and 16) of his Disability Impact statement (pages 39 to 41) and
    ii. PTSD as from 2012 – he suffers from these in a manner such as to constitute a disability as at the dates of alleged misconduct and at dismissal.

10. Did the Respondent discriminate against the Claimant for a matter arising from or connected with his disability (poor memory) when (a) treating his conduct as gross misconduct and (b) dismissing him?
11. The unfavourable conduct relied upon is dismissal.
12. The something arising from disability includes:
    a. The Claimant's impaired memory function as a result of ABI;
    b. The Claimant's depression and mood swings exacerbated when untreated by medication affecting his inter personal relationships.
13. If the Tribunal finds that the Claimant was subjected to unfavourable treatment because of something arising in consequence of his disability, it must then consider:
    a. Whether the treatment was a proportionate means of achieving a legitimate aim; and
    b. Whether the Respondent knew or could reasonably be expected to know of the Claimant's disability.

Witness

For the Claimant we heard from:
The Claimant
Ms. Howell
Mr Hayes
Ms. Jones

The Tribunal also had a statement from Mr. [S] but he was not called to give evidence.

For the Respondent we heard from:

Mr Whelan the Investigations Manager and
Ms Thompson the Dismissal Manager

Preliminary Matters

The Respondent produced on the morning of the hearing on the 28 July 2016 the documents at pages 183A-Q. These were the minutes taken during the disciplinary hearing by Ms Thompson at pages 183L-Q and the minutes taken by Ms Knight at 183R-U.

Findings of Fact

1. The Claimant began working for the Respondent in 1990 the first two years working as a casual employee then he became a full time employee in 1992 working in Pest Control. The Respondent underwent a reorganisation in 2013 and the Claimant was appointed to the role of "Neighbourhood Adviser (Operational – Rapid Response & Maintenance), this role commenced on the 1 April 2013. In the contract there was a section on page 118 of the bundle headed "Code of Conduct" where it stated that "**The public expects the highest conduct from all employees who work for local government. The Council's Code of Conduct sets standards for its workforce and reminds us that our behaviour should never be influenced by improper motives**..". The Contract referred to the Code of Conduct which was in the bundle at pages 191- 4 and the Tribunal were taken particularly to page 192 paragraph 4.2 dealing with "relationships with service users" and it stated that "**Employees should always remember their responsibilities to the community they serve and ensure courteous, efficient and impartial service delivery to all groups and individuals within that community as defined by the policies of the authority".** The Claimant told the Tribunal that he was provided with the Code of Conduct when he first joined in 1992 but was not provided with a copy at any other time by the Respondent.

2. The Tribunal were taken to the disciplinary policy at pages 203-216 of the bundle. The procedure stated that minor matters dealt with under informal action (meeting with the employee) would be held on the employee's records for 12 months. Paragraph 6.1 on page 207 stated that the process required the manager to be "**very clear with the individual about the shortfall in conduct, explaining the standard required. Taking the employee's feedback into account, clear standards for improvement will be agreed. The manager will summarise the discussion in writing and send to the employee. The letter will be placed on the individual's personal file. It will form part of the background record if the matter progresses to the formal disciplinary process during the 12 month period".** The disciplinary procedure then provided at page 207, paragraph 7.1 that the line manager is usually the investigations manager, but this may not be appropriate where the line manager is "**involved in some way in the matter to be considered.**"

<u>The evidence relevant to the issue of disability</u>

3. The Claimant's disability impact statement was in the bundle at pages 35-41. He told the Tribunal that an incident occurred on the 28 August 2010 (wrongly identified in his impact statement as October 2010 see page 36) when he was working at the Bandstand on the seafront and was clearing up after a concert and he and a number of friends decided to go for a drink at a local pub. The Claimant was knocked over by a person evading arrest and he suffered a head injury. He was taken to hospital and was kept in for a period of 9 days during which time he suffered six separate bleeds to his brain. After his release from hospital he reported that he felt "**constantly tired. I could not walk, I was totally exhausted..**". He also reported that he suffered "quite severe mood swings" which was followed by depression.

4. The Respondent commissioned a number of Occupational Health reports, the first dated the 8 November 2010 at page 57, which stated that the Claimant reported suffering from severe headaches and loss of energy. Another occupational report at page 107 dated the 13 December 2010 reported that the Claimant was suffering from "**severe headaches, tiredness and some short term memory loss.**" There was a subsequent report on page 59 of the bundle where it was reported that the Claimant was reporting "**headaches, tiredness, lack of balance**.." and was unable to work, this was dated the 3 December 2010.

5. In a report dated the 4 January 2011 at page 77 of the bundle from his neurosurgeon Mr F. Ruggeri it was reported that the Claimant was "**still headachy and complaining of global tiredness and some short term memory problems**" it also confirmed that the Claimant had experienced a complete loss of his sense of smell. The Claimant was asked in cross examination about page 77 and it was put to him that it was reported that he was gradually improving but he replied that his short term memory had got worse but he confirmed that the report was right at the time it was written. An occupational health report dated the 12 January 2011 at page 111 of the bundle reported that the Claimant was suffering from a degree of "**short term memory loss and headaches**", it recommended that he had a phased return to work and he does not initially work alone or at heights. The Claimant's symptoms were reported to have improved by the 16 February 2011 (see page 112). The Tribunal noted at page 53 which was a GP record of the 17 February 2011 that the Claimant had commenced his phased return to work.

6. The Respondent had a one to one meeting with the Claimant on the 25 February 2011 (see page 113 of the bundle) with Ms Benfied Employee Relations Officer where he complained of some tiredness but no headaches and was "continuing to refrain from taking any medication". The meeting recorded that there would be a steady increase in his hours and by the 4 April 2011 he would be back to full time duties. He told Ms Benfield that he did not need to see his GP.

7. The Tribunal were taken to page 51 which was an entry in the GP records dated the 20 July 2012 where the Claimant was suffering from low mood and was stressed and tearful and was given Citalopram. Mr Whelan was taken to this entry and it was put to him that there was a diagnosis of PTSD in October 2012 and he was having difficulty at work and he

accepted that he was aware of this because he was signed off sick at the time. He confirmed that he was aware of the Claimant's medication but he stated that the Claimant did not inform him that it was PTSD.

8. The Tribunal were taken to page 51 of the bundle which was an entry in the GP records date the 28 November 2012 referring to PTSD and noted that the Claimant was getting flashbacks and he was "**better with citalopram but lapsed since stopped difficult times at work for Council tends to be snappy and a bit tearful".** The Claimant remained on Citalopram until 2014 and when he stopped taking it, the symptoms returned.

9. The Claimant told the Tribunal that he suffers from depression, mood swings, and severe tiredness to the point of incapacity and severe short term memory loss. The Claimant stated that during the course of his employment, he managed the adverse impact of his short term memory loss because "**everything was recorded**" and gave the example of being provided with a list of calls he had to make and after he made the calls he would keep diary entries of the work he did. The Claimant stated that, but for the medication, he would not be able to carry out normal day to day activities. The Claimant stated that the Respondent was aware of his brain injury and his line manager at the time Mr. Albon was aware of his mood swings and his depression and he recalled breaking down in a meeting. The Tribunal noted that on the 7 January 2014 the Claimant was referred by his GP to the service Health in Mind and the referral reflected that he felt that he was "struggling" and suffering from PTSD symptoms (see pages 50 and 95); the GP records showed that the Claimant had been suffering from these symptoms on this occasion since October 2013.

10. The Claimant was taken in re-examination to page 99 dated the 10 February 2014 100 which was from Health in Mind and a later letter dated the 25 June 2014, it recorded that the Claimant was suffering from depression and he confirmed that at this time his mother was very ill and he had missed his medication. He confirmed that this situation was ongoing and he suffers from "peaks and troughs". The Claimant carries a card from the charity Headway which states that **"I am a survivor from a brain injury; I may have problems with my memory speech or actions. Your help and patience would be appreciated**". Mr Whelan was taken to these documents in cross examination (and to page 44 of the bundle) and he stated that it did not occur to him at the relevant time that the Claimant was suffering from a disability. Mr Whelan accepted that he relapsed in February 2014 because he had stopped taking his medication.

11. The Tribunal noted that the Respondent sought a further OHS report on the 25 November 2014 at page 102-3 of the bundle after he had taken time off sick from the 15 September to the 24 November 2014 with PTSD. The OHS letter stated that he had suffered from "unexplained fatigue" in 2014 and the Claimant had "**describe[d] it is difficult to manage any activities other than minor household chores and describes feeling exhausted by mid-afternoon**". The OHS obtained a report from the Claimant's GP which was dated the 9 February 2015 at page 104-105. The report confirmed that the Claimant's medical condition had continued "**on and off for a couple of years**". They confirmed that he would be on

Citalopram "for the foreseeable future" and he tried to come off it but had a relapse. His GP confirmed that the Claimant was suffering from depression "**which I feel is underpinned by post-traumatic stress disorder which has followed his head injury."** The Tribunal were taken to page 49 of the bundle which was the GP records dated the 15 September 2014 where it records that the Claimant "**cannot manage without Citaloram".** The claimant's evidence to the Tribunal was that he had been advised by his GP that he would have to continue taking it forever to "control the consequences of my injury". Mr Whelan was taken to this report and he confirmed that he had seen this. He accepted that the Claimant had an ongoing problem and he needed to continue to take his medication to avoid a relapse.

12. Mr Whelan was taken in cross examination to paragraph 14 of the Claimant's disability impact statement at page 39 where he referred to his severe short term memory loss and he stated that this was not something that presented to him. Mr Whelan had noticed his lack of smell so as a result he assigned all the unpleasant jobs to the Claimant. Mr Whelan told the Tribunal that all aspects of the job are diarised and if he needed something to be done urgently he would telephone the Claimant. Mr Whelan was taken in cross examination to the impact statement at paragraph 14 on page 40 where the Claimant referred to nature of the impairment as being severe tiredness, severe mood swings and depression and he confirmed that from one to one meetings he was aware of Citalopram but not of his short term memory problem.

13. Ms Howell was asked in cross examination about her statement at paragraph 19 where she referred to the Claimant's appalling short term memory and his difficulty in receiving and processing information (paragraph 20). It was her view that the Claimant "**requires medication to function at all**" and was deeply concerned when he stopped taking his medication as his behaviour deteriorated and this manifested itself by him becoming unpredictable and his mental health deteriorating (paragraph 22). Ms Howell also described the Claimant in cross examination as having a "**mental destabilisation not able to regulate himself, a bit of a freefall, I felt he was very unwell**." Mr Hayes also gave evidence to the Tribunal about the Claimant's short term memory at paragraph 14-15 of his statement. He stated that the Claimant's short term memory was "appalling" and he was in the habit of repeating stories three or four times. He would also not recall what he had been told, he would have to follow it up in writing. He told the Tribunal in answers to cross examination that the Claimant's memory is worse than his other friends and would say "have I told you" every other time he meets him.

14. The Claimant accepted in cross examination that the GP did not make an entry about his short term memory loss prior to this because he did not raise it with him; he said the main issues were tiredness depression and mood swings. He confirmed that the three symptoms were controlled by drugs but there was no treatment for his memory loss.

15. The Tribunal find as a fact that the Claimant was suffering from a disability following an Acquired Brain Injury "ABI" caused by a head injury sustained in 2010. The brain injury then led to the individual mental impairments of severe tiredness, severe mood swings and depression,

which have been controlled by Citalopram since 2012. The consistent evidence before the Tribunal is that his behaviour becomes erratic and he suffers mood swings and also his character changes and he becomes short tempered and tearful when he comes off the medication. The medication therefore treats the symptoms therefore when considering whether the impairment is treated as having a substantial adverse effect any measures being taken to treat or correct the condition should be ignored (paragraph 5(1) Schedule 1 of the Equality Act). The periods when he ceased taking medication in 2014 caused a significant absence due to a return of his PTSD symptoms and the Claimant reported fatigue and finding it difficult to manage anything apart from minor chores. The PTSD symptoms arose out of the Claimant's ABI. The Tribunal conclude on all the evidence that the depression, mood swings and severe tiredness have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities as when he is depressed and suffering from extreme tiredness he can only carry out day to day functions with difficulty as reported by OHS in 2014. His mood swings have been seen to impact his ability to cope with interactions with others and his ability to interact socially with others.

16. The Claimant also suffers from memory loss which cannot be treated. The Respondent was aware from their medical records in 2010 and 2011 of this impairment which arose out of his ABI. The evidence before the Tribunal was that this is a long term medical condition which began in 2010 and has subsisted until the present day. The Tribunal accept the unchallenged evidence of Ms Howell and Mr Hayes that the Claimant's memory was appalling. In the disability impact statement at paragraph 14 he told the Tribunal that this condition is severe and he is prone to forget things he has been told and things that he has done. Mr Hayes told the Tribunal (in paragraph 15 of his statement) that the Claimant will often forget about a social engagement and fail to attend. Although the Claimant can make notes to ensure that he does not forget appointments, he is reliant upon others to remind him of social gatherings and activities, his poor memory therefore affects his ability to remember engagements and activities and to organise his social life, this amounts to a substantial adverse effect on his normal day to day activities. The Claimant is therefore disabled within the meaning of the Equality Act in terms of his short term memory loss.

Evidence in relation to the management instruction/ conversation

17. In January 2014 the Claimant's line manager was Mr Whelan, the Claimant felt he got on well with him and "**regarded him as a friend**" (see paragraph 11). Mr Whelan referred to the document that led to the informal discussion with the Claimant at page 143A written by Mr Pidgeon a manager. This was a complaint from Ms H, a service user, dated the 6 January 2014; she was complaining that her rats had not been dealt with and that she had received an email from the Claimant's ex-girlfriend informing her that the Claimant had photographs of her and that "**he has asked out a number of women he has visited for pest control**". Mr Pidgeon commented that "**this may be Ian's ex-girlfriend trying to cause trouble, but nevertheless is something that needs to be looked into**". Mr Whelan was taken in cross examination to this document and asked what his concerns were and he stated that "**my first concern is**

around my team, he is a good member of staff and managing his illness and the second concern is how did someone's partner get hold of a customer's email". It was confirmed that the Claimant had been off sick around this time (with PTSD) and had been liaising with OHS and was on a phased return to work. Mr Whelan confirmed in cross examination that the basis of the complaint was that this was an unhappy customer and the fact that the Claimant's ex-partner contacted her; he also stated that she said it was "fine" about being asked out on a date by the Claimant. Mr Whelan told the Tribunal that he telephoned Ms H and she was "**adamant that she did not want any recourse on the Claimant**". Ms Thompson was taken to this document by the Tribunal and she confirmed that Ms H was not complaining about the Claimant. Ms Thompson confirmed that it was her view that the inappropriate conduct in this scenario was the Claimant giving her his mobile number, this did not appear to be a cause for concern for Mr Whelan. The Claimant had not been given a copy of this document at the time of his meeting or at any time during his employment, the first time he saw this was during the course of these proceedings.

18. The Claimant accepted that he had a meeting with Mr Whelan on the 7 January 2014 to discuss this complaint but did not recall it being a formal meeting. He recalled that it was a "very informal discussion" about Ms H, who the Claimant met through his work and continued having contact with her via Facebook. He stated at paragraph 12 of his statement that at no time was it suggested that he was using his employment to meet **"vulnerable women"**. It was his recollection that it was she who made contact with him and not the other way around. The Claimant's evidence seemed to be corroborated by the minutes of this meeting where he informed Mr Whelan that "**I think she sent me [a friend request]".**

19. The minutes of this meeting (at page 127-8 of the bundle) were also not provided to the Claimant at any time during his employment. The Tribunal also find as a fact that this document did not appear to deal with the customer's complaint about the rat problem, which was predominantly the cause for her complaint. This did not appear to have been raised at all with the Claimant. Mr Whelan did not appear to make any comment about the use of Facebook, all references to Facebook were made by the Claimant. Mr Whelan confirmed in cross examination that at the time, this recorded a one to one with a trusted member of the team and the document stayed as an Outlook note to reflect the informal nature of the meeting. Mr Whelan said that what came out of the meeting was a verbal instruction. He confirmed that this was not an informal disciplinary matter as if he had gone down that route he would have involved HR.

20. Ms Thompson was taken to these minutes and she confirmed that this was not a disciplinary meeting and felt that the "**clear management instruction was that he cannot use pest control to meet women**" and she clarified in answers to the Tribunal questions this meant "**to form relationships**".

21. The Claimant could not recall the conversation where Mr Whelan was alleged to have said that this was "**really serious, position of trust,**

vulnerable customers..". The Claimant did not receive any clear advice following this meeting and nothing was put in writing to confirm what had been discussed. Mr Whelan was taken to this quote in the minutes and he was asked why he referred to vulnerable customers, he said this was because he "**needed to be careful about his girlfriend getting hold of his phone. I found his story really plausible he came back suffering from PTSD and now a customer makes a complaint"**. The Tribunal noted that the reference to vulnerable customers was identical to the description used by Ms Howell in 2015 and Mr Whelan's response gave no indication of whether he had any information to support his description of this particular customer as vulnerable on the knowledge he was in possession of at the time (and no reference was made by Mr Pidgeon of this customer being vulnerable).

22. Mr Whelan was asked in cross examination whether this would be a difficult instruction to obey he stated that "**if I give my staff data and if they use the information to track people down it is the same as putting a note through their door**" he conceded however that it "**would be a different matter bumping into someone at the pub or in the street**". He conceded that after the meeting it was over for both of them. He told the Tribunal that he did not put a note on the Claimant's file because he was "misled" by the Claimant. He stated that the only reason that this meeting became relevant was that it was "**background to the further claims we received**". He was asked what the Claimant had not been honest about in this meeting was and he replied "**he gave different answers about Facebook**". However, the note of this meeting showed that the Claimant was not asked any questions about Facebook and he was not told or warned that the use of Facebook would be deemed to be a breach of the Code of Conduct. There was also no evidence to sow that the Claimant had used information to "track people down". The Tribunal on all the evidence conclude that the Claimant was not given a clear instruction at this meeting or thereafter about the use of Facebook and he was not warned that socialising with customers or service users after first meeting them at a pest control visit, could amount to an offence of gross misconduct that could lead to dismissal.

23. Ms Howell confirmed to the Tribunal that she contacted the service user. Ms Howell told the Tribunal that this and the complaint that she made in 2015 (see below) were the only two complaints that had been made against the Claimant.

24. Mr Whelan told the Tribunal that he did not follow the meeting up in writing as it was informal and he concluded that he had "**no concerns whatsoever that the Claimant would not recall our meeting".** The Claimant told the Tribunal that he had no memory of the meeting until he was reminded of it in 2015.

25. The Claimant was off sick having a hip replacement from July 2015 until the 21 September 2015. Although he was unfit to perform his duties he was able to engage in his hobby as a radio broadcaster during the air show held at Eastbourne called Airbourne. As he was signed off sick at the time he attended on a purely voluntary basis and received no payment for his attendance. During the show they held telephone competitions and the

prize was a helicopter ride. While he was on the radio a person called Stephanie Jones won one of the competitions after her name was pulled out of a hat by Mr Hayes. The Claimant was asked to telephone the winner and at the time did not realise that it was a person that he knew. He accepted that he did not announce that he knew the winner when she came to pick up the prize because he did not wish to embarrass her (about having a rat problem).

The email that led to dismissal

26. The incident that led to dismissal occurred on the 24 August 2015 when the Claimant's ex-girlfriend Ms Howell made very serious accusations against the Claimant by writing to Mr Whelan directly, this email was at page 144 of the bundle. Ms Howell was at the time a Social Worker for East Sussex County Council in the Looked After Children Team. Ms Howell in her statement described their stormy relationship and told the Tribunal that in 2012 they became a couple and in January 2013 became engaged but separated in June 2013. When they patched things up she became aware that the Claimant had formed another relationship and was "**in some form of sporadic contact with the mother of his son**" and she also "**discovered that Ian was also in Facebook contact with two other women..**" (Paragraph 6 of her statement). After this discovery they separated for a second time "just after Christmas day 2013". This coincided with her contacting the customer Ms H (see above at paragraph 24).

27. The couple then decided to attend Relate but she stated that she did not feel the relationship was secure. She then learnt on the 22 August 2015 that the Claimant had "**gone off with another woman**". Ms Howell said that this was the last straw and she felt "**betrayed, humiliated and very angry indeed**" (paragraph 8) so the next day she emailed the Claimant's line manager. Ms Howell accepted that their relationship started after he attended her home on a visit in course of his duties and thereafter they started dating, there was no evidence that she felt this to be inappropriate at the time.

28. The email contained some very serious accusations against him and Ms Howell confirmed that she had now separated from the Claimant. She stated in the email that "a **woman has now accused him of sexual assault**.." which she confirmed to the Tribunal to be untrue. She described the Claimant's behaviour as "**grooming**" and "**bombarding [women] with messages and compliments**". She described his behaviour as being "**ethically and morally wrong**". She accused the Claimant of "**offering free helicopter rides**" to those he attends on visits in his job and described him as a "**sexual predator**". She stated that **"I know that E made a complaint against him last year and I would imagine that there may be more**" (see above at paragraphs 15-20). Ms Howell ended the email with the words "**As a social worker I am acutely aware of how perpetrators operate and unfortunately for me, I should have ejected him from my life eighteen months ago. I have no doubt that he is officially single that when he returns to work more mindful of his relentless persual of women and that I have a duty to inform you of my very real concerns about him, This is not malicious**".

29. Mr Whelan was taken in cross examination to this email and it was put to him that this was not a member of the public, it was the Claimant's partner who he had met socially a couple of time and he replied that she was a social worker "**who deals with protecting people**" and he referred the matter to HR as she "**may have written the email in her capacity as a social worker**". The Tribunal noted that there was no evidence before the Tribunal that Ms Howell had written in her official capacity and was not a matter that he clarified with her at the time. Ms Howell told the Tribunal that she spoke with Mr Whelan a couple of times after sending the email, no notes were made by Mr Whelan of the contents of these calls.

30. Ms Howell accepted that "**with hindsight I would not have sent an email of this sort**". Ms Howell in cross examination told the Tribunal that she felt that the Claimant was having "**some sort of crisis or mental de-stablement**" and she felt he was "**very unwell**". Ms Howell accepted that what she had said about the number of relationships that he had with clients was wrong (she said it was 5 or 6, including her) and she confirmed that it was 4 including her. She confirmed her anger had blurred her thinking when she sent this email. Ms Howell conceded in questions to the Tribunal that had she genuinely been concerned about the Claimant's behaviour she should have reported him to other agencies to investigate, but she did not. The Claimant was not provided with a copy of this email by the Respondent at any time during the disciplinary process. This document was disclosed to him for the first time in the course of these proceedings.

The Investigatory meeting on the 25 August 2015

31. The Claimant was called into work by a telephone call from Mr. Whelan on the 25 August 2015 to discuss this complaint (see his statement at paragraph 17). The minutes he took were brief and seen on page 146-7 of the bundle and they were not agreed. It was noted that no reference was made to the email or the contents of the email and the Claimant was not told who it was from. The Claimant was told that "**We have received an allegation that you have been using your job to form relationships with female customers**". The Claimant denied the allegation. He admitted however that he had friends on his Facebook account who are female customers and identified Stephanie who his partner Ms Howell had met and he stated "**there is nothing going on.**.". He referred to Ms T and Ms B who were not on his Facebook account with whom he had an intimate relationship about 2 years' prior but had no relationship with them now and sometimes "bumps into them at the pub". He stated that Ms. T and Ms B both initiated the contact but it was not going anywhere so it ended. He gave Mr Whelan full access to his Facebook account and the names were seen at page 148 of the bundle. Mr Whelan conceded that nothing inappropriate was found from his Facebook account.

32. The Claimant was asked in this meeting about what Mr Whelan described as their discussion in January 2014; the Tribunal noted that it was described as a discussion and not a management instruction. The minutes also showed that the Claimant did not respond to this question or acknowledge that he recalled the discussion. The minutes showed that the answer that the Claimant gave was that he "**went through a phase, went**

off the rails, I was seeing 3 or 4 people, all those named. I haven't done anything since, hand on heart". This did not answer the question and Mr Whelan did not probe the Claimant as to his recollection of their discussion. The Tribunal find as a fact that from these notes that the Claimant did not indicate that he recollected what was discussed in the previous meeting and Mr Whelan accepted in answer to questions posed in cross examination that the Claimant could not recall what he had been told. Mr Whelan stated in his statement at paragraph 17 of his statement that the Claimant's evidence was inconsistent with what he had been told previously in his meeting in January 2014 (that there were no others). At the end of the meeting he asked the Claimant why anyone would make up an allegation like this and he replied (after being asked a second time) "**he and Jackie had a major bust up at the weekend**". It was put to Mr Whelan in cross examination that this placed a major question on the Ms Howell's reliability and he replied that he was "**not investigating, just fact finding**" and he admitted he wanted to establish "**how the relationship was formed**." The Tribunal noted that in January 2014 the motivation of Ms Howell was considered, but on this occasion it was not, even though the circumstances surrounding the complaint were similar in nature (i.e. made following an acrimonious termination of their relationship). Mr Whelan told the Tribunal that for him the allegations in the email and the Claimant's responses "matched up" and after that he took further advice.

33. The Clamant attended an OHS appointment on the 4 September 2015 to provide advice on his fitness to attend work. The report dated the 8 September 2015 at page 149 confirmed that he was likely to make a full recovery following surgery for a hip replacement. The report also referred to his head injury reporting that following the injury he developed low mood, it was reported he was on medication and was stable. This letter confirmed that the "**current disability legislation is likely to apply to this case**". The Tribunal took this comment to refer to the Claimant's head injury and low mood as the conclusion OH reached on his hip replacement was that he was likely to make a full recovery. Mr Whelan confirmed that he had sight of this report. This medical evidence was consistent with all previous medical reports before the Respondent that confirmed that the Claimant was suffering from a head injury and had developed depression and low mood which was controlled by medication, had the Respondent been in doubt before about whether the Claimant was suffering from a disability this was further evidence.

<u>The Investigatory meeting on the 29 September 2015</u>

34. The Claimant was called to an investigatory hearing on the 29 September 2015 by Mr Whelan and a letter of the same date confirmed the outcome of that meeting (see page 151). The Tribunal did not see the letter that called him to the investigatory meeting nor was there any reference to the Claimant being reminded of the right to be accompanied which was in the letter that was written after the outcome of the meeting. In this letter Mr Whelan confirmed that he would carry out "**a full and thorough investigation…and I will consider both the immediate events of this matter and any other relevant details which may emerge during the course of the investigation**". He then went on to state that the findings **"will be placed before Melanie Thompson, Head of Customer First, the deciding manager**" who would decide "**whether**

this is a matter which needs to be progressed to a disciplinary hearing..".

35. It was put to Mr Whelan in cross examination that he may not be the right person to investigate as he would be investigating his own conduct in January 2014 (when he gave the purported management instruction); he did not agree saying that "**HR thought I was the right person to investigate**". He did not feel there would be a conflict of interest and his role was to "**investigate this email**". The Tribunal find as a fact that Mr Whelan was conflicted in his role as investigations manager as he would be required to investigate his own conduct in the meeting in January 2014. The Tribunal noted that this was a large organisation where others could have been identified who would have been independent and able to adequately investigate the matter fully and fairly whereas Mr Whelan, due to his prior involvement, could not.

36. Mr Whelan accepted that he had a telephone conversation with Ms Howell but he failed to discuss the truth or otherwise of the allegations she made against the Claimant and did not know if anyone else had. It was put to Mr Whelan in cross examination that Ms Howell admitted on the witness stand that these accusations of grooming and predatory behaviour were untrue and he replied that they did not ask her if what she had said was true because he was advised not to. Mr Whelan stated that "**we did not want to rely on the email, which is why we arranged the fact find meeting";** he also told the Tribunal that he was advised not to disclose this email to the Claimant. Mr Whelan's confirmed that he did not "**investigate the sexual assault, grooming or predatory behaviour, they only investigated the sexual relationships**". However, the Tribunal found Mr Whelan's evidence to be contradictory as he told the Tribunal that his role was to investigate the email (see above at paragraph 35) but he accepted that he did not investigate the most serious allegations made against the Claimant, there was also no evidence to suggest that he investigated the sexual relationships.

37. The minutes of the investigatory meeting were at pages 153-160 were taken by Ms Whyatt of HR. The minutes reflected that the Claimant was informed that the allegation was that he was "**using his job to form relationships with female customers**" but the specific details were not put to him. The Tribunal find as a fact that Mr Whelan's evidence that they did not rely on the contents of Ms Howell's email to be inconsistent as this document started the whole chain of events that eventually resulted in the Claimant's dismissal. There was no other evidence provided by customers or staff that was relied upon when deciding to dismiss the Claimant. It was noted that the Claimant at the end of this meeting was unaware of the allegations because he asked Mr Whelan for details of the "**serious allegations**" that were being investigated. This reflected a major flaw in the fairness of the investigation as the Claimant had not been informed of the precise details of the allegations in terms of the times, dates and the persons involved which made it impossible for him to respond to the allegations or to defend himself.

38. The minutes of the meeting reflected that the Claimant appeared to accept that in the previous year he had been told that he was "**not to get involved with customers of a social basis, not to use Facebook as a way of doing that**". It was put to the Claimant that at the previous meeting he had been asked whether he had any "previous relationships with customers" and he had said no and he was asked if this was correct and the Claimant replied that he had a relationship with Ms B but could not recall if it was before or after Ms H but confirmed that he asked her to be a friend on Facebook. He confirmed that Ms Jones was a friend and she had sent the friend request to him but it was purely platonic. Ms T was not a friend on Facebook but confirmed that they had been in a relationship, it was put to the Claimant that this relationship occurred after the meeting in January 2014 but the Claimant could not recall. It was put to the Claimant in the meeting that some of those people "**could be described as vulnerable**" and he was asked to describe them which he did giving clear evidence that none of the women could be described as vulnerable (page 155). The Claimant was asked about a number of names that appeared in his Facebook account that appeared to be linked to his visits which were all platonic friendships.

39. Mr Whelan was asked in cross examination why the Ms. H issue had come up again because it was all "done and dusted" in January 2014 and he replied "**I believed his story and then I get a different story**" and he referred to the email at page 144 but it was put to him that this matter had been dealt with and he accepted that there was no new issue in relation to Ms H. Mr Whelan was asked what made the Claimant's conduct inappropriate and he stated that it was "**going on a pest control visit and then going on Facebook**" and what made this different to meeting people down the pub (which he had previously indicated in his evidence would be acceptable behaviour) and he replied that, for him was that meeting in a pub was a "**coincidence and completely different to going on a home visit to ladies houses and to leave the home visit after a bit of banter and then to send a friend request**" . The Tribunal noted that this was not mentioned in the meeting of the 7 January 2014 (see page 127-8), Mr Whelan made no mention of the Claimant going on Facebook therefore this cannot have been part of a management instruction given to the Claimant at the time. The tribunal also noted that the respondent's code of conduct did not forbid staff from forming relationships with those they met whilst performing their duties in the community.

40. At the end of the interview the Claimant was asked about his role in the Airbourne event, he confirmed that Ms Jones' daughter won the event and the winning ticket was drawn out of a hat by Mr Hayes.

41. There was an interview with Ms Howard (the Events Co-ordinator of Airbourne) on the 5 October 2015 (see pages 159-160) who was unable to assist with evidence relating to the prize draw. The Claimant was then interviewed again on the 7 October 2015 (at pages 161-3) and the meeting was again attended by Ms Whyatt of HR. He confirmed in this meeting that he did not know the questions that were to be asked in the competition and the winner was picked out of a hat by Mr Hayes. The Claimant only became aware that it was someone he knew when he called her to tell her that she had won. He stated that he did not acknowledge her when she came to pick up the tickets for a free helicopter ride because he

did not wish to embarrass her (by talking about her rat problem). Mr Whelan was asked what was suspicious about the Claimant doing this and he replied **"I don't know their thought process; I did not ask the question".** The tribunal find as a fact that that at the time Mr Whelan could not provide any evidence of the Claimant's wrongdoing and he failed to probe into the evidence to establish the relevant facts.

42. Mr Whelan was asked why he did not interview Mr Hayes and he replied "**HR did not think it appropriate to contact him because the Claimant was living with him**". He was asked why Ms Whyatt had commented (page 163) that she felt that it was "**more than just a coincidence that you had told Stephanie that if she rang in prizes were available to be one?**" and he was asked what the coincidence was and he replied "**a pest control customer who is a friend, who had managed to get through, managed to get the question right and the Claimant did not admit to knowing her**". However, he conceded that the Claimant did not pick her name out of the hat. He accepted that this quote (about being more than just a coincidence) appeared in his report even though this was Ms Whyatt's view and not his and he could not identify any evidence to support his suspicion and he failed to investigate this matter.

Letter calling the Claimant to a disciplinary hearing.

43. The Claimant was called to a disciplinary hearing by a letter dated the 14 October 2015 at pages 165-6 of the bundle. The letter was from Ms Thompson, the dismissal manager. The disciplinary hearing was to take place on the 21 October and the two allegations which were that the Claimant had "**formed inappropriate relationships with customers following home visits; failed to follow a management instruction**". The letter also stated that **"I also want to discuss your involvement and the circumstances in which a customer, who is a Facebook friend of yours, won helicopter flights at Airbourne after you prompted her to apply**", this was not stated to be a formal disciplinary charge but was a matter for discussion. He was warned that if the allegations were found to be proven, it could amount to gross misconduct resulting in a summary dismissal. The letter stated that the management case would be forwarded to him in advance for him to prepare. The Claimant accepted in cross examination that he knew he had three allegations to answer.

44. The Claimant sent a written statement to HR dated the 19 October at pages 167-170 clarifying that he had not had a relationship after his meeting with Mr Whelan in 2014 as he had confirmed with Mr Pidgeon that Ms T had contacted the Respondent about a problem on the 14 July 2014 and he informed Mr Pidgeon that he could not get involved with her; he stated that this was the last time she had contacted the Respondent. This was further evidence provided by the Claimant that should have been followed up as part of their investigations. The Claimant also confirmed that his partner had told him that it was she who complained to the Respondent about him in August 2015 and said that they were now having counselling. He provided mitigation which was the illness of his mother and the medication he was taking "**for his own mental health**".

45. Prior to the hearing, Ms Howell emailed Mr Whelan on the 19 October (see page 173 of the bundle) stating that she believed the Claimant needed "**some kind of therapy/counselling and support regarding his well-being. This may be pertinent to the issues that he has experienced**" and did not wish him to lose his job. She went on to state that she felt that his mental well-being "**seems to be at the crux of the problem**". This email again placed the respondent on notice about the Claimant's mental health and reinforced the contents of his own submissions in relation to his mental health issues. Ms Howell then sent a message from her phone on the 20 October saying "**I am honestly worried about Ian and have been made to feel really bad about my actions"** and it was put to Mr Whelan that this had not been included in his report and nothing appeared in the report about the possible inconsistencies in Ms Howell's evidence and he replied "**no, I received this email days before the hearing, the HR Consultant said she was concerned about the words "made to feel really bad.." and felt it showed coercion. We did not rely on her evidence".** The Tribunal noted that the view formed by HR and by Mr Whelan was not supported on the facts and had been disputed by Ms Howell in Tribunal. Ms Thompson was also taken to this email in cross examination and she could not be clear if she had seen it or if Mr Whelan had mentioned it. When she read it she "**perceived this as someone putting pressure on her**", this reply illustrated that she was willing to interpret all the evidence before her in a way that was consistent with the sentiments expressed in Ms Howell's first email. The Respondent failed to follow up these two communications and proceeded on an assumption that was uninformed and not based on fact.

46. Ms Thompson was asked if she would want to speak to Ms Howell after seeing her further communications and she replied that she would **"if she had said it was [the Claimant] who made her feel bad**". She was then asked that it may show the opposite and the only way to find out what was the email meant was to interview Ms Howell, she replied she was "**not sure if it would have added anything**". The Tribunal find as a fact that Ms Thompson appeared to view the evidence of Ms Howell to only be of relevance if it showed the Claimant to be guilty of culpable conduct. This was clear evidence of predetermination and bias where evidence was only considered to be relevant if it was consistent with the view they had already formed that the Claimant's had behaved inappropriately towards women.

47. Mr Hayes also sent a letter to the Respondent (see page 174 of the bundle) explaining the procedure that was adopted that day for the draw of the helicopter flight. He confirmed that it was he who folded every correct entry and put them into the hat and picked out the winner himself. He "strongly contested" the allegation that the draw was in some way fixed. Ms Thompson was taken to this document and she accepted that she had received this and was asked in cross examination whether she was concerned that people who were critical to the facts were not interviewed, she replied that she was "**not concerned".** The Tribunal again noted that Ms Thompson did not appear to be concerned that eye witness testimony was not taken into account and relevant facts were not investigated, this again reflected the considerable substantive failings of the investigation and of the disciplinary process as a whole.

The management report

48. The management report prepared by Mr Whelan and was at pages 175-183 of the bundle and was dated the 21 October 2015, the same date as the disciplinary hearing. The report referred to the Respondent's Code of Conduct but did not cite which particular section was relevant to this particular factual matrix. Paragraph 1.5 of the report (see page 175) referred to three allegations, the first two were the same as the letter calling the Claimant to a disciplinary hearing and the third allegation was that the Claimant "**acted inappropriately in his involvement and the circumstances in which a customer, who is a Facebook friend of his, won helicopter flights**". This allegation was not in the letter calling him to a disciplinary hearing, the only mention of the helicopter flight incident was that this was something she wished to discuss. The Tribunal note that by the time the Claimant had seen the report this had become a formal charge although the Claimant had not been put on notice of this in the letter calling him to the hearing.

49. The appendices of documents did not attach the emails or subsequent texts from Ms Howell to Mr Whelan, the letter from Mr Hayes or the statement from the Claimant.

50. The allegations referred to in the report at paragraph 4.1 stated that it was from "the complainant" but it was not confirmed that this was the Claimant's partner. It was noted that in the disciplinary investigation no specific allegations had been put to the Claimant to respond, he was simply asked to described the nature of his relationship with certain women (Ms [W], Ms Jones and Ms [S]). Not knowing the specific nature of the complaint made it impossible for the Claimant to defend himself and although Mr Whelan had told the Tribunal that the purpose of the investigation was to discover if he had entered into a sexual relationship with these women, no specific questions were put to the Claimant.

51. Mr Whelan also did not state in his report that this complaint was made after the Claimant and Ms Howell had gone through what the Claimant had described as a "major bust up" (see page 147) and none of the women referred to had complained. It was also noted that in paragraph 4.1 (page 177), the Respondent quoted a number of emotive and highly charged words that had been copied from Ms Howell's letter such as the allegation that the Claimant had used Facebook to "groom" women that he had "targeted". This wording tended to suggest, in the absence of any consistent evidence before the Respondent that the Claimant was perceived as a sexual predator. These words were adopted without questioning their meaning and without taking advice as to how this type of conduct could be identified (and whether the Claimant had exhibited the type of behaviour referred to by Ms Howell). This conclusion was reached (that the Claimant had to respond to these charges) on the basis of uncorroborated evidence from a witness who was hostile to the Claimant and at the time this email was written she was motivated by anger. The Respondent also failed to refer to Ms Howell's subsequent emails and texts dated the 19-20 October (pages 172-3) which again prevented the Claimant from having access to all the relevant evidence from his accuser. The Tribunal also conclude that the Respondent relied entirely on the

email from Ms Howell as there was no other evidence of alleged inappropriate behaviour and the management report quoted extensively from this email. The Respondent's evidence that they did not rely on this email was not consistent on the facts. It was essential for all the documentary evidence against the Claimant to be disclosed to him for the process to be fair.

52. In paragraph 5.1.4 of the report six women's names had been identified from the Claimant's Facebook account, only three of whom had resulted in intimate relationships (B, T and H) and none of these women had complained to the Respondent about the Claimant's conduct. B and H had been in a relationship with the Claimant in 2013 (before the conversation in January 2014). The report then stated that the dates of T was in July 2014 but this seemed to ignore the Claimant's statement dated the 19 October sent to Ms Whyatt (which was not referred to in the report or in the appendices) where he denied that he responded to this call and explained the reason why to Mr Pidgeon. The report did not accurately record the Claimant's evidence given in the investigatory meeting (see above at paragraph 38) that he could not recall when he had a relationship with T when it was put to him. Mr Whelan concluded that the Claimant "**had an intimate relationship with T in July 2014**" (see page 180) despite the inconclusive nature of the evidence before him at the time.

53. Mr Whelan stated in the report at paragraph 5.1.7 that he was "**concerned that some of the customers of the Council could be described as vulnerable**..". Mr Whelan also confirmed to the Tribunal that although it was in the report he had not concluded that they were vulnerable and Ms Thompson failed to establish this as a fact. It was again noted by the Tribunal that the word vulnerable was a description first used by Ms Howell and was adopted by the Respondent without question, despite the fact that this was never investigated and no conclusions were reached on the facts. It was also noted that Ms Howell worked in social services worked with vulnerable people and she accepted she was aware of the serious implications of using this terminology, she confirmed to the Tribunal that these allegations were entirely untrue.

54. Mr Whelan conceded in answers to the Tribunal that it was an omission to fail to identify the identity of the complainant and he accepted that this may go to motivation. He told the Tribunal that he did not attach the email from Ms Howell to his investigation report because "**I did not want to inflame a domestic situation any further, the advice was that it should not be put in"** he stated that in his view the domestic was "ongoing". This consideration was irrelevant to the obligation of the Respondent to conduct a fair and reasonable investigation in a serious matter where dismissal was one possible outcome.

55. Ms Thompson was not concerned that none of the women were interviewed because **"the Claimant admitted the relationships and we felt they were inappropriate from our point of view".** This quote by Ms Thompson suggested that she had already formed the view that the relationships were inappropriate from her own personal point of view but she failed to reach a conclusion as to whether his conduct had breached the Respondent's Personal Conduct Policy or any instruction that may have been given in the management discussion.

56. Mr Whelan was taken to his conclusion on the first allegation at page 179 and he conceded that where he identified that the Claimant had entered into three intimate relationships with customers he omitted to mention that at least two of them were prior to 2014. The third relationship was admitted to have taken place but there was a dispute about when it was. It was also put to Mr Whelan that where he referred to "**all the customers were single women**" was false (because one was male and two were in relationships) he accepted that he could see how this statement gave a false impression. The Tribunal find as a fact that Mr Whelan's investigation and his management report failed to consider all the evidence, failed to make clear findings of fact and the report contained false and inaccurate information. Mr Whelan also failed to reach a conclusion as to disputed facts (in relation to Ms T) and failed to conduct a further investigation to establish the truth or otherwise of the Claimant's evidence (in relation to his conversation with Mr Pidgeon).

57. It was also put to Mr Whelan that paragraph 5.2.1 under issue 2 of his report where it stated "**I had instructed IH that he could not get involved with customers on a social basis and he was not to use Facebook as a means to do so";** and he was asked about the accuracy of his statement and he stated it was his view that it was "**pretty much the same and has the same context**". However, the Tribunal have already found as a fact that he did not give the Claimant a management instruction and the contents of the discussion did not include a reference to Facebook, therefore his view that the instruction was the same or similar was inaccurate to a material degree. The Tribunal conclude that this was further evidence to show why it was inappropriate for Mr Whelan to conduct the investigation, due to his prior involvement in this matter.

58. Mr Whelan concluded in his report that the Claimant had failed to follow a management instruction because he had entered into an intimate relationship with Ms T after the instruction was given to him in January 2014. However, this conclusion was disputed by the Claimant in his written statement dated the 19 October where he confirmed that he had no contact with Ms T in 2014. Save for that relationship, no other relationships were of an intimate nature. It was put to Mr Whelan in cross examination that no one he had interviewed had said that the relationships were inappropriate and he agreed with this and went on to state that "**no, the only issue was that it was formed out of a pest control visit to a house**" . It was put to Mr Whelan that the relationship with Ms T was before the instruction in 2014 and he replied that "**our customer records showed 2014, our case is that he formed a relationship in 2014".** He accepted that he did not show the Claimant the APP records at the interview (which were alleged to have shown a pest control visit to Ms T) or the statement from Mr Pidgeon and this matter was not followed up after the Claimant sent Ms Whyatt his statement to establish the truth or otherwise of this allegation.

59. In relation to the helicopter ride, Mr Whelan concluded that the Claimant acted inappropriately because (see page 182 at paragraph 6.4) "**his inconsistency in his responses relating to who phoned the**

winner, his lack of recognition of her prior to the telephone call, and his failure to acknowledge that he knew her when he presented the prize to her in front of an audience, raises doubts as to it being just a coincidence". Mr Whelan was asked in cross examination what was in doubt in relation to this allegation and he stated that "**the Claimant could not remember who phoned the winner…"** and "**the involvement of a client (of pest control) in winning and the way he acted was inappropriate".** The Tribunal find as a fact that the Claimant's consistent evidence is that he has a poor memory and there was no evidence to equate his initial lack of recollection with dishonesty. The Claimant also gave a logical and reasonable reason as to why he did not state he knew the winner when she turned up to pick up her prize. This was a plausible explanation and no reason was given by Mr Whelan as to why this explanation was found to be unsatisfactory. The Tribunal also noted that there had been a statement provided by Mr Hayes who drew the winner and he was a witness to the proceedings but his evidence was given no weight. It appeared to the Tribunal that the Respondent preferred the evidence of Ms Howell, even though she was not present at the time and was not an independent witness and was motivated by anger towards the Claimant.

The Disciplinary hearing.

60. The Tribunal noted that there were no notes in the bundle recording the conduct of the disciplinary hearing, the Tribunal asked for the whereabouts of the minutes and some hand written notes were provided and put in the bundle at pages 183L-Q, these were part minutes and part pre prepared questions written by Ms Thompson. The notes of Ms Knight the HR manager were at pages 183R-U. The Tribunal noted that most of the document comprised of questions and conclusions reached after reading the documentation, but before the hearing. The replies given by the Claimant to questions asked in the disciplinary hearing were often in note form or his answers were not recorded. The Claimant made submissions in the hearing and these were not referred to in the notes of either Ms Thompson or Ms Knight. Ms Thompson conceded in cross examination that their notes, taken together, did not form an accurate record of the hearing. The notes also included Ms Thompson's conclusion and a draft dismissal paragraph that was later transposed into the dismissal letter (at pages 183P-Q).

61. The Claimant was accompanied to the meeting by Mr. Albon his previous line manager

62. Ms Thompson was asked in cross examination what she perceived to be the purpose of the disciplinary hearing and she told the Tribunal that the purpose was to decide if the Claimant had formed inappropriate relationships and to decide "the **trust and confidence and it was around the trust and confidence going forward**". Ms Thompson accepted that this purpose was not referred to the in the letter calling the Claimant to the hearing. It was Ms Thompson's view that it was not necessary to interview any of the women involved because it was a "**matter for the Council**". Ms Thomson told the Tribunal that she felt that the Claimant had committed misconduct because "**it is misconduct to go into a customer's home and to form short term relationships with people".** It was put to Ms

Thompson in cross examination that she had already formed the view, prior to the hearing that he had formed inappropriate relationships and she replied "**he was forming relationships but it was the content that made them inappropriate".** She accepted that she had formed a predetermined view that any relationship would be inappropriate. She also accepted that the Code of Conduct did not forbid staff from forming relationships with service users.

63. Ms Thompson could not recall if she gave the Claimant a chance to make submissions as to whether his conduct met with the expectations of the Code of Conduct. She was asked in cross examination whether she took the Claimant to the Code or asked him questions on it and she confirmed that she "**quoted it when I delivered the outcome but can't recall if I referred to it in the meeting**". The Tribunal find as a fact that the minutes available did not show the Claimant being taken to the Code of Conduct and no questions were put to him as to his understanding of the Code as it applied to him.

64. Ms Thompson accepted that she asked the Claimant about the consistency of his evidence but she did not note down his answer (see page 183M of the bundle). Ms Thompson was taken to page 183O of her notes to the words "**Inconclusive re: [Ms} T**" she was asked where this appeared in her outcome letter and she agreed that this conclusion did not appear in the letter. There was no evidence that despite the inconclusive nature of this evidence, that it was excluded from the charges. The Tribunal noted that this omission was central to the case as this was the only relationship that was alleged to have occurred after the 7 January 2014 discussion and at the date of the disciplinary hearing this evidential dispute had not been resolved. Ms Thompson was taken to page 186 of the dismissal letter and to the reference in relation to Ms T. and the APP record on the 14 July 2014 and she recorded that the Claimant was "**certain that you did not attend the customer on this date**". Ms Thompson confirmed that this evidential dispute was not resolved and she failed to reach any conclusion as to whether on the balance of probabilities which aspects of this evidence should be preferred and why.

65. There was no evidence that they took into account the Claimant's written submissions or the evidence of Mr Hayes, when Ms Thompson was taken to the dismissal letter at page 185 she confirmed that his factual submissions were not referred to in the letter. Ms Thompson was confident she took into account all of the evidence because she conducted her deliberations with Ms Knight straight after the hearing therefore things were fresh in her mind. She was asked in cross examination how they knew what the Claimant had said in the hearing because his replies were not written down and she did not look at Ms Knight's notes and she replied that "**through my profession, I am a professional and honest manager, I went through this straight away**". Although Ms Thompson did not appear to answer the question, the Tribunal conclude that the dismissal letter failed to refer to resolve factual inconsistencies and failed to refer to all the evidence and submissions provided by the Claimant in his defence. Ms Thompson also accepted that in the hearing the Claimant asked Mr Whelan questions but she could not recall the questions asked

and this evidence was not recorded in the dismissal letter, this was a further failure to record evidence that may exculpate the Claimant.

66. The disciplinary hearing commenced at 9.00 and there was an adjournment until 9.36 then the hearing continued and Ms Thompson could not tell the Tribunal how long the hearing took but accepted that it was not a long hearing. She confirmed that the Claimant's submissions about those he saw were not vulnerable and some were not single (and one was male) did not find their way into the dismissal letter neither did his evidence about his brain injury. It was put to Ms Thompson that she should have excluded Stephanie Jones from the list of women referred to in the minutes at page 183S because the Claimant's evidence was that she was married and she added him to her Facebook page. She could not recall if she had excluded Ms Jones from those that were a cause for concern. Ms Thompson was also taken to Ms. Knight's minutes on page 183S where she wrote the words "total confusion" and she was not sure what this referred to or whether it was something the Claimant said or if it was Ms Knight's perception of the Claimant. The Tribunal again note the poor standard of the note taking and the lax and inconsistent approach taken during the hearing, there seemed to be a significant difference to the way the Respondent recorded the evidence they felt supported the charge and the evidence that the Claimant gave during the hearing to defend himself.

67. The Tribunal noted from Ms Thompson's statement that she stated that she took his health condition into account (paragraph 19). Ms Thompson was asked about page 183O in relation to her minutes about the Claimant's memory loss and she was asked what conclusion she had reached and she replied that it was not there but it was in the minutes of the meeting with Mr Whelan. She stated that she was "**trying to weigh up the fact that he could recall a phone call but could not recall a relationship with a woman**". Ms Knight notes were on page 183S which recorded that the Claimant had stated that he had "**forgotten that information**" (referring to the management instruction) due to his poor memory. Ms Knight's made an entry in her notes in relation to the Claimant's poor memory was by drawing a circle around the word "**doubt**", this suggested that a question had been raised in her mind about the reliability of his evidence. Although there was doubt in the mind of the HR adviser, the reliability of the Claimant's evidence in relation to his short term memory loss was not investigated further.

68. The Tribunal noted that the Claimant spoke about his head injury in the hearing (page 170) and Ms Thompson's recollection of this evidence was that "**the only time he mentioned a memory problem was at the hearing, he mentioned the head injury and taking advice but at no time did he say that he felt that this was the cause of his behaviour**". When she was asked what steps she took to establish the extent of his condition she replied "**at no time did HR flag any on-going issues**". Ms Thompson was taken to her notes of the hearing at page 183L and she was asked what was meant in the notes to the words "**short term memory loss"** and she could not explain the relevance of these words. Ms Thompson accepted that she made no reference to the Claimant's

memory loss in the dismissal letter; she did not know if she was concerned that this evidence had been omitted.

69. The Claimant made submission to the hearing regarding mitigation and he stated that he was prepared to work alongside others and no longer be a lone worker. He also indicated in the hearing that this would not happen again. The written notes of Ms Knight that appeared to have been made in response to these submissions were the words "**suspicion, improper motive**" and on page 183O of Ms Thompson's notes she wrote the words "**groom**" noting that this word was used by the complainant in her email, this note in her minutes reflected the importance placed by the Respondent on the email and the relevance placed on this evidence by those hearing the disciplinary case. The negative words in the notes used to describe the Claimant strongly suggested that they did not place great weight on his submissions (which were not recorded) or did not believe them, choosing instead to believe the contents of the email.

70. The Tribunal noted that the only reference made to the Claimant's disability was on page 186 of the dismissal letter where reference was made of his "brain injury", being on medication and the Claimant's submission that his medical condition made him act irrationally and gave him mood swings. Although this evidence was before Ms Thompson she took no steps to enquire further into his medical condition or whether the condition caused changes in his behaviour. It was also noted that the dismissal letter referred to the Claimant's most recent visit to OHS and confirmed that he had suffered from "unexplained fatigue" in 2014 but there was no evidence that Ms Thompson considered the evidence on the Claimant's file concluding that as HR had not flagged it up, it was an enquiry she did not need to make.

71. After being taken to pages 62-4 of the bundle in cross examination Ms Thompson accepted that the Claimant was suffering ongoing health issues and the Claimant had told her that he had been on medication since 2012 but "**he had not raised this with his managers since 2013**". Ms Thompson was asked in cross examination how she ensured it was fair if she did not check the Claimant's health records in the light of his PTSD and his citalopram and she replied "**the decision on the day was fair because I had no trust and confidence that he would not repeat his behaviour"** and she concluded that his health "**didn't have any impact".** Ms Thompson was taken in cross examination to page 183U where Ms Knight's notes of the hearing recorded that the Claimant had said "**made me do things, act irrationally, mood swings"** and she was asked what conclusion she had reached and she replied "**the issue was, he didn't believe the things he did were inappropriate, if at the time that caused the behaviour, will that behaviour going forward change?"** From this reply the Tribunal conclude that Ms Thompson did not consider the Claimant's evidence about his mental impairment and the effect that his impairment had on his interactions with others. Her answer reflected a lack of informed knowledge or understanding of the Claimant's mental impairments and she closed her mind to the impact that his impairment had on his behaviour and his ability to moderate it and on his memory. Ms Thompson failed to seek advice or guidance from OHS or from his GP

despite the Claimant's submissions in the hearing. Ms Thompson was on notice of the disability, having actual knowledge of his ABI and PTSD; she also had knowledge of a causal connection between the adverse impact of his impairment and his behaviour (provided by the Claimant) but despite being in possession of this evidence failed to seek any specialist advice on the matter.

72. Ms Thompson confirmed that it took her about 45 minutes to an hour to reach her decision, which was to dismiss the Claimant summarily. She also discussed with Ms Knight what they had seen and they discussed the Claimant's response to questions. No minutes were made of these discussions. The Tribunal also note that during these discussions Ms Knight may have shared the views that appeared in her notes of the proceedings of the Claimant's motive.

73. Ms Thompson conceded in cross examination that Ms Knight wrote all the factual findings and she could point to only a couple of minor changes that she made to the document (page 185 changing name to Paul Hayes and the wording of one sentence). Ms Thompson confirmed that Ms Knight wrote the dismissal letter (see page 184 of the bundle) and she checked it because she "**would not know how to write it**". She conceded that the only part of the letter that was written by her was the outcome paragraph on page 187, where she posed two questions that she concluded needed to be answered namely "**on the balance of probability do I think that the allegations and information presented in the management case are true and do I have trust and confidence in <u>you</u> going forward, particularly bearing in mind your role requires you to be out of the office 75% of the time?"**. Ms Thompson accepted when taken to the first question that she did not have a good grasp of the facts and she also conceded that in order to answer this question she needed to.

74. The Tribunal find as a fact that Ms Knight made findings of fact and then wrote the dismissal letter, this was corroborated by the chain of emails seen in the bundle at pages 183A-K where Ms Knight send Ms Thompson the draft dismissal letter at 13.47 on the 21 October 2015 and the letter that she sent back to Ms Knight on the same day at 15.39 was identical. The Tribunal therefore find as a fact that Ms Knight strayed into the fact finding role and her input was not limited to advising on process and procedure, the findings of fact and decision was written by Ms Knight and was amended by Ms Thompson. The conclusion written by Ms Thompson (at pages 183P-Q) appeared in the dismissal letter at page 187 but it was not linked to any factual findings or conclusions. The tribunal find as a fact that Ms Thompson failed to establish any facts or reach conclusions as to whether the two or three charges were found to have been proven and if so whether the conduct amounted to acts of misconduct.

75. Ms Thompson was asked about the second question in relation to trust and confidence and she accepted that she did not assess how serious the conduct was and accepted that it was important to do so. She told the Tribunal she did not think it was fundamental to put this in the letter. Ms Thompson accepted that the first time she mentioned trust and confidence

was in the dismissal letter and she made no findings of fact on improper motive. She also conceded that she did not check the facts referred to in the outcome letter against her and Ms Knight's notes.

76. Ms Thompson concluded that the Claimant had "**understood what was said to him**" on the 7 January 2014 and he had referred to this in his subsequent meeting with Mr Whelan on the 29 September 2015. This was a line on enquiry that was not pursued in the disciplinary hearing, she appeared to accept the contents of Mr Whelan's management report despite the Claimant producing evidence to the contrary. However, the Claimant's evidence on this point was that he had been reminded of the contents of this conversation in the initial investigatory meeting. Ms Thompson referred to the Claimant reading out his statement and concluded that the Claimant had admitted initiating 4 of the 5 Facebook friend requests of female customers and that **"there had been two complaints in 18 months of a similar nature regarding your conduct at work**", but again no reference was made in the letter to the fact that the Claimant's partner had been behind both complaints, this was a fact that was highly relevant to the reliability of the evidence and the motivation of the complainant, a matter that was not considered by the dismissing manager.

77. It was her conclusion in the dismissal letter that "**nothing I heard today has lessened my concerns because you have admitted having relationships or personal contact with EBC Customers**". She concluded that the Claimant had not met "**the Code of Conduct, despite a management instruction in January 2014, therefore it is my decision that you be dismissed from the Council's employment due to Gross Misconduct**" (page 187). Ms Thompson was asked in cross examination about what she meant by the words "improper motives" in her statement at paragraph 14 and she replied "**his behaviour was improper in forming relationships; his behaviour was influenced by improper motives".** It was then put to Ms Thompson that the Code of Conduct did not forbid forming relationships and she replied "**my interpretation is that the Claimant is going into people's homes with an improper motive".** The Tribunal noted that her interpretation of the Code was never put to the Claimant in the disciplinary hearing; it was also never put to the Claimant that he was influenced by improper motives. Ms Thompson confirmed to the Tribunal that she felt it was gross misconduct rather than a lesser sanction because "**the Claimant could not grasp the professional and personal boundaries, I felt there was no option".** She concluded it was gross misconduct because "**he has done these things and I am very concerned".** Ms Thompson did not consider whether the Claimant's alleged failure to grasp the issue regarding boundaries was a feature of his mental impairment as described by him in his meetings with Mr Whelan and before the disciplinary hearing.

78. Ms Thompson conceded in cross examination that she did not say in the dismissal hearing that she dismissed the Claimant because he did not feel that what he had done was wrong. Ms Thompson was asked by the Tribunal what the Claimant could have said to save his job and she replied "**I wanted to hear he accepted it wasn't appropriate to go into any house and have banter, personal chat and exchange phone numbers.**

He could see it was not professional the reputation of the council was at risk and that moving forward it won't happen". Although Ms Thompson's personal view was that it was inappropriate to have banter and personal chat this was not a matter that was investigated and again appeared to be her personal view of appropriate behaviour in the circumstances. Ms Thompson then confirmed to the Tribunal that the relationships were inappropriate because they were "**physical and intimate**"; she concluded that he had relationships of this kind with H, T and B. For Ms Thompson what made it inappropriate was he was "having sex with a number of people" but she felt that the views of the customers were not relevant to her consideration because "**these women entered into a relationship willingly, the issue for me and the Council was he was abusing trust and confidence to meet these women".**

79. Although she also concluded that there was a risk of repeated behaviour, this matter had been referred to in the Claimant's written statement which gave an apology and told the Respondent that he had closed down his Facebook account. This was evidence of the Claimant showing insight into his actions and taking action to comply with the concerns that had been raised directly with him in the course of the disciplinary process. There was no evidence that Ms Thompson considered this submission when reaching her decision that dismissal was the only option. There was no evidence that Ms Thompson considered any other sanction apart from dismissal.

80. Ms Thompson was asked in cross examination about the helicopter ride and she confirmed that it was an issue that was relied upon when deciding to dismiss because "**there was a lot of coincidences that led to mistrust".** The Tribunal have found as a fact that this was not a charge it was a matter that was to be investigated further. The Claimant was put at a disadvantage because he was not on notice of the facts that that had escalated this from a matter to be discussed further (in the letter) to an offence of gross misconduct (in the management report). There was also no evidence that they took into account the facts and reached conclusions on the balance of probabilities and failed to give any weight to Mr Hayes who was an independent witness.

81. Although the Claimant was advised of the right to appeal in the dismissal letter he did not put in an appeal in writing and there was no mention of the appeal in his statement. He told the Tribunal that he did not put in an appeal because he was suffering from depression and at the time his mother was dying. Although he told the Tribunal that he indicated in the hearing that he intended to appeal, this was not something that he followed up. The Claimant confirmed that he did not say that the dismissal letter was inaccurate and he conceded that it recorded what happened in the hearing.

The Claimant's submission

Section 98 ERA

Reason for the dismissal

82. First the Tribunal must determine what was the reason or principal reason (if there were more than one) for the dismissal.

83. C submits that the principal (indeed, only) reason for the dismissal was **conduct**. The critical decision to dismiss, as enunciated by Ms Thompson, is as follows (B187):

"*As I do not believe that you have met the Code of Conduct, despite a 'management instruction in January 2014' therefore it is my decision that you be dismissed from the Council's employment due to gross misconduct*".

84. Breakdown and trust and confidence (which R now submits was an alternative reason for the dismissal if not conduct) is referred to earlier in the dismissal letter, but it is certainly not the principal reason for the dismissal: it does not feature in the critical paragraph above; indeed, the first ever mention of the implied term of mutual trust and confidence was on the day of the disciplinary hearing itself. The only allegations of which C was notified in advance at any stage went solely to conduct.

85. Conduct is a potentially fair reason under s.98(2) ERA. As such, the Tribunal then has to consider s.98(4) ERA, namely whether R has acted reasonably or unreasonably, within the band of reasonable responses ("RORR") open to it, in deciding to treat C's conduct as a sufficient reason to dismiss C.

86. The classic three-part test in *British Home Stores v Burchell* [1980] ICR 303 applies as the formulation of what a Respondent will need to establish to show that its decision fell within the RORR.

Reasonably thorough investigation

87. To be entitled to dismiss fairly, R is required to have carried out an investigation that was sufficiently thorough in all the circumstances (*Burchell*). The minimum requirements of procedural fairness and natural justice to be observed at this stage are provided for by ACAS Code I which also apply here.

88. The amount of investigation needed differs with each case. However, it must *at least* satisfactorily cover the issues around which there is a factual dispute[1]. Any factual conclusion must be supported by evidence – mere suspicion is, for obvious reasons, unacceptable.

89. In this case, Mr Whelan, C's line manager, conducted the investigation from start to finish. The investigation began after an email was received

[1] See, e.g., *Scottish Daily Record and Sunday Mail (1986) Ltd v Laird 1996 IRLR 665, Ct Sess (Inner House)*, in which a Claimant was dismissed for failing to inform his employer of some outside professional interests. Although there was no dispute that he should have informed his employer of those other interests and had not done so, the Court considered that an investigation should nonetheless have taken place because there was a dispute as to whether there was a *conflict* between the employer's business on the one hand and the employee's outside professional interests on the other.

by Mr Whelan from C's partner Jacqui Howell on 24 August 2015. Mr Whelan considered that there were three allegations to investigate:

a. Whether C had had formed "inappropriate" relationships with female customers following home visits;

b. Whether C had failed to follow a "management instruction" given by Mr Whelan in January 2014;

c. Whether C had "acted inappropriately in his involvement and the circumstances in which a customer, who is a facebook friend of his, won helicopter flights".

90. Curiously, the investigation invitation letter (B151) only notified C that the issue was "using your job to form relationships with female customers". In fact, clearly there were three separation allegations (see below), one of which was of a substantially different nature (disobedience to a manager's instruction).

91. As part of the investigation, which was a formal investigation carried out under and pursuant to R's own disciplinary policy and notified to C as such (B151), Mr Whelan interviewed C twice and interviewed one another colleague, Jane Howard, about the Airbourne festival.

92. Following this, Mr Whelan produced a report as to whether there was evidence of misconduct on C's part, concluding that there **was** evidence of misconduct as to three allegations.

The flaws in the investigation

Flaw 1: Mr Whelan should not have been the investigator in the first place

93. Under R's disciplinary policy (B207 – para 7.1) the investigator is ordinarily the employee's line manager. However, the policy clearly provides that:

"*There may be occasions when it is not appropriate for the line manager to undertake the investigation <u>because they are involved in some way in the matter to be considered</u>. In this even, another appropriate manager will undertake the investigation.*"

94. It must (or should reasonably have) been immediately apparent to Mr Whelan that he was involved quite substantially in two of the three allegations:

a. As to the oral "management instruction" of January 2014, it was he who had given the instruction and had chosen to deal with the instruction in the way he did;

b. As to the issue of "inappropriate relationships" with customers, Mr Whelan was also involved because he had previously in January 2014 investigated one such case ([Ms] H) with C and taken a particular view on such conduct. It was agreed that there *had* been such a relationship (including on Facebook), but Mr Whelan had not considered it sufficiently

serious to invoke the disciplinary process *at all*[2].

95. Further, on the issue of the alleged "management instruction", Mr Whelan was management's *sole witness*. The evidence as to what C was instructed in January 2014 would of necessity have to come from Mr Whelan and C.

96. The above made Mr Whelan manifestly inappropriate as an investigator. R's own policy provided for another manager to hold the investigation, obviously so as to be able better to assess the evidence of both sides objectively. Inexplicably, given R's size as an employer, the policy was simply ignored.

97. In wrongly proceeding to appoint himself as investigator of the issue of whether an instruction issued by him had been obeyed, Mr Whelan placed himself in the impossible position of having to determine:

a. His own evidence, including whether it was reliable, by contrast with C's evidence;

b. The credibility, completeness and accuracy of his own note made allegedly later that day (but never given to C at any time);

c. The correctness and reasonableness of his own manner of dealing with the issue via an oral instruction and not (at the least) as part of informal action under the disciplinary policy.

98. For obvious reasons, it was difficult if not impossible for Mr Whelan to undertake that task objectively.

99. Further, the self-appointment of Mr Whelan as investigator destroyed or severely distorted C's entitlement (see ACAS Code I, para 12) to *question witnesses* in the case. Clearly it was impossible for C to undertake questioning adequately if the witness was also the investigator evaluating the cross-examination!

100. This flaw was both procedural and substantive since it distorted the ability of the investigator to fulfil his role, and detracted from the objectivity needed of the investigator.

Flaw 2 – the investigation report made recommendations for a disciplinary hearing concerning conduct that in part had ***already been dealt with in 2014*** *by management action*

101. The investigation reached conclusions of fresh misconduct on the part of C as to matters that had already been dealt with by management – namely the [Ms] H incident, which had clearly taken place in 2013 and was

[2] Mr Whelan's evidence before the Tribunal was that by issuing an oral management instruction he did not consider he was engaging even the "informal action" stage of the disciplinary procedure (Policy at B207, para 6.1). Instead, Mr Whelan viewed this response as simply a part of his ordinary management of C day-to-day and not a response under the disciplinary policy.

dealt with in January 2014 by Mr Whelan.

102. The implications for fairness of including already-dealt-with material in a report about whether to start a fresh disciplinary hearing as to the same conduct were major. If this was only background, it would have been acceptable to include. But Mr Whelan clearly goes further includes the E case as part of an allegation requiring *new* disciplinary proceedings – not merely as background. That was irrational and unfair – no reasonable investigator could have based a new disciplinary finding on old material already the subject of a previous management action.

Flaw 3 – C not provided with sufficient material to participate

103. Despite C's entitlement to be provided with "copies of any written evidence" (ACAS Code, para 9) and to "be given an opportunity to raise points about any information provided by witnesses" (ACAS Code para 12), and despite R's obligation to "go through the evidence that has been gathered" with the employee (ACAS Code para 12), Mr Whelan:

a. Does not provide C with the text version of the message received from E at any time;

b. Does not provide C with the email of Jacqui Howell of 24 August 2015 at any time.

c. That very seriously disabled C, since he was thereby deprived of the ability to provide to R his position as to the totality of the complaints – and in the case of Jacqui Howell's email, even to know the identity of the author of the email! R did or should have known that depriving him of this opportunity would distort the nature of the investigation since C was not in a position of knowing what he had to respond to. Significantly, although Mr Whelan feels it unnecessary for C to see the two documents, he does pass them to Ms Thompson who then (unlike C) had a chance to evaluate them for herself.

104. This flaw goes to both the procedural and the substantive requirements of a thorough investigation.

Flaw 4 – the investigation into "inappropriate relationships" failed to assess the question by reference to any identifiable standard;

105. As to the first allegation, the investigation needed to go past simply *whether* C had had relationships at any time with one or more women whom he had initially met through pest-control visits - that basic fact was admitted and the issue was not whether this happened but whether they were *inappropriate*. As "inappropriate" involves a value judgment, the only identifiable objective standard to which C could conceivably be held is that which R had published to all its employees in its Code of Conduct, which contains a specific chapter (Chapter 4 – B192) on Relationships, and specific provisions as to service users/customers and employees.

106. Significantly, though the Code *does* ban or discourage certain relationships between certain categories of individuals (eg councillors and council employees), and although there is a paragraph on service users,

the Chapter (in particular para 4.2)[3] **nowhere bans employees from entering into relationships with service users** but simply underlines employees' obligations to "courteous, efficient and impartial service delivery" to all groups and individuals. As such, though R had clearly turned its mind to the issue, it had not opted on a ban of relationships between service users and employees. Indeed, employees were not even required to disclose these, unlike the position with external contractors (see Code of Conduct, paragraphs 4.3 and 4.4).

107. Consideration of the Code on this issue was **vital** and the minimum required of any investigation. An investigation which did not take into account C's conduct by reference to the Code's provisions could not be considered "thorough".

108. Amazingly, the investigation simply failed to consider the Code of Conduct's Chapter 4 on Relationships at all. The final report doesn't mention the Code's provisions even once (even though it annexed the Code itself as an appendix). This fundamentally negated the thoroughness of the investigation **and** its ability to reach any reliable conclusion as to what relationships were in this context "appropriate" or not.

Flaw 5 – the investigation into "inappropriate relationships" simply did not gather the minimum required information to enable it to assess inappropriateness;

109. The investigation manifestly failed to investigate this allegation adequately:

a. The sole complainant (C's then partner), who communicated her complaint to R via a single email, was never interviewed, nor had her version of events checked *in any way*;

b. This was despite the fact that Jacqui Howell's email was emotionally-charged and, because emanating from a person herself romantically involved with C and going through a break-up with C, raised obvious issues of impartiality, objectivity, reliability and potentially the existence of other motives on Jacqui Howell's part. Mr Whelan agreed in oral evidence that he was aware that C and Ms Howell had had "a massive bust-up" only days prior to the writing of the email. It was particularly important to check that since C had not been shown the email and did not, as far as R was concerned, even know the identity of the "complainant" and so could not make any submissions about the complaint himself;

c. Not one of the women with whom C had allegedly had inappropriate relationships was *ever* contacted or interviewed. That is extraordinary, given the need for the investigator to establish satisfactorily whether there had been *inappropriate* conduct and also (because of the management instruction issue) *when* this had occurred, if at all. C was clear in his interviews that any romantic relationships had been *prior to January 2014*

[3] *"Employees should always remember their responsibilities to the community they serve and ensure courteous, efficient and impartial service delivery to all groups and communities within that community as defined by the policies of the authority."*

and that there had never been anything inappropriate about them. For Mr Whelan to find otherwise, he would need to have evidence contradicting that of C. He did not seek any.

d. The Tribunal has now had a potent live demonstration – via the evidence at the hearing of Ms Howell and Ms Jones – of the sort of evidence that **would have emerged** had even those two ladies been even minimally questioned as to the email and the relationships C had formed after 2014. Jacqui Howell revealed her earlier email to be in numerous ways an **exaggeration** (as to the number of relationships C had had), and even **untruthful** (the wholly false allegation of sexual assault; and the suggestion that the relationships were "predatory"). The need to elicit such evidence was obvious to any reasonable investigator. The failure to do so was inexplicable and unacceptable. The inadequacy of the investigation in light of the fuller evidence the Tribunal has heard – and which was available to R to obtain at the time – is obvious.

e. Tellingly, R's own managers had conflicting views as to what is "appropriate" and "inappropriate" – with Mr Whelan suggesting at the Tribunal that it would be acceptable to become (non-sexual) friends with service users provided there was a legitimate reason (eg a hobby) and suggesting that meeting people at a bar, pub, church or on the street and then becoming friends would be acceptable; Ms Thompson appears to have had a far more extreme view, namely that C could *never* entertain any kind of friendship with any former service user he had encountered - even if this meant ignoring them in chance encounters in the town, or on the street, and refusing their own invitation to him to be a friend!). This really highlights the problems created by the failure to identify by reference to any objective, knowable standard what is "inappropriate" about a relationship between an employee and a service user;

f. As a result of not contacting any of the service users, the final report written by Mr Whelan made serious factual mistakes that could easily have been corrected had the women been contacted – for example, it treats C's "victims" as all single vulnerable women whereas in truth (a) a number of the women were happily married; (b) there was no evidence of vulnerability as to any of them; and (c) most (66 at least) of C's Facebook friends were in fact men, including one client of a house visit, [Mr. S];

g. Even more ominously, Jacqui Howell had expressly written to Mr Whelan on 20 October 2015, a day prior to Mr Whelan's presentation of the management case at the disciplinary hearing, to indicate that she had "*been made to feel extremely bad about my actions*" (B172). Although this email was received following the compilation of the report, it was received a day before the disciplinary hearing, and put a whole new light on the investigation report's reliability – most importantly, the email exposed clearly the problem caused by the failure to contact and interview Jacqui Howell. This gave rise to very serious doubts as to the quality of her evidence – which was after all the **only** evidence critical of C in the case. On any view, this further email of Jacqui Howell required further investigation, given the critical nature of her evidence in the case. None was undertaken;

Flaw 6 – the investigation report's conclusion on misconduct was irrational,

*given that the same conduct was adjudged **not** to have been misconduct at any level by the same individual in 2014, despite substantially the same facts*

110. By concluding that he was satisfied that there was evidence of "inappropriate" relationships that had fallen short of the standards of the Code of Conduct, Mr Whelan faced the obvious difficulty that, as concerns **exactly the same conduct** – namely, a sexual relationship with a customer following a pest control visit, initiated by C and involving a Facebook friendship – all admitted by C – Mr Whelan had *not* considered that this was an event of gross misconduct, or indeed even misconduct since he chose, in January 2014, not to engage the disciplinary procedure *at all*. This was never adequately explained in the report or at all.

Flaw 7 – the allegation of "failure to follow a management direction" was inadequate and fundamentally compromised by Mr Whelan's position as both witness and adjudicator

111. This allegation required at a minimum that there be factual evidence of:

a. Whether an "instruction" was given at all (as opposed to a mere discussion/conversation);

b. If so, what that instruction was;

c. Whether C disobeyed the instruction following receipt of it.

112. As to whether an "instruction" was given, the position was hardly clear: Mr Whelan himself refers to the whole event as simply a "discussion" (B147) when he first reminds C about it in the first 2015 interview. In January 2014, Mr Whelan does no more than record a private note of the conversation in his Outlook notes system, hardly consonant with an instruction, which of its nature is for the benefit of (and compliance by) a third party; (C stated in oral evidence at the Tribunal that as far as he was concerned it was more of a conversation;)

113. As to *what* the instruction was, the evidence was again clouded by multiple inconsistent accounts:

a. Mr Whelan's account is in his Outlook notes (B128). Much of the note is concerned with the issue of Jacqui Howell obtaining a customer's private details, not C's use of Facebook or whether he can have relationships with service users; the only actual instruction given (if the note is complete) is "*you cannot use pest control visits to meet women*"; there is **no** instruction as to Facebook whatever;

b. C's first answer (B147) when asked whether he remembered the "discussion" of January 2014 does not produce any clear recall of what the instruction was at all (he simply recalls that it was about [Ms] H and the relationships he had had by then);

c. Only upon a second attempt during the second interview, after C's memory has been prompted to reflect upon Mr Whelan's "expectations" (B154), does C provide a version of an 'instruction' - but one that does not

match Mr Whelan's actual instruction as recorded in Mr Whelan's Outlook account. C's version is that Mr Whelan's "expectations" were "not to get involved with customers on a social basis, not to use facebook as a way of doing that".

114. The evidence for what instruction had been given was thus fragmentary and inconsistent at best. That Mr Whelan was himself conflicted as to what version to rely on rendered the report even less satisfactory.

115. As to whether the instruction had been disobeyed, this depended on what version of the instruction one took as being accurate (which was not something that Mr Whelan reaches a view on – of course his position was inherently conflicted here, since he was a witness as well as investigator). At the least, it required evidence that C had socialised with a service user whom he had sought to meet *after January 2014*; or, if the Facebook element mentioned by C but no one else was relied upon, that C had added one or more of them to Facebook *after January 2014*. The first requirement was not investigated *at all* despite C's repeated contention that he had not had *any* relationship with a service user after January 2014. As to the Facebook issue, only two cases of making a friend request were detected, [Ms W] and [Ms S].

Flaw 8 – The conclusions as to the Airbourne event were contradictory, irrational and based upon pure suspicion without evidence of any kind

116. The investigation here needed to establish *factually* that:

a. C's activities at the fete in fact sufficiently related to his work as to be a subject of intervention by R;

b. C had conducted himself wrongly and in what way.

117. As to both of these, the investigation was simply completely silent as to any form of misconduct which could remotely be relied upon at a disciplinary level. Mr Whelan is clear that, even on his own rudimentary investigation:

c. "*There is no evidence to suggest that IH was involved in the design of the question and drawing the winner."* (B182, para 6.4)

d. Inexplicably, however, Mr Whelan then concludes that he still has "doubts" as to whether Ms Jones winning the raffle was "just a coincidence". Of course, if C had not designed the way the competition ran or drawn the winner, then it could not be anything other than a coincidence. No reasonable investigator could make conclusions on the basis of "doubts" – he would have needed to investigate further. But Mr Whelan did not do so, making no further inquiries of other parties who could have assisted – for example, Paul Hayes.

118. No reasonable investigator could have found a case to answer as to the Airbourne raffle on the basis purely of "doubts" that had not been further pursued despite the opportunity to do so.

***Conclusion on the investigation**:*

If the Tribunal concludes that there had **not** been a sufficiently thorough investigation of C's alleged misconduct, then the *Burchell* test simply cannot be satisfied, and a finding of unfair dismissal is inevitable.

Genuine belief upon reasonable grounds

119. *Burchell* requires that the dismissing officer possess a genuine belief in (gross) misconduct, having reasonable grounds for that belief.

120. Ms Thompson's approach and conclusions as to the entire disciplinary proceeding were so deeply flawed that they negate any genuine belief in misconduct; and also demonstrate that she had no, or no adequate, grounds for any such belief to have been reasonable.

121. For Ms Thompson's (or indeed any disciplinary decision-maker's) decision to be genuine and pursuant to reasonable grounds, it would need (at a minimum) to:

a. Have properly considered the evidence both of the investigation and also any further evidence raised by C (and anything known to R in C's employee file);

b. Arrive at findings on the facts including drawing conclusions where there is a dispute and explaining briefly her reasons;

c. Consider properly what level of mis/conduct the conduct found to have occurred constitute;

d. Consider properly any mitigation evidence;

e. Consider properly what sanction (if any) was appropriate.

122. Failing those steps being taken, it is difficult to characterise a decision to dismiss for misconduct as either genuine or based on reasonable grounds.

123. Regrettably, it is submitted that Ms Thompson failed to undertake *any* of the above steps adequately, or as to some, at all.

Flaw 1 - Failure to consider the evidence of both the investigation and any further evidence raised by C; including any relevant material in C's employee file

124. Although Ms Thompson clearly had read the report of Mr Whelan, she did not identify any of the serious evidential flaws in the report (identified above). The most serious of these, namely the failure to check or interview either Jacqui Howell or any of the women the subject of the romances (particularly in light of Jacqui Howell's further email of 20 October), should have been so obvious to any decision-maker as to prompt the decision maker to seek further information. Ms Thompson does not seek any further information.

125. More significantly, although C was permitted to read out his written submissions at the disciplinary hearing, there is no evidence that Ms Thompson ever actually engaged with any of the factual challenges or sought to reach reasoned findings as to them. It appears that C's reading out of his submissions was for the sake of theatre only.

126. Further, Ms Thompson makes almost no mention whatever in her decision text of the impact of C's medical conditions on his conduct, even though this is a matter which is of major importance to C, raised both in his written submission and his oral submissions on the day, and also clearly in the health material available in R's employee file on C, and obviously important to the decision. The most that C's medical problems merit in the dismissal letter is a few lines in the meeting summary section of the letter (written by Helen Knight, not Ms Thompson) simply to note that . Even on the few lines devoted to the subject, it is clear that at the meeting C has stated that his medical condition has "*made him act irrationally*" and "*given him mood swings*". For the issue of C's medical state not to have factored in Ms Thompson's decision is unjustifiable.

Flaw 2 – failure to make factual findings!

127. After considering the evidence for and against the employee, it is for the decision-maker to make findings of fact as to what in fact occurred, and particularly in areas where a relevant factual disagreement existed.

128. Incredibly, Ms Thompson makes no findings of fact ***whatsoever*** before reaching her conclusion that "*I do not believe that you have met the Code of Conduct, despite a 'management instruction in January 2014"*.

129. That is despite the case that Ms Thompson was aware that there were areas of relevant factual dispute. In oral evidence at the Tribunal, Ms Thompson was taken to the specific written submissions of C at the hearing, and accepted that C was making factual arguments there that (to give only two examples)

130. By no means all of the friends he had added to Facebook were single, or indeed, females (B169);

131. He had not visited [Ms] T in 2014 following the conversation with Mr Whelan (B169) asking him not to form such relationships, and that someone else had undertaken the visit in July 2014;

a. Though accepting that these *were* contentions which C was raising for her to make a determination about, she accepted that she had made no findings about any of this in her reasoning.

132. Rather than make factual findings, Ms Thompson instead poses herself two questions:

a. "*Do I think that the allegations and information presented in the management case are true*?" and "*Do I have full trust and confidence in you …*"?

133. As to question 1, she says that "*nothing has lessened my concerns because you have admitted having relationships or personal contact with EBC customers*". (This was, of course, not the allegation against C – and is not in any event an answer to the question posed.)

134. Ms Thompson's response that "*nothing I heard today has lessened my concerns*" offer a hint as to why she had not made any factual findings. She clearly viewed her role as one of *review*, akin to an appeal holder (which she was not); and not as a role in which she was the primary finder of fact (which she was). That was a critical misconception on Ms Thompson's part. The "*nothing I heard today has lessened my concerns"* comment further reveals her view that it was for C to <u>disprove</u> the allegations, not for her to <u>prove</u> them. – her role was, in her view, a passive one. The exercise appears, in Ms Thompson's mind, to her to be one of pure mitigation, i.e. had C proved to her that despite his failings he should be given a second chance? This was, again, a misconception.

135. Ms Thompson was so blasé about any obligation to make any findings as to facts – including setting out the factual summary of what happened at the disciplinary hearing – that she decided not even to do such a summary herself, delegating that role in its entirety (as she admitted in cross-examination) to Helen Knight of HR.

136. In oral evidence, Ms Thompson admitted that, aside from the decision paragraphs themselves, the entire factual summary of the decision letter, explaining what had happened at the meeting, had been done in fact by Helen Knight of HR (subject only to minor cosmetic changes made by Ms Thompson before sending it out). The factual summary was based upon *Helen Knight's* own incomplete notes of the meeting, not Ms Thompson's. Ms Thompson's notes contain numerous elements of relevance not ultimately included in Helen Knight's summary.

137. This was a delegation of duties which was wholly unacceptable, amounting not only to an inaccurate and incomplete factual summary being composed but also to one not even composed by the decision-maker!

138. As to question 2 ("do I have full trust and confidence in you?"), this was not in fact a question she was called to answer in the context of the disciplinary hearing – it simply does not follow that an employee in whom an employer does not have "full trust and confidence" must be guilty of misconduct (or be dismissed).

<u>Flaw 3 - Ms Thompson did not consider the level of misconduct, either at all or adequately;</u>

139. The dismissal decision is bereft of any indication that Ms Thompson considered how serious the conduct allegedly proved was; she simply assumes that the conduct is gross misconduct when in fact (particularly as to the management "instruction" and the Airbourne raffle) the conduct was not even close to representing such a level of misconduct.

140. At most, C was guilty, since the management 'instruction' of 2014, of inviting two customers to be his friends on Facebook – with no clear

evidence of sexual relationships of any kind. This could not possibly be gross misconduct – at worst the matter might amount to minor misconduct. To treat this as even close to gross misconduct was so far outside RORR – particularly given that Mr Whelan's own record of the "instruction" didn't include reference to Facebook *at all,* and that other officers – including Mr Whelan – considered that it was in fact acceptable under the Policy for employees to make simple friends with customers (if nothing more).

141. Most significantly of all, Ms Thompson's conclusion that the inappropriate relationships constituted Gross Misconduct completely fails to deal with why, in the face of substantially the same conduct discovered in 2013-4**, R had not even considered the matter worthy of engaging the disciplinary process *at all*.** In January 2014, C had admitted to a sexual relationship with a customer whom he met via a pest control visit, went on a date with and added to Facebook. As to this, the disciplinary process was not even engaged by Mr Whelan. If it was as remotely serious as is now being alleged, then at the very least C should have been treated pursuant to the disciplinary process and received at least a final written warning. While different managers may assess conduct as more or less serious, the difference here is radical. It is not explained simply by reference to the fact that there were "more than one women" on the second occasion, since on Ms Thompson's view the fact of having any sexual relationship with a customer is automatically a serious breach.

Flaw 4 - Ms Thompson did not consider alternative sanctions but jumped robotically to dismissal;

142. Ms Thompson's thinking process is nakedly inadequate as to appropriate sanction:

*a. "I do not believe that you have met the Code of Conduct, despite a 'management instruction in January 2014' **therefore** it is my decision that you be dismissed from the Council's employment due to gross misconduct."*

143. There is no consideration at all by Ms Thompson, as there should have been, of appropriate sanction or the possibility of a sanction less than dismissal. She jumps straight to dismissal consequent on her finding of a breach of the Code of Conduct.

144. In an important error, Ms Thompson assumes that the "instruction" of January 2014 is a rule the breach of which could lead to gross misconduct dismissal. This was clearly deeply wrong. Even if the discussion had, in January 2014, constituted a final written warning under R's disciplinary policy (which it was not, for good reason), breach of such a demand would **not** have been sufficient to justify dismissal on the back of it in late 2015, by which time the warning would have expired. The 'instruction' was *not* a final written warning nor even a formal disciplinary warning of any kind.

145. What R could not have achieved via even the strongest disciplinary action prior to dismissal, it certainly cannot achieve by the unwritten "instruction" of January 2014 which R accepted did not even constitute the lowest level of "informal resolution" under the Disciplinary Policy, since this involved the employee being written to, which did not happen.

146. R's attempt to somehow get around this problem at the Tribunal was to say that the instruction, being a reasonable management instruction, was "permanently in force" and thus that it didn't matter that had it been a final written warning, it would have expired since this instruction continued forever. This, of course, ignores the fact that although the *instruction* may have remained in force, the *range of disciplinary sanctions available* was not the same as if the instruction had been a final written warning.

147. Additionally, by simply adopting Mr Whelan's management case, Ms Thompson was by definition taking into account and imposing a punishment in part as to matters pre-dating January 2014 which had already been dealt with by Mr Whelan in January 2014. It was clearly unacceptable to use the [Ms] H relationship in any way to justify the imposition of a new punishment when that had already been subject to management action.

148. Ms Thompson's decision is also bereft of any real consideration of C's mitigation, including his medical state and his completely clear record which for 23 years had been free of any disciplinary findings against him.

Flaw 6 - Ms Thompson failed to articulate any objective framework for determining whether a relationship was "inappropriate" or not. She completely ignored the relevant passages of the Code of Conduct, despite citing breach of the Code as the reason for C's dismissal.

149. Ms Thompson accepted, at the outset of her oral evidence at the Tribunal, that friendships/relationships between employees and council users are not *per se* wrong or prohibited. She further accepted that R's Code of Conduct (clause 4.2) does not forbid relationships between employees and council service users (in distinction with certain other categories, e.g. councillors and employees, which the policy states "should be avoided" – cl.4.1). Nor are such relationships notifiable, as they would be with contractors (4.3-4.4).

150. In her decision-making process, however, Ms Thompson appears to have entirely ignored clause 4 of the Code of Conduct, citing it not even once throughout the entire process even though it was the most relevant clause applicable to the allegations.

151. In Ms Thompson's evidence at the Tribunal, it was abundantly clear that she held a personal conviction that *any* relationship between a service user and an employee in the position of C would be inappropriate:

a. She attempted to justify in oral evidence the complete failure of R to investigate any of the alleged girlfriends of C on the basis that "*C had admitted the relationships*". (This is almost word-for-word what she writes in her dismissal letter too: B187.) That attitude, of necessity, illustrates that Ms Thompson considered the fact of any kind of relationship to be self-proving evidence of misconduct, howsoever it transpired and apparently without the need for any further investigation of any kind;

b. When questioned specifically about what was inappropriate about C's relationship with one complainant, [Ms] T (as to whom Ms Thompson

possessed no information at all other than the fact that a relationship had happened some years previously), Ms Thompson's answer was that it was inappropriate "*because he met her at a pest control visit*" – the simple fact of his status as an employee and her status as a service user being sufficient. Of course, this is not what the policy provides.

152. Ms Thompson's approach, which treated the *fact* of a friendship/relationship as itself sufficient evidence for misconduct, is so divorced from the policy, and indeed from the more specific allegations said to be made against him in the disciplinary invitation letter (i.e. that he had formed *inappropriate* relationships), to constitute a fundamental flaw in her whole approach to the misconduct question. She assessed misconduct by reference to a standard which was her own invention and one not present in the policy which says something quite different.

153. Because she engaged in no real assessment of whether the relationships were inappropriate or not, established no objective framework for what was and was not acceptable, and simply assumed they all were *by definition* inappropriate and misconduct (because between employee and service user), she had no reasonable grounds for her conclusion. She proceeded on an *assumption* of misconduct without any basis in any policy or fact.

154. That assumption perhaps explains why Ms Thompson was unconcerned that none of the six women alleged to be the inappropriate friends of C were interviewed, checked or contacted in any way; or that Ms Thompson knew nothing about the content of the relationships said to have happened.

155. Ironically, Ms Thompson's approach essentially amounted to a conclusion that simply abiding by the express provisions of Chapter 4 of the Code of Conduct on Relationships was not enough, and that a higher (unwritten) standard actually applied, failure of which would constitute gross misconduct and result in dismissal. There was simply no justification for this whatever.

Conclusion on genuine belief on reasonable grounds:

c. For the above reasons, C contends that Ms Thompson had no genuine belief as to gross misconduct nor could she have had reasonable grounds for so holding. As such the decision was substantively unfair.

Polkey considerations and employee contribution

156. The considerations mentioned in *Polkey v Dayton Services Ltd* arise where, in a case of procedurally unfair dismissal, the Tribunal assesses the likelihood that the Claimant could have been lawfully dismissed had the procedure been fair.

157. *Polkey* will not arise where the dismissal is not only procedurally, but also substantively unfair. Such is the case here. As such, *Polkey* considerations do not apply to this case.

158. *Employee contribution* to the dismissal can be considered in any case (ERA s.123). In this case, the correct determination is one of no contribution.

159. For an employee to have contributed to his/her *dismissal*, he/she has to have engaged in at least some serious misconduct (not minor, since minor misconduct can never give rise to a dismissal in the absence of a final written warning). In this case there was no sufficient evidence of any, or any substantially serious, misconduct on the three (later two) allegations against him: there was no satisfactory evidence that C had pursued sexual relationships with customers *after* January 2014, nor is it the case under R's policy that a relationship with a customer is automatically inappropriate simply because it became a romantic involvement. The evidence that C had added two ladies to his Facebook friends after 2014 was, on its own, not sufficiently serious, *particularly* in light of C's claim to have no longer remembered the instruction. Finally, there was no evidence of *any* misconduct as to the Airbourne event. As such, it cannot be the case that C had contributed to a circumstance whereby he was (unfairly) dismissed.

160. Further, it is noted that if the Tribunal considers that the dismissal amounted to disability discrimination (for which see below), no finding under *Polkey* and employee contribution is appropriate, or indeed meaningful, as the calculation of losses for discrimination are not subject to either deduction.

Uplift for breach of ACAS Code

161. *Breach of ACAS Code I.* R's conduct of both the investigation and the disciplinary hearing breached the ACAS Code as to at least the following weighty requirements of procedural fairness:

a. C's ability to question (or even comment upon or see) the evidence of witnesses against him;

b. Adequate notice of the allegations C was going to face at the disciplinary hearing (the Airbourne fete issue and whether it was a part of the allegations or not; the breach of trust and confidence allegation);

c. The Tribunal should make a finding of a serious breach and direct an uplift of any damages awarded by 25% (in the event of damages being awarded).

DISABILITY

162. C alleges that he was subjected to unfavourable treatment (namely, dismissal) because of something arising in consequence of a disability contrary to s.15 EA2010.

163. It is clear that dismissal is unfavourable treatment. The questions are therefore:

a. Was C disabled?

b. Was C dismissed because of something arising in consequence of his disability?

164. If so, then it is for R to show (s.15(1)) that such treatment was a proportionate means of achieving a legitimate aim, or to show (s.15(2) that it did not know and could not reasonably have been expected to know, of C's disability.

Fact of disability

165. C will succeed in demonstrating disability if he shows that at the relevant times (namely, at the times of his alleged misconduct and his dismissal) he suffered from a mental impairment having a substantial and long-term (i.e. more than 12 months) adverse effect on his ability to carry out normal day-to-day activities (s.6(1) EA2010)).

166. Importantly, in determining whether a person's impairment has a substantial effect on his ability to carry out normal day-to-day activities, *the effects of medical treatment on the impairment are to be ignored*. Given a payment would be likely to have an substantial adverse effect but for the fact that measures are being taken to treat or corrected, it is to be treated as having that effect – see para 5(1) Sch 1 EA2010.

167. It is C's unchallenged evidence that since 2010 and the occurrence of his brain injury, he has been subject to medical supervision and was at the relevant times being prescribed a variety of medication to control his condition, which is in part successful in doing so.

168. The Tribunal thus needs to consider whether C's condition *absent* the medication would satisfy the s.6 EA2010 test for substantial impairment. If so, he is disabled for the purposes of the Act.

169. The Tribunal is referred to C's witness statement on disability (B35ff). In particular, C relates that:

a. He suffers from a brain injury (medically identified as ABI or "Acquired Brain Injury") as a result of a serious head trauma which hospitalised him in 2010 and resulted in months off work;

b. He suffers from at least the following four symptoms as a result:

c. Occasional severe tiredness to the point of incapacity;
d. Severe mood swings;
e. Depression;
f. Severe short term memory loss.

g. The first three symptoms are adequately treated by his medication (notably Citalopram) but recur when he comes off the medication; this was experienced when he decided, ill-advisedly, to stop taking his medication for a period in 2014;

h. Memory loss persists whether he takes the medication or not;

i. But for the medication he does not consider that he would be able to carry out normal day-to-day activities since the combination of exhaustion, depression and mood swings would prevent him even from attending work in the first place;

j. C's memory loss problems also have a substantial adverse effect on his ability to carry out day-to-day tasks, such as shopping: see C's description of a simple episode of shopping (disability statement, para 15). The evidence of Mr Hayes and Jacqui Howell attested to the noticeable impact of C's memory loss on socialisation: C has an "*appalling*" memory (Mr Hayes, statement, para 14) and "*if I saw him every day he would repeat the same thing four times*" (Mr Hayes, oral evidence); he cannot attend simple social engagements and Mr Hayes frequently finds he does not turn up to social events unless he is immediately reminded by phone or text message that he has agreed to meet (Mr Hayes, para 15). According to Jacqui Howell he has a short term memory that is "*utterly appalling*" and that "*there is no point in telling him something unless you confirm it by some form of writing, email or note*".

k. The Tribunal is invited specifically to consider his partner Jacqui Howell's unchallenged assessment of C in her statement (see paras 20-22) as to how the injury has affected his mood and behaviour, as well as his (in)ability to cope without medication; her oral evidence was that at the time she wrote her email to Mr Whelan complaining about C's relationships with other women:

1. "*I think Ian had gone into a crisis – a mental destabilisation, not able to regulate himself, a bit of a freefall. I felt, knowing him, it felt like he'd become very unwell … I felt he was someone who presented as outwardly unwell, I could see that, so I was wondering whether other people could.*"

l. The detailed GP notes (B45 and ff), as to which C had given his consent to R to seek reports from (B70), are supportive of a person undergoing the above problems, acutely when not treated by medication – "he cannot manage without citalopram" (B49) – and manageably when on medication.

m. The GP notes diagnose C as having suffered his brain injury in 2010 with the effects described above, as well as having developed **Post-Traumatic Stress Disorder** (PTSD) from at least 28 November 2012 (see B51).

n. From 25 September to 25 November 2014, C was signed off work owing to PTSD conditions which had been too severe for him to continue working and provided no fewer than four fitness to work notes identifying PTSD as his condition (this appears to be the period immediately following his ill-fated decision to stop taking Citalopram – see entry of B49, 16 Sept 14 and reference to "restart");

o. C's GP does indicate in February 2015 (B104) that C's functionality should not be impaired as "it seems currently well-controlled for the first time and as such, I don't see that it should have an impact on his functionality". This is clearly a reference only to C's status *when on medication*;

p. On 8 September 2015, R's OHS formally writes (B149-150) to state that

it considers that "disability legislation is likely to apply in this case" (B150). Though the letter mainly concerns C's physical ailments there is also reference to his mental state. The conclusion as to disability legislation is not specific but certainly put R on notice that C should be considered a disabled person;

q. C's regular treating GP, Dr Southward, reads C's disability impact statement and expressly agrees in writing with the description C provides there of his health status (B44).

170. In *Goodwin v Patent Office* [1999] ICR 302*,* the EAT clarified that simply because a person can cope with getting through a daily routine does not mean that they are not suffering a substantial adverse effect - if it is done only with difficulty, or the person has arranged their daily routine to seek to avoid situations where the adverse effect will become problematic, there is still a substantial adverse effect. Additionally, the EAT warned against too much store being put in a stoic person's commentary as to their ability to lead a "normal" life:

r. 'What the Act is concerned with is an impairment on the person's ability to carry out activities. *The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired*. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no". Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected."

171. In the light of the above it is submitted that C clearly satisfied the s.6 EA2010 test at the relevant times and therefore was disabled for the purposes of these proceedings.

Dismissed because of something arising in consequence of C's disability

172. As stated above, the dismissal letter is so poor that it is unclear as to the reason for the dismissal.

173. However, on any view C is apparently being dismissed for allegations of:

a. Having previously had relationships with customers at that were "inappropriate";

b. Having failed to follow a management instruction given orally in January 2014;

174. It is obvious that both these allegations, if true, were manifestations of symptoms arising "in consequence of" of C's disability, namely:

a. **mood swings and depression:** C had expressly stated during the investigation that when he had had relationships with a number of the women he "*was going through a difficult time … went through a phase, went off the rails … felt vulnerable*"; additionally, a number of the relationships C was accused of inappropriately entering into occurred in 2013 to 2014 when GP records indicated (if R had taken the effort to consult them) that C's PTSD was at its worst, and at times that he was unmedicated; thirdly, Jacqui Howell's email specifically indicated the author's "*very real concerns about his conduct/mental health*" – "*I am extremely concerned about his mental state*"; and C specifically raised the issue of his medical state in his written representations (B171); At the least, it was clearly plausible that there was a link between the brain injury, ensuing mood swings and then the phases when C at timees went "*off the rails*" to at least merit investigation of the phenomenon's link with disability;

b. **Failure to follow an oral management instruction**: the problems C had experienced with memory do not need to be rehearsed again here. C did not remember any 'instruction' at all when first asked – his answer (at B147) when first asked about the "discussion" in January 2014 bears no relationship whatever to any "instruction". It is after being asked a second time, during the disciplinary process and after being prompted by Mr Whelan, was able to recall *a version of the purported instruction* (and one which still does not match Mr Whelan's). This is entirely consistent with how C's memory apparently works (see Mr Hayes on needing to be reminded in order for his memory to function) – memory loss does not function as a *complete* destruction of C's memory but impairs his ability to recall.

175. In dismissing C on the basis of these allegations, R dismissed C because of "something arising in consequence of his disability". As such, section 15 EA2010 has been triggered.

176. Additionally, R dismissed C *without even inquiring* or exploring with C during the disciplinary process as to whether as to the alleged misconduct might have derived from a disability. The EHRC Code on Employment 2011, para 5.15 (and the example which follows in the Code), indicates that where an employee shows symptoms that may plausibly be arising from a disability, "*it is likely to be reasonable to expect the employer to explore with the worker the reason for these changes [of behaviour] and whether the difficulties are because of something arising in consequence of a disability*". R's failure even to explore with C whether the alleged misconduct was in consequence of a disability when dismissing him – despite his significant medical history and his own specific submissions reminding R of his medical position - highlights the discriminatory context of the act, which by its failure to deal with the relevance of C's disability

also represented an omission.

Not a proportionate means to achieve a legitimate aim

177. R has come nowhere near establishing that the dismissal of a disabled employee exhibiting mood and memory difficulties, precisely for conduct plausibly related to these, is proportionate. First of all, the consideration of other lesser penalties; adequate consideration by the decision-maker of the evidence as to C's disability before taking the step to dismiss; and consideration of re-deployment within the Respondent would be a *minimum* pre-requisite for an employer seeking to show it was acting proportionately before opting for dismissal on these grounds. Furthermore, while protecting customer relationships with R is a legitimate aim, there is no evidence that customer relationships with R were endangered by the conduct for which C was dismissed.

R knew, or could reasonably have been expected to know, of C's disability

178. R's knowledge extended to ***actual*** knowledge:

a. Of C's brain injury in 2010 and the medical sequelae thereof, including nausea, anxiety, mood problems, memory loss and also tiredness;

b. That the consequence of C's brain injury had sadly continued, albeit with some improvement (see Mr Whelan oral evidence);

c. That C's condition had developed into PTSD at least by 2014 and was sufficiently severe to require two months sickness leave in late 2014;

d. That the stabilised condition C manifested at various times was a result of prescribed medication, which C needed to remain on;

e. That as of September 2015, R's own Occupational Health experts considered C to be covered by disability legislation;

f. That others (see, eg, Jacqui Howell) had expressly raised written concerns about C's mental health at the time of the conduct and dismissal;

g. That C specifically raised the issue of his brain injury at the disciplinary hearing and commented at the hearing on a specific memory failure as to an important point - whether he had remembered the January 2014 discussion (he speaks of the brain injury, the effect on him, the medication he needs, and at the disciplinary meeting raises his forgetting the "instruction).

179. Additionally, R had sought and obtained C's permission to access reports from C's GP and thus had access to material from his GP. R additionally had fitness to work notes which C had regularly sent in, it had the medical records (provided by C or C's doctors) in R's employment file, and it had its own OHS reports.

180. Further C gives evidence of inexplicably (and unusually) bursting into tears in front of his then line manager (Mr Albon) on one occasion (C

witness statement on disability, para 29).

181. As a matter of law, an employer has imputed knowledge if any of its officers (including an HR officer) knows of the material leading to the reasonable conclusion of disability: see *Equality Act 2010 Code of Practice* at para 5.17. Any material held by R's Human Resources department was thus within the "knowledge" of R at the time of the dismissal.

182. It is submitted that R had sufficient *actual* knowledge for it to be aware that C was disabled at the relevant times.

183. Alternatively, beyond actual knowledge, R certainly was **reasonably expected to have known** of C's disabled status. The disability is C's Acquired Brain Injury – not the symptoms that flowed from it. It is not a requirement of disability that a sufferer list all the symptoms of the disability – rather that is the employer's task to find out, once it has discovered the existence or probability of the existence of a disability. R's contract specifically reminded employees that it was not an obligation upon employees to disclose their disabled status (B119) – which also reflected the EHRC Code on the issue (para 5.14)[4]. R was fully aware of the fact that C had had suffered an Acquired Brain Injury in late 2010 and that that incident constituted a serious head injury. They commissioned numerous reports at the time and also obtained an indefinite consent from C for them to seek information from his GP into the future. There was never any medical confirmation to R that the sequelae of C's brain injury (for example, his memory loss) had permanently *resolved*. At least from September 2014, R was specifically aware again that C appeared to be suffering from the after-effects of his injury via a two-month absence provoked by PTSD, which clearly put it on notice that C's disability had definitively resurfaced. If R did not continue to monitor C's situation via regular (or at the least, annual) reports from his treating doctors and GP, that was its choice – but it did not diminish the fact that it could reasonably be expected to have known of C's disability. R knew that C may have appeared stable – but only because of being on medication, as such a normal "appearance" was insufficient to permit R to shut its eyes to the ongoing existence of disability in C.

Conclusion on disability

184. The Tribunal is therefore invited to find, on disability, that:

a. C was at the time of his dismissal and at the times of the alleged misconduct a disabled person;

b. C was subjected to unfavourable treatment by R, namely dismissal;

c. This treatment was because of something arising in consequence of a disability, contrary to s.15 EA2010;

[4] EHRC para 5.14 (excerpt): "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'".

d. R has not shown that such treatment was a proportionate means of achieving a legitimate aim;

e. R knew, or could reasonably have been expected to know, of C's disability;

f. As such R has acted unlawfully under s.15 EA2010.

Overall conclusion

185. The Tribunal is invited to make findings of:

a. Unfair dismissal;

b. Breach of ACAS Code I in the disciplinary procedure that was adopted;

c. Unlawful disability discrimination pursuant to s.15 EA2010;

d. and to convene a remedy hearing to determine remedy.

The Respondent's submissions

Introduction

186. At the heart of this case lies the Respondent's assessment on two issues:

a. Making Facebook friend requests to customers, particularly after a management instruction not to do so, is a disciplinary offence

b. Forming intimate, sexual relationships with a number of customers is inappropriate and a disciplinary offence.

187. C does not accept that either of the above behaviours are wrong or inappropriate. That was C's position at the throughout the disciplinary process and in the presentation of his case to the Tribunal.

188. A generous discretion is given to employers to make their own judgment on questions of misconduct. It is for the employer, with knowledge of their business, to make the judgment on whether the behaviour constitutes misconduct and, if so, how severe that misconduct is.

189. The employers' judgment on such an issue should only be interfered with if no reasonable employer could have made the same decision (i.e. if the decision is outside the band of reasonable responses). The Tribunal must be careful not to fall into the trap of substitution.

Burchell test

190. As the reason relied on is conduct the Respondent must satisfy the *Burchell* test, i.e. it must prove that:

c. The Respondent had a genuine belief that the Claimant was guilty of the misconduct alleged
d. That belief was based on reasonable grounds
e. At the time of the belief the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances

191. The Tribunal must bear in mind throughout that the "band of reasonable responses" test applies to each limb of the *Burchell* test. Again, the Tribunal must not be tempted to consider whether they would have done differently; instead the Tribunal must ask whether the Respondent's actions were such that no reasonably acting employer could have done the same.

Whether R had genuine belief that C was guilty of the misconduct alleged

192. The allegations are set out in the investigation report, repeated at paragraph 6 of Ms. Thompson's statement. In summary:

a. Forming inappropriate relationships

b. Failing to follow a management instruction (the January 2014 instruction)

c. Acted inappropriately in his involvement and the circumstances in which a customer, who is a Facebook friend of his, won helicopter flights

193. Having heard the evidence of Ms. Thompson it is submitted that it is clear that she had a genuine belief that C had formed inappropriate relationships.

194. Equally, it is clear that Ms. Thompson found that C had failed to follow the management instruction: this is expressly stated at paragraph 21 of her witness statement. Whilst C claimed to have forgotten the instruction Ms Thompson noted that this "did not add up with the fact that the Claimant had confirmed in his meetings with Tim Whelan on 25th August and then on 29 September 2015 that he had remembered his meeting with Tim Whelan on 7th January 2014" (Thompson witness statement para 9, also noted at [185]). In the disciplinary outcome letter Ms Thompson concluded that she did not have confidence that C would take personal responsibility for following management instructions [187] and that C had not met the Code of Conduct "despite a management instruction in January 2014" [187].

195. In relation to the Airbourne allegation, Ms. Thompson states that "although I did not think that there was sufficient evidence that the Claimant had engineered Stephanie Jones' win I did think that, despite her connection with pest control, it was less than transparent of him not to acknowledge to anyone that he knew her. I also noted that initially, the Claimant said to Tim Whelan that he could not remember who had rung SJ to say that she had won but later he confirmed it was him" (Thompson witness statement para 18)

Whether the belief was based on reasonable grounds

196. An investigation was undertaken into the allegations. The following facts emerged as undisputed by C:

a. C had sexual relationships with three customers who he had met via pest control visits.

b. C had initiated Facebook friend requests with 5 customers, and had accepted a Facebook friend request from Stephanie Jones. Of those, 3 were post-January 2014 (including Stephanie Jones).

197. Those undisputed facts provide reasonable grounds for R to form the belief that C has engaged in inappropriate relationships with customers.

198. In relation to failing to follow a management instruction, the following emerged from the investigation:

a. Mr Whelan stated that in January 2014 he had instructed C not to get involved with customers on a social basis and was not to use Facebook as a means to do that [175], [179]. Mr Whelan was in no doubt that C understood the instruction [184].

b. C was able to recollect the instruction during the investigation [154].

c. At the disciplinary hearing C stated for the first time that he could not remember the management instruction [185]. This had not been mentioned in C's written submissions prior to the hearing, nor during the course of the investigation.

199. The above matters gave R reasonable grounds on which it could conclude that:

a. In January 2014 C was instructed not to contact customers on a social basis and not to use Facebook as a means to do that

b. C was aware of and failed to comply with that instruction

200. In relation to the Airbourne allegation, the Respondent had undisputed evidence that C had C had invited Stephanie Jones to enter the competition; he had called her to let her know she had won the competition and he had not told anyone that he knew the winner, even when she came to collect her prize. The Respondent was also presented with an account from C which had changed: C initially said that he could not recall who called Stephanie Jones, before admitting that it was him [158]. Those were sufficient grounds for Melanie Thompson to conclude that C's behaviour was less than transparent.

Whether R had conducted as much investigation as was reasonable in the circumstances

201. C admitted the following:

a. Re: [Ms] H – He asked her to be a friend on Facebook [155], he went for a date and had a short (sexual) relationship with her [155]

b. Re: [Ms B] – He asked her if she would like to go for a drink, he asked her to be a friend on Facebook [155]. He had an intimate relationship with her [146]

c. Re: [Ms] T – He had an intimate relationship with her [155]

d. Re: [Ms W] and [Ms S] – he initiated Facebook friend requests [157]

e. Re: Stephanie Jones – He accepted a Facebook friend request from her [156]

202. In those circumstances it was not necessary to interview the women involved in the sexual relationships. In fact it would have been inappropriate to do so – the matters they would be asked about are incredibly personal and in a situation where they are customers of the Respondent and not employees it should be avoided unless absolutely necessary. The Respondent submits that its decision not to interview the female customers involved was comfortably within the range of reasonable responses. In fact, it is difficult to imagine circumstances in which an employer would be acting reasonably in asking customers about sexual relationships, where the employee admits that the relationships occurred.

203. The question is whether the relationships were "inappropriate". That is an issue for the Respondent, not for the women involved in the relationships. The Respondent formed the view that having relationships or personal contact with EBC customers was inappropriate [187, next to top hole punch]. Little would have been gained by interviewing the women involved. The issue for the Respondent was the fact of the relationships having occurred, not the women's subjective views on whether the relationships were inappropriate. That much is clear from the allegation during the investigation meetings ("using your job to form relationships with female customers [146], [153]); and the tenor of the investigation report [177-179, 182].

204. In relation to the failure to follow a management instruction, R had the account of Mr Whelan and the account of C. No further investigation on this point was required, and what was undertaken was reasonable. R simply had to determine whether the allegation of failure to follow a management instruction was made out.

205. On behalf of C much is made of the failure to investigate his medical condition. From the records available it is clear that had R obtained all of the available information it would not have discovered evidence which supported C's claim that he suffered from memory problems – this was not addressed in any recent OH report, it had not featured in any medical records, GP records or reports since early 2011 and since that date there had been accounts from C that he had "no long lasting effects" [110] and he hasn't experienced any difficulties since his return to work in early February [113], together with an OH report which states that his symptoms "appear to have improved" [112]. There are also more recent OH reports (149-150] and correspondence from C's GP to OH [104-105] which make no mention of memory loss as a symptom of C's condition.

206. Equally, the findings in relation to the airbourne allegation were made on the basis of agreed evidence from C; no further investigation was necessary in circumstances where there was no dispute about what occurred.

Whether decision to dismiss was within range of reasonable responses

207. A key issue for Ms. Thompson was whether C accepted that what he did was wrong.

208. These matters were clearly in the mind of Ms. Thompson when she reached her decision on sanction: her announcement at the end of the disciplinary meeting (repeated in the outcome letter) refers to the key issue of "trust and confidence" which will often be a concern in cases of misconduct. As Ms. Thompson said in response to a question from the Tribunal, she was looking for C to accept that his behaviour was not appropriate and that moving forwards it would not recur.

209. The importance of this is obvious: without some level of insight from C, R cannot be confident that there will not be a repeat of the conduct. This is an acute concern where the employee is in a customer-facing role, where he works alone, and where he is away from the office 75% of the time.

210. In circumstances where C cannot see that forming sexual relationships with customers is wrong, the risk of repetition is high and the Respondent is entitled to find that this means that a sanction below dismissal is not appropriate.

211. Ms. Thompson also said that if there had been a single sexual encounter then it may have resulted in a final written warning; equally if there had been Facebook encounters and no sexual encounters then there would have been a lesser sanction than dismissal (re-examination).

Procedural matters

212. C was given sufficient detail of the case against him to enable him properly to put his side of the story. He understood the allegations. He was told of the time and date of the disciplinary hearing and where it was to be held. He was entitled to bring a companion to the disciplinary hearing and to all investigation hearings. There was substantial compliance with the ACAS code of practice on disciplinary and grievance procedures ("the ACAS code").

213. A large number of procedural issues have been raised on C's behalf in the course of cross-examination, very few of which appear to have troubled C at the time of dismissal, at the time of filing his ET1 or at the time he drafted his witness statement.

214. Nevertheless, some of the issues C is likely to rely on are addressed below. Obviously this involves a degree of guesswork on the part of R as to which issues C is relying on, so I apologise in advance if any of the below are irrelevant.

Oral request for appeal

215. This is set out in the ET1, although not in the witness statement of C. Ms. Thompson's evidence is contained at paragraph 24 of her statement; her evidence was completely unchallenged on this issue. It is submitted that the Tribunal is bound to accept Ms. Thompson's evidence on this point.

216. The Tribunal may also to find that C failed to follow the ACAS code in failing to appeal the decision to dismiss.

Whether Whelan was appropriate as the investigation officer

217. C had no issues with Mr Whelan investigating the complaint, in fact C thought he was the appropriate person to do so.

Who drafted the outcome letter/who made the decision to dismiss

218. The dismissal letter was drafted by HR. That is not unusual. The electronic properties for the letter show that it was subsequently reviewed/edited by Ms. Thompson for 30 minutes. This occurred on the same day as the disciplinary hearing, when matters were fresh in Ms. Thompson's mind.

219. It appears to be suggested that HR were the real decision makers, or overstepped the proper boundaries for their role. The part of the letter which delivers the decision is at page 4 of the letter [187]. This is taken directly from what Ms. Thompson stated at the disciplinary hearing, before the letter was drafted. It follows Ms. Thompson's own handwritten notes made in her own book [183P]. It is clear that Ms. Thompson formulated and drafted the decision herself.

Failure to investigate C's medical position

220. This is dealt with in part at paragraph 20 above. The investigating and dismissing officer relied on information from HR that there were no relevant ongoing health issues. That information was correct and accorded with the available medical evidence (which showed no evidence of memory problems).

Code of Conduct does not specifically prohibit C's behaviour

221. Hopefully it is obvious to state that the Code of Conduct does not aim to set out a list of all prohibited behaviour. To do so would make it an interminably long document and it would be nearly impossible to be comprehensive.

222. What the Code aims to do is set out general expectations of workers. The parts of the Code relied upon by Ms. Thompson is at the top of [190] (as repeated in the outcome letter).

223. The Code does not, for example, expressly state that employees cannot be deliberately rude to customers, or deliberately soil the floor of a customer's house. However it should be obvious that these matters are unacceptable. C was acting as an ambassador for the council and his behaviour was a reflection on the Council's reputation.

224. Equally it should be obvious that it is not acceptable to ask customers out on dates when attending their home for a pest control visit (regardless of whether it is the first or a subsequent visit) and it should be obvious that it is not acceptable to form sexual relationships with a number of customers. The Respondent is concerned that C still does not understand or show insight into this.

No mention that the complaint came from C's ex-partner

225. Once a complaint had been made, R had a duty to investigate it.

226. C was disciplined on the basis of his admissions during the investigation process. The dismissing officer was not provided with a copy of the original complaint; she based her decision on the matters set out above under "the Burchell test". How the investigation started is neither here nor there: the investigation revealed facts which had to be ruled upon.

227. Equally, to the extent that the complaint exaggerated or fabricated matters, these were not matters relied upon in the disciplinary hearing. The facts admitted by C were sufficient to lead to the disciplinary sanction involved.

Polkey

Tribunal's approach

228. Should the Tribunal find that the dismissal was unfair then it may consider whether the period or quantum of loss should be limited to take into account the possibility of a dismissal if a fair process had been followed.

229. The question for the Tribunal is whether the C would have been dismissed in any event, had a fair procedure been followed. There are three possible outcomes:

f. The Tribunal may find that the Claimant would clearly have been retained if proper procedures had been adopted, in which case no *Polkey* reduction ought to be made.

g. The Tribunal may conclude that the dismissal would have occurred in any event, with or without a delay to allow for implementation of fair procedures. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had the proper procedures been carried into effect.

h. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained

230. Importantly, in making these assessments the Tribunal is not answering a question of what it would have done if it were the employer: it is assessing the chances of what the actual employer would have done. The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand. (*Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274 at para 24)

Submissions on Polkey

231. R invites the Tribunal to find that had a fair process been followed then the outcome would still have been dismissal.

232. In the alternative, R submits that whatever its procedural failings there was a very high probability of C being dismissed as a direct consequence of the matters uncovered in the investigation.

233. Contributory Fault

234. The Tribunal may reduce the basic or compensatory awards per sections 122(2) and 123(6) of the ERA 1996.

Section 122(2) provides:

235. "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

Section 123 (6) provides:

236. "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

237. The Respondent invites the Tribunal to find that the dismissal was caused or contributed to by the Claimant's actions, in particular:

a. The forming of sexual relationships with customers of the Respondent, whom C met in the course of his employment whilst visiting their house for the purposes of pest control.

b. Using data obtained for the purpose of his employment (customer names) for the purpose of tracking customers down on Facebook and making friend requests. Alternatively, making Facebook friend requests to customers of the Respondent whom C met in the course of his

employment whilst visiting their houses for the purposes of pest control, either in breach of a management instruction or generally.

238. The Tribunal should adopt the following approach when considering a deduction to the basic or compensatory award:

a. Identify the conduct which is said to give rise to possible contributory fault

b. Ask itself whether that conduct is blameworthy

c. For the purposes of s.123(6), ask itself if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent.

d. Consider to what extent the award should be reduced and to what extent it is just and equitable to reduce it

239. It is submitted that C's conduct was clearly blameworthy and obviously caused or contributed to his dismissal.

240. It is just and equitable to make a significant reduction to the basic and compensatory award in the circumstances of this case.

Disability

241. Appended to these closing submissions is a chronology relating to the issue of disability (medical notes, OH reports etc), to assist the Tribunal in navigating the bundle on this issue.

242. It is for C to prove that he had a disability at the material time.

243. The key issues in this case is whether C was suffering from a condition which had a substantial adverse effect on his memory and whether R was, or ought to have been, aware that that was the case.

244. R submits that the evidence provided is not sufficient for the Tribunal to be satisfied on either of these issues.

245. The medical chronology attached shows that whilst there were references to memory issues in 2011, these were followed by representations from C that he had "no long lasting effects" [110] and an occupational health report which stated that C's symptoms had improved [112].

246. Further, there are a number of occasions after this date when C's symptoms are referred to, either by medical experts (e.g. GP reports to CICA at 71-76 and 83-86, GP correspondence to OH at 104, OH report at 149), or by C (e.g. [113], [99]). Memory problems are never mentioned, despite apparently more minor symptoms such as minimal dizziness, or lack of headaches being referred to.

247. In the whole of C's GP notes there is not a single reference to C attending upon his GP with memory problems. This does not make sense in light of C's claim that this has always been a "very severe impediment"

[39]. C has sought no follow-up from any specialist on the issue of memory problems. There is no diagnosis or prognosis from any specialist neurosurgeon that this will be a long-term issue in C's case.

248. In short, the evidence C has provided falls short of what is needed to demonstrate that he had a disability which caused the substantial adverse effect of memory problems.

249. In any event, R had no actual knowledge of C's memory loss issues. C confirmed in cross-examination that he did not mention it to Tim Whelan. The only person C refers to having told in his witness statement is Adrian Albon [41 at para 19], where C says he told Mr Albon of his mood swings and depression, but not of memory issues.

250. The information available to R was what C stated in his return to work interview: there were no ongoing issues. That followed an OH report which said that memory problems were "intermittent". There was then another medical report which stated that symptoms had improved.

251. C's other symptoms are not strictly relevant for the purposes of this case – whether he was depressed/suffered from PTSD/suffered from tiredness takes us no further on the question of memory loss. Whilst OH reports dealt with some or all of these other symptoms, that did not and could not lead R to the conclusion that C's disability included any effect on his memory.

252. This is particularly so where C did not mention any memory issues in his investigation, nor at any time during his employment prior to the disciplinary process. Here it should be noted that C accepted in cross-examination that he did not mention memory issues to Mr Whelan but appeared to change his position in response to questions from the Tribunal. Mr Whelan's evidence was clear that he had no knowledge of C's purported memory problems. This accords with what C said during the disciplinary hearing: "you have previously told TW as your manager that you 'are on medication' but you had not specifically discussed your brain injury from 5 years ago with him" [186]

253. In any event, it is denied that C suffered discrimination arising from his disability.

The Law

Section 98(1) (a)– Employment Rights Act 1996

"In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held"

Section 98(2) a reason falls within this section if it relates to the conduct of the employee

Section 98(4)

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case".

Equality Act 2010

Section 6

"A person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities"

Schedule 1 Part 1 paragraph 5

"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 if (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect"

Section 15 (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"

Decision

254. the unanimous decision of the Tribunal is as follows:

255. The first issue for the Tribunal in the Claimant's claim for unfair dismissal is to decide the reason or principal reason for the dismissal. In this case we conclude that the consistent evidence before the Tribunal is that the Claimant was dismissed for conduct. We refer to the dismissal letter at page 187 (see above at paragraphs 73 and 77) where it states that the Claimant had not met the "Code of Conduct, despite a management instruction in January 2014" and the dismissal was confirmed to be for gross misconduct. The Respondent in their opening and closing submissions have submitted that in the alternative, that the Claimant was dismissed for breakdown of trust and confidence however this was not a charge that was included in the letter calling him to a disciplinary hearing and was not stated to be the reason or principal reason for dismissal. The Tribunal therefore conclude that the Claimant was dismissed for conduct, which is a potentially fair reason to dismiss.

256. The Tribunal then turns to the three-part test in the case of British Home Stores v Burchell, the first stage requires the Respondent to show they have adopted a reasonably thorough investigation. In our findings of

fact above we conclude that Mr Whelan should not have conducted the investigation as he was conflicted due to his prior involvement in the case; he had to investigate his own conduct in January 2014. This is a case where Mr Whelan was involved in the process and in the background evidence and therefore should not have been the investigator, this eventuality was provided for in the disciplinary policy (see above at paragraph 2). Mr Whelan could not fairly investigate his own part in the case which was to assess the status of the conversation in January 2014, the contents of the discussion, the terms of the instruction given and the accuracy of any notes taken. Mr Whelan's involvement in the investigation also denied the Claimant the opportunity to challenge Mr Whelan's recollection, and to that extent produced unfairness in the process from the commencement of the investigation. The flaw was so fundamental to a fair process, it went the substantive fairness of the case as the investigator was not independent or objective and the basis of part of the disciplinary charge of "failing to follow a management instruction" was not open to effective challenge by the Claimant.

257. The second concern about the investigatory process conducted by Mr Whelan, was that the investigation covered incidents that had been dealt with in January 2014. Mr Whelan took the view at that time, after discussing them with the Claimant that they were not serious and were only worthy of an informal discussion, he did not invoke the disciplinary procedure even though he was aware that the Claimant had entered into a relationship with a service user. Mr Whelan did not warn or inform the Claimant at the time that this may be viewed as gross misconduct as it was noted in the Respondent's closing submission (see above) that it was Ms Thomson's view that "a single sexual encounter" may result in a final warning, this view was not shared with the Claimant at the time and was not a view held by Mr Whelan.

258. When the investigation commenced in August 2015, the matters dealt with in January 2014 were then reopened and became part of the disciplinary investigation for a second time, despite the fact that no new evidence had come to light in relation to this particular service user. The Tribunal conclude that Mr Whelan's decision to add to the factual matrix matters that had been dealt with previously, was irrational and unfair and no new evidence had come to light about the Claimant's conduct that justified his decision him to reopen an historical matter that was closed.

259. The Tribunal found as a fact that the Claimant was not provided with the evidence against him. The Claimant did not have sight of the original message received in January 2014 that led to the informal discussion, he never received a copy of the email from Ms Howell dated 24 August 2015, which the Tribunal has found as a fact led to the Claimant's dismissal. The Claimant was never provided with a copy of the informal discussion note until these proceedings commenced. Although the Claimant was told in January 2014 that Ms Howell was behind the first complaint (and this was taken into account by the Respondent at the time), the Claimant was not informed by the Respondent that she was behind the

August 2015 complaint. The Claimant also did not have copies of the emails from Ms Howell dated 19 and 20 October indicating a change of heart and providing supportive evidence relevant to his mental health. These communications were central to the case against the Claimant in relation to the reliability of Ms Howell's evidence against him and in relation to the issue of mitigation. These were all documents that should have been disclosed at the time and although the Respondent has submitted to the Tribunal that these documents were not relied upon we have concluded that the evidence strongly suggested to the contrary. This was the only evidence before the Respondent of what they described as inappropriate conduct. Some of the more damaging words from the email appeared in the notes of the investigation report and in the disciplinary hearing (see above at paragraph 51, 53 and 69).

260. The Tribunal has found as a fact that Mr Whelan and Mr Thompson, the dismissal manager did not appear to have a consistent view of why they concluded that the Claimant had formed what they described as inappropriate relationships with customers. The Respondent could produce no evidence of a policy or procedure that restricted an employee's right to form relationships with service users. Paragraph 4.2 of the Code of Conduct applied to employees and the standard expected of employees was that they were required to give courteous, efficient and impartial service. That is the only part of the code that dealt with an employee's relationship with customers. The Respondent was unable to provide any evidence of a policy that restricted an employee's right to form relationships or any evidence that employees had been warned that to do so would amount to an act of gross misconduct. The view that such conduct would amount to an act of gross misconduct appeared to be the personal view of Ms Thompson and not a view shared by Mr Whelan. Although it has been submitted by the Respondent that the Code of Conduct cannot cover all prohibited behaviour, those who wrote the Code had sought to prohibit personal relationships under certain circumstances (between Councillors and Council Employees), but the Code was silent on personal relationships between employees and service users. If the Respondent wished to prohibit any social contact between service users and employees (after visits to a service users home) this should have been a matter that was made clear to all employees. Similarly, if this was a matter that was deemed to be so serious so as to amount to an act of gross misconduct the Claimant should have been informed of this in the management discussion, but he was not.

261. Although the Respondent's policy made reference to "improper motives", this was not referred to in the letter calling the Claimant to a disciplinary hearing (page 165-6) and the policy was only referred to in the decision letter (page 186). The Respondent did not appear to consider whether their own code of conduct applied in this case and whether the Claimant's conduct fell foul of it and if so in what way. This may explain why Mr Whelan's view that it would not inappropriate for him to enter into a relationship if he bumped into someone in the street or if they met down the pub, but it was Ms Thompson view it was always gross misconduct if an employee went into someone's home and formed a short-term

relationship and in her view it was the content that made the relationship inappropriate. This wide divergence of personal opinions held by the Respondent's witnesses as to what amounted to inappropriate behaviour reflected the confusion of all those involved in the disciplinary case for the Respondent. There was no clear definition of what was found to amount to inappropriate behaviour in this case. Mr Whelan and Ms Thompson failed to make clear findings of fact in this matter and failed to reach clear conclusions on the balance of probabilities according to an objective standard.

262. The Respondent also failed conduct any investigation into whether the relationships that the Claimant had formed with customers were inappropriate. The Respondent failed to take a statement from Ms Howell or to question her allegations or views in any way. The Respondent failed to take into account that Ms Howell had just terminated a relationship with the Claimant and may have had ulterior motive for contacting Claimant's employer. This was something that the Respondent took into account in January 2014 when deciding what weight, if any, they would place on the seriousness of the complaint; this scepticism was not adopted in August 2015, even though the background facts were the same ("ex-girlfriend trying to cause trouble" see page 143a). The Respondent did not put Ms Howell's evidence to proof nor did they challenge any of the evidence that she provided in her original email. The Tribunal noted that Mr Whelan was in telephone contact with Ms Howell and could have probed a little further to establish the truth or otherwise of the allegation, had he done so he would have discovered that the allegations were untrue. It was also of concern that the Respondent did not follow up on Ms Howell's subsequent emails about the Claimant and failed to share these with him prior to the disciplinary hearing. It appeared to the Tribunal that there was an assumption made by Ms Thompson and Mr Whelan that Ms Howell was a truthful and honest witness without conducting any investigation into the allegations or to view with some suspicion her motivation.

263. The Respondent conducted no investigation of their own customers to establish whether or not he had breached any of the codes of conduct or whether the relationships were in some way inappropriate. The Respondent formed the view that these women were vulnerable when there was absolutely no consistent evidence of this and this conclusion ran counter to the evidence given by the Claimant. The word vulnerable was used in the note produced by Mr Whelan in January 2014 and this word was also used in the management report when describing the women, despite the fact that the Claimant had provided details as to why they were not vulnerable. Mr Whelan failed to conclude whether the women were vulnerable and failed to make any finding of fact about what made these relationships inappropriate. Mr Whelan also made reference in the management report to the Respondent's standards of behaviour (page 179) but failed to state which Code of Conduct he was referring to as the Tribunal has already found from the evidence given by Ms Thompson, that the Code of Conduct does not prohibit personal relationships between service users and employees.

264. Mr Whelan failed to analyse the evidence relating to the management discussion, this was a fundamental flaw and was an inevitable outcome when a person is charged with investigating his own conduct. The Tribunal has found as a fact that no instruction was given, at best, this was the result of a discussion and not an instruction. There was also no instruction in relation to the use of Facebook in the note produced by Mr Whelan. The only reference made in the note in relation to his future conduct was that the Claimant "cannot use pest control visits to meet women" (see above at paragraph 20), after that date there was no evidence that the Claimant had. When the Claimant was questioned about this in the initial meeting in August 2015 he could not recall it (see page 147 see above at paragraph 32), then on the second attempt of being asked he gave a version that was not consistent with the note purportedly produced in January 2014. The evidence before the Respondent showed the Claimant's recollection to be vague and certainly not consistent with the note produced by the Respondent.

265. The Tribunal noted that the Claimant's failure to recall the contents of the discussion in January 2014 reflected the informal nature of the meeting. In January 2014 Mr Whelan was content to deal with it outside of the disciplinary process as an informal discussion. Mr Whelan's failure to establish whether or not he had given an instruction or whether that instruction had been obeyed formed a major flaw in his investigation. Mr Whelan also failed to establish what conduct occurred after the meeting in January 2014. The Claimant's evidence that he had only contacted two people on Facebook after that date and had not entered into any relationships after January 2014 despite this being the Claimant's evidence and there being no consistent evidence to the contrary, Mr Whelan concluded that the Claimant had entered into an intimate relationship with Ms. T in July 2014 (see page 180).

266. It was noted that Mr Whelan conducted an investigation into the Airbourne event, this was an activity outside of at the Claimant's role, he was not acting in the course of his employment at the time. Mr Whelan failed to consider whether this should be investigated as an employment matter within the Respondent's disciplinary policy. There was no evidence to suggest that the Claimant was involved in designing the questions or drawing out the winning ticket. The Respondent held doubts as to whether the winner, a person known to the Claimant, was just a coincidence. He concluded that the Claimant had acted inappropriately and rejected the possibility of "mere coincidence" but failed to interview Mr Hayes who was directly involved in the incident and was willing to be interviewed. His investigation was inadequate and his conjecture based simply upon Ms Howell's accusations and the opinion voiced by the HR person present see above at paragraphs 42 and 59. For all the reasons stated above the Tribunal conclude that the investigation was inadequate for the reasons stated above and resulted in procedural and substantive unfairness.

267. Turning to the disciplinary hearing conducted by Ms Thompson, the Claimant was not provided with a copy of Ms Howell's emails dated the 25 August 2015, 19 and 20 October, a copy of the Outlook note or of the original complaint that led to the January 2014 discussion. These

documents formed the entire evidential case against the Claimant and all emanated from Ms Howell. Ms Thompson failed to question any part of the report produced by Mr Whelan and failed to seek clarification where there were inconsistencies in the evidence.

268. We have found as a fact that Ms Thompson made notes prior to the hearing of questions to be put to the Claimant however the questions did not appear to specifically relate to the charges. It appeared to the Tribunal that she commenced the hearing with a preconceived view that any relationship was inappropriate (as described by her above at paragraph 20 and 62) so to that extent she had already formed the view that the charge was made out. She told the Tribunal that her role was to consider the trust and confidence going forward however this was not her role as the letter inviting the Claimant to the disciplinary hearing referred to two specific charges (and one matter for discussion), the issue of trust and confidence going forward was not a consideration until she had decided whether the charges were found to be proven and then only in relation to the sanction.

269. During the hearing very few notes were taken and where the Claimant responded to questions his replies were not recorded or were taken down in note form. His entire statement read out to the hearing was not recorded or referred to in the notes taken by Ms Thompson or Ms Knight and neither were his questions put to Mr Whelan. The Claimant appeared to be asked no questions after he read out his statement. Where the Claimant's words were recorded they were written down in a piecemeal manner.

270. Where the Claimant made submissions about his health there were odd words recorded but not the full details of his evidence for example on page 183O it is recorded that the Claimant referred to his memory loss. Ms Knight notes were on page 183S which recorded that the Claimant had stated that he had "**forgotten that information**" (referring to the management instruction) due to his poor memory. The evidence before them was that the Claimant had forgotten the discussion; the comment made by Ms Thompson on this evidence was "**2 years ago can't remember relationships …**" and Ms Knight's comment in the notes on the Claimant's poor memory was by drawing a circle around the word "**doubt**", thus showing that both were calling into question the Claimant's honesty without conducting any investigation into his evidence regarding his poor memory or into his medical condition generally. It was also noted that Ms Thompson equated the Claimant's poor memory as evidence of his dishonesty which was a reason related to his disability. The evidence before us was consistent in that Ms Thompson found no facts and conducted no further investigation after hearing the Claimant's evidence on his disability and submissions in relation to mitigation.

271. The Claimant also flagged up evidence of his medical condition where he referred to his medication and to issues with his mental health and despite this being a part of his submission, no investigation was carried out. Had they looked at the Claimant's medical records on file they would have seen evidence of the Claimant's ABI and PTSD and absences due to that medical condition. It was also noted that Ms Howell had also flagged up her concerns about the Claimant's mental health and this was before Mr Whelan and before Ms Thompson but it was given no weight

unless it supported the allegations that had been made against the Claimant and we refer to our findings of fact above at paragraph 46.

272. The Tribunal conclude that Ms Thompson failed to make any findings of fact and she admitted to the Tribunal that Ms Knight made the relevant findings of fact and wrote the dismissal letter. Ms Thompson only wrote a small part of the dismissal letter which is the paragraph we refer to at paragraph 77 which did not relate to the three specific allegations that the Claimant faced which she had set down in her letter dated the 14 October calling him to the hearing (see page 165). We conclude on the balance of probabilities that Ms Thompson delegated the fact finding process to Ms Knight and therefore the decision making process.

273. The letter calling the Claimant to a disciplinary hearing referred to three charges, that he formed inappropriate relationships with customers, failed to follow a management instruction and that she wanted to "discuss his involvement" in the Airbourne event. She failed to make any findings of fact or reach any conclusions from the evidence on each of those allegations. She failed to probe the evidence as to the precise wording of the management discussion or the Claimant's understanding of it, she failed to establish the status of the instruction. She also failed to establish as a fact whether the Claimant had breached the instruction by forming relationships after the instruction was given; the Claimant's evidence in the hearing was that he had not had a relationship with T in 2014, this was crucial to establishing whether he had breached the instruction but was a matter which was not followed up. In relation to the two allegations the Tribunal conclude that Ms Thompson failed to show any credible evidence that she formed a genuine belief on reasonable grounds that the Claimant was guilty of the misconduct alleged and for this reason we conclude that the decision to dismiss was unfair.

274. In relation to the Airbourne event Ms Thompson had additional evidence before her in the form of a statement from Mr Hayes but there was no evidence that she took this into account. Her conclusion on this offence was that the Claimant's actions were "less than transparent" (paragraph 18 of her statement). Also at paragraph 23 of her statement she concluded that although this was not gross misconduct it "**added to my loss of trust and confidence**". This conclusion was not supported on any facts but was a further conclusion reached by Ms Knight and Ms Thompson based on their personal opinion that they felt that the Claimant was "**somewhat deceitful**" (page 183T). No findings of fact were made by her to support this opinion and she did not form a view on reasonable grounds after conducting as much investigation as was reasonable. The Tribunal noted also that there was no clear allegation in the letter calling him to the disciplinary hearing in relation to the Airbourne event. Despite there being no clear allegation this suspicion was found to be proven, Ms Thomson formed the view on what appeared to be the basis of 'no smoke without fire'. She did not go into the details of why she concluded that in her opinion there was a lack of transparency that should result in a conclusion that he had committed an act of misconduct, in his employment relationship. Again the Tribunal conclude that Ms Thompson failed to form a genuine belief formed on reasonable grounds that the Claimant was guilty of the conduct alleged and the Tribunal conclude that the decision to

dismiss on this ground (or to rely on it as culpable conduct in relation to deciding whether to dismiss) was unfair.

275. Ms Thompson also appeared to move towards dismissal rather than to consider the Claimant's submissions regarding mitigation and his undertaking that he was prepared to work alongside others and no longer be a lone worker. The Claimant also informed her that he had closed down his Facebook account. He also indicated in the hearing that this would not happen again. Despite these representations and of the Claimant's 23 years' clean conduct record, the decision was made to dismiss and there was no evidence that they considered any sanction short of dismissal. The Tribunal conclude that the dismissal is therefore procedurally and substantively unfair.

276. We now turn to the issue of Polkey and whether had a fair procedure had been adopted by this employer, the Claimant would have been dismissed and if so when. As we have concluded that the unfairness extends beyond procedural unfairness to substantive unfairness the issue of Polkey does not arise.

277. We are invited to make a deduction from compensation to reflect the contribution of the Claimant and the Respondent particularly refers to the finding that the conduct alleged is that the Claimant formed sexual relationships with customers. The second issue was in relation to the using the Respondent's data of which mention was made by Mr Whelan in cross examination but was not a charge that the Claimant faced and not an allegation that was investigated. In relation to the issue of forming sexual relationships, there was no consistent evidence before Mr Whelan or Ms Thompson (or the Tribunal) that this conduct occurred after the management discussion had taken place and no evidence of what the Respondent described in their closing submissions of "tracking customers down on Facebook". We have already concluded that there was no evidence to support the allegations into the Airbourne event. As there is insufficient evidence of culpable conduct provided by the Respondent, the Tribunal conclude that there should be no reduction in the award of compensation.

278. The Claimant asks in closing submissions for there to be an uplift for failing to comply with the ACAS code of practice. Having looked at the ACAS Code of Practice it appears that the Respondent has complied with most of the the basic requirements set down at paragraphs 5-26. The major failing was in respect of what appeared to be a breach of paragraph 9 by failing to provide copies of any written evidence. This was a matter that was dealt with in the evidence and it was the clear evidence of Mr Whelan that it was his decision not to provide the information to the Clamant on the advice of HR and because he did not wish to inflame what he described as "the domestic situation". The decision not to provide copies of these documents was not as a result of a procedural failure but as a result of a misplaced desire to protect Ms Howell. We conclude therefore that it is not just and equitable to award an uplift in respect of this one procedural failing alone taking into account the Claimant's failure to appeal the dismissal.

279. We have found as a fact that the Claimant is disabled within the meaning of the Equality Act (see above) and we refer to our findings of fact above at paragraphs 3-16 above.

280. The next question for the Tribunal is whether the Claimant was dismissed because of something arising in consequence of his disability. The first question for the Tribunal is what was the nature of the unfavourable treatment and we conclude it was dismissal and the dismissal was carried out by Ms Thompson.

281. The next step for the Tribunal is to establish what caused the treatment and we conclude that it was the Claimant's behaviour while suffering from mood swings and depression and his poor memory. The mood swings and depression were documented to be shown at their worst in 2013-2014 as referred to above at paragraph 9-11 of our findings of fact and during this time the Claimant also sought support from a mental health charity to manage his illness. The GP records showed that he had come of the medication in 2014 and had suffered a relapse and was off sick from September to October 2014. The downturns in the Claimant's ability to manage his behaviour in his personal life appeared to be linked to his depression and he informed Mr Whelan that he had "gone off the rails" in 2013- 14 (see above at paragraph 32). Ms Howell evidence to the Respondent was clear that she was concerned that he was very ill and required counselling and support.

282. It is difficult to establish what evidence was relied upon by the Respondent to dismiss the Claimant but as Ms Thompson's evidence was that she dismissed because the he had gone into service users' homes and formed short term relationships. She concluded that his health "**didn't have any impact**" despite the Claimant's evidence to the contrary and despite a number of medical reports and sick notes referring to the Claimant's absence due to depression and PTSD. She appeared to ignore the evidence provided by the Claimant that his ABI made him act irrationally (as recorded in Ms Knight's notes) and failed to undertake any investigations to establish the nature of his impairment and the impact that it had on his behaviour. The Tribunal have been referred to paragraph 5.15 of the EHRC Code on Employment 2011 which states:

> 'A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened. The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.'

283. This part of the Code appears to be particularly relevant to the facts of this particular case. The Claimant had served 23 years without any conduct issues and then his performance and personal conduct appeared to change significantly. This sudden change coupled with

the Claimant's own representations to the disciplinary investigation and hearing put the Respondent on notice of the causal link between his behaviour and his disability. The Claimant having raised this matter with the Respondent, it was then reasonable for them to explore with him as to whether his behaviour was something arising from his disability. This was not done, in fact, on the contrary they raised an adverse inference from his evidence concluding, despite evidence to the contrary, that his impairment had no impact on his behaviour. This was a conclusion that ran counter to the evidence before them.

284. The reason for dismissal was therefore something arising from his disability; there was a link between his ABI and his subsequent depression and irrational behaviour. The Respondent therefore closed their minds to the effect that the impairment had on the Claimant's normal day to day activities and his ability to regulate his behaviour and failed to seek any professional input despite a recent letter from OHS indicating that the Claimant would be covered by Equality legislation. The Tribunal conclude on the evidence that the Claimant was dismissed because of his irrational and behaviour that was out of character in his personal life, which was something arising from his disability.

285. Turing to the second matter arising in consequence of the Claimant's disability was the issue of short term memory loss, his evidence to the disciplinary hearing was that he suffered memory loss but this was perceived by Ms Thompson with scepticism (page 183O) and no further investigations were conducted. The dismissal manager failed to give any weight to the Claimant's submissions on this matter and on his disability generally. The Claimant's evidence on his disability appeared to be perceived by Ms Thompson and Ms Knight as corroboration of his unreliability or of his dishonesty and we conclude this from the comments made in the written in the notes of the hearing. Despite the Claimant referring to his medical conditions, the word "doubt" was written alongside the Claimant's submission which gave a strong indication to the Tribunal that the Respondent gave this evidence very little weight or doubted it's veracity.

286. The Respondent having heard the Claimant's submissions should have conducted some investigation and looked into their medical notes to reach a conclusion on the facts, not on their uninformed opinions. However, they failed to do so instead equating his failure to recall the management discussion as corroboration of wrongdoing. The Claimant's poor memory was something arising from his disability, thus there was a causal connection between the disability and the dismissal. The tribunal therefore conclude on the evidence that the Claimant was dismissed for something arising out of his disability by concluding that his poor memory was evidence or corroboration of misconduct without investigating further, despite all the evidence that had been produced by the Claimant during the hearing.

287. The Respondent does not make any submission in relation to whether the dismissal was a proportionate means of achieving a legitimate aim and in the absence of any evidence led by the Respondent in evidence or in closing submission we conclude that dismissal was not a proportionate means of achieving a legitimate aim.

288. Lastly turning to the issue of the Respondent's state of knowledge of the Claimant's disability. The Tribunal has found as a fact that the Respondent was aware of the Claimant's brain injury in 2010 (see above). The Respondent referred the Claimant to OHS twice in 2010 and once in 2011 where short term memory was recorded. The Respondent was aware at the time of the injury and he was monitored in a phased return to work. The Claimant was then off sick and diagnosed with PTSD in 2012 and in 2014 and Mr Whelan had accepted in cross examination that he was aware of that he was off sick with this condition and that he needed to take medication to avoid a relapse. The last OHS report before the Respondent dated the 4 September 2015 specifically referred to the disability legislation being likely to apply. This evidence taken with the Claimant's evidence before the disciplinary hearing about his mental health and memory loss and Ms Howell's evidence shows that the Respondent was in possession of actual knowledge of the Claimant's disability.

289. It was also noted that not only was Mr Whelan aware of the Claimant's disability, his previous line manager Mr Albon had witnessed him breaking down at work, this would have put the Respondent on notice of the state of his mental health. It was put to us in the Respondent's closing submissions that the Claimant had stated that he had informed Mr Albon of his mood swings and depression but not of his memory issues but this matter was raised by the Claimant before Ms Thompson who failed to investigate the matter further or to seek OHS advice on the matter choosing to conclude that, in her view, his medical condition had no impact. The knowledge that is required under Section 15 is for knowledge of the disability not of the somethings arising that leads to the unfavourable treatment. Mr Whelan and Mr Albon had knowledge of the Claimant's PTSD and the Respondent had actual knowledge of the Claimant's ABI from 2010. This issue for the Tribunal is whether the Respondent had actual or constructive knowledge of the Claimant's disability on the facts and we conclude that the Respondent had sufficient actual knowledge for it to be aware that the Claimant was at the material times disabled.

290. The Claimant's claim for discrimination for a reason arising out of disability is well founded.

291. The matter will now be listed for a remedy hearing. The parties are to be given 21 days from the date of promulgation of this decision to consider whether the issue of remedy can be agreed without the need to attend a further hearing. If that is not possible the parties are to write jointly to the Tribunal within 28 days, indicating whether they consider one day to be sufficient (if not, how may days are required) and dates to avoid for a four-month period commencing in March 2017. At the remedy hearing the parties are to come prepared to deal with the Claimant's application for reinstatement and/or re-engagement as well as compensation (as requested by the Claimant in his ET1 at page 11 of the bundle). To this end the Tribunal orders that a single joint bundle shall be produced for the remedy hearing (in addition to the bundle used in the liability hearing), this shall be an agreed bundle produced by agreement of the parties four weeks before the remedy hearing. Witness statements shall be exchanged 14 days before the hearing.

Employment Judge Sage

Date 14 March 2017

CORRECTED RESERVED JUDGMENT & REASONS