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EMPLOYMENT TRIBUNALS

Claimant: Mrs S Bibby

Respondent: Family Mosaic Housing

Heard at: East London Hearing Centre

On: 24-26 April, 1 May & 11-12 June 2018 (Tribunal only)

Before: Employment Judge Prichard

Members: Mr L O'Callaghan
Mr P Quinn

Representation

Claimant: Mr S Soor (counsel, instructed by Birketts LLP, Chelmsford)

Respondent: Ms E Sole (counsel, instructed by Roger Vincent Associates, Claygate)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. The claimant was not constructively dismissed.
2. The claimant was fairly expressly dismissed and her complaint of unfair dismissal therefore fails and is dismissed.
3. The claimant's complaints of disability discrimination under ss 13, 15, & 20 of the Equality Act 2010 fail and are dismissed.
4. The claim for arrears of one month in hand fails and is dismissed.

REASONS

1 Mrs Bibby is currently 49 years old. She was employed by the respondent from 1 December 2009 until her summary dismissal on 21 October 2016. Prior to that she

had been relief / bank working there from 1 September 2007 and was taken on as a full-time employee on 1 December 2009. It was a fixed term contract for a year, at the expiry of which she was taken on as a permanent employee on 1 November 2010. She brings claims of unfair dismissal and disability discrimination and for arrears of pay (over a disputed one month in hand payment dating from the start of her employment).

2 Originally the claimant had been self-represented when she presented her ETI claim form. Although she was dismissed on 21 October 2016 she had resigned before that - 3 times in fact. The first was on 3 October 2016, that was sent to Paula Blundell but the email address was wrong (she spelt Paula with 2 l's). A week later on 10 October she sent a resignation email again to Paula Blundell at the right address saying:

“Please accept this as my letter of resignation under duress and months notice.

After recent events some of which we discussed in my supervision, I feel I have lost faith and trust in Family Mosaic and feel I can no longer work for the company.”

3 That notice stipulation was unsatisfactory and not acceptable to Ms Blundell, as it did not state an end date. The third iteration was on 14 October 2016 where the notice passage read:

“Please accept this as my letter of resignation under duress and months notice. My last day of work being 10th November 2016. Due to staff shortage I can stay if you require.”

4 The claimant's role was in floating support, she was a floating support officer (FSO) supporting a set number of service users or “customers” who typically have rent and housing benefit problems as well as problems with substance abuse, and sometimes behavioural and mental health issues.

5 Family Mosaic is a well known established housing association which builds and runs accommodation for thousands of disadvantaged individuals in London and South East. They apparently employ some 2,500 people. Many of the contracts for carrying out care and support work are commissioned by London Boroughs or local authorities. This case concerns services for Southend Council.

6 The respondent is answerable to the “Commissioners” which is a function of the local authority commissioning services. The Commissioners keep a close oversight over the standard of staff care of their customers. It is within this context that the floating support officers work. The aim is to keep the customers as independent as possible in their living as well as providing accommodation.

7 There is also hostel based accommodation and the claimant spent much of her time in working with customers in hostels. These are hostels for the homeless. The main narrative of this case concerns two hostels Mosaic ran for Southend Council where some 30 homeless individuals were accommodated.

The claimant's sick leave, dismissal and re-instatement

8 After she first started in employment in December 2009, the claimant took a lot

of sick leave. She was absent from 16 October 2010 to 31 January 2011. The prevailing diagnosis seems to have been anxiety due to bereavement following her mother's death.

9 On 1 February 2011 she returned on a phased return to work. She had by now triggered the first stage of the respondent's absent management procedure. Subsequently she was absent from 18 November 2011 continuously to 23 July 2012 (8 months). Following that she was absent again from 30 May 2013 to 14 August 2013 because she had been sectioned / detained in a mental hospital. She was discharged from section on 1 July thereafter was off work sick until 14 August. The record from which we have obtained these dates from was dated 27 December 2013.

10 By letter of 25 November 2013, the claimant was dismissed. The decision maker was Rosie Green, the Head of Housing and Support. The letter was written by Amanda Smith and stated:

"Rosie looked at your medical history and the reasons for your absence and even though you feel that you would now be able to return to work the concerns are that we can no longer sustain the level of sickness absence you have had and furthermore, with the condition you have now been diagnosed with, would not support you in the role of a Floating Support Officer due to the complexities of some of the cases which would impact on your health further."

11 The claimant appealed against that decision by email of 10 December 2013 addressed to Moira Griffiths a Regional Director. She mentioned in her email:

"In my opinion, Family Mosaic have contributed to my health issues due to very stressful working conditions, a lack of support (support requested many times) and bullying behaviour by management at a time when I was vulnerable due to a bereavement (the death of my mother who I lived with and cared for)."

12 There was an appeal meeting on 6 January 2014 and the appeal was successful. The claimant was reinstated on a phased basis over 2 weeks. At this stage she was reassigned to the Southend hostels with effect from 17 February 2014. Ms Smith in her witness statement stated that while the appeal was not strictly speaking "allowed", Ms Griffiths decided that Rosie Green's decision had been right but that events had moved on and the claimant was now in a better state and fit to return. When the claimant returned her line manager was now Edwina Wellard. She now no longer took these long periods of sick leave.

13 The claimant did well on this return. Her work was clearly important to her and it was helping her with her "social anxiety". She was nominated for 7 Wow awards between June 2014 and December 2015 (an award system run by the respondent, based on ratings by service users). When at work it seems that she was highly thought of.

14 The claimant was off sick briefly from 6 to 8 January 2016 with sinus issues, anxiety, and possible complications with asthma. On her return to work form signed on 11 January, the claimant described her disability as "fibromyalgia and anxiety".

15 Returning from this short absence, the claimant stated that she was stressed by working in the hostels. She asked to be transferred away from the hostels. She was

then promptly transferred to Nicky Patel's team, still as a Floating Support Officer, but not in hostels. She was not requesting any other adjustments at this time.

16 A subsequent return to work form from Nicky Patel, following another 3-day absence with tonsillitis, laryngitis, glandular fever (sic), stated:

"Susan was off sick at the beginning of January 2016 with the same symptoms. Was stressed working in the hostel, feels a lot better not working in the hostel."

The move was therefore beneficial. The claimant still described her disability as fibromyalgia, and this time bipolar affective disorder. A further note was:

"Susan has said the anxiety and stress levels will be managed well as she is not working in the hostels. She said this is a trigger point."

It all seemed to be going well in Nicky Patel's team. That was 1 February 2016.

The complaint against the claimant

17 However, in the meantime on 27 January 2016 a complaint came from Layla Claxton to Paula Blundell and was cc'd to Edwina Wellard. This was what was to lead to the claimant's dismissal.

18 Layla Claxton was the Temporary Accommodation Officer for South Essex Homes, (an ALMO derived from Southend Council). Paula Blundell is the Family Mosaic service manager of Floating Support in Southend. Paula Blundell is the primary addressee of this email of complaint. Ms Claxton stated:

"I am sorry to have to be contacting you in these circumstances, but sadly I feel I have no other option but to raise these issues as a complaint to you.

Last Thursday afternoon 21/01/16 when I was over at 94/98 Southchurch Ave, I was spoken to by tenants in room 2 & 4. They advised me that they had heard from Susan Bibby and she had told them that she would no longer be working in the hostels and was arranging a hand over to another support worker. The lady from room 2 indicated that I should be happier with another support worker, when I asked why that was, she said she was under the impression that myself and Susan did not get on. I asked her why that was and she advised me that Susan had indicated this to her on many occasions, and that she had also told her that I was married to the man that runs the housing options team and that residents should be cautious when dealing with me because I could influence the outcomes of their housing cases. The lady from room 2 went on to tell me that Susan had indicated to her that I did not like her and that I was trying to get her evicted for rent arrears."

The service user in room 2 is SW, the service user from room 4 is AC, and the service user from room 17 is SL.

"The lady from room 4 also stated that Susan had been allowing the man in room 17 to help her do her case work on her laptop as she often had technical issues and he was very good with computers, she advised me that he was aware of all the details of all the other residents in the building, and she quoted some details regarding a past resident from room 10 that had recently been evicted.

I have on several occasions seen Susan in the lounge at 94/98 Southchurch Ave with the man

from room 17 [SL] on her laptop, and she has started to openly discuss other residents with me in front of him and others in the room and I have had to walk away.”

19 She added:

“... I am very confident from what I have heard that Susan has certainly disclosed personal information about me, which I might add is incorrect, as I have been divorced from Phil Warren for many years.

I was shocked and felt very angry when I heard these details ... and I myself have never have dreamt about discussing her personal life with residents either as I understand the importance of keeping professional boundaries with clients.

The issue of certain residents being aware of the personal cases relating to other residents in the building is probably something that effects the way residents deal with each other in the hostels, but I am certain that residents being told that I have influence over housing options cases has had a direct effect on my ability to work with these residents and carry out my role as a hostel manager since I have taken over managing 94/98 Southchurch Avenue.

I now feel I have a long way to go to gain the trust of some of the residents that I work with on a daily basis, which just makes my life a lot harder.”

20 Ms Claxton added a note from the Temporary Housing Services Officer, Nichola Hayden, also from South Essex Homes who confirmed that she witnessed the claimant discussing individual’s drug problems in front of other clients and she had had to take the claimant into the kitchen stating: “I don’t want to talk in front of that lady”.

21 When the claimant returned to work on 1 February 2016 she was suspended by Paula Blundell. Ms Blundell notified Barbara Horne who is the Operations Manager for Floating Support the most senior manager. She also informed Amanda Smith, the regional HR partner, that she received a serious complaint from South Essex Homes and stated:

“Due to the seriousness of the concerns raised i.e. breach of confidentiality/data protection, professional boundaries and a possible safeguarding issue, I would like Susan to be suspended pending further investigation – can I initiate this tomorrow? (If she is in). Please advise.”

She was in and it was initiated.

22 Ms Horne met with the claimant and, rather than suspending her, she decided to move her to Pembroke House in Pitsea. Pembroke House is an administrative centre for Family Mosaic. That is where Amanda Smith and other managers are based.

23 In the midst of this the respondent commenced a third stage absence review meeting arising from the 6 days absence in January, 6-8 and 27-29, with sinusitis, tonsillitis and glandular fever.

24 Beena Khan the Floating Support Manager held a meeting on 10 February 2016 and at the meeting the claimant was told that she would get a first level warning with 12 month monitoring period to 1 January 2017 quarterly meetings with Paula Blundell and: “To reiterate again in the last 14 months you have taken 27 days sick leave”.

25 After she had received the complaint, Paula Blundell carried out some enquiries

the same day. She also made contact with AC from room 4. They discussed SL from room 17. She discovered that the claimant had apparently been going to lunch most days with SL (McDonald's Drive Thru). Apparently she would buy herself her lunch but SL could not buy anything as he was on Job Seekers Allowance and could not afford to have lunch and was apparently quite upset. Apparently the claimant had offered to buy him a Happy Meal. Further it came to her attention that 3 patients were complaining of lack of follow-up; there was JL, TM and DH.

Disciplinary investigation

26 An investigation report was requested. It took a long time to complete. The investigator was Sarah Thompson who is the Operations Manager (for young people) based in London. It was not published until 21 September 2016. There were 12 appendices.

27 Part of the investigation involved identifying handwriting. A sample of the claimant's own handwriting was taken. Recording sheets are kept for each customer. She appended a recording sheet for service user SL room 17 and the male service user SW in room 2. She then appended an example of a record made by SL for another service user TM, then a record made by SL on behalf of SW too. The problem the respondent perceived with these is that it was the claimant's duty to write these records and that it was wrong for her to entrust the record of a service user to be written up by another service user.

28 The tribunal was critical of the investigation report of Sarah Thompson. Apart from having taken too long to complete, it suffered from a serious flaw in that Ms Thompson clearly believed that the claimant was wrong to ask service users to write their own reports. What is wrong with this first of all is it was not one of seven charges that were being investigated at all. It was a grey area. It was a positive practice of the claimant's. She considered that it empowered the service users by involving them in the writing of the reports on their own case records.

29 One can understand that point of view. The claimant had made the Service Manager, Paula Blundell, aware of this. Paula Blundell had said she would get back to the claimant about this practice, but she never did. Apparently Paula Blundell consulted the claimant's line manager Edwina Wellard about the matter but nobody ever took this up with the claimant. Thinking about it as a matter of common sense, the tribunal cannot think that this would be a breach of confidentiality of any particular code. If it had been clearly wrong, these managers would surely have told the claimant so at once. Ultimately they never got back to the her.

30 Near the beginning of the report she said:

"In her interview, Susan freely admitted that she actively encouraged or supported her customers to write their own recording sheets".

She also confirmed that both her direct line manager Edwina Wellard and the service manager Paula Blundell had been aware of the practice: "... nothing further had been said or action taken". However it is clear that she herself was more critical. For instance under the heading of professional boundaries she stated:

“She has shared customer information with others inappropriately, asked customers to complete their own recording sheets, and encouraged customers to participate in activities which placed them in a difficult financial situation ...”

Ms Thompson’s view about service users writing their own reports also found its way into her interviews of witnesses such as Paula Blundell and Edwina Wellard. She interviewed them in February. She did not interview the claimant until May.

31 Also, there having been 7 charges in the letter of suspension, and the letter of convening the disciplinary hearing, the investigation report has 8 charges. So what is the extra charge? It is the charge of badmouthing Layla Claxton cited as: “You have discussed with customers and made comments about a manager of South Essex Homes”. That clearly derived from Layla Claxton’s original email of complaint.

32 The disciplinary hearing and the dismissal letter reflect all 8 charges. It was worrying that the investigation officer should have taken that stance because it complicated an already complicated picture. The respondent ultimately makes a real distinction between people writing their own reports which does not involve breaching confidential information, and service users writing other service users’ reports which does. The tribunal can appreciate this distinction. It is an important distinction which Ms Thompson blurred. It made the tribunal sceptical of the report as a whole.

33 Contrary to what investigation reports should be, Ms Thompson appeared to have formed a non provisional and definite view on the charges: “the allegation is found to be true in respect of all 8 charges”. That was not the role of an investigation officer. Her recommendations were better stated. They said the allegations had been investigated and were believed to have a strong foundation. Nonetheless this may only be a stylistic point.

34 Overall the investigation took far too long. There were large gaps between interviews when nothing seemed to be happening. Ms Thompson has not been a witness to the tribunal. It is not clear why it took so long.

35 When the charges they were first formulated they were so vague that the claimant would not have had much clue as to what they consisted of. Ultimately it came down to two specific service user reports. The two in question date from the same day 1 December 2015. They were around the same time of day. The claimant would inevitably have forgotten some of the surrounding detail of that day although it did mean something to her because later in the disciplinary hearing with Richard Priest (Regional Director of Care and Support), she stated:

“... to be honest when I got home I bawled my fucking eyes out because I was put in this fucking position and I was determined for it not to happen again..... After annual leave and sickness she came back and asked if she could come out of the hostel and she was told yes.”

This was in January 2017, and she was moved promptly following that request (see above).

36 It was part of a general complaint that she found the workload very intense. It

was a difficult environment to work in. Service users' knowing about other service users was a permanent risk because there were no private rooms. There was a large open plan lounge. People discussed themselves with other people anyway, voluntarily.

37 The respondent's final conclusion on this was it would inevitably happen but it should not be encouraged or facilitated by support workers, which is what the claimant had done in the view of Mr Priest who was the decision-maker in the disciplinary process.

38 The charges were general in the extreme and resulted, as so often in these procedures, in double counting of offences. In outline the 7 charges were:-

- "A customer has had sight of confidential information
- You have discussed confidential information with other customers regarding their housing
- You have brought lunch for yourself while undertaking a visit with a customer
- You failed to keep regular contact with customers
- You have breached your professional boundaries
- You have breached confidentiality
- Your actions have potentially brought the name of Family Mosaic into disrepute."

As we say, in the investigation report there was the 8th charge:

- "You have discussed with customers and made comments about a manager of South Essex Homes."

39 Nothing there would have put the claimant on notice of any particular day, date, time or individual service user. That put her at a disadvantage although in the event as we said above, she had remembered this day and it contributed to her asking to be taken out of the homes a month later.

40 The claimant found working in the hostel harder as she felt bombarded. She was reacting to service users coming to her with queries. She did not have the time and space to reflect and think about the service users on a case by case basis. It was a disturbed environment too.

41 Ultimately at this tribunal hearing the tribunal spent most time studying the recording sheets service users' reports from pages 514 to 519 of the tribunal bundle.

42 First we were shown the handwriting of service user SL on one of his own recording sheets on 29 October 2015. Next another from 1 December. Service user SL was just 18 years old.

43 Not that it was ever noticed during the disciplinary process but it appears from

that that service user SL actually signed it on behalf of the claimant, writing the initials SB. Next we saw an example of a self recorded sheet of service user SW. This was another example of a service user writing his own report and indeed writing the claimant's initials in the staff signature box quite distinctively. This report was from 18 December. Then we saw a report on service user TM. This was clearly started by the claimant whose writing appears at the top. It describes the situation where service user SW had been to inspect a property which he might have been given the tenancy of and he was particularly anxious because he had a dog that he wanted to be able to keep there. (The dog was boarding elsewhere for the time being because no dogs were allowed in the hostel). There were discussions about whether he could erect fencing to facilitate keeping the dog there. This was all in the distinctive writing of service user SL.

44 The claimant's recollection of this had been that she was interrupted and went off to have a talk with SW about his national insurance number and how his progress was blocked for the lack of an NI number. She left the pad and pen there with the incomplete TM report. The TM report continues:

".. advised to go to Miles at CAB if he feels he is being pressured. Went to property looked at fencing for the dog. FSO advised T if he would not be happy with the fencing to get pictures and send to FSO. FSO can discuss with Hayley at SEH..."

45 The technology for writing these reports was quite complex as it was described to us. Part of the claimant's equipment was a DigiPen. These reports get uploaded on to a database. They are written on what looks like plain paper with this DigiPen and then via a Blackberry can be uploaded as handwritten sheet on to the Blackberry. We have not seen anything like it before. The reason for describing this is that the claimant had left this equipment there. The report was opened and started when she was interrupted and went off and it was at that point and this seems to have been accepted by the respondent ultimately that SL took it upon himself to finish this report on the special sheet with the DigiPen.

46 SL was like this generally. He wanted to be helpful, he wanted to be involved. He was not typical of the hostel residents. It appears he had once had a high powered job and lost it and lost his home. The TM report again appears to have been signed as a staff signature "SB" by service user SL.

47 Next we saw a report for SW which had been written entirely by service user SL. Nobody managed to explain to the tribunal, how the service user knew the client ID or service user number which is an 8-digit number appearing at the top of the sheet. It is not the sort of number that service users would have in their head - certainly not for other service users. The explanation for this is the claimant states that she had started the report when SW took the report and passed it over to SL there in front of the claimant and the claimant did not interfere and take it back, she just let this take its course.

48 In the report in SL's handwriting there is a full account of the advice given to SW about obtaining a national insurance number. He needed to go to Jobcentre Plus to make an appointment then he could go to college and enrol on a course as a physical support dependant.

49 The claimant's account was she had opened the report up she asked SW to fill it in but SW chose she said to pass it over to SL who was there in the group at the time. She should have intervened, and she knew she should have intervened. She would not have been so upset that evening, in her own description, if that had not happened. It was, as the claimant stated throughout, very difficult to get any privacy in that hostel. The claimant's version of these events was never challenged.

50 The tribunal noted, as mitigation, having looked at both these summaries, for TM and SW, these are not matters of the highest sensitivity as e.g. mental health or drug abuse problems might be. It was just day to day planning.

51 Ultimately we will get to the decision-making stage. What was said was that if the claimant knew there had been an untoward incident like this involving service user SL writing other service users reports, the claimant should have raised that promptly with her manager. In retrospect it is a great shame for her that she did not ask to be taken out of hostels earlier if she was finding it so difficult to cope, so that this kind of incident was more of a risk. The tribunal does not consider the claimant made any attempt to conceal this. Judging from the original email complaint of Layla Claxton, the claimant seems to have been consistently open:

"I have on several occasions seen SB in the lounge with the man from room 17 (SL) on her laptop, and she has started to openly discuss other residents with me in front of him and others in the room and I have had to walk away."

She has correctly identified SL. She calls it a "laptop", but she clearly meant the DigiPen etc.

52 The respondent never properly investigated how persistent this practice had been. These were the only two examples given in the investigation. There is a major unresolved question as to whether there were others, and whether this was developing into a practice as the original Layla Claxton complaint suggested.

53 Another major wasted opportunity in the investigation was that Ms Thompson actually interviewed Layla Claxton on 24 May, but all she spoke to her about was the extra allegation that the claimant had been badmouthing Layla Claxton to the service users (which was anyway not ultimately upheld). It would surely have been appropriate to ask her to give more detail about the practice of SL using the claimant's IT equipment which she clearly described in the complaint.

Disciplinary hearing & dismissal

54 The disciplinary hearing took place on 11 October after being postponed by 1 week from the original date. The claimant chose not to be accompanied. Ms Thompson was present for some of the hearing. The duration of it was 3 / 3½ hours. We have seen the minutes.

55 Just prior to the disciplinary hearing the claimant had understandably asked for a copy of Layla Claxton's original complaint. She did this by email of 27 September. Amanda Smith arranged for a copy of this to be sent to the claimant. It is puzzling to

the tribunal why that important document should not have been included as an appendix to the investigation report.

56 At the hearing claimant showed a good deal of awareness of the risks that were raised by SL being too closely involved with other service users. She said:

“She had explained to SL not to get too involved as she had seen situations like this before such as a group of young mums who were in the hostel and were having regular parties. There was a falling out and the hostel became chaotic. This was SB’s first experience of the hostel and she told SL not to get too involved.”

She then explained about how the reports been completed by SL, and about SW’s national insurance number. She stated that she had started TM’s report when this was all going on. She thinks she also started SW’s notes and felt that SL was trying to take over. When asked by Mr Priest what she should have done in hindsight she stated:

“SB stated she should have done any recording of the notes at the time and put the Digi pen in my bag until I was able to record individually.”

57 The claimant generally said that she was having trouble remembering. That was hardly surprising as the events were 10 months old by then, and the original charges had been generalities. In response to further questioning:

“SB stated she knew it was wrong. She replied that she had now stopped customers writing their own support plans but only kept doing this with some. SB stated she felt very uncomfortable during this but SL did like to write these. SB claimed that she had spoken to Paula Blundell about this and Paula said she would look into this and get back to SB but she didn’t.”

By this we do not take it the claimant said she asked Paula Blundell about SL writing reports for others. She only asked about service users writing their own reports. She knew it was wrong for SL to write others’ reports and would not have needed to ask about that.

58 In his witness statement for this hearing Mr Priest deduced from that passage that this was a habit of the claimant to allow SL to write these plans. That is not the way the tribunal reads that passage of the minutes. It seems an unwarranted conclusion. If that was what he really felt the claimant was habitually doing, then that passage of the Layla Claxton complaint should have been highlighted and investigation should have established either that there were or that there were not other examples of this happening. It should have been established in the original Thompson investigation, or by Mr Priest asking for further investigation if he was going to suspect that it had become a habit.

59 In the tribunal’s view if the claimant bawled her eyes out after this day, it would suggest it cannot have been an everyday occurrence otherwise she would have asked to transfer far sooner than she did and not wait for a month. At another point in the disciplinary hearing, the claimant stated that she knew it was wrong allowing SL to type the notes and she was disappointed with her behaviour and that she felt out of control.

60 There are signs of Mr Priest suffering from the same problem as the

investigation suffered from. He was going off point and not really drilling down into whether the claimant actually told Paula Blundell or Ed Wellard that on 1 December SL had completed records for SW and TM and that it had upset her.

61 The decision was not announced at the disciplinary hearing. It was reserved. A dismissal letter followed on 21 October. There were 8 charges reflecting the structure of the investigation report. The main burden was on the first charge, customers had sight of confidential information relating to other customers. In the letter and to the tribunal, Mr Priest impressed upon the tribunal, the potential seriousness of breaches of confidentiality. He even told the tribunal that there had been 2 murders in hostels which they ran. He explained the dangers of “mate crime”. He stated:

“You described SL as persuasive and that he had ingratiated himself with other people living at the hostel however none of them had expressly given permission for you to share their personal information or circumstances. You had not sought any dispensation from your manager and you had not sought any guidance or clarification around this issue you clearly knew was wrong.”

That conclusion appears to the tribunal to be a fair one based on this evidence.

62 Mr Priest also came to a conclusion for which there was no justification. He stated: “It is considered a matter of gross misconduct that you conceal any matter you should report...” What he actually meant was that she should have reported an untoward incident. She did not conceal it. There is a major distinction between concealing and not reporting. That was the wrong word to use in this delicate situation.

63 He stated: “You should have ended the meeting in the communal area and completed those notes confidentially yourself.” The claimant knew that. Mr Priest gave a helpful illustration which showed that he had appreciated the distinction between users’ writing other users’ reports and users’ writing their own:

“A parallel I will give you as an example is should two people in a GP’s surgery talk about their medical conditions to each other that is a matter for them, however their specific needs are addressed by the GP and any notes would be written confidentially by a GP. The GP would not ask the other parties to write the notes regarding other patients for him, this applies as you know to the work that we do, our customers may choose to share information but it has never been nor ever will be appropriate for customers to be encouraged to write up notes for others.”

Again the word “encourage” was the wrong word. The claimant did not stop SL. The word facilitation which was used later in the appeal was nearer to the mark.

64 In the background of Mr Priest’s reasoning was the suspicion that this was habitual. This should have been properly investigated to find out one way or the other. The tribunal and the respondent have only seen two examples SL writing other service users’ records. The claimant was unaware that one was happening while it happened and did not correct it or undo it after the event. The other one she was aware of, while it was happening because she was there when it was happening.

65 Allegation 2 was almost completely identical to the first: “You have discussed confidential information with other customers regarding their housing and support”. It adds nothing but bulk. The problem is that it goes to the bottom line conclusion of the report that: “To conclude, you have been issued with a number of sanctions for gross misconduct”. This and several

other disciplinary outcome letters are guilty of the same error. It is double counting and gives a misleading picture. It is too stiff, over elaborate and formulaic, and from an employee's standpoint, hard to comprehend.

66 Allegation 3 was different. This was: "you brought lunch for yourself whilst supporting a customer." This was rejected. We will not go into detail on the allegations that were rejected.

67 Allegation 4 was: "You failed to keep regular contact with customers." Apparently customers were individually contacted to ask about the regularity of contact they had had with the claimant. They were JL, TM, DH and PLS. In fairness, in this list there were some who were very happy with the level of support they received; it was a mixed picture. The allegation was not clearly put to the claimant at any stage and, properly, it was not upheld.

68 Allegation 5 is yet another overlap: "you have breached your professional boundaries". This goes back to the SL report writing but because it is thought to be a lower calibre kind of an offence it merited a level 1 warning (for what that was worth).

69 Allegation 6 was merged with allegation 1 and was not counted at all.

70 Allegation 7 then became: "You have discussed with customers and made comments about a manager of South Essex Homes". This was the charge of badmouthing Layla Claxton:

"Although I think there is a strong possibility that you did do this, I am choosing not to uphold this allegation as I do not feel that the statements and evidence are clear enough."

That was a grudging rejection. There was no need for that tone. You either uphold these allegations or you do not.

71 We remind ourselves that this charge did not appear in the letter of suspension or in the letter convening the disciplinary hearing. The only place it appeared was in the investigation report and the original Layla Claxton complaint.

72 Allegation 8 in the investigation report and in this dismissal letter is: "Your actions have potentially brought the reputation of Family Mosaic into disrepute" and that merited a level 2 warning. Mr Priest's concern, which we accept was a genuine one, was concern about the commissioners mentioned above.

73 He then seems to resurrect the charges which had not been upheld:

"It is reasonable to conclude that some of the customers would recognise that personal information could be given out by you, it is also reasonable to assume that the partner organisation South Essex Homes believes that you have spoken ill of members of their staff..."

74 In a stilted closing paragraph:

"To conclude, you have been issued with a number of sanctions for gross misconduct, and one level two warning, and one level one warning. The overall outcome is gross misconduct, and on

that basis and even though you have resigned, your contract of employment will cease with immediate effect.”

75 Clearly the claimant's resignation was not going to forestall the disciplinary hearing although the claimant hoped it would, as anybody would. Employers of this kind, with caring responsibilities, usually have a duty to form some conclusion on incidents such as this. It is similar in care homes or in nursing.

76 In this case Mr Priest states: “the commissioners will require an updated report from us following the outcome of this investigation”. The investigation report had contained a recommendation: “Chair of the Hearing consider if referral to Disclosure and Barring Service is relevant”. This is an employment that is exempt from the Rehabilitation of Offenders Act 1974.

Appeal

77 The claimant made a 9 point appeal:

- “someone with mental health issues cannot make their own decision but if they have mental capacity we as support worker have to accept the customers' decisions as their right to be in control of their own decisions
- the outcome does not relate closely enough to the original complaint [Layla Claxton]
- mitigating circumstances have not been taken into account
- I had asked to come out of the role as I felt it was making me ill due to the work load and had asked for help on several occasions
- training quality has declined at FM
- working at FM has caused me stress and anxiety and caused me to suffer from mental health issues
- there are several discrepancies in the report
- there is no confidentiality within FM
- the outcome says that I have suffered no ill effects while the investigation was carried out, but I had to work in Pitsea office alongside managers who had been involved with previous issues with FM, and don't feel I had any support during the first five months of being there I didn't have a supervision and was advised not to talk to or disclose anything about the investigation... Due to the amount of time the investigation took and having the outcome pending did affect my mental health greatly. As a result I resigned.”

78 The appeal was to Amanda Holgate the Deputy Finance Director. It was to be heard at Pitsea where Ms Holgate was based as was the claimant at the time. The ultimate appeal hearing was adjourned several times and eventually the claimant declined to attend and it proceeded in her absence.

79 Ms Holgate had email correspondence with the claimant asking her to amplify her grounds of appeal. This was carried out through Christine Stearman of HR. The claimant replied directly to Amanda Holgate on 17 January. The hearing itself took place on 12 January in the absence of anybody but Ms Holgate. She was trying to

gather further information before settling an outcome letter. She made thorough notes. She did not waste time going over allegations that had not been upheld.

80 What seems to have dropped out here was the claimant's criticism of the length of the investigation process. That was rather obscured by collateral complaints about how she had been treated at Pembroke House Pitsea which was not something Ms Holgate had to consider at all.

81 This appeal was a review it was not a rehearing. Evidence of that is the claimant mentioned in the later email exchange that the death of a close colleague and friend of hers, Christine Mitchell, had upset and stressed her. (She died in June 2015). Ms Holgate stated: "Susan did not raise the specific issue of bereavement at the hearing so Richard was unable to consider this."

82 Ms Holgate liked Mr Priest's parallel about the GP surgery waiting room to illustrate the exact point that a professional should not be involved in information sharing. She rightly stated:

"I have been unable to establish whether this recording of other customer's notes represents a pattern of behaviour that Susan followed, facilitated or encouraged or if it was an isolated incident".

That was precisely the problem that the tribunal had. We were critical of Mr Priest's assumption / suspicion, adverse to the claimant, that it was habitual. Generally she uses a better vocabulary than Mr Priest had done. Instead of "encourage" she rather refers to "facilitating" or "participating".

83 However she upheld Mr Priest's conclusion on the central point.

84 About the outcome not relating closely enough to the original Layla Claxton complaint she considered it was close enough. The main complaint Of Layla Claxton had been that the claimant was badmouthing her, but that had been rejected by Mr Priest anyway.

85 As far as the mitigating circumstances are concerned, she found that the claimant's workload was not unrepresentative of an FSO and that the claimant had received sufficient management support. She found, as does the tribunal, that when the claimant asked for transfer a month after the incidents, she was transferred almost immediately.

86 The question of "training" raised by the claimant's appeal puzzles us. It is not relevant to the situation because the claimant has properly acknowledged that something was seriously wrong with her conduct in allowing SL to write reports for other service users and not raising it with her own management as an untoward event, whoever's fault it was.

87 Of the stress, anxiety and mental health Ms Holgate concluded: "In the absence of a qualified medical assessment, I cannot assert that the mental health issues Susan describes would impair her judgment to the extent that she would commit the breaches of policy outlined in Richard's findings".

88 The discrepancies in the report, number 7, they related to the bad-mouthing of Layla Claxton which Mr Priest did not uphold anyway (grudgingly). Number 8 which she had asked for clarification of was there was no confidentiality within FM that apparently consisted of the claimant feeling that the disciplinary investigation and the outcome itself would not be kept confidential. She said: "I will take steps to ensure that all managers are reminded of their obligations to keep such matters strictly confidential."

89 Overall her conclusion was: "I believe that Richard reached a fair, reasonable and balanced conclusion following the disciplinary hearing."

90 The final outcome letter was sent to the claimant on 20 January 2017. That was the end of the dismissal process.

Unfair Dismissal

91 This case has given the tribunal a good deal of trouble. As will be evident from our account of the process we have been highly critical and highly sympathetic towards the claimant who had a very straightforward stance in the whole process and was quick to acknowledge fault where she felt there was fault. She was completely open with the respondent.

92 However, between Mr Priest and Ms Holgate, they arrived at a conclusion on the two customer reports completed by SL for other customers, which the claimant knew was wrong, and they both viewed as a serious breach of customer confidentiality.

93 Clearly there is a range of sanctions. Mr Priest's letter implies the forbidden logic that if something is classified as gross misconduct, (an antiquated and widely misunderstood term), it will lead to summary dismissal. That is not necessarily the case at all. There is always a choice of sanction. Nonetheless under section 98(4) of the Employment Rights Act 1996, the tribunal is bound by precedent case law to assess whether the sanction of dismissal was so unreasonable as to be outside the band of reasonable responses. We cannot do that in the final analysis. That band is known to be broad, ranging from harsh to lenient. Sometimes it is obvious that dismissal should be the outcome in a case. In this case it was not so obvious, particularly given the remorse shown by the claimant, and that her conduct was unlikely ever to be repeated.

94 Under section 98(2) there is no doubt that the claimant's dismissal was on account of her conduct. She is not suggesting anything else. The dispute is all on section 98(4) and the range of reasonable responses. There is a neutral burden of proof under section 98(4).

95 On the basis of the evidence the respondent had about breaches of confidentiality it was not an unreasonable decision to summarily dismiss the claimant.

Constructive Dismissal

96 The claimant claims constructive dismissal. It seems that the alleged issues she raised in her resignation letter do not truly amount to breaches of contract at all. She stated:

“After recent events some of which we discussed in my supervision, I feel I have lost faith and trust in Family Mosaic and feel I can no longer work for the company.”

97 What matters were discussed in supervision which led to that letter of resignation? There was a supervision with Paula Blundell on 16 September when the claimant said she would like to get some recognition and appreciation when she does a good job, and for the focus not to be so negative all the time. It is hard to see that itself as a breach of contract. The fact that the claimant was unhappy is not itself a breach of contract by the respondent.

98 The constructive dismissal case really makes little sense. We need no persuading that the claimant was bitterly unhappy with her position and with the delay in the disciplinary investigation. The delay had been inordinate. We find it did not ultimately affect the core finding and outcome on the SL report writing.

99 Sarah Thompson was appointed on 3 February, almost immediately after the Layla Claxton email of 27 January. Ms Smith was constantly chasing up Ms Thompson and was told on 11 May that the report was nearly at an end. She still had not interviewed the claimant or Barbara Horne or Edwina Wellard. These interviews took place around May and June. There was further correspondence with the claimant in July getting further information from her.

100 The respondent was painfully aware that the delay was considerable. Mr Priest took the opportunity at the beginning of his dismissal letter to apologise on behalf of Ms Thompson. The delay did not materially affect the conclusions of Mr Priest and Ms Holgate. The extent of it was not such as to give rise to a fundamental breach of contract by the respondent.

Disability Discrimination

101 It should be noted that the claimant did not emphasise stress as a potential disability during the initial disciplinary process, but only later on appeal to Ms Holgate.

102 The claimant was originally unrepresented when her case was case managed by Employment Judge O'Brien on 5 June 2017. It was not at all clear at that stage what disability she was relying on.

103 The claimant stated she has fibromyalgia, polymyalgia, stress related asthma, eczema, bipolar affective disorder, chronic depression/anxiety and dyslexia. There has been no special medical report for the purpose of these tribunal proceedings. There is no doubt that the claimant's bipolar affective disorder must have been severe in the past. She would not have been sectioned in 2013 if it had not been. It would be surprising if at that stage she did not have disabled status section 6 of the Equality Act

2010.

104 Extraordinarily little evidence was put before the tribunal to support these diagnoses and their effects on day-to-day living. The medical records were disclosed. Judge O'Brien decided that the question of disabled status under section 6 would be rolled up into this final hearing.

105 Now that we come to trial, according to the claimant's submissions, the acts of discrimination are identified as (1) being forced to tender her resignation and (2) being expressly dismissed - those 2. It appears that the claimant is claiming 3 kinds of discrimination: (1) direct disability discrimination - section 13 of the Equality Act 2010; (2) discrimination on the grounds of something arising in consequence of the claimant's disability - section 15 Equality Act, and (3) failure to make reasonable adjustments - section 20 of the Equality Act.

106 As at August 2015 her GP, Dr Giles, from Billericay, was stating: "I am writing a letter in connection with the claimant's claim for a personal independence payment". The doctor states:

"Mrs Bibby does have a past history of anxiety with depression and was admitted to hospital with a hypomanic episode in 2013. She made a good recovery and is in full time employment but still suffers with significant anxiety when outside the home. She also suffers from fibromyalgia such that walking can be painful for her. She has now been told that it may not be possible for employees to park at the place of work and she may have to park some distance away instead. This would cause significant problems for her, not only from a physical point of view in the difficulty in walking she can experience, but also from the fact that this will exacerbate her anxiety and may then cause problems with her getting to work. Therefore I would support Mrs Bibby's application and in particular with regards to the request for a parking badge."

The claimant was refused a personal independence payment.

107 The claimant herself describes her hypomanic episode bipolar affective disorder as having been a one off episode. In her own witness statement she states:

"I was advised by medical professionals that it was unlikely that such an extreme psychotic episode would reoccur as this is the first time in my life that I suffered such an occurrence."

At the time she was aged 46. It is apparently unusual to suffer an episode such as that for the first time in your 40's.

108 Perhaps the other lead mental impairment relied upon by the claimant is chronic depression and anxiety, as distinct from bipolar affective disorder. The claimant says it was first diagnosed in March 2011. The claimant had just recently lost her mother with whom she had lived. She says she got palpitations, chest pains, and low mood. She was, jumpy nervous and had angry outbursts, uncontrollable crying, and feelings of low self worth. She swung from binge eating to self starvation. She could become very withdrawn, frightened to leave the house, and unable to use public transport. She says she became forgetful and burnt food. She knocked things over. The anxiety was caused by stress and sometimes triggered asthma attacks, constipation, stomach pain, and bruxism. Nowhere in this list does the claimant include lapses of professional

judgment.

109 The claimant in her witness statement nowhere suggests the contention, put on her behalf in this case, that her judgment may have been affected by one of her mental impairments. That is a significant and telling omission.

110 The claimant started these tribunal proceedings unrepresented. Her present solicitors came on the record on 7 November 2017. On 9 November they wrote to the tribunal enclosing a medical note from the same Billericay Practice stating:

“... she has been suffering for many months with a flare of depressive illness and fibromyalgia; this is despite increases in her usual medication. I certainly feel at this stage that she is not fit to attend an employment Tribunal; that her conditions would be adversely affected by this, and so her ultimate recovery.”

111 The contention was made to Amanda Holgate on appeal that the claimant had stress and anxiety from working at Family Mosaic. Despite it being a review Ms Holgate did make some determination. As quoted above:

“... in the absence of a qualified medical assessment, I cannot assert the mental health issues Susan describes would impair her judgment to the extent she would commit the breaches of policy outlined in Richard’s findings.”

112 As a tribunal we are in the same position here. It would be pure supposition to say that she let SL write other service users report because of a mental impairment. The claimant does not even assert this on her own behalf. It seems her statement might well have already been provided and exchanged prior to Birketts coming on the record to apply for the postponement of the hearing originally dated for 5 days commencing on 23 November.

113 We have seen an excerpt of medical records. In the bundle we have an excerpt from June 2015 to August 2015 printed out on 24 May 2017. It is page 52 of a remarkable 281 pages. The full medical record would have filled 1 complete lever arch file. It shows that the claimant was prescribed a pink inhaler 200 mg on a repeat basis twice daily. She was also prescribed Duloxetine on a low dosage of 20mg twice a day. Duloxetine is recommended for use with major depression, generalised anxiety disorder and fibromyalgia, as well as stress urinary incontinence. So it would seem to be an appropriate choice of medication. Duloxetine is classified as an SNRI.

114 The record also shows an examination the claimant had on 1 August when she went to see Dr Giles. She had stated to the doctor:

“... Ongoing social anxiety and feels safe at home. Finds she is ok in work and drives there. Feels work very important to her and feels she is coping with this. A young close work colleague died about 6 weeks ago. Long discussion”

This bereavement(Christine Mitchell) was alluded to above. The claimant declined counselling at that stage.

115 If the tribunal had to make a finding on disabled status it would be very hard on

this medical evidence, and the claimant's own witness statement, to say that she was disabled. We do not have to make that determination. We can decide it on the merits, making the hypothetical assumption that the claimant was disabled at the time. We know that the claimant became quite depressed over aspects of the workplace as she stated to Paula Blundell at the last supervision before she tendered her resignation. It was a generalised complaint about negative management perceptions of her.

116 On the claims of disability discrimination first of all there is no direct comparator put forward under section 13. There can only be a hypothetical comparator. Was the claimant treated this way because she had mental impairments (a lot of the physical symptoms seemed to be related to the mental impairments which is the lead impairment). Would the respondent have treated somebody who did not have a mental impairment more favourably? It is utterly impossible to find that the claimant was treated as she was because of any of her impairments and the tribunal reject the complaint.

117 Under section 15 of the Equality Act 2010 discrimination because of something arising in consequence of disability. We found already on the direct unfair dismissal complaint that the claimant did not permit SL to write service users reports because of anything at all to do with her mental impairment. It was poor judgment as she herself acknowledged. It is impossible for us (or, Ms Holgate on the appeal), without more medical evidence to see any link at all between any impairment and the poor judgment. We cannot conceive that any such link is what brought about the claimant's dismissal. See for the causation *Charlesworth v Dransfields Engineering* UKEAT/0197/16.

118 So far as the resignation is concerned this is almost impossible to understand. We have found that the claimant's resignation was not a constructive dismissal. There would be no compensation for loss of earnings flowing from the fact that the claimant resigned as her employment ended anyway for different reasons than those for which she says she resigned. She says resigned because she felt pressured. She resigned in part because of the delay to the investigation. Did that arise from her disability? Did it impact on her more because she was a vulnerable person with a mental impairment? Arguably yes. The concerns in the claimant's resignation letter reflect a negative management perception of her. It happens she resigned 2 weeks after the investigation report was sent to her on 21 September. Her first resignation was on 3 October.

119 In our view the reason the claimant resigned was because she was likely to be taken through a disciplinary hearing, and not because of something arising from her disability. It was a pre-emptive attempt to safeguard her work record. We do not consider it was tainted in any way with disability discrimination.

120 The complaint under section 20 of the Equality Act 2010 of failure to make reasonable adjustments has a number of weaknesses. Presumably it is said that dismissing the claimant for gross misconduct was a provision, criterion, or practice. The adjustment therefore would be not to dismiss her.

121 The tribunal cannot see that the respondent knew the claimant was at a substantial disadvantage here because of any impairment of hers, for the purpose of

section 20 and Paragraph 20 of Schedule 8 to the Equality Act 2010 (knowledge of substantial disadvantage). It was not part of the claimant's case to Mr Priest, and she did not suggest to Ms Holgate or to the tribunal that this lapse of judgment was caused by any impairment. Knowledge is the principal weakness with the reasonable adjustments claim, even if we were to assume everything else in the claimant's favour.

122 After that a reasonable adjustment assessment is usually similar to an unfair dismissal assessment. In other words are there things the respondent could reasonably have done which they did not? The only adjustment the claimant contends should have been made is for the claimant not to be dismissed or to give her only a warning.

123 At the disciplinary hearing the claimant was told at the outset that she could have a break whenever she wanted to when she reached the passage where she talked about "bawling my eyes out" Mr Priest again suggested she take a break and she was emphatic in saying no. It is arguable that an employer should have insisted contrary to her insistence but to say that this was a failure to make a reasonable adjustment in the process is going a step too far. There was one 10 minute break in the disciplinary hearing.

124 Would a reasonable adjustment have prevented her from feeling the negative perceptions of her that made her resign? We cannot imagine what such reasonable adjustments would be. The complaint is not clearly put on the claimant's behalf.

125 This has been the claimant's problem at this final hearing that very little focus has been given to the claimant's disability discrimination claims. The closing submission for the claimant is mainly a recital of the law and a long quote from the code about employer's knowledge / constructive knowledge.

126 The tribunal reminds itself generally of Family Mosaic's approach in the earlier years of the claimant's employment. Her attendance record had been dreadful and despite that they gave her another chance when it appeared after even after she had been dismissed that she was substantially recovered and should be given a chance. Even after that her attendance continued to be poor and that is why she was on a stage 3 attendance warning at the time she was summarily dismissed for her conduct.

127 The respondent gave the claimant support, and when she requested help in order to catch up with administration, that support was provided in order to make her job easier to cope with and thus less stressful. Many employers would not have been so accommodating.

128 In a 14-page submission to the tribunal Ms Sole for the respondent only saw fit to devote 1 page to the claimant's disability discrimination claim. It has had a very low profile and is almost an afterthought.

129 Judging from an exceptionally large number of Wow awards pointing to an excellent rapport with service users, the claimant was doing well at work. She was popular. If the claimant had not been a successful worker her appeal against her earlier attendance dismissal might not have been allowed. Clearly she was seen as an

asset.

130 There is another important point ther makes which has not been challenged, that neither of the decision-makers in the unfair dismissal Mr Priest and Ms Holgate knew anything about the claimant's sick record. It was not relevant to any of the issues they had to decide. We do not know if Ms Thompson was aware of the sickness record. If she did know she certainly did not allude to it anywhere in her investigation report.

Money claim for month in hand

131 So far as the month in hand is concerned this is alleged by the claimant to have occurred around 1 to 31 December 2009. She went from being paid in arrears to being paid for the current month when she acquired employee status and was not in the relief bank which she had been from 2007 till 2009. After that from being paid at the end of the month she was paid on the 1st of the month, it was salary in advance. It means that she got a catch up month at the time in 2009 / 2010. We saw 3 payslips: 31 October 2009 at the end of November, 30 November 2009, the next one was 31 December 2009.

132 This was explained painstakingly by Amanda Smith who dealt with the enquiry on behalf of HR. This seems to have been settled during the hearing. It did not form any part of the respondent's or the claimant's closing submissions to the tribunal. Mr Soor, for the claimant accepted that the pay records showed there was no shortfall. On that basis the claim for arrears of pay has to be dismissed.

133 The claimant has failed to discharge the burden of proof in proving a shortfall in her pay arising from that period as a breach of contract claim. In fact Amanda Smith made it eminently clear in her last email to the email as follows:

"If you started on the 26th October, you would have been paid from the 26th October – 30th November inclusive in your November salary. We do not and never have paid staff in arrears.

However, if you have actual evidence to support this claim then please do send through the payslips and I will look into further."

Outlying complaints - constructive dismissal – no findings made

134 For some reason, we do not understand why, we were given evidence about an incident at work with Fay Kricha who was a witness to the tribunal. Apparently there was a hot desking arrangement. Fay was heard to say: "It's my fucking desk". She thought it was under her breath but it was not. The claimant clearly heard it. This was approximately 1 week before 1 December 2015 when the SL reports were written.

135 The claimant complained to Edwina Wellard and Paula Blundell. It does not seem to have resulted in any changes. The claimant said at the foot of her complaint:

"After careful consideration I am deeply concerned about the impact of working in this environment on my health as I have had an outbreak of asthma and eczema on my face (stress related) and would ask if we can look into the option of me moving to a different office department if possible as I find the office becoming more and more uncomfortable to work in.

Sorry for any inconvenience caused.”

136 We are not sure why Ms Kricha was called really because the relevance of all this is marginal. The tribunal discounted it. It was conspicuously trivial and of no relevance to what we were asked to decide in the case.

137 There was another episode of extraordinarily marginal significance with which we need not deal. This was dealt with in evidence by Jennifer Walter. There had been concern over Scott McGaughin’s leaving luncheon in a local Harvester restaurant. There were reasons for the claimant not going to the luncheon. Mr McGaughin was not actually in the claimant’s team even though they knew each other. Why we were told about this at all we do not know.

138 Neither of these trivial episodes comes close to raising or even contributing to a constructive dismissal claim, however much they may have affected the claimant subjectively.

Employment Judge Prichard

23 August 2018