Appeal No. UKEAT/0275/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 23 August 2018
Judgment handed down on 1 November 2018

Before

HER HONOUR JUDGE STACEY

MS G MILLS CBE

MS N SUTCLIFFE

MR L PHILANDER — APPELLANT

LEONARD CHESHIRE DISABILITY — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR CHRISTOPHER MILSOM (of Counsel) Instructed by: Duncan Lewis Solicitors Spencer House 29 Grove Hill Road Harrow HA1 3BN
For the Respondent	MR RICHARD HIGNETT (of Counsel) Instructed by: Bates Wells & Braithwaite LLP 10 Queen Street Place London EC4R 1BE

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

CONTRACT OF EMPLOYMENT - Wrongful dismissal

DISABILITY DISCRIMINATION - Direct disability discrimination

The Employment Tribunal ("ET") was entitled to conclude that the Respondent had established a conduct reason for dismissal on account of the Claimant before the ET's gross negligence. The reason had not been mislabelled by the Tribunal and its finding of not unfair dismissal stands.

The Tribunal was also entitled to conclude that the Claimant had not been wrongfully dismissed on the evidence before it and on its findings of fact.

There was no error in the Tribunal's approach to the comparator exercise both in considering disparity of treatment for the purposes of the unfair dismissal claim and for the exercise of the statutory comparison under section 23 **Equality Act 2010** in considering the Claimant's complaint of direct discrimination.

Employment Tribunal decision upheld.

HER HONOUR JUDGE STACEY

1. This is an appeal against the Judgment of the Employment Tribunal ("ET") sitting at London South before Employment Judge Freer and Members (Ms S Campbell and Mr C Edwards) which took place over six days from 3 to 6 October 2016 and 29 to 30 November 2016 followed by two further days in Chambers on 1 December 2016 and 5 January 2017. Judgment was reserved and Judgment with Reasons were sent to the parties on 11 May 2017.

2. The Appellant was the Claimant before the Employment Tribunal and the Respondent to the appeal was the Respondent below. I shall continue to refer to the parties as they were before the Employment Tribunal.

3. The Tribunal unanimously dismissed all the Claimant's claims, which were for unfair dismissal, wrongful dismissal and disability discrimination.

4. The issues in the three grounds of appeal permitted to be argued before this Tribunal are that the Employment Tribunal failed to consider whether the reason for dismissal put forward by the Respondent in the unfair dismissal complaint properly fell within the capability (as opposed to conduct) category (which would mean that the Respondent had not established a potentially fair reason for dismissal), whether the Tribunal's findings of fact supported its conclusion that the Claimant had not been wrongfully dismissed, and, in relation to the disability discrimination complaint, whether the Tribunal had correctly approached the comparative exercise in considering whether the Claimant had been less favourably treated and subject to unlawful direct disability discrimination contrary to section 13 **Equality Act 2010**.

5. The appeal first came before Mr Justice Choudhury on the sift, who allowed the appeal to proceed to a Preliminary Hearing which took place before HHJ Eady QC on 26 February 2018. She permitted the matter to proceed to a Full Hearing on parts of grounds 1 to 3 only of the proposed grounds of appeal, dismissing the remaining grounds. She listed the case to be heard before a full Tribunal with Lay Members for their expertise and assistance in analysing the Employment Tribunal's approach to the category of reason for dismissal - conduct or capability, assessment of what constitutes gross misconduct and the comparative exercise required in the disability discrimination claim.

The Background Facts

6. The Claimant commenced employment with the Respondent disability charity and care provider in 1998 as a Support Worker. Over time, he had risen to the position of manager of two residential homes, Maple House and Elmer's End. When the Elmer's End home closed down in 2013, the Claimant agreed to become the Service Manager and Registered Manager of Parkside in Penge in addition to Maple House. Both homes are in the London Borough of Bromley. In the Claimant's ET1, he describes his very great reluctance to take on Parkside, but the ET makes no findings in that regard other than to record that the Respondent agreed to put in place support measures to assist him in the role at Parkside. A Registered Manager is one who has been approved and registered by the CQC and it is a regulatory requirement for institutions such as Parkside to have a CQC Registered Manager.

7. The Claimant is disabled within the meaning of section 6 **Equality Act 2010** with the condition of dyslexia which had been diagnosed in January 2012. A number of adjustments had been put in place in order to support him, recommended in a report prepared by Dyslexia Action

and an employer's response provided to Dyslexia Action by the Claimant's then line manager, Claire Waterman in December 2012.

8. From November 2013 Mr Sam Clubb was his line manager. Considerable criticism is made of Mr Clubb by the Claimant in his claim form, whom he considered to be an unsupportive and difficult manager and who did not provide the supportive measures outlined by the Dyslexia Action Report. The Tribunal found however that the Respondent acted on the recommendations of the Dyslexia Action Report (see paragraph 35) although in one aspect, the aim of Mr Clubb meeting the Claimant every six weeks for supervision, was not achieved. The Tribunal did not find it to be a significant failing.

9. The Tribunal makes a number of findings about the ongoing supervision sessions between the Claimant and Mr Clubb and records that at the time, the Claimant stated that he appreciated the support provided to him, recording, for example that he was "very happy in post". The Tribunal rejected the Claimant's evidence in cross-examination that he did not raise problems with Mr Clubb for fear of reprisal stating the evidence was unconvincing and not credible (see paragraph 170). It is not entirely clear if the conclusion of that finding was that the Claimant's apparent satisfaction at the time was genuine, or if there were other reasons for not raising his concerns earlier, but little turns on it.

10. CQC inspections at both establishments noted various problems throughout the period under consideration from November 2013 onwards - for example they assessed Maple House (where the Claimant had been in post for some time) as "Action needed" with regard to management of medicines where instances of inaccurate recording of medicines was discovered following an unannounced visit in November 2013.

11. In July 2014 a London Borough of Bromley contract compliance visit to Parkside raised a number of areas for improvement, in particular service users' weights needed to be accurately recorded.

12. Mr Clubb had also raised a number of concerns in supervision meetings with the Claimant. Initially they were low key and supportive, providing guidance and additional training where Mr Clubb considered it appropriate, for example in relation to the Deprivation of Liberties Safeguards (DoLS) which required application to be made to the Local Authority where residents lacked freedom and for the CQC to be informed (see paragraph 53).

13. In November 2014 Mr Clubb stressed to the Claimant that it was imperative that staff understood and acknowledged the importance of maintenance of accurate records and a failure may result in disciplinary action. Mr Clubb was evidently concerned about continued problems with record keeping and the problems being identified both by the Local Authority and the CQC. The Tribunal does not record that if there were continuing failures, whether it would be the individual staff members or the Claimant who would be subject to disciplinary action, but either way, the importance of the issue was clearly explained to the Claimant.

14. In January 2015 there was a misunderstanding between Mr Clubb and the Claimant. Mr Clubb considered that the Claimant had raised a trivial matter with him which did not need to involve him, concerning a member of staff changing her contracted hours, and the Claimant considered Mr Clubb had been sharp with him. The Claimant raised it with Mr Clubb who apologised if he had been insensitive, explaining that the Claimant needed to exercise judgment in deciding what matters to refer to him. The matter was constructively resolved after an open and productive discussion between them.

15. In supervision on 30 July 2015 Mr Clubb was concerned about two safeguarding/ complaints issues. Mr Clubb was also concerned about the Claimant's failure to keep him informed about the DoLS applications, following earlier supervision instructions to do so and the comprehensive training that had been provided to him. Mr Clubb considered matters to be serious enough to invoke the LCD capability policy in consequence and informed the Claimant accordingly.

16. Shortly before the 30 July 2015 supervision, the CQC had conducted an unannounced visit to Parkside, but their report was not delivered until 31 July 2015 so it was therefore not discussed in the supervision. When the report was received it was highly critical. A formal warning notice CQC under section 29 **Health and Social Care Act 2008** and Regulation 12 of the associated Regulations was issued to the Claimant in his capacity as Registered Manager of Parkside home in respect of his failing to comply with safe care and treatment of residents, and a second warning notice was issued to the Respondent head office, as the service provider in respect of premises and equipment at Parkside.

17. The Claimant was suspended on 4 August 2015 pending an investigation as a consequence of the formal warning notice issued by the CQC to him. The Tribunal found that the decision to suspend the Claimant was made by Ms Rosemarie Pardington, Director of Services, following a discussion with Mr Clubb and a number of other senior managers. The allegations and suspension were explained to the Claimant by Mr Clubb at a meeting on 4 August and confirmed in writing the next day. They were that: firstly, he was alleged to have failed in his duty of care and may have put service users at potential risk; secondly, he was alleged to have neglected service users' needs, thereby creating untenable safeguarding risks to people who use the service that he was tasked to manage; and thirdly, that his failures had directly brought the Respondent into disrepute.

A fourth allegation that he had failed to give the required statutory notification to the CQC of a DoLS application to the Local Authority, was later added when it came to light when the Service Manager covering for the Claimant following his suspension (Kevin Parkes) discovered the omission. The Claimant was warned in the letter that the allegations might constitute gross misconduct and an investigation would commence.

18. The allegations were investigated under the Respondent's disciplinary procedure by Ms Sue Hopkins who concluded that:

> **"Throughout the investigation LP [the Claimant] does not seem to comprehend the great range of responsibilities that are involved with managing a complex and challenging LCD [Leonard Cheshire Disability] service. LP does not have a consistent comprehension of the need to comply with LCD['s] and national regulations commensurate with service users['] well-being and ongoing care. There is undeniable evidence that his lack of planning, record-keeping and staff education puts service users at risk. It is apparent that the CQC's unannounced inspection and the subsequent report with its inherent criticism was unfortunately entirely justified." (Paragraph 74)**

19. At a disciplinary hearing conducted under the Respondent's procedure by Mr Robert Edwards, Head of Operations, the allegations were found to be well founded and Mr Edwards concluded, after considering mitigation and alternatives to dismissal, that he had "no option but to find that due to the gross nature of the findings against you, I have no option but to summarily dismiss you from your post of Service Manager at Parkside without notice or payment in lieu of notice." The Claimant's effective date of termination was 15 October 2015.

20. The Claimant appealed the decision to dismiss him on the grounds that the decision was "a failure of duty of care with regard to the disability discrimination act"; was inconsistent with other cases and, thirdly, too harsh. He relied on two comparators who he said had been treated more leniently in comparable circumstances and who were not disabled. Mr Jogan Dullip, Service Manager of Shore Lodge and Mr Jason Semple, Service Manager of Seven Springs, since the CQC had also criticised the service provided at both homes.

21. The appeal was unsuccessful and the appeal officer, Ms Kim Moore, did not consider the circumstances of CQC's criticism of Shore Lodge and Seven Springs were comparable to the problems at Parkside. She concluded that the other Service Managers' actions had not directly put service users at risk, as had been the case with the Claimant and she upheld the decision to dismiss the Claimant.

22. The Tribunal made a number of findings concerning the demands of the role and the shortcomings in the Claimant's performance that the Respondent had identified over a considerable period of time gleaned from a number of sources: its own internal management and supervision procedures, the Local Authority, London Borough of Bromley oversight of the homes, and also the CQC.

23. The Tribunal found that the Claimant had key responsibilities and accountabilities as both Service Manager and Registered Manager with regard to vulnerable people in a regulated environment, with specific legal responsibility to ensure that the care services delivered met the legal requirements under the **Health and Social Care Act 2008** and regulations made thereunder. As the Registered Manager he was required to have the necessary qualifications, skills and experience to manage the regulated activity. The ET in paragraphs 131 to 170 made detailed findings. They concluded that in a number of key areas, the Claimant had individual responsibility for which he had received appropriate training, guidance and support consistent with his needs identified by the Dyslexia Action Report. The areas covered included putting in place service users' Personal Care Plans and ensuring each service user's risk assessments were up to date, as well as ensuring that they were followed. This was an extremely important and serious responsibility. The care and management of medicines was the Claimant's responsibility including the recording and auditing of medication. COSHH risk assessments and ensuring

COSHH items were kept in a locked cupboard was also part of his role. Ensuring service users, especially those with Type II diabetes, were regularly weighed and had their blood sugar levels monitored was the Claimant's responsibility and another extremely important one. The specific responsibilities he had concerning DoLS vis a vis both the Local Authority and the CQC has been mentioned already.

24. Unfortunately, the ET found that the Claimant had failed in significant ways in relation to all those areas over a sustained period of time, notwithstanding the support, management and guidance and steps put in place to support him. For example, for a service user with Type II diabetes there was no treatment or management plan in place and the individual had not been weighed or had their blood sugar level recorded for over eight months. DoLS applications approved by the Local Authority had not been reported to the CQC or Mr Clubb, even though the Claimant had recently received training on the requirement to report to the CQC on at least two occasions. These were all part of the Tribunal's findings of fact.

The Issues before the Tribunal

25. The issues before the Tribunal had been identified and agreed at a Preliminary Hearing in advance of the main hearing on 21 March 2016. They were, whether the Respondent had shown a potentially fair reason for dismissal relating to the Claimant's conduct, pursuant to section 98(2)(b) **Employment Rights Act 1996**; and whether the Respondent had a genuine belief in the Claimant's misconduct, based on reasonable grounds after a reasonable investigation and having followed a fair procedure and if the decision fell within the band of reasonable responses.

26. The Claimant alleged direct disability discrimination contrary to section 13 **Equality Act 2010** that because of the protected characteristic of disability he had been treated less favourably

by the Respondent than they treat, or would treat, others. He relied on two acts of alleged discrimination: firstly, the invoking of the disciplinary procedure alleged as a detriment and, secondly, dismissal. It was identified at the Preliminary Hearing that the Claimant was relying on actual comparators of Jason Semple and Jogan Dullip.

27. The further issue of wrongful dismissal was added at the outset of the Full Hearing when the ET consented to the Claimant's amendment application.

Employment Tribunal Conclusion: Disability Discrimination

28. The Tribunal found that neither Mr Semple nor Mr Dullip were in materially similar circumstances to the Claimant and were not apt comparators for the disability discrimination complaint. Although they had both been Service Managers at establishments criticised by the CQC, the Respondent had not accepted the criticisms made of them by the CQC (and challenged them with a measure of success), whereas at Parkside, Ms Hopkins found the CQC report and criticism "entirely justified". The Tribunal also found that it was a material difference that the CQC criticisms of Seven Springs and Mr Semple had fallen short of a formal warning notice. Both Mr Semple and Mr Dullip had been subject to the capability procedure which had resulted in action being taken against them short of dismissal.

29. The Tribunal concluded that on the basis of an absence of appropriate comparators, the complaint of disability direct discrimination must fail (paragraph 100). The Tribunal however nonetheless went on to consider the substance of the disability discrimination complaint and concluded that the Claimant had not raised primary findings of fact from which the Tribunal could conclude, even by inference, that his dyslexia condition was the reason for the invocation of the disciplinary procedure and his subsequent dismissal. The Tribunal broke their reasoning

down to each of the three stages and decision points leading to the Claimant's dismissal: (1) the decision to suspend and invoke the disciplinary procedure; (2) the decision to dismiss; and, (3) the decision of the appeal. It noted that different people had been involved at each stage, and Mr Clubb was not the decision taker in any one of those stages. In relation to each decision point the Tribunal concluded that the reason why the decision had been taken was because of the CQC report and warning notice and was not because of the Claimant's dyslexia.

Employment Tribunal Conclusion: Unfair Dismissal

30. In the unfair dismissal complaint, the Claimant had advanced a positive case that he had been dismissed in order to facilitate a restructure. The Tribunal rejected the Claimant's suggested reason for his dismissal and concluded that the reason for the Claimant's dismissal was related to the CQC report and principally the Regulation 12 warning notice issued to him personally as the Registered Manager of Parkside. It went on to conclude that that was a conduct reason because of the extensive training and guidance that the Claimant had had in the matters of concern raised by the CQC report and that he had been provided with access to assistance if required (paragraph 155).

31. The Tribunal concluded that a fair procedure had been followed and the Respondent had a reasonable belief, based on the evidence before it, entitling it to conclude that the Claimant had been guilty of gross misconduct. The Tribunal also rejected the disparity of treatment argument and the comparators relied on by the Claimant to demonstrate unfairness by inconsistent treatment, having directed itself in accordance with the well-known line of authorities from **Post Office v Fennell** [1981] IRLR 221 through to **Paul v East Surrey District Health Authority** [1995] IRLR 305. They looked in detail at the circumstances surrounding Seven Springs and Shore Lodge and concluded that the material differences between Parkside and the other two

establishments, did not lead to a conclusion that there was an inconsistency of treatment as between the Claimant on the one hand and Mr Semple and Mr Dullip on the other, that rendered the Claimant's dismissal unfair.

32. The decision went through some of the detailed and extremely worrying findings of the CQC in relation to the Claimant and Parkside, which it considered were more troubling, and of greater magnitude than the criticisms of Shore Lodge and Seven Springs. The Tribunal summarised that the issues identified by the CQC in the warning notice "can fairly be described as a catalogue of significant failures that placed the health and safety of service users at substantial risk, which fully explains why the statutory Warning Notice had been issued by the CQC in addition to the poor Inspection Report" (paragraph 138).

33. The Tribunal considered the arguments raised by the Claimant that his dyslexia had made an impact on his ability to carry out his work and went through the Dyslexia Action Report that had been prepared to assist both the Claimant and the Respondent in January 2012. They concluded the Claimant had received appropriate supervision and support from Mr Clubb as he had confirmed contemporaneously in supervision. In reaching that conclusion it took into account the one occasion when the Claimant considered Mr Clubb had been short with him. They noted that on that occasion, the Claimant was able to address the issue directly with Mr Clubb, who had apologised and explained why he had behaved as he had done. The Tribunal therefore considered that the Claimant's disability had not impacted on the reasonableness of the Respondent's decision to dismiss and that dismissal for gross misconduct fell within the range of reasonable responses (paragraph 182).

Employment Tribunal Conclusion: Wrongful Dismissal

34. The Tribunal dealt with the wrongful dismissal claim in paragraphs 187 to 189, drawing on its earlier findings and the CQC warning notice. It concluded, having heard the evidence, that the Claimant had committed a repudiatory breach of contract based upon the terms of the warning notice for Parkside, noting that the CQC is "an independent body entrusted to make such judgements and the accuracy of which was not challenged." They considered all the matters raised in the warning notice and concluded that they were serious, and picked out one example of particular concern which was the Claimant's failure concerning a service user with Type II diabetes where the Tribunal found that the Claimant was significantly at fault. It was illustrative of a substantial omission or oversight and constituted gross misconduct the ET concluded. It did not represent the totality of the Tribunal's findings relevant to the wrongful dismissal claim.

Grounds of Appeal

35. Our approach to this appeal has been to scrutinise the ET's findings with particular care and anxiety, given the delay in promulgating its Decision. A late Judgment is not of itself sufficient to result in a successful appeal, but it is a helpful start for an Appellant, and we have approached our consideration of the appeal and the Judgment itself knowing the case was stale when it was written.

Ground 1: Unfair Dismissal

36. In permitting grounds 1 to 3 to go forward for a Full Hearing, HHJ Eady QC made clear that she was not allowing a re-run of the case below and struck through paragraphs 9 and 12 of the proposed grounds relevant to grounds 1 and 2 which sought to re-open the facts.

37. The issue in ground 1 is whether the ET had failed properly to consider whether the case was more one of capability than conduct in the unfair dismissal complaint. In permitting the matter to proceed on this ground it is not apparent that the Claimant has permission to re-run his point concerning the comparators, but he has chosen to do so anyway, and to that end submitted a 333 page supplementary bundle. But since Mr Milsom skilfully argued that it was bound up with the issue of coherence and consistency and overall fairness - "equity and the substantial merits of the case" in the words of the statute, we allowed the argument to be advanced before us.

38. However, it was an argument which ultimately failed. It was the ET's task to analyse the evidence and make facts. They saw and heard the evidence, which was considerably more extensive than the 333 pages in the supplementary bundle. They were entitled to conclude that in relation to Seven Springs, the fact that the CQC criticism fell short of a statutory warning notice was an important material difference to the position at Parkside. We see from the papers that it was particularly irksome for the Claimant that Mr Semple, Seven Springs Manager, had previously been an interim Manager at Parkside and that the Claimant considered he had inherited a very troubled establishment. The difficulty with this argument however is that the Claimant had been in post for 18 months at Parkside before the CQC statutory warning was issued against him.

39. At Shore Lodge the fact that the Respondent did not accept the CQC findings and challenged them, unlike at Parkside, was a material and important distinction which distinguished the circumstances from Mr Dullip to that of the Claimant. Mr Milsom makes extensive reference to the supplementary bundle and submitted that the CQC did not accept its criticisms of its report. Even if that were the case, the Respondent was entitled to conclude from its knowledge of the

A sector and industry and the individuals involved that Mr Dullip was part of the solution and not the problem, and that the capability procedure was the appropriate route to enable the problems to be rectified. The ET did not fall into the substitution mindset.

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40. The ET heeded its own direction in paragraphs 16 and 17, which accurately set out the caution urged by the Court of Appeal in **Paul v East Surrey District Hospital Authority** [1995] IRLR 395, to scrutinise the Claimant's arguments on disparity with particular care. It did so, and found them wanting.

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41. The attempt to re-visit the ET's findings relating to the inconsistency of treatment argument, is, on close analysis an attempt to re-open the facts. The circumstances when this appeal might do that, have not been met.

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42. The assertion that the failings at Parkside did not constitute the true reason for dismissal and were a pretext, was not sustainable on the ET's findings. The ET considered the Claimant's view that his dismissal had been to avoid an expensive redundancy payment in a restructure, and it was dismissed by the Tribunal.

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43. The potentially more fruitful area, as identified by HHJ Eady QC, is the labelling of the reason for dismissal as conduct, the Claimant's submission being that there was a manifest failure by the Tribunal to engage in the distinction between capability and conduct and that the facts found by the Tribunal supported a conclusion of capability rather than conduct. The Claimant relied on the authority of **Burdett v Aviva Employment Services** UKEAT/0439/13 for the proposition that the ET had not asked itself whether there were reasonable grounds for the Respondent to conclude that the matters identified in the CQC report which were the

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responsibility of the Claimant, had been done wilfully or in a grossly negligent way, which would justify a finding of misconduct.

44. The details relied on in support of that contention were the Claimant's commitment to work; the impact of his dyslexia on his work performance; that delegation was known and accepted therefore some of the errors identified by the CQC report were wrongly blamed on the Claimant; the failure to inform the CQC of the DoLS application was a genuine error; and that the Claimant was undergoing prostate cancer treatment at the time.

45. The Respondent counters that these were matters taken into account by the Tribunal and they were entitled to reach their conclusions on the facts that were its to find. Mr Hignett also noted that the claim had never been advanced by the Claimant as a capability dismissal. He accepted the conduct identified in the CQC report, but the thrust of his case was that this was a smokescreen for the real reason for dismissal which was the proposed restructure and, in the alternative, that dismissal was too harsh a sanction bearing in mind the mitigation and reasons why Parkside was failing.

46. The ET accurately summarised the law in paragraphs 8 to 9 and no criticism is made of it in that regard. It noted that the reason for dismissal does not have to be correctly labelled at the time and different reasons may be relied on.

47. Mr Milsom accepted that misconduct can be deliberate or inadvertent since it is a long-established principle that gross negligence as well as deliberate wrongdoing can amount to misconduct.

48. It is apparent from the Tribunal's detailed findings, even if not expressly articulated, that the Respondent concluded, and was reasonably entitled to conclude, that the Claimant had been grossly negligent in his management of Parkside. They considered the impact of his dyslexia made no difference to his performance and concluded that the Dyslexia Action Report had been largely implemented and followed. The few recommendations that had not been followed to the letter, such as the frequency of supervision had no overall impact. Indeed, such a finding was consistent with the Claimant's case advanced at the Tribunal (but not articulated during the course of his employment) that he gained little benefit from Mr Clubb's supervision of him in any event. This case is not on all fours with **Burdett**. In that case the evidence was that Mr Burdett had only committed the assaults which caused his dismissal because of his mental impairment. In this case, the ET specifically found that the Claimant's dyslexia did not explain the catalogue of failures identified by the CQC: they "were not matters in respect of which [his] dyslexia condition had material bearing" (paragraph 188). In light of that clear finding by the ET, it follows that the ET did not place the burden on the Claimant to devise coping strategies in a regressive pre-disability discrimination legislation type approach, and the criticism of the Tribunal in this regard is wide of the mark.

49. The ET found that the Claimant was legally responsible for ensuring proper patient records were kept and that he had been repeatedly advised of his obligations in supervision. It found the duties were not delegable.

50. The ET had addressed head on the interplay between misconduct and capability in relation to the failure to inform the CQC of the DoLS application, discussed the recent training he had had and concluded at paragraph 155 that it amounted to misconduct.

51. It must be painful indeed to be dismissed for gross misconduct where there is no deliberate wrongdoing and we understand why the label will have been so difficult for the Claimant to accept. Given however the extent of the criticisms made of the Claimant and the aspects of his role for which he was personally responsible, the Tribunal cannot be fairly criticised for concluding that the extent of his lack of comprehension of the requirements of his role entitled the Respondent to conclude that his actions and inactions as Registered Service Manager constituted gross misconduct. The ET has explained its reasoning and dealt with the relevant facts necessary to reach its conclusion.

52. The dividing line between conduct and capability can be paper thin and even porous. Some behaviours or acts or omissions which fall within the definition of extreme negligence can be considered as either capability matters or conduct matters and can properly be described as either. The Respondent in this case was entitled to consider the Claimant's behaviour as conduct. It could also have concluded it was capability. Even if it had plumped for a capability label it would, on the facts, have been entitled to dismiss, given the extensive recent training on the matters identified in the CQC report and the seriousness of the failings.

53. Mr Milsom's reliance on Mr Clubb's decision at the 30 July supervision session (prior to the receipt of the CQC statutory warnings) to invoke the capability procedure does not undermine the decision to treat the matters identified by the CQC as misconduct matters, but merely emphasises that the Respondent itself was increasingly aware of the shortcomings of the Claimant, independent of the CQC report.

54. Ground 1 of the grounds of appeal is not successful.

Ground 2: Wrongful Dismissal

55. In ground 2 the issue is whether the ET has made sufficient findings to reach a sound conclusion that the Claimant had not been wrongfully dismissed and concerns his claim for notice pay.

56. Here Mr Milsom criticises the brevity of the ET reasoning and that the ET did not identify what rendered any failings on the part of the Claimant as amounting to repudiatory conduct, citing the well-known authority of **Neary & Another v Dean of Westminster** [1999] IRLR 288 that the employee's conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that [the employer] should no longer be required to retain the [employee] in his employment." Nor did it make findings about the personal culpability of the Claimant.

57. In the course of argument Mr Milsom conceded that gross negligence can amount to gross misconduct, which can amount to repudiatory conduct even where the behaviour is not wilful, or even blameworthy. He accepted that whether repudiatory conduct has occurred is ultimately a question of fact for the ET, but he criticised the Tribunal's decision for a lack of clarity and that it did not explain why it had found the conduct to be repudiatory.

58. We agree that the reasons could perhaps have analysed its findings in more detail by reference to the case law. The difficulty for the ET was that the wrongful dismissal claim had been added as an afterthought and we are told scantily addressed in the Claimant's closing submissions.

59. Our reading of paragraph 187 is that the ET has found as a fact that the criticisms of the Claimant in the CQC Regulation 12 warning notice are accurate and that they constitute a repudiatory breach of contract. The reference to the role of the CQC as an independent body is made to add strength and explanation to the ET's conclusion, and not a derogation of the ET's fact finding responsibility. But in any event, the Claimant accepted the factual accuracy of the contents of the CQC report. His challenge was to the extent of his personal responsibility for the failings and that the sanction of dismissal was too harsh, bearing in mind that there were considerable inherited problems at Parkside. It was the apportionment of responsibility for all the acknowledged failings identified by the CQC at his door that he was concerned about not seeing matters in the mitigating light through which he saw events.

60. In is clear from the context that paragraph 188 does not stand alone, but is to be read with the Tribunal's earlier paragraphs where it discusses the problems identified in the CQC report and statutory warning, and the Claimant's contractual and regulatory responsibilities as both the Registered Manager and Service Manager of Parkside. Drawing on its earlier findings it concludes in paragraph 188 that the Claimant's failings constituted gross misconduct. It uses, merely by way of example, the service user with Type II diabetes who was not weighed and had not had her blood sugar levels checked for over eight months, and that the Claimant was significantly at fault.

61. We are mindful that Ms Hopkins' investigation found that the Claimant did not seem to comprehend the range of responsibilities required of him, and accept Mr Milsom's submission that this was not a case of deliberate wrong-doing by the Claimant. But the Tribunal was entitled to conclude from the evidence before it that the Claimant's shortcomings were serious enough to

constitute gross negligence, amounting to repudiatory conduct, such as to entitle the Respondent to dismiss without notice.

Ground 3: Disability Discrimination Comparator

62. Ground 3 challenges the ET's conclusion that there had been no direct disability discrimination and its approach to the comparative exercise in assessing whether there has been less favourable treatment because of the protected characteristic relied on, in this case, disability.

63. The nub of the concern is paragraph 100 and the ET's finding that because Mr Semple and Mr Dullip were not true actual comparators with materially comparable circumstances to those of the Claimant, the discrimination claim must fail.

64. Mr Milsom submits that there is a duty on an ET to consider how a hypothetical comparator would have been treated (**Balamoody v UK Central Council for Nursing Midwifery and Health Visiting** [2002] ICR 646) even where a Claimant relies solely on an actual comparator, and in any event the real focus of the legislation is the consideration of the reason why the treatment occurred.

65. If paragraph 100 had been the end of the matter, Mr Milsom would have had a good point. The difficulty for him however is that the ET did not stop there. It went on to consider the reason why the treatment occurred and in paragraph 104 concludes that the burden of proof has not shifted to the Respondent to prove a non-discriminatory reason for the treatment. It then goes further still in paragraph 105 to say, in effect, that if the burden had shifted, the cogent explanation for the treatment was the CQC report, it was not because of disability. It is worth remembering

A that this was a claim brought as a direct discrimination complaint, not a claim of discrimination arising from disability (section 15 **Equality Act 2010**).

B 66. Mr Milsom has sought to attack the ET's findings of fact as to who made the decision to suspend the Claimant and commence a disciplinary investigation. This arguably strays beyond what was permitted by HHJ Eady QC at the Preliminary Hearing. But even if we permitted the point to be argued, the ET was entitled to conclude that the most senior person in the room at the C meeting, Ms Pardington, was the decision taker: it was a legitimate inference for them to draw from the evidence[1]. Therefore, the argument would not have been successful, even if we had allowed it to be advanced.

D 67. In the submissions, extensive criticism of the ET in rejecting Mr Semple and Mr Dullip as apt comparators in the discrimination complaint is made. There are two difficulties with this argument. Firstly, the assessment of comparators and the determination of there being no material E difference between the circumstances relating to each case, is very much a matter of fact for the Tribunal to determine having heard the evidence in accordance with section 23 **Equality Act 2010**. The Tribunal undertook that exercise and explained its reasons for doing so and no legal F error has been identified in that process. Secondly, in any event, it was not determinative of the claim since the ET analysed the reason why the treatment occurred absent any comparator, and found it was not because of disability.

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[1] We were shown an agreed note of the cross-examination of Mr Clubb which supports the finding of the ET. He explains that initially he decided to invoke the capability procedure, but following a discussion with Ms Pardington the decision was to suspend, and he accepted that his (Mr Clubb's) feedback on the supervision session he had had H with the Claimant influenced the decision to suspend. It must follow that Mr Clubb was not the decision taker if his input only influenced the decision. The fact that he had thought the capability procedure more appropriate reinforces the ET's conclusion that he was not the decision taker. The notes also set out the reasoning behind the decision to invoke the capability procedure rather than suspend Mr Semple, and illustrate the different circumstances as between the two managers. The notes of evidence assist the Respondent and support the ET's conclusions.

68. Ground 3 does not show any error of law to the Tribunal's approach to the discrimination complaint.

69. For the above reasons we uphold the Judgment of the Employment Tribunal.