



## EMPLOYMENT TRIBUNALS

Claimant

v

Respondent

Mrs B Baldeh

Churches Housing Association of  
Dudley & District Limited

### RESERVED JUDGMENT

Heard at: Birmingham

On: 3, 7, 10, 13 and 16 March 2017

Before: Employment Judge Dean

Members: Mr P Tsouvallaris

Mr RS Virdee

Appearance:

For the Claimant: in person

For the Respondent: Mrs M Peckham, solicitor

### JUDGMENT

1. The respondent has not subjected the claimant to unlawful discrimination contrary to the provisions of s 15 of the Equality Act 2010.
2. The respondent has not subjected the claimant to an automatically unfair dismissal contrary to s103A of the Employment Rights Act 1996.
3. The claimants complaints do not succeed and are all dismissed.

### REASONS

#### Background

1. This complaint was heard application in March 2017 and our judgment was reserved. I apologise to the parties in this case for the length of time that has passed since the complaint was heard and the decision of the Tribunal made at a reserved deliberation of the panel on 16 March 2017 and the delay in producing the written reserved judgement and reasons. I regret that for a variety of reasons, including a lengthy period of absence because of ill health and other judicial commitments, this judgment and the reasons for it are sent to the parties after a significant delay.

2. By way of background in this case the respondent is a housing association formed in 1979 to address the concerns over housing problems in the Dudley and district area. It had developed residential housing schemes for people with mental health problems, learning difficulties, refuges for women and children and supported living flats for older people and young people who are vulnerable in the community. In particular at the facility at which the claimant was employed the respondent provides accommodation for young people and provide access to training, education and employment. Service users are referred to the respondent from the Homeless team and from Dudley Social Services. The claimant was employed by the respondent as a support worker on 22 December 2014.
3. At the end of her six month probationary period the respondent considered that the claimant had not performed satisfactorily during her probationary period and her employment was terminated on 18 June 2016.
4. The claimant asserts that she had made a protected disclosure to the respondent on 1 May 2015 and that she was dismissed because of that disclosure and the dismissal was automatically unfair.
5. The claimant asserts that she is disabled and that the reason for her dismissal was for a reason arising from her disability.
6. On 13 October 2015 the claimant presented a complaint to the Employment Tribunal that she had been automatically unfairly dismissed in breach of s 103A of the Employment Rights Act 1996 and that she had been subject to unlawful discrimination contrary to section 15 of the Equality Act 2010.

## Issues

7. List of issues as Respondent identified and the parties agreed at the start of the hearing that the issues to be determined by the tribunal are:
  - a. **Time issues – jurisdiction**
    - i. Was the claim submitted on 13 October 2015 in time?
    - ii. If not in time, was it not reasonably practicable for the claimant to submit the automatically unfair dismissal claim in time?
    - iii. If it was not reasonably practicable was such further delay reasonable?
    - iv. In respect of the complaint of unlawful discrimination because of protected characteristic of disability was the equality act claim brought outside the time limits?
    - v. If so is it just and equitable for the employment tribunal to exercise its discretion and allow the case of unlawful discrimination to proceed to hearing?

The answer to these discrete issues were determined by the tribunal at the conclusion of the claimant's evidence and are dealt with by our Preliminary judgment on jurisdiction.

### b. **Disability Discrimination**

- i. The respondent accepts the claimant was a person with a disability at material times; that is by depression.
- ii. Should the respondents have had either actual or constructive knowledge of this disability at the material time?
- iii. Was how colleagues perceived the claimant's communication with them "something arising from her disability"?
- iv. Did the "something arising from her disability" materially influence her dismissal?
- v. If the required causal link is established, does the respondent have a legitimate aim in treating the "something arising from" as a reason for dismissal?

The claimant in her original complaint asserted that she was subject to direct discrimination because of her disability s13 Equality Act. That complaint was NOT live issue – it was withdrawn at a case management preliminary hearing held on 7 June 2016 before EJ Perry and is no longer a live issue before us to be determined.

**c. Public Interest Disclosure**

- i. Did the claimant make a disclosure on 1 May 2015 to the effect that the way the respondent expected her to complete license agreements would result in a fraudulent claim?
- ii. If such disclosure was made, the respondents conceded that it satisfies section 43B (1) ERA 1996:
- iii. that a criminal offence has been committed; and
- iv. that a person has failed to comply with legal obligations to which is subject, and that it was made to the claimant's line manager.
- v. If such disclosure was made, was it reasonable for the claimant to hold that belief?
- vi. If it was made, did the claimant make the disclosure in the public interest?
- vii. Does the claimant satisfy the burden of proof to show that the reason or principal reason she was dismissed was the disclosure?

The claimant's original complaint that she had been caused to suffer detriment pursuant to section 47B ERA 1996 was dismissed following the withdrawal as per the Judgment of 7 June 2016 before Employment Judge Perry.

**The Law**

8. Part X of the Employment Rights Act 1996 (ERA) provides protection to employees from unfair dismissal by their employers.
  - a. Section 94(1) ERA provides that: '*An employee has the right not to be unfairly dismissed by his employer.*' However, section 108 ERA ('Qualifying period of employment') provides as follows:

*(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination.*

...

(3) Subsection (1) does not apply if—

...

(ff) section 103A applies

b. Section 103A ERA ('Protected Disclosure') provides that:

*'An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.'*

9. Therefore, unlike PIDA detriment, where the protected disclosure need only be more than a trivial cause of the detriment suffered by the claimant, a PIDA unfair dismissal only results where the protected disclosure is the main or only reason for the dismissal (**Kuzel v Roche Products Ltd [2008] IRLR 530**). Moreover, the reverse burden of proof, applicable in discrimination claims does not apply to whistleblowing claims.

10. A protected disclosure is defined in section 43A ERA as:

*'...a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections 43C to 43H.'*

11. Section 43C ('Disclosure to employer or other responsible person') provides that:

*'(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure—*

*(a) to his employer, or*

*(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—*

*(i) the conduct of a person other than his employer, or*

*(ii) any other matter for which a person other than his employer has legal responsibility,*

*to that other person.*

*...'*

1. Section 43G (' provides:

*(1) A qualifying disclosure is made in accordance with this section if—*

*(a) the worker makes the disclosure in good faith,*

- (b) *he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,*
        - (c) *he does not make the disclosure for purposes of personal gain,*
        - (d) *any of the conditions in subsection (2) is met, and*
        - (e) *in all the circumstances of the case, it is reasonable for him to make the disclosure.*
- (2) *The conditions referred to in subsection (1)(d) are—*
  - (a) *that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,*
  - (b) *that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or*
  - (c) *that the worker has previously made a disclosure of substantially the same information—*
    - (i) *to his employer, or*
    - (ii) *in accordance with section 43F.*
- (3) *In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—*
  - (a) *the identity of the person to whom the disclosure is made,*
  - (b) *the seriousness of the relevant failure,*
  - (c) *whether the relevant failure is continuing or is likely to occur in the future,*
  - (d) *whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,*
  - (e) *in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and*
  - (f) *in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.*

(4) *For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.*

12. A 'qualifying disclosure' is defined in section 43B ERA ('Disclosures qualifying for protection'):

1) *In this Part a 'qualifying disclosure' means any disclosure of (information which, in the reasonable belief of the worker making the disclosure, [ is made in the public interest and ] tends to show one or more of the following—*

(a) *that a criminal offence has been committed, is being committed or is likely to be committed,*

(b) *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

...

(d) *that the health or safety of any individual has been, is being or is likely to be endangered,*

...

(5) *In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1*

13. The phrase 'disclosure of information' requires the conveying facts; the mere making of allegations by the claimant will not be a 'disclosure' for the purposes of s43B ERA (**Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38**).

14. The question in relation to whether the communication for employee is the disclosure of information or a mere allegation is intertwined. **Underwood v Wincanton PLC , Kilrane v London Borough of Wandsworth 2016 IRLR 422**

15. As suggested by the phrase 'reasonable belief' there can still be a qualifying disclosure if the worker is later shown to have made a reasonable mistake (**Darnton v University of Surrey [2003] IRLR 133**). However, where the individual has special skill or professional knowledge of the matters being disclosed this may have an effect on what it was reasonable to believe (**Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4**).

16. Where 'automatic unfair dismissal' is claimed pursuant to s103A ERA, in circumstances where the employee has insufficient continuity of employment, the test for proof or reason for dismissal is as follows (**Kuzel v Roche Products Limited**):

- a. Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason? Has she raised some doubt as to that reason by advancing a s103A reason?
- b. If so has the employer proved its reason to dismissal?
- c. If not has the employer disproved the s103A reason advanced by the claimant?
- d. If not dismissal is for the s103A reason.

17. A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee (**Abernethy v Mott Hay and Anderson [1974] ICR 323**).

18. The question we must ask ourselves is whether disclosure, if protected, materially influence the decision to dismiss, in this case as result of deciding not to extend the promotion period.

19. In **Panyiotou v The Chief Constable of Hampshire 2014 IRLR 500 EAT** at para 49 we are reminded at that:

- e. *“depending on the circumstances it may be permissible to distinguish between the disclosure of the information and the manner or way which it was disclosed”*

20. In **Feccitt** at paragraph 44 we are reminded that in unfair dismissal complaints at section 103A the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically fair. In cases where a protected disclosure is made where such a disclosure has been made but is not the sole or principal reason for the dismissal the dismissal will not be unfair automatically.

21. In the same way that unfairness or unreasonableness per se would not give rise to an inference of unlawful discrimination (**Bahl v Law Society [2003] IRLR 640**, a decision of the EAT subsequently approved by the Court of Appeal at **[2004] IRLR 799**), a finding that a dismissal would have been unfair (had the claimant had qualifying service) does not of itself imply victimisation or a whistleblowing dismissal.

22. Whilst a tribunal could draw adverse inferences from an utterly inadequate appeal process (for instance that it was so clearly an attempt to sweep matters under the carpet that the original dismissal must have been on prohibited grounds), it is submitted that the opposite inference can be drawn from a manifestly fair appeal (in particular, one whose process far exceeds the minimum contemplated by the ACAS Code).

23. A Tribunal has to be mindful in considering whether a decision to dismiss falls within section 103A, whether the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure; that test is very different from the test contained at section 47B in respect of the right not to be subject to a detriment in employment “on the ground that the worker has made protected disclosure.
24. The two tests are different and in this case we apply only the test at section 103A.

### **Disability Discrimination**

25. From the case management hearing of 7 June 2016 before employment Judge Perry confirms that, the claimant relies on section 15 of the equality act 2010 which provides:

#### **s 15 Discrimination arising from disability**

*(1) A person (A) discriminates against a disabled person (B) if—*

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

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

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

26. The unfavourable treatment alleged by the claimant is that the respondents dismissed. The event that there is unfavourable treatment because of something arising in consequence of the claimant's disability, can the respondent show that the treatment was justified, i.e., that it was a proportionate means of achieving a legitimate aim?
27. The claimant relies upon the legitimate aims as identified at paragraph 9.6 of the case management summary of the preliminary hearing held on 7 June 2006 as follows:
- i) to maintain the standards required of individuals working with vulnerable people and

ii) to maintain a workforce where staff can work amicably in a pressured environment.

The case law to which we must have regard includes **IPC media Ltd v Millar [2013] IRLR 707 EAT** the claimant must establish that a person who took the decision either knew or ought to have known of the claimant's disability. The burden of showing section 15 defence is on the employer. The act claimant to show that the respondent had actual or constructive knowledge of her disability.

**Gallop v Newport City Council [2014] IRLR 211 CA**

*"Before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person. The knowledge which the employer is required to have, whether actual or constructive, is of the facts constituting the employee's disability. Provided an employer have actual or constructive knowledge of the facts constituting the employee's disability, the employer does not need to know that, as a matter of law, the consequences of such facts is that the employee is a disabled person as defined in the statute."*

**Evidence and findings of fact**

28. We have heard evidence in person from the claimant and have been referred to relevant documents within the bundle that has been placed before us on the issues. The sequence of events relating to the presentation of evidence has been somewhat unusual. The claimant gave evidence on 3 March and had concluded her evidence in chief. When the tribunal returned the 2<sup>nd</sup> day of evidence, 7 March the claimant indicated she wished to introduce additional documents that she had omitted from the earlier bundle. After that introductory matter had been dealt with, the documents were introduced and then Miss Peckham for the respondents made an application that we consider and rule upon the question of the tribunal's temporal jurisdiction to hear the complaints.
29. Having heard the respondents submissions the claimant went on to make her submissions in which she, without realising, sought to introduce new evidence about the reasons why she had not presented her claim sooner. Mindful that the claimant is a litigant in person and also of her disabling depression and anxiety which had caused the tribunal to make reasonable adjustments in the conduct of this hearing and with the respondents agreement, it was proposed that the claimant would have an opportunity to give further evidence and explain in fuller detail the reasons why her complaint was presented when it was, four days out of time on 13 October 2015.
30. The tribunal granted an adjournment of some 20 minutes for the claimant to gather her thoughts and emotions. The tribunal was mindful that the account the claimant gave when she took the oath for a 2<sup>nd</sup> time was one in which she had had time to speak with her friend and supporter at the hearing Miss Jones and we would observe that the account the claimant next gave was in very large part consistent with the more contemporary account that she gave to her GP as recorded in the GP records and as recorded by the claimant in the impact

statement she sent to the employment tribunal and copy to the respondents in April 2015. We find that the claimant's evidence supported by contemporary records has been genuine and is compelling. We are grateful to the manner in which Mrs Peckham, who has ably represented the respondents, has asked appropriately probing questions of the claimant in a most considerate and proportionate way.

31. In her witness statement dealing with the reasons why she had not presented her complaint to the tribunal the claimant stated at the conclusion of para 57:

*“ following the dismissal I have been under a lot of stress and anxiety for which I was taking medication and left me feeling very lethargic and depressed. I did not knowingly return the ET 1 late I was not in the best frame of mind to be able to do any more than I did at the time. My GP has provided a printout of the appointment I have attended during that time.”*

The respondents do not dispute that the claimant is a disabled person, the disability being that of a recurring depressive disorder. Unbeknownst to the respondents the claimant was first diagnosed with depression in 2004 and has suffered with it on an intermittent basis since that time. The claimant confirms in her evidence that she did not inform the respondents that she suffered with depression. The claimant's employment began on 22 December 2014 and ended following an unsuccessful probation period 18 June 2015.

32. We have not been informed that during the course of her employment with the respondent the claimant had cause to take time off work because of her health because of depression or otherwise. The claimant asserted that the fact Mr Griffiths described the claimant to have given him the impression that:

*“her body language was quite aggressive, for example, the looks she would give people and her choice of words.”*

should have put the respondent on notice that the claimant may have had a depressive illness. Mr Griffiths disagrees, he describes her as causing him to form the impression that she was straightforward but reserved. Without more we find that nothing in the claimant's behavior nor her statements to the respondents gave, or ought reasonably to have given, the respondents cause to believe she was disabled or to enquire as to the state of the claimant's mental health and in particular whether or not she suffered from depression.

33. In a statement that she submitted to the employment tribunal as she was ordered to do, to detail how she describes she is affected during a depressive episode she says in an email of 24 April 2016 [C9]: –

*“During the initial stages of the depressive episode, my response to triggers, I become very aggressive and loud in my manner of speaking, not giving the other person chance to speak.”*

She continues:-

*“once having ‘lost it’ I would have difficulties sleeping for several nights. This in turn would make me extremely tired and anxious.”*

She states:

*“unless the issues surround the trigger is not addressed I will continue to experience varying levels of anxiety. I eventually become very tearful, sometimes slight thing, or for no apparent reason. At this stage I just stay in bed for days at a time. I often become very tired as I’m not actually getting little, if any sleep. I find it almost impossible to do any house work and then become more anxious because the house is in a mess, I become very sensitive about the mess, (I’m normally very houseproud and like to see everything nip clean) but will refuse any assistance.*

She describes that when she is unwell she isolates herself from family and friends. She says that she is often unable to cook, she is too tired and lives on crisps, sweets and fast-food. She says that she has major problems with her short-term memory often leading to forgetting where she has put things or putting things somewhere and not remembering about it.

34. The claimant explains that all of the effects do not happen simultaneously and it depends on the kind of day that she is having and how she responds to triggers.

35. The claimant has disclosed her GPs medical notes and we have considered the notes from the date of termination of their employment until she submitted her claim form ET1 on-line on 13 October 2015 in order that we have been able to make a determination on the preliminary issue that we have determined separately in the judgement and reasons on the Preliminary issue delivered by us on 10 March.

36. Claimant’s employment terminated 18 June 2015. She visited her GP on 25 June. The GP note reports that the claimant:

*“has not been sleeping properly for 2 weeks prior to that: lives alone. Has friends; NO thoughts of self-harm. Afraid of slipping back into severe depression like previously.”*

37. The hearing of this case has been conducted in accordance with the sitting pattern that was arranged as a reasonable adjustment for the claimant. The claimant as she appears before us is accepted to be a disabled person, being disabled by depression. The sitting pattern has been a day in Hearing separated by at least 2 days either over a weekend or mid week to assist the claimant. The claimant who has appeared in person and represented herself has been supported throughout by her friend, who has assisted by taking notes for her, Mrs Jones. At the start of the Hearing, the parties were informed of any reasonable adjustments that the tribunal may make including frequent breaks during a day, at least mid morning and a full hour for lunch with breaks in the afternoon and more frequent breaks when required and requested by the claimant.

38. We have considered the documents that have been placed before us, those documents contained within the core bundle of documents pages 1 to 151 and we have been at pains to remind the parties, that we consider only those documents within that bundle to which we have been specifically referred. We have had brought before us, additional documents R1, R2, R3, C1 to C9. We have been referred to a bundle of written statements at paragraph C10, we have taken as read. The witness statements that have been placed before us, including in the bundle the claimant's witness statement pages 1 at 20, Mr Tony Griffiths pages 23 to 25, the respondent's project leader Mr Foyer, Mr Zacariah Alexander (pages 26 to 28) a senior project worker for the respondents, Mrs Jodi Blackford (pages 29 to 31) a project worker, Ms Helen O'Neil (pages 32 to 36) a senior support worker, Ms Jillian Hartland (pages 37 to 48), service manager for the provision of services to young people and the claimant's line manager, Ms Angela Cockette (pages 21 to 22) support services coordinator. We have been referred to the written witness statements of Beverley Greenage who was the officer conducting the appeal (pages 49 to 50) who did not attend the tribunal Hearing and Mrs Joanne Briscoe (pages 51 to 53) a support worker. Those latter 2 witness statements which are not supported by live witness evidence have been read and the parties have been informed that they attract relatively little weight given that the witnesses are not in attendance to be cross examined or questioned by the tribunal.
39. We are mindful that the claimant represents herself. The tribunal has reminded her of the issues on very many occasions, Mrs Peckham, solicitor for the respondents indicating her submissions that the judge had had cause to remind the claimant to focus on the issues that we were required to determine on no fewer than 12 at a time. The claimant was reminded that her witness statement was taken as read, and that she should add if necessary to her evidence in chief, any account of facts that she disputed, that were raised by the respondent's witnesses in their witness statements that she had not previously dealt with. The claimant was reminded that her witness evidence needed to deal with all matters that she wished to place before the tribunal, notwithstanding that guidance, the claimant was recorded to give further evidence when she sought to introduce it on the second day of the hearing as she produced additional documents to the tribunal following the day's break. It was also necessary for Miss Cockette who had been a support service coordinator at the respondent and to whom the claimant reported concerns on 22 May 2016 to give further evidence.
40. At the start of the Tribunal Hearing the parties were informed of the pattern of breaks mid morning to about 11.30am, lunch 1pm till 2pm with a break if necessary during the afternoon and the conclusion of business each day between 4pm and 4.30pm. Both parties were informed that they could make requests for additional breaks and they would be accommodated where reasonable. The tribunal were made aware that the respondent's witnesses with Ms Hartland is herself disabled by Lupus, a condition which, where she gets stressed is exacerbated and may require her to take additional breaks.

41. The claimant was informed that her evidence was given whilst she was under her affirmation and that comments that she made from the parties bench were submissions and did not form part of the evidence that she presented to the Employment Tribunal. The claimant was reminded as she was the litigant in person, that it was necessary to put all of her evidence before the tribunal to be considered and in cross examining the respondent's witnesses if her case was the opposite of what a witness said, she would need to challenge the different account presented by the respondent's witness. The claimant who is clearly an intelligent person indicated that she understood the directions that were given. Notwithstanding, the directions that were given to the claimant, the conduct of the Hearing proved to be unusual insofar as the claimant returned to the witness stand no less than 3 times to expand upon her original case. The tribunal confirmed to the claimant that in light of the fact that she represents herself as a litigant in person she would be afforded the opportunity to give all of her evidence and Mrs Peckham for the respondent agreed that it was necessary to comply with the overriding objective that all of the claimant's case was heard by the tribunal and the respondents were afforded additional time for Mrs Peckham to take instructions from her clients on new matters that the claimant sought to raise. The claimant was informed that as her evidence was aggregated in a piecemeal fashion, the tribunal may take into account the fact that the accounts had not been full and frank and all inclusive initially, but had been added to when the claimant had had the benefit of hearing the respondent's witness evidence or where over the first weekend she had had an opportunity of reviewing her case as it had then been put and taking guidance from her friends and supporters.
42. Finally, the parties have agreed that, in light of the service users of the respondent's business being in large part vulnerable young adults, the names and identifying information of those service users to the extent that it is contained within the witness bundle are redacted.
43. As well observing that the claimant has had the where with all and has sought to make applications to introduce additional evidence that was not previously disclosed to the respondent in the disclosure exercise ordered by the tribunal; it has become clear that the claimant has on occasions accepted that some of the very bold assertions contained in her witness statement were incorrect and were on occasions misleading distortions and exaggerations of events to the extent that on occasions they were untrue and misleading. We refer to the claimant's evidence in respect of events of 22 May 2016, where the claimant alleged that Mr Alexander had "grabbed her". The claimant confirmed that the adjective used at paragraph 41 of her witness statement was not the correct adjective as when Mr Alexander "Z" had urged her not to go out to Jill at Heartlands Office she conceded that Mr Alexander had not 'grabbed' her at all, but had moved towards her. Subsequently, at paragraph 41, the claimant said "*As Z would not allow me to leave the office I became even more distressed and started to bang my head against the wall.*" During this time, JD was also in the office.
44. We have had no corroborative evidence of the claimant having allegedly "banged her head against the wall". On the contrary Mr Alexander denied that he had prevented the claimant leaving the office or that the claimant became

distressed or that she had banged her head against the wall. Ms Judy Blackford who the claimant seemed to accept was an honest broker in these proceedings confirmed that the not to scale plan of the office on 22 May was not correct. The fact that the claimant conceded and moreover Ms Blackford confirmed that the claimant had not been seen by her banging her head against the wall, Ms Blackford indicated that she may well have said words to the effect that she was concerned that the claimant intended to go to Jill Hartland's office when the claimant appeared angry and agitated. In light of the claimant's misleading account and her acceptance that her plan was incorrect and the fact that both Mr Alexander and Ms Blackford indicated that the claimant had not banged her head against the wall, we conclude that that account given by the claimant was inaccurate and her evidence in that regard showed the claimant to be a stranger to the truth.

45. Whilst giving her evidence the claimant has been in very large part able to give articulate answers to questions that have been put to her and only on a limited number of occasions has she become upset in recounting her story of events. We are grateful to Miss Peckham who has been the most considerate of advocates and has been measured and patient in her examination of the claimant notwithstanding that on many occasions the claimant was reticent to give a straightforward answer to the questions as they were asked. Miss Peckham whilst robustly representing the respondent was gracious in accepting the need to hear all of the relevant evidence that the claimant sought to give, even when out of order and added after the first examination of her first evidence that required the claimant to be recalled to give further evidence to ensure that the claimant was able to be satisfied that, albeit piecemeal, all of the evidence that she wished to put before the tribunal was heard.
46. The claimant first gave her evidence on day 1 of 6 on Friday 3 March, she concluded her evidence and confirmed that, having answered questions in cross-examination she did not wish to make any clarification of her evidence and day one closed at 16.10p.m. with the claimant having concluded her evidence and being released from her oath. On return to the tribunal on Tuesday 7 March, the second day of the hearing, the claimant made an application to introduce additional documents C3 and others. The claimant sought to introduce new documents which she asserted were an example of the kind of case that the claimant would describe as fraudulent at C5 to C7 and document C5 license agreement re: LH, C6 Dudley Housing Benefit Council Tax Reduction Application Form, C7 emergency bed referral Foyer, C8 page 4 of 44 claimant's GP's medical notes, C9 e mail claimant to Midlands West Employment Tribunal for the attention of Judge Cocks attaching her disability impact statement, C10 extract copy of the claimant's diary. The claimant confirmed that C5, 6 and 7 were not documents to which the respondents had been referred prior to the termination of her employment and that nowhere had the claimant suggested, that the license agreement C5 was an example that the claimant asserted was fraudulent.
47. Evidence was then heard from Mr Griffiths who was cross examined by the claimant at length. At the start of the day 3, on Thursday 10 March, at the start of the day's Hearing, the claimant indicated that she wished to submit more

additional documents and the claimant produced the claimant's medical notes that were omitted from the original bundle of documents. At the introduction of that additional information, the claimant gave further evidence in relation to her medical notes and the respondent made an application that in light of all of that information, the tribunal were invited to conclude that the claimant's complaints were out of time and to determine the preliminary issue at that stage without the need to hear any further evidence from the respondents; a decision on the Preliminary Hearing was delivered by the tribunal at 11.30am on day 3.

48. The ex tempore judgment and reasons delivered on the Preliminary issue was that although the claimant's application was presented out of time, it was presented within such further time as was reasonably practicable to do so, in relation to her complaints of automatically unfair dismissal because she had made a protected disclosure and, because it was just and equitable to extend time in respect of the allegations that the claimant had been dismissed for matters arising from her disability. The written judgement on that preliminary issue was sent to the parties on 13 March 2017.
49. The respondent's case continued and we heard from Mr Alexander, Miss Blackford, Ms O'Neil, Miss Hartland during the course of day 3 and day 4.
50. On the tribunal's return to the tribunal on 16 March, the fifth day of evidence, the claimant indicated that she wished to add a sentence to her original witness statement in relation to the appeal hearing that was held with the respondents to consider the claimant's appeal against the decision to terminate her employment. The claimant indicated that she wished to add to her original statement in respect of paragraph 1, on page 105, the notes of the appeal meeting. The claimant confirmed that the notes of the appeal meeting were accurate and the claimant was reminded that her complaint to be considered by the tribunal was in relation to the decision to terminate her employment, a decision that had been taken and communicated to her following the probationary period review meeting held on 5 June the decision having been sent to the claimant on 17 June. The claimant wished to add to her statement a sentence to say:-

*"During the appeal meeting I told Mrs Greenage that I had had a breakdown in the past and in discussing its effects and symptoms of my mental health I described it as feeling agitated and trapped in and I can say things unguarded and can remember standing by a wall and knocking my head against it (page 105) and I know that it could be considered as unusual behaviour.*

The claimant then added in answer to questions in cross examination that she had not verbalised any concerns about her mental health or its history to Ms Hartland during the probation review meeting that led to the termination of her employment or to anyone within the respondents during the course of her employment.

51. The claimant explained that although she had disclosed her mental health vulnerability to other employers before, she had done so because their relationship with her had made it easier to make that disclosure. The claimant confirmed that notwithstanding requests from the respondent who enquired if

there was anything they could do to assist the claimant she had not felt that she could make that disclosure to the respondents.

52. In light of the turn of the evidence and issues relating to the claimants credibility as she sought in piecemeal fashion to develop her evidence we have found, having heard evidence, that the claimant made no disclosure of her disability or rather her depressive condition to the respondents. Moreover, as we explain below we find that the claimant's behavior did not put the respondents on notice to make further enquiries or to suspect that the claimant had a disabling mental health impairment.
53. We observe now, as we did to the claimant during the course of the hearing, that the development of her case through the telling of her evidence as it developed on three separate occasions as she was recalled, raises with the Panel concerns as to the credibility of the account which was not a full and frank one when initially made in her witness statement that had clearly been prepared with some care and thought.

### **Findings of Fact**

54. Turning to the substantive findings of fact relevant to the issues in this case that we make, we remind ourselves that the respondent is a charity which helps homeless young people. The respondent is an organisation which provides accommodation for young people as well providing them help accessing training, education and employment. The respondent service users are referred to them by the Homeless Team and Dudley Social Services and the respondents deal with vulnerable young people who are in urgent need of accommodation. The accommodation provided by the respondent is for 31 beds and the respondent employs between 15 and 17 members of staff working in the facility which the claimant works.
55. The claimant was employed by the respondents as a support worker whose employment began on 22 December 2015 and the terms of her employment were contained in her contract of employment signed on 15 January 2015, pages [28 to 32] and she was provided with copies of the respondent's employee handbook at pages [33 to 47] together with their various policies and procedures including the appropriate professional boundaries policy [pages 48 to 50]. The claimant was provided with a workbook that was to be completed by her during the induction period of her employment at pages [51 to 61]. The workbook was provided to her by Mr Tony Griffiths who met with her from time to time to review completion of the induction manual. It is accepted that there claimant was shown the various policies and procedures on the respondent's computer system.
56. The claimant who had previously been a support worker in similar charitable organizations was employed by the respondent as an individual having considerable experience in that care sector. Indeed, the claimant acknowledges that on very many occasions she referred to the way in which the service was delivered to users in her previous employment and she questioned and challenged the respondent's way of operating. We have no doubt that the claimant was confident in her own abilities, perhaps overly so and the claimant on

many occasions operated in a way that she wished to apply procedures in a manner with which she was familiar rather than with the respondents own policies and procedures. What is clear to the tribunal is that the claimant was aware of care standards and, was aware where the standards and practices and procedures of the respondents would be located and she understood the underlying principles of those procedures and policies including safeguarding, confidentiality, and appropriate behaviors.

57. The claimant's contract of employment provided that she was engaged for a probationary period that would continue for a period of at least 6 months at page 28. The probation would be confirmed as permanent status if the claimant had reached the satisfactory required standard or may have been extended in borderline cases or, if the claimants had not reached the required standards her employment would be terminated with the required notice period.
58. During the course of her employment, the claimant was subject to her staff supervisions as well as being provided with one to one feedback as and when required. The claimant does not deny that her line manager, Jillian Harland on a number of occasions provided one to one feedback to the claimant where concerns relating to her performance arose. Indeed, the claimant expressed a view that she felt that she was being "picked upon" when Miss Hartland spoke to her and reminded her of the respondent's policies, procedures and practices that were procedures that the claimant had to comply with, with which the claimant had to comply.
59. We have been referred to a record of staff supervision dated 3 April 2015 [page 63 - 65] and the next staff supervision was scheduled for 11 May 2015. It is regrettable that at the staff supervision on 3 April aspects of the supervision, in particular 5 exchange of issues work and project information could not be discussed in significant detail as there was no time available to discuss that issue as the claimant's shift had ended [page 64].
60. Having begun employment with the respondents on 22 December, the claimant was unable to work independently with young people until 29 January 2015, when her DRB Form had been returned. On the claimant's own account, she spent most of her time with a senior support worker, Stuart Payne, who she found to be helpful and he did all he could to put her at her ease, as well as with Jodi Blackman and Helen O'Neil, both of whom were support workers and have given evidence to the tribunal. The claimant in her witness statement confirms that on 30 March 2015 there had been an incident between her and Stuart Payne and Mr Payne sent an e mail to Jill Hartland on 30 March 2015 [page 62], which raised concerns about the claimant's attitude towards Mr Payne the senior Support Worker and the directions that he had given to her. We find that Mr Payne's observed in his email that the claimant seemed to have an issue with the directions that he gave her, that she had an attitude towards him and the directions that he gave and that she referred frequently to the way in which she had done the job for many years and she considered directions otherwise were on the verge of harassment. It was following this e mail that the claimant had her first supervision meeting with Miss Hartland on 3 April 2015.

61. Subsequently, and before the next supervision meeting that was scheduled for 11 May 2015, two key matters for concern arose in relation to the claimant's behavior, the claimant's conduct.
62. On 20 April 2015, the claimant's co-workers notified Jill Hartland (page 66) of a service user LW having raised a concern in relation to text messages that had been received from someone called Beverley. The service user had raised a concern, expressing concern that the text messages that had been sent to her may cause upset to another service user should they receive similar text and they were not be able to speak up for themselves as that service user LW could.
63. The transcript of a text exchange made on 10 April 2015, demonstrates the exchange between the claimant and a young person [page 67]. The claimant suggested that her text comments were to correct poor English used by the service user LW4. The claimant confirms that the concerns about the text communication had been raised with her by the respondent and it had been highlighted to the claimant that the young person had limited literacy skills and the exchange would not have helped the user develop her confidence and self esteem.
64. Subsequently, on 28 April 2015, a concern was raised that the claimant sent an e mail from the key workers' e mail box to Jill Hartland on 28 April 2015 [page 68], whereby the claimant informed Mr Alexander and Mr Griffiths and copied Jill Hartland with an e mail confirming that she had given the Service User AB £10 cash as he had no money and although the Service User had food he was unable to prepare a meal because he had no money to top up his electric meter. The claimant confirmed:

*"I understand I should have waited, but AB looked totally distraught. If there is an issue with whether he would be entitled to the hardship fund, then I'll bear the loss. This is not something I would normally do, but the decision based on my gut instinct, at that time."*

The claimant acknowledged that to have lent money to a service user, however well intentioned, was in breach of the respondent's policy in relation to appropriate professional boundaries [pages 48 to 50] and in particular to the direction that:

- ❖ **"You must not lend money to service users.**
- ❖ **You must not lend your own money or make personal gifts.**
- ❖ **Where Chad would normally lend money to a service user, you may do so within the compliance of your delegated authority to make such decisions. – In such cases, you must make it clear you are lending the money on Chad's behalf."**

The claimant had not received delegated authority to make a decision to make payment to the Service User.

65. In light of these two incidences at a pre-arranged staff supervision meeting with Jillian Hartland on 11 May 2015 [pages 69 to 73] Miss Harland had discussion with the claimant about those two concerns at paragraph 1 "*Feedback on previous meeting*" which confirmed that there had been one to one

discussions with the claimant in between a formal supervision meeting that had discussed:

- (1) concerns about the relationship between the claimant and Stuart Payne and his practice towards her;
- (2) the claimant having loaned a resident £10, from her own money; and
- (3) the claimant having failed to consult and seek advice from Jillian follow through with clear instructions from Jillian.

66. At paragraph 3, there was a note “personal development and training” [page 70] which raised with the claimant an occasion when on 1 May, she had failed to follow clear instructions that Miss Hartland has given to her relating to the attendance of a young person to complete induction on that day and to sign his license as he had expected and an offer of accommodation on the foyer.
67. We find that before 11 May, the respondent’s Jill Hartland had had occasion to speak on a one to one basis with the claimant about a number of matters that were of concern to her, in particular:
  - (1) breach of the professional boundaries policy concerning unknown to a service user of money without authorization;
  - (2) a complaint from service user and failing to follow an instruction from a senior member of staff, namely, Miss Hartland on 1 May 2015.
68. Having heard evidence from the claimant and also from Miss Hartland it became apparent to us that on 1 May 2015, the claimant had been informed by Miss Hartland that a young person in need of urgent accommodation was to call at the Forum on 1 May to complete his induction and to sign the license agreement for his immediate occupation of the accommodation. The claimant in her evidence confirmed that the vulnerable young person service user was known as JG (R1).
69. Having heard the account by the claimant and also that of Miss Hartland we find that Miss Hartland’s account of the events of 1 May is the more credible. The claimant in her witness statement [para 15] said that she had been informed by Miss Hartland that a young person JG was going to attend on 1 May with a view to looking at accommodation. The claimant accepts that she had been told by Miss Hartland that he was happy to accept the accommodation he should have been taken through the induction process and he should be required to sign the license agreement to start with immediate effect on that day when he could take her occupation.
70. The claimant in her witness statement gives an account that the young person JG had told her that his benefit had been sanctioned and that he did not have money to pay for food or electricity and would not have money until Monday, 4 May. On the claimant’s account she expressed a view that the young person had previously been prescribed anti -depressants and that he was no longer taking them, that his emotional wellbeing caused her concern and that she allowed him to not take possession of the accommodation on Friday 1 May, but to allow him to return on 4 May with his possessions to occupy the flat. The claimant gives an account that she spoke about the interview with another member of staff, Joanne

Briscoe, told her what had occurred and the decision that the claimant had taken and indicated that the claimant might speak to Jillian Hartland as well. The claimant does not in her witness statement give an account that she spoke to Jillian Hartland over the telephone before Miss Hartland spoke with her in person.

71. On the claimant's account it was at this face to face encounter on 1 May that she told Miss Hartland that she records in her witness statement [para26]  
*"You can only claim housing benefit once the accommodation has been occupied, if the license agreement is signed before the person moves in then any claim made before the tenancy start that date would be classed as fraudulent."*

It is this statement that the claimant says was a disclosure qualifying for protection as a result of which, Miss Hartland then determined to terminate the claimant's employment.

72. We have heard an account provided by Miss Hartland. Miss Hartland gave an account that during the week ending 1 May 2015, she had been notified that a young person, JG, required accommodation and when she had spoken to JG to suggest that the respondents had available accommodation in the terms of the occupation he had indicated that he would attend the premises on 1 May as he had been "soafsurfing" would be happy to sign up on the day if he liked the flat. Miss Hartland had given directions to the claimant that if the accommodation was acceptable that JG should be taken through the induction programme, registering him with the electricity company and making him aware of the drug, personal property and personal safety policies and she had completed the housing benefit application form. Later on 1 May, Miss Hartland had received a telephone call from the claimant who informed her that she had not had the young person sign the agreement as she had been directed as he had no money to move in, but that he had indicated he wanted the flat but did not have any money until Monday for food or electricity and he would take up occupation on Monday 4 May.

73. Miss Hartland expressed concern as the claimant had not raised any concerns or queries with her. Miss Hartland would have informed the claimant that the respondents had an ability to provide food bank vouchers, emergency food boxes and, hardship funding to provide support to young people with food and electricity and that the claimant should have consulted her to sanction such support. In those circumstances, there was no reason why the young person JG could not have been allowed to move into the accommodation.

74. We have heard from both Miss Hartland and from Mr Griffiths that when accommodation was accepted by a young person the license has to be completed at the same time as the induction and there may be a day or two's grace before people finally move in to accommodation. Miss Hartland acknowledges that during the telephone conversation she expressed concerns to the claimant about the way in which she had handled the reference, the claimant had confirmed that the young person had already left the building but that the claimant had disregarded Miss Hartland instruction that she should raise any queries with her about the license arrangements so that arrangements be put in place for the young person to have the keys to move in immediately or shortly

thereafter, rather than delaying his occupation until 4 May. A few minutes after the telephone conversation the claimant went to see Miss Hartland. Miss Hartland acknowledges that during the course of the encounter she had with the claimant when the claimant went to her offices the claimant expressed concern that she did not like Miss Hartland's manner in which she had spoken to the claimant on the telephone and that the claimant made a reference to her previous place of employment where there had been suggestions of fraud when licenses have been signed that users had not taken out occupation for some time thereafter. Miss Hartland expressly has rejected the claimant's argument that was put to her that the claimant made protected disclosures to her.

75. In light of the concerns we have regarding the claimant's credibility as outlined in our observations above and the robust account given by Miss Hartland we conclude that whilst the claimant would seem to have had a view of the inadequacies of the respondent's practices as she seems to quote the words she used to Miss Hartland to be:

*"You can only claim claim Housing Benefit once the accommodation has been occupied, if the license agreement is signed before the person moves is then any claim made before the tenancy start that date would be classed as fraudulent" [sic]*

We find that the claimant did not articulate those concerns to Miss Hartland on 1 May in the explicit terms that she has suggested she did. We find that the exchange between the claimant and Miss Hartland on 1 May was more accurately recalled by Miss Hartland in her evidence in her statement [para 17-22] and in particular the honest recollection she makes of the claimant's comments:

*"I do recall that she made some reference to suggestions of fraud at a previous place of employment. I did not ever consider this as some kind of 'whistleblowing' it was an aside to her excuses for what had happened. She certainly did not allege that the process I explained to her was fraud."*

76. Having raised a number of concerns about her performance with her at a one-to-one meeting on 11 May [69-73] on 22<sup>nd</sup> of May Mrs Hartland had cause to speak with the claimant about a young person who had been referred to the emergency bed and Mrs Hartland had asked the claimant to follow through with the young person's induction and to sign his license agreement. Mrs Hartland had forgotten to ask the claimant to telephone the young person's mom to ask if there are any health issues and therefore she telephoned the claimant to ask her to do that. Sadly there was poor communication between the 2 women the claimant thought that Mrs Hartland was asking her to telephone her own mother and was abrupt with her. Mrs Hartland made a note of the conversation and the instance surrounding it [75]. Mrs Hartland told the claimant when she confronted her about the conversation that the claimant presented is very abrupt on the phone, that she had raised concerns about abruptness with her in the past, that of the staff that expressed concern about her abruptness that could come across as rude and the claimant had acknowledged that she was mindful how she comes across and that her mother at the time was ill and she panicked as she thought the call had been about her own mother.

77. Subsequently the claimant spoke with Angela Cockette, support services coordinator on 29<sup>th</sup> May and Miss Cockette made a contemporary note by sending an email to Miss Hartland at 16:29 on the same day [74]. We find that the email contains a contemporary and accurate account of the discussion she had with the claimant. The claimant gives an account [w/s para 48- 49] that the email did not include reference to the fact that she had also described that she was distressed, crying and that she had recounted she had had an accident on the way home from work 26 May. Having considered the objective evidence we prefer the account of the telephone conversation given by Ms Cockette.

78. The claimant was given a copy of a letter dated 29 May 2015 from Jill Hartland, service manager [76] informing the claimant that she was to attend a probationary review meeting on 5 June 2015 to discuss performance in the role of support worker and informing her that it would review amongst other things issues that have been discussed during her supervision sessions. We find at that the issues raised had previously been discussed as follows:-

- Breach of professional boundaries by loaning a service user money without authorisation – discussed on 28 April 2015 [p68]
- a complaint from the service user about the tone of a text message which the claimant had sent to them - discussed on 10 April 2015 [p66-67]
- 2 incidents of breaching data protection in regards to not maintaining confidentiality service user information – discussed 9 May [117A].
- Failing to consult with senior staff relating to an instruction left for you on 1 May 2015 -discussed 11 May 2015[69-73]
- communication how you relate with your colleagues and myself - discussed 22<sup>nd</sup> May and in one-to-one supervisions.

The claimant attended the probation review meeting on 5 June 2015 [81-84] she was accompanied by Helen O'Neill, a support worker as her companion. Mrs Hartland was accompanied by Ms Cockette who took the notes. At the meeting the claimant produced to Mrs Hartland a written response to the letter inviting her to the probation review meeting that had identified concerns that will be discussed [77-80].

79. The claimant acknowledges that the issue of loaning money to service users without authorisation was a breach of professional boundaries for which she had taken full responsibility and that the incident had been raised in her supervision meeting on 11 May when she had apologised for it.

80. In respect of the complaint from a service user relating to the turn of a text message the appellant apologised for the content of her texts, explained she had not meant to cause offence, and she had assured Mrs Hartland that it would never happen again.

81. In respect of concerns relating to the breach of data protection and not maintaining confidentiality the claimant acknowledged that the behaviours should not have happened, the mistakes of that nature did not happen on a regular basis and concluded saying "*I am in no way justify my actions and since the last instant, 'doublecheck that all files are put away'*"

82. In respect of the fourth matter of concern, failing to consult with senior staff, referring specifically to the signing of a licence agreement the claimant describes that on 1 May when signing up a young person she had been in a bit of a quandary as sometime ago (during the previous employment a colleague had been disciplined for benefit fraud after signing someone up, before the tenant had moved in. We find it telling that at no point did she assert that she had made a disclosure to Mrs Hartland, or to anybody at the respondent, asserting that the respondents procedures were fraudulent. At no point does the claimant make an allegation or communicate information that the respondent was committing fraud, that section of the claimant's letter is not read by us nor could it reasonably be read as making a protected disclosure in respect of the respondents practices. Furthermore, we find that the letter, written with the benefit of reflection at the time does not suggest as the claimant has in her evidence to the tribunal that she had made a disclosure to Mrs Hartland in the terms she describes at paragraph 26 of her statement.
83. We pause here to reflect that the reasons we have already described above the claimant's evidence relating to an alleged protected disclosure is not accepted. We have heard evidence from respondent's witnesses, Mrs Hartland in particular that the respondent does not claim housing benefit, the claim is made in the name of the young person or service user. The claimant on her own account as an experienced adviser was aware of the respondents procedures and was aware of the fact that the respondent does not itself claim housing benefit. The respondent's practices to provide urgent accommodation to vulnerable people on the day and the date on the licence agreement should be the day that the service user moves in. Generally the moving in date is the date the tenant signs the licence and on occasion a short period of grace time is permitted. We are satisfied on the evidence before us that the respondents practices are not fraudulent, the claimant did not make an allegation or communicate information that would be a protected disclosure and the reasons for the claimant's dismissal are unconnected with the allegation that the claimant now seeks to make.
84. Finally in commenting upon her relationship with colleagues and managers the claimant accepted [79] at that in process of communication with colleagues she may have been abrupt. The claimant gives an account of her conversations with Mrs Hartland on 22 May which differs from the count of both Mrs Hartland and the contemporaneous record made by Ms Cockette.
85. We find that at the probationary review meeting Mrs Hartland considered the information that was provided to her by the claimant as recorded in the notes of the meeting and she confirmed that the decision in relation to the probation review would be communicated as soon as Mrs Hartland returned from her annual leave.
86. On 17 June 2015 Mrs Hartland wrote to the claimant [87-88] in which she confirmed that having considered the claimant's comments if been decided that the claimant had not made satisfactory progress during her probation period and

that therefore it had been decided to terminate your employment with effect from 18 June 2015 the claimant was paid in lieu of notice.

87. The claimant was informed that she had a right to appeal against the decision that had been taken and that an appeal should be sent within 5 working days of receipt to Beverley Greenage operations manager.
88. On 24 June 2015 the claimant wrote a letter of appeal [91-93].
89. We have considered carefully the notes of the probationary review meeting and find that during the course of the review meeting Mrs Hartland was evenhanded in reflecting the achievements that the claimant had made, attending core training sessions as required and managing her caseload for cases to a satisfactory level including some that had been difficult to engage with. Mrs Hartland gave the claimant time to give further explanation in response to the concerns that were raised, it is apparent to us that the claimant perceived Mrs Hartland as unduly critical of her however we accept the account given by Mrs Hartland that her management style was to raise issues with her staff members as and when they arose rather than waiting only to discuss them at one-to-one reviews. We note that the claimant acknowledged that in the period of 5 days before the review meeting, since speaking to Ms Cockette the claimant's perception was that things had got easier and now Ms Hartland "*met her halfway as a human being*".
90. We note that at the probation review meeting the claimant did not suggest in discussing any of the issues that she was being instructed to carry out any steps that were fraudulent or that the charity was conducting its business fraudulently.
91. The letter of dismissal confirms the reasons why the claimant's progress had not been to an acceptable standard during the probation period. The claimant herself acknowledges her culpability in terms of breach of confidentiality, failing to consult with senior staff about instructions left for her, contravening professional standards, inappropriate communications with service users. We find that the claimant's acknowledgement of her failings and apology for her actions goes some way to address the criticisms that the respondents had of her. However, whilst some employers may have given an employee the conclusion of a probation period a second chance to improve her performance we remain mindful that the respondent employer was one dealing with vulnerable members of society and the standards they required led Mrs. Hartland to conclude that on balance the claimant's progress was not satisfactory and it was not appropriate to extend the probation period by further length of time. We find the respondent's decision in this regard well within the range of reasonable responses that we may have considered with the claimant to have been a position to claim that she had to use service and had the right not to be unfairly dismissed.
92. We have considered the evidence and find that the sole reason for the respondent's decision to terminate the claimant's employment and not extend the probation period related solely to the matters of concern that had been raised by the respondent with her at the probation review meeting and since.

93. Although we have not heard evidence from Mrs Greenage the appeal manager we have been referred to her witness statement and the contemporaneous documentation contained within the bundle of documents. In her appeal against dismissal [91-93] the claimant articulates the first time [92]:

*"I believe that the motive for my dismissal was based on a concern I had phrased regarding the way the licence agreement was being dated and that it was tantamount to benefit fraud."*

The appellant says she had told Mrs Hartland's her reason for leaving this about 45 weeks ago and she interprets Mrs Hartland's response as a justification for fraud. We have considered the notes of the supervision held on 11 May and the notes of the probation review meeting 5 June. We have also carefully considered the claimant's own letter produced to the probation review meeting in which she carefully laid out arguments and responses to each allegation. The assertion that the claimant makes in the letter of appeal does not reflect the truth of those notes or her own letter. We have no doubt that the claimant who was confident in her own abilities may well have referred to practices that had been in place in her previous employments in the sector, the claimant may well in her own mind have conflated those observations to sustain her belief that she had in fact articulated to the respondents that she considered their practices to be fraudulent. We find that the claimants belief that she articulated to the respondents information that they were perpetrating a fraud is entirely mistaken. Sadly it does not escape our notice that the claimant had been employed by the respondents for significantly less than 2 years and only if she can establish the grounds that she had made a protected disclosure can she claim that she had been unfairly dismissed in breach of s103A.

94. In her appeal letter the claimant maintains that she had been *"too frightened to follow CHADD's whistleblowing policy for fear of reprisals."* We have been referred to the respondents policies and procedures and observe that the policies contained within the employee handbook [33-50] are extensive and are regularly reviewed reconfirmed and updated and the claimant has confirmed that she had been made aware of those policies including that relating to whistleblowing [39]. Given the forthright terms in which the claimant is critical of senior managers including Mrs Hartland we have no hesitation in finding, as did the respondent at appeal that there was no reason why the claimant reasonably ought to be inhibited from using the respondents whistleblowing policy had she sought to make a disclosure. The whistleblowing policy advises employees that in cases of criminal offences the police should be contacted and in cases of fraud the tenant services authority should be informed. Within her appeal hearing [106] the claimant acknowledges that she could have made an anonymous call to housing and benefits about her concerns but that she had felt loyal to the respondent organisation.

95. Having considered the written witness statement of Mrs Greenage and reviewed the investigation that she then undertook and having reviewed the notes of the appeal hearing held on 7 July 2015 [103-106] we are satisfied that Mrs Greenage was concerned in particular about the allegations of fraud and took a robust appeal investigation. Mrs Greenage wrote to the claimant on 13 July 2015 [124-126] and having identified the seven grounds of the claimant's

appeal she dealt with each of those issues in her decision. At the final appeal decision Mrs Greenage upheld the original decision to dismiss the claimant. In particular Mrs Greenage in relation to the whistleblowing complaint undertook further investigation into the procedures to assist service users to claim housing benefit and reached the conclusion that workers within the respondent organisation were not acting fraudulently. The appeal determined, we find reasonably that the claimant had fully understood the respondents whistleblowing policy, she had had an opportunity to address the concerns with a member of the management staff and she had not done so.

96. We note that for the first time at the appeal the claimant explained [105] that in describing how her colleagues may have seen her behaviour as negative she described one occasion when she had been a bit distressed and feeling agitated and trapped in. The claimant had referred to the behaviour being such that she had seen the pattern before with her mental health and can say things that are unguarded. She informed the appeal hearing that she had had a breakdown in the past and knew the signals. The claimant confirmed to Mrs Greenage that she had not spoken to Mrs Hartland about this, that Mrs Hartland was not the type of person she could divulge this information to and she confirmed that she had not spoken to anyone else at CHADD about it as she was a private person.

97. We find that the communication to Mrs Greenage at the appeal hearing was the first time that the claimant put anyone at the respondents business on notice that she previously had experienced poor mental health or had had a breakdown in the past. The acknowledgement that the claimant makes in the appeal we find undermines the suggestion the claimant has made in her evidence that on 29 May she had told Angela Cockette how she was feeling and she states in her witness statement at paragraph 48 “ *I also told her how I was feeling and that I felt that ‘someone had got there handed my mouth and nose and that I could not breathe’ I told Angela that ‘I cannot go on like this’...* Or words to that effect.

98. Having heard all of the evidence we find that the claimant’s statement to Mrs Greenage about her mental health was the first time that the claimant had given any indication to the respondent at that mental health was fragile such as to put note the response on notice that her behaviour was evidence of impairment that had a long-term and significant adverse effect on her ability to undertake normal day-to-day activities.

99. We find that the respondents management of the appeal against the dismissal was fair and reasonable and objective in the circumstances and was not tainted by unfairness, victimisation or discrimination to render the decision to terminate the claimant’s employment unreasonable or unfair or discriminatory.

## **Conclusions**

100. In light of the findings of fact that we have made we consider the questions that the parties have agreed we are required to do to determine the issue that remain in this case.

## **Discrimination**

101. The respondent accepts the claimant was a person with a disability at material times; that is by depression. We turn to consider whether or not respondents treatment of the claimant was unlawful discrimination because of or arising from her disability. We address the issues that the parties have identified to us to enable us to reach our conclusions.

*Should the respondents have had either actual or constructive knowledge of this disability at the material time?*

102. In light of our findings of fact most recently set out in respect of the appeal hearing we find that the claimant confirmed at her appeal that she had not expressly informed either Mrs Hartland or for that matter any other employee of the respondent that she was disabled or had a condition that had along term, substantial adverse effect on her ability to undertake normal day-to-day activities. The claimant seeks to rely upon the respondent being fixed with constructive knowledge of her disability following a conversation with Angela Cockette on 29 May 2015. We have found that we prefer the evidence of Miss Cockette that was contemporaneously recorded [74] to that provided by the claimant of the conversation. In light of the statements that the claimant made at the appeal hearing our view is reinforced and we infer from her statements that she had not said or done anything to alert Miss Cockette that she was disabled by depression. Even were we wrong and the claimant had informed Miss Cockette of how she was feeling such reference to upset distress or anxiety does not of itself, without more, put an employer on notice that those one off feelings are attributable to a disabling impairment.

*Was how colleagues perceived the claimant's communication with them "something arising from her disability"?*

103. The claimant's communication with her colleagues was considered to be blunt and suggestive that the claimants way of doing things was the right way of doing things. We have heard no evidence to suggest and lead us to conclude that the claimants communication with her colleagues and managers was anything other than her personality trait and was something to do with or arising from her disability.

*Did the "something arising from her disability" materially influence her dismissal?*

104. Our findings of fact lead us to conclude that the respondent's decision to terminate the claimant's employment was for the reasons outlined to the claimant in the invitation to the probation review meeting [76] and not something arising from her disability. The claimant asserts that her perceived communication may have been something arising from her disability. We observe that the detailed reasons for concern in the claimant's performance referred to communication as the 5<sup>th</sup> element of concern most significantly in respect of her communication with work colleagues and her managers and we have no doubt that each of the other 4 reasons why the claimant's behaviour was unsatisfactory would have caused this employer to had concerns and considered her unsuitable to continue in their employ.

*If the required causal link is established, does the respondent have a legitimate aim in treating the “something arising from” as a reason for dismissal?*

105. We do not find that the respondents either knew nor was on notice that the claimant was a disabled person. Moreover we find that the respondent's perception of the claimant's communication with her colleagues was not something arising from her disability. We do however find that the respondent in any event relies upon legitimate aims that it was necessary to maintain standards required of individuals working with vulnerable people and maintain a workforce where staff can work amicably in a pressured environment.

106. We have had regard to the case law. The respondent we find did not know nor ought reasonably to have known of the claimant's disability. We have identified a clear evidence that for legitimate reasons has led the respondent to reach the decision that they did terminate the claimant's employment and no evidence has been led by the claimant to need is to find that the respondent had actual or constructive knowledge of her disability. We find that the respondent's knowledge of the claimant's depression was communicated to them only her at the stage where she submitted an appeal on 24 June 2015 and was not information known by the response from the decision was made to terminate her employment with the respondent company decision communicated on 17 June 2015 we find that the respondent did not know nor could reasonably have been expected to know that the claimant had the disability of depression.

107. The claimant confirmed in her appeal hearing on 7 July that she had not spoken to Ms Hartland or to anyone else within the respondent about her mental health as she is a private person. At the claimant in her evidence confirmed that she had previously disclosed to other employers her mental health history and depression however she had not informed at the respondent and had concealed her depression from her employers as of course she was entitled to do. The erratic behaviour that the claimant refers to does not of itself compute knowledge of the claimant's behaviour being arising from her disability. We find that the claimant was dismissed for something other than her mental health issues and the respondent's decision has been and had a proportionate means of achieving a legitimate aim to ensure that it cared for vulnerable young people and for their staff who worked within a pressured environment and sought to maintain high professional standards and teamwork.

### **Public Interest Disclosure**

*Did the claimant make a disclosure on 1 May 2015 to the effect that the way the respondent expected her to complete license agreements would result in a fraudulent claim?*

108. Our findings of fact lead us to conclude that the claimant did not whilst in the respondents employment make any such disclosure as she alleges. Moreover we

find that the facts of the case are such that claimant has not satisfied the burden of proof to show that the reason or principal reason she was dismissed was the disclosure had one been made.

109. The respondent has shown clearly the reasons why the decision was taken to terminate the claimant's employment and why in the circumstances it was reasonable for them to take the decision that they did not to extend the claimants probation period as her performance was not considered to satisfactory. The claimant herself acknowledged that her performance had been in breach of the respondent's own policies and procedures and considered that though culpable of breach she should have be treated more generously and given another chance. While some other employers may have been more lenient with a probationary employee than were the respondent their decision was within the range of reasonable responses and not for the reason or principal reason that the claimant had made a protected disclosure.
110. The respondent has not subjected the claimant to unlawful discrimination contrary to the provisions of s 15 of the Equality Act 2010.
111. The respondent has not subjected the claimant to an automatically unfair dismissal contrary to s103A of the Employment Rights Act 1996.
112. The claimants complaints do not succeed and are all dismissed

---

**Employment Judge Dean**

19 December 2017

Sent to the parties on:

19 December 2017

For the Tribunal:

.....