EMPLOYMENT TRIBUNALS

Claimant: Mrs M Mitchell

Respondent: BUPA Insurance Services Limited

HELD AT: Manchester **ON:** 4, 5, and 6 October 2017
15, 16 and 17 November 2017
21 and 22 December 2017
(in Chambers)

BEFORE: Employment Judge Feeney
Mr R W Harrison
Ms J W Beards

REPRESENTATION:

Claimant: Ms Sanders, Counsel
Respondent: Miss Wilson, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was unfairly dismissed.

2. The claimant's claim of race discrimination fails and is dismissed.

REASONS

1. The claimant brings claims of unfair dismissal and race discrimination following her dismissal by the respondent on 2 September 2016.

Claimant's Submissions

2. The claimant submits that the matters relied on by the respondent did not constitute gross misconduct and that any issues should have been dealt with as performance/capability issues. She submits that the dismissal and the decision to

take disciplinary action was discriminatory on the grounds of race, relying on various matters detailed below.

Respondent's Submissions

3. The respondent submitted they were entitled to embark on disciplinary proceedings against the claimant on the basis of conduct as the claimant had shown she was capable of doing the job properly but was inconsistent in her performance and they took the legitimate view that the claimant was negligently failing to undertake her duties to the required standard.

The Issues

4. The issues for the Tribunal to decide are:

Unfair Dismissal

(1) What was the principal reason for dismissal and was it potentially fair in accordance with sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserts that it was for gross misconduct, for negligently failing to comply with performance standards.

(2) If so, was the dismissal fair or unfair in accordance with section 98(4) of the 1996 Act, and in particular did the respondent in all respects act within the so called band of reasonable responses?

(3) If the claimant was unfairly dismissed, regarding remedy –

(i) If the dismissal was procedurally unfair what adjustment if any should be made to any compensation award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed – had been dismissed in time anyway (i.e. **Polkey v A E Dayton Services Limited 1987** and **Software 2000 Limited v Andrews [2007]**)?

(ii) Would it be just and equitable to reduce the compensation and the claimant's basic award because of any blameworthy or culpable conduct before the dismissal pursuant to section 122(2) of the 1996 Act, and if so to what extent?

(iii) Did the claimant by blameworthy or culpable actions cause or contribute to the dismissal to any extent, and if so by what proportion if at all would it be just and equitable to reduce the amount of any compensation award pursuant to section 123(6) of the 1996 Act?

Race Discrimination

(4) Was the claimant treated less favourably because of her race in respect of being submitting to disciplinary action and/or dismissed because of her race?

Witnesses

5. For the respondent we heard from Krista Welsby, Clinical Lead and Manager of the respondent's Anytime helpline; Liz Pascoe, telephone counsellor; David Parker, Customer Services Manager; Louise Walker, Lead Healthcare Manager; and Naomi Humber, Employee Assistance Programme Manager. For the claimant we heard from the claimant herself. There was an agreed bundle.

Findings of Fact

6. The claimant, who is black, came to the United Kingdom in 1976 at the age of 18 from Jamaica. She worked as a nursery nurse before training as a counsellor and qualified in 2002 with a diploma in counselling, and she has been registered with the BACP Register of Counsellors and Psychotherapists since 2007. She undertakes private work particularly through voluntary organisations and the church of which she is a member.

7. The claimant began working for the respondent on 17 March 2014 as a telephone counsellor in the Employee Assistance Programme ("EAP"). This is a 24/7 telephone counselling service. Telephone counselling and signposting services are provided to vulnerable people by highly trained telephone counsellors from the respondent's Salford Quays office. The EAP service is often provided as a benefit by employers who provide details of the helpline to their employees who require mental health support or counselling on a confidential basis. The managers of the service were Adeela Irfan and Naomi Humber. There were 10-13 telephone counsellors working shift rotas providing this service.

8. The telephone counsellors receive calls on an individual basis, assess the caller's mental state and recommend further action such as further clinical assessment or treatment. These had to be done in accordance with the respondent's relevant policies and procedures. Obviously some of the callers are in a highly vulnerable state, some potentially suicidal and/or under the influence of alcohol or drugs. Every call is recorded in clinical notes which must be sufficiently detailed so that they can be used by other counsellors or in the event of any investigation, internal or external. There is a regulatory background. The calls are audited by the respondent's internal team auditors on a regular basis and Ms Humber advised in evidence that it was regularly her job to speak to team members about their calls. She also held monthly one-to-ones with each counsellor and would send recordings to each counsellor asking them to audit their own calls following which a discussion would take place. If there were problem calls additional meetings would sometimes take place.

9. The Healthcare Quality Team, the respondent's internal quality management and governance team, raised any issues of clinical practice or quality during their weekly audit and concerns were sent to senior managers, including Naomi Humber and sometimes Nicola Hopkins, the senior manager.

10. The claimant passed her probation on 17 December 2014 and her employment was confirmed as permanent. The claimant recorded that one of the other counsellors, Liz Pascoe, had said to her she did not realise that there were black counsellors until she started at BUPA. Ms Pascoe denied this. However, we

find that she did say something along these lines but we cannot see that there was any issue of concern raised by this comment; it was an observation. Ms Pascoe had no influence over what happened to the claimant.

11. In late 2014 the claimant was being managed by Adeela Irfan. The claimant's shifts were at that time eight hours.

2015

12. The claimant felt that things changed in 2015 with some colleagues who had been more recently appointed. In particular she felt that a colleague, Carina Basford, did not like her and that a clique developed around her. In addition in 2015 the claimant's mother was diagnosed with a terminal condition and the claimant was looking after her at home for the first few months of 2015 up to her death on 27 March 2015. The claimant asked if she could have unpaid time off but was told it was not possible and she would have to report as sick if the stress of looking after her mother was affecting her performance. The claimant felt after this conversation that Ms Irfan was more difficult with her. Ms Irfan had said that there were issues with the claimant's work but this was never tackled formally. The one specific issue she said was that she was slow on the keyboard. The claimant said she used to make handwritten notes during calls and then would type them up later but nothing was ever specifically raised with her about this.

13. The claimant discovered she was being excluded from training and mentoring new members of staff which was being organised by Carina Basford. She overheard Carina Basford say that the claimant was too slow and there were problems with her work even though Ms Basford was a colleague and not a manager. We accept this evidence from the claimant as we will see later from a complaint Ms Basford made that this was indeed her view of the claimant.

14. The claimant reported that Ms Irfan was still difficult with her, asking her if she was going to stay at BUPA and pushing a chair at her when she was frustrated with the claimant. The claimant did not raise a grievance about this at the time as she was overwhelmed by dealing with her mother's illness. Following returning to work she asked if she could change managers to Naomi Humber and this was agreed.

15. When the claimant returned to work after her mother's death she discovered that there were going to be changes in the shift pattern and that longer shifts of 10-12 hours rather than eight hours were likely to be required. The claimant was worried about this as she had other commitments: her private practice, voluntary commitments and her church activities. She was also concerned that longer shifts might affect her health, which she did raise with Naomi Humber.

16. On 8 July 2015 an incident occurred with Ms Basford about a shift proposal which Ms Basford was coordinating. Ms Basford complained that the claimant had raised her voice at her and spoken inappropriately. The claimant said that Ms Basford raised her voice at her, was annoyed with her and told her not to "speak to her" like that. The claimant believed she was not rude or disrespectful to Ms Basford; they had calmed down, they spoke, apologised and in the claimant's view the matter was forgotten. She did say when speaking to Ms Basford that she felt, as the only black person on the team, that she was isolated and she mentioned the fact that she

was not included in mentoring the new starters. Ms Basford, however, raised a complaint about this incident.

17. On 9 July 2015 Ms Basford sent an email to Naomi Humber headed up "Staff Concerns". This said:

> "Hi Naomi
>
> I would like to raise a couple of matters to your attention. There was an incident in the office yesterday which involved Maurcia and myself which was witnessed by many members of staff. After I came off a very difficult call yesterday at approximately 3.30pm Maurcia very abruptly and loudly shouted at me 'what's all this about Carina?'. When I looked around she was pointing at her computer screen. As I approached she continued to speak to me in a very rude, loud and inappropriate way. Maurcia was questioning the accuracy of some data I asked her to check for me. She continued (in what I can only describe as ranting and shouting) to behave inappropriately towards me regarding 'incorrect data' shouting in front of everybody 'this is utter rubbish'. I asked Maurcia politely and professionally to not speak to me in that way and that I wouldn't continue with the conversation if she continued in this manner. She did choose to continue in an inappropriate manner so I walked away and back over to my desk. Maurcia then continued to rant at me whilst I was at my desk. I didn't respond to her and at which point Sophia stepped in and asked Maurcia what was the matter to diffuse the situation. At that point I left the room with Karen Ashcroft for a debrief as the impact of the difficult call and attack from a staff member had an impact on me. When I came back into the room staff members asked me if I was ok as they felt what had happened demonstrated highly inappropriate behaviour in a workplace (or anywhere) and they praised me on the professional manner in which I conducted myself despite the aggression that was directed at me and having just handled a difficult call. This isn't the first time Maurcia has acted in this way towards me. I believe that Cecilia Sibley raised concerns about this behaviour towards me previously. In addition to this I have had a conversation with Maurcia this morning to try and ascertain what happened yesterday and how we can come to a resolution and move forward. Maurcia explained that she had been feeling 'tension' within the room. On further exploration into this Maurcia stated she is the only 'black woman' who works in the team and that she is feeling resentments and segregation because of this. Maurcia also implied this towards myself saying that I exclude her from mentoring new starters because of this. I would like to assure you that the reason that new starters are not 'buddied' with Maurcia at this time is due to unsatisfactory competencies within her role which have been identified by myself and others and is not due to race or gender. I find this behaviour offensive, aggressive, inappropriate and threatening and not conducive with the therapeutic nature of our work."

18. We note that a judgment had been made by Ms Basford and "others" that the claimant's performance was unsatisfactory. This suggests this was well known and that management knew about it as it seemed inherently unlikely management would not have known that the claimant was not being used as a mentor and why that was, or that Ms Basford would have the authority to exclude the claimant as a mentor on

this basis. Naomi Humber contacted Sophia O'Donnell and Karen Ashcroft for their accounts of what happened, together with Margina Mohamed and David Seddon. She also requested Cecilia Sibley for details of the previous complaint and Cecilia Sibley sent her an email from 13 March that she had sent to Adeela Irfan. This involved an issue over the claimant taking lunch at a time she was not specified as taking lunch because she had failed to check the computer system which would have given her lunch time (IEX). Further, that Carina had reported looking stressed and said it was because Maurcia had been shouting at her. She said that Carina did not want her to raise this with Maurcia at the time but believed Carina had sent an email to Adeela and Naomi regarding her clinical concerns about the claimant. She also complained about the claimant's, in effect, slowness with her e-learning, although the claimant had reported she had a head cold and that may have made her slower.

19. Margina Mohamed stated that Maurcia was "angry, her tone of voice was unprofessional and uncomfortable". David Seddon reported that Maurcia had got quite heated and appeared agitated. Carina stayed calm. He did hear Maurcia's voice raised. Carina had said, "don't talk to me in that tone, please" and Maurcia had replied, "well don't talk to me in that tone".

20. Sophia O'Donnell said it was not an" incident" and she did not feel like she was a witness to an incident. She said she was aware of Maurcia sounding agitated during a conversation with Carina and that she was starting to raise her voice and seemed upset so Sophia went over to her and suggested they went for a coffee break, after which she seemed calmer and there appeared to be no ongoing problem.

21. Karen Ashcroft said she did not witness what had happened as she was coming off a call but she was aware there had been words as the room felt quiet and Maurcia was mumbling at her desk so she took Carina for a break and Carina was shocked and bewildered about the argument.

22. Naomi Humber carried out an investigation. This recorded discussions that had taken place regarding the claimant's performance in the last 18 months. Again, there appeared to be an issue with performance but the respondent did not use any sort of performance management scheme to attempt to improve the claimant's performance. This stated that Adeela Irfan had raised performance related matters with the claimant but there had been no response to requests for information/explanation and that the claimant had been absent from work due to "emotional distress", "reportedly" with sickness absence due her mother's ill health and then death. When she returned she wanted to change line managers, which was agreed. It was alleged there was a meeting with Michelle Winstanley where performance related matters were said to need addressing but Maurcia refuted suggestions her performance was impaired, saying that errors were due to external matters and that her relationship with Adeela was affecting her performance. It was agreed there would be a fresh start to determine whether there were any factors affecting performance, and performance was to be monitored by Naomi Humber as well as emotional wellbeing.

23. Naomi Humber recorded that on 9 July 2015 she had a one-to-one following evidence of incorrect process being followed; numerous files being opened

incorrectly and insufficient clinical notes being entered. Maurcia initially considered her training had been incorrect and there may have been a problem with the computer system but there was no evidence of either matter being valid and the claimant was to be sent on refresher training on all EAP modules.

24. Naomi Humber then went on to consider the complaint by Carina Basford, the email from Cecilia Sibley and the one-to-one discussion with Maurcia Mitchell following receipt of the email from Carina Basford. She recorded the email statements from Margina, David, Sophia and Karen. She felt that the claimant had shouted at Carina Basford and that Carina Basford had now experienced two incidents of poor behaviour which may make her feel uncomfortable or threatened during her daily work, which is wholly unacceptable. She stated:

> "Maurcia Mitchell is not embracing BUPA values and demonstrating them towards her colleagues and this finding is concerning."

25. Naomi Humber cited some mitigating factors such as Maurcia having taken a stressful call, that she felt there was tension in the team and that she was reported as stating she was the only black woman, which Ms Humber said was inaccurate. She went on to say:

> "It suggests that she is referring to her ethnicity as being a reason for actions towards her, to assist in supporting her performance and it implies discrimination. The matters that are being addressed with Maurcia are related to her performance or conduct and no area of diversity. Poor or inadequate performance is managed and addressed in the same way no matter what ethnicity, gender or any other diverse aspect that an employee may have within BUPA. The comment has led to her colleagues feeling offended by this statement and one that has been refuted in its entirety."

26. The recommendation was that the claimant's behaviour was clearly unacceptable and in breach of company standards.

27. When Naomi Humber asked the claimant about her version of events she stated she would rather provide a written version of events and the claimant said as follows:

> "Yesterday I was really upset. Went out after a difficult call. The way things were, the atmosphere, the change of contract, when came back looked on the system, had been crying, saw shift pattern and waited but said, 'Carina, what's this?'. She came across about shifts. It was nothing to do with Carina. I was upset and changes of contract. There was no proper confirmation as though I'm going to be working. I've been struggling with it and at breaking point. Went out with Sophia. Helped me. Mannerisms and way she was speaking to me, she shouted 'don't speak to me like that'. Not the first time she has done that to me. She didn't have to come and speak to me gesticulating 'look at that there'."

28. On 23 July 2015 the claimant was required to attend a disciplinary hearing in relation to this incident. It stated that:

> "On 8 July you subjected a colleague to a verbal tirade or rant in a raised voice which witnesses described as heated, agitated and angry. This behaviour continued despite you being asked to desist."

29. Caroline McLaren, the Booking and Process Improvement Manager, was to take the hearing.

30. The claimant said that there was a misunderstanding; that she was not complaining about the counter proposal she just wanted to see the shifts she was on. The claimant said she had been on a difficult call and she was not agitated at Carina and that she was unhappy with the tone Carina adopted She said she did say "do not speak to me in that tone". She also said that she had had a chat with Carina and she thought it was resolved. She said she had had a difficult year as her mum had been diagnosed with cancer and then died. Caroline McLaren stated that there were matters about performance that had been noted but that was separate and was not relevant to today's meeting. The claimant also said if her voice was raised it was because Carina spoke down to her. She said she was asked what prompted the comment about the black person and she said:

> "I have not said I'm the only black person. It's nothing to do with segregation. I don't speak like that. It goes against the core of what I do in the community."

31. The claimant said she had not spoken to Carina about mentoring but had spoken to Naomi.

32. There was also some discussion about a client complaint; however we had no further information about that. The claimant said that Carina had said it was a complaint about her but in fact it was about the service in general. The claimant also said maybe she spoke more loudly. She had been to see the doctor about her hearing as she was concerned about this and she tried to keep her voice low.

33. Ms McLaren said that she gave her decision that there was no further action as four witness statements were different she could not confirm whether Maurcia had raised her voice, and she advised the claimant she should flag concerns to her manager immediately and not let it fester. Ms McLaren also said she thought Maurcia had presented herself very well.

34. Soon after this the claimant was invited to a capability absence meeting by a letter of 6 August. This was in relation to absences she had had which included absences looking after her mother. A letter of 13 August stated she had got a first written warning for a 12 month period; however this was later clarified that it was for six months.

35. On 17 August 2015 Caroline McLaren wrote to the claimant stating that her reason for not upholding the allegation was that four witness statements were not sufficiently consistent with each other to merit disciplinary action, and she stated she recommended that any concerns should be "raised with your line manager in the first instance and please remember under our company values we should all strive to treat our colleagues with respect and kindness".

36. On 18 August the claimant appealed the capability hearing outcome and she stated that a lot of her absence was due to looking after her mother; that she had asked for unpaid leave on compassionate grounds but had been told that she had to register this as sickness absence when in fact it was not sickness absence; that otherwise she had only had two absences and therefore the hearing would not have been necessary. The claimant had no response to her appeal.

37. The claimant was then given a salary rise in October 2015.

38. Following the introduction of the new shift patterns the claimant asked for a particular flexible working pattern of 21 hours with Tuesdays and Fridays free and no night shift on Mondays and Thursdays. This was agreed on 23 November for an initial period of three months.

39. A further meeting took place on 10 December between the claimant and Naomi Humber discussing the Carina incident. She was concerned that there were still underlying issues and she wanted to ask Carina for an apology. She said it was defamation of character. Ms Humber said that:

> "The outcome in this case from the hearing officer was no further action. We considered what Carina said had happened and the witness statements showed the incident had happened but the outcome was no further action."

40. Unsurprisingly the claimant was confused by this, saying "how can they find me guilty? What do they think happened?" and she was annoyed and she repeated that this was defamation of character. Ms Humber said the witness statements supported the incident happened and the claimant had several options: she could raise a grievance formally, which would result in the whole incident being investigated again and the outcome previously given could change. She said:

> "You do have to be mindful that the complaint is valid. If you were to raise a complaint against Carina or others BUPA would need to consider and ensure that you were not making vexatious complaints so please be aware of this. Then there is the mediation route to help try and recover the relationship. This means for you to hold an olive branch out and apologise and try and rectify and move forward. It is not an opportunity to challenge Carina and cause her distress."

41. The claimant said:

> "Am I guilty of an altercation? Who said this? How could this be me? I have been told I was shouting and screaming and I'm the one who was put through strain so I am guilty and Carina is right?"

42. Ms Somers said:

> "HR accepts the incident happened. Mediation will look at the recovery of the relationship and moving forward. You can revisit the incident, however be mindful the outcome can change."

43. The claimant said she needed to clear her name. There was no need to meet Carina and she needed to clear her name. She said she would think about what she wanted to do but at this point she took no further action.

2016

44. A monthly role development minute from January 2016 stated that:

> "Maurcia is currently working well with her manager to achieve successful outcomes in her working practice and she is working well within the team."

45. There were then some issues about the claimant's annual leave which became a long running issue. Leave had to be booked through the computer system and the claimant felt she had booked leave but it was not registered on the system, whereas the systems administrator was telling her she had not booked it properly or that it was on a waiting list due to the dates applied for having already been fully booked.

46. A clinical supervision, (which was confidential to the claimant and was provided by the respondent as a therapeutic service to their counsellors), of 5 February noted that the claimant had stated she had feelings of being set up, a witch-hunt, discrimination.

47. On 9 March 2016 the claimant underwent a competency check list with Margina Mahmood where the claimant got top marks in all issues, including form filling. The respondent would later rely on this to show that the claimant knew perfectly well what she should be doing however the claimant denied it was as comprehensive as the respondent claimed.

48. The claimant received notice on 16 March she would be receiving a staff bonus of around £270.

49. On 6 April Carina Basford made a further complaint about the claimant. She said that Stephen Westby, another employee, had told her that Maurcia had made certain allegations that Carina Basford was leader of the National Front and two other colleagues, Liz Pascoe and Margina Mahmood were involved. She noted she had two previous incidents with the claimant when she had been shouted at, and that the claimant was claiming that Carina Basford had excluded her due to the colour of her skin regarding training. Ms Basford related she had told the claimant that her failure to involve her in mentoring was not due to racial issues but it was competency related. She said she was uncomfortable and fed up with the claimant. Again we are surprised that Carina Basford was allowed to openly make such judgments about the claimant's competence and that no member of management engaged with her about this.

50. An investigation meeting was held with Ms Basford and with the claimant and Margina Mahmood on 6 April. Margina Mahmood had heard allegations via Carina via Stephen Westby that Ms Basford was leader of the National Front and that Liz and herself were involved.

51. Stephen Westby refused to give a detailed statement about what had been said to him. He said he had dealt with it on the day. He said he felt it was a storm in

a teacup and that the claimant was in a bad place personally. The claimant denied making any such statement. How could anyone make a statement like that? She said she felt there was an atmosphere in the room last week and spoke to Naomi about it.

52. On 21 April 2016 Naomi Humber asked the claimant to listen to some calls which they would then discuss, and they arranged to meet on 28 April to discuss the outcome of the claimant's audit.

53. On 21 April Nicola Hopkins had received a complaint call from a client and it transpired that the call was with the claimant. The complaint was about the difficulty in arranging appointment times for counselling and that the claimant had apparently said that the caller could only have six sessions, which he found distressing; (obviously that would have been part of the package his employer had bought into that he was only allowed six sessions). It was confirmed by BUPA that he would receive a call at 5.30pm from a counsellor on Friday 15 April but no call came. He then rang BUPA that morning to find out what was going on and was put on hold for 12 minutes and now he said he felt worse. However, it was not clear that the fact that a counsellor did not ring and that he was holding for 12 minutes had anything to do with the claimant.

54. Nicola Hopkins commented that the claimant said "err" and awful lot and gave the impression she did not really know what she was doing and was not listening properly at times, and that her rapport building was poor and that she seemed to be assuming he had a deep seated childhood issue after a few minutes' conversation. She was advising him that he would need more treatment than he was able to have from the service, although Nicola Hopkins acknowledged that some counsellors wanted to manage expectations and therefore would raise that. The call was discussed with the claimant on 21 April but she had not completed the audit. She agreed she would be kept off calls on Monday to listen to calls and to have a further meeting and to complete an audit for each of the calls referred to her.

55. Meanwhile Jonathan Fineberg, a service team manager, completed an investigation into the "National Front" comments. The allegation was described as:

> "I am offended and concerned that Maurcia said to Stephen that I was 'a leader of the National Front' and that Margina and Liz were also involved. She was apparently insinuating that we treat her differently because she is black. I am extremely concerned about these racist comments towards me because of the colour of my skin. This is not only a legal issue of discrimination and defamation towards me but also an ethical issue due to the nature or our work and our commitment to our ethical framework."

56. The report highlighted that Liz Pascoe thought that the claimant had made a previous racist remark in that she had said:" Have you noticed how all the Asians get the best jobs in this place?". Ms Pascoe said she did not want to escalate this, did not know how to address it so preferred not to spend time with the claimant in order that the matter would not be repeated.

57. The outcome of the previous complaint by Carina was also noted and it was also noted that Naomi stated that Carina, as a trainer, had passed over Maurcia for

extra responsibilities due to concerns about her competency in the role, and that Naomi had said that Carina and Maurcia, due to their shift patterns, did not overlap that often. Mitigating factors were said to be that Maurcia and Carina have a history, and neither of them were happy with the outcome of the previous matter which remained unresolved.

58. Mr Fineberg in his report of 22nd April said:

> "We do not have sufficient evidence to take this forward to a formal hearing due to the fact that Stephen Westby has not confirmed the wording used by Maurcia Mitchell in a conversation with him on the evening of 14 March, and the other witness statements were all second-hand information."
>
> He had taken the advice of the Manager Advisory Service (MAS), an internal HR advice service before deciding whether the matter should proceed further. We noted that MAS was referred to on a number of occasions as having given advice but we had no details in the bundle or witness statements about that advice,which if it existed in written form should have been disclosed.

He recommended that:

> "A meeting takes place with Maurcia to discuss the outcome of the previous disciplinary to highlight that whilst no further action was taken her conduct towards Carina was not acceptable or in keeping with BUPA values. I would also recommend that once this meeting has taken place that a facilitated meeting take place with Maurcia and Carina to discuss how they can draw a line under this and move forward. Finally, a number of witnesses have alleged that Maurcia has made racially charged comments. Therefore I would recommend that a discussion is had with Maurcia to understand whether she feels that she or others are treated differently to their race, colour, belief or sex."

59. None of these recommendations were followed up.

60. The claimant was absent from 25th April to the 3rd May and In a return to work report of 3 May it was noted that the claimant had had flu but that she also said the stress due to the investigation had contributed to her feeling ill.

61. On 28 April 2016 the claimant was asked to audit another call to discuss in her one-to-one . This was the normal practice for the EAP team we were told in evidence. She could not deal with this until she returned to work on 4th May. It was noted in the one-to-one of 4 May by Ms Humber that the claimant's audits were sometimes 4 (i.e. outstanding) and sometimes 1 (i.e. needs significant development). She felt that outside stressors such as her mother's death or the environment in the office affected the claimant's performance, and that "Maurcia must inform Naomi if she feels unable to deal with calls".

62. It appeared that the claimant had signed this although she denied it. It is certainly true that the signature was not similar to others in the bundle from the claimant. The significance of the note is that on the face of it it shows the respondent raising the claimant's inconsistent performance with her at an earlier stage (although

it was not much earlier in fact than when it was raised formally with her). We accept the claimant's evidence that she did not sign this note.

63. The note of the meeting states that, "Naomi had to speak to HR about conduct/performance management and have another one-to-one to discuss". There was no note of any discussion with HR.

64. The claimant did not agree that the call was as bad as had been said. There was therefore a further discussion about the complaint took place. The claimant stated that it had been a ten hour shift, that it was the anniversary of her mother's death and she had been unable to take leave, and she had needed to know the outcome of the investigation.

65. Ms Humber recorded in an email to the claimant that:

> "I appreciated your receptiveness to feedback and reflections over the call today. As I have explained, if you have work or personal matters that you feel could affect your work or are affecting your work we expect you to raise it us before allowing it to impact on the customer. If there are certain times of year that are difficult for you please let us know or book some leave to ensure you are up to your roles and responsibilities."

66. An audit for May was positive on both sides. The claimant gave an 8 for how much she liked working at BUPA.

67. On 6 June Nicola Bowden sent an incident reporting form to Naomi Humber regarding a matter which had been raised by Krista Welsby and she stated it should be discussed clinically, "from what Krista is saying". Ms Bowden said:

> "I know you are managing her performance so I though I'd flag it. Information very limited on the form!"

As far as we are aware at this stage Ms Humber was managing the claimant as she would manage anyone else. Ms Humber was on holiday until the 8th June but began investigating this when she came back. It was not explained why she did not raise it immediately with the claimant as at this stage the issue appeared to be about the lack of information on the required forms and an issue regarding an ambulance being called.

68. Nothing then happened until 29 June when Naomi Humber came to see the claimant accompanied by Nicola Bowden and another manager. She told her that over the past few weeks a number of matters had been brought to Naomi Humber's attention which needed to be discussed with the claimant. She told her that she (Naomi Humber) did not need to give her (the claimant) any notice when the claimant remonstrated that she had not been given any warning, and Ms Humber stated she wanted to talk about inappropriate and unprofessional conduct on a call on 22 June, not following risk incident policy on 23 and 25 May and poor and inadequate clinical decision making on 23 and 25 May and 20 and 22 June. Unacceptable timekeeping was also raised as the claimant had failed to arrive on shift on time on 26 June. The claimant asked if she could record the conversation but

was not allowed to, and she was required to go through several incidents without any preparation.

69. One of the issues which the claimant accepted was that on one occasion she had referred in passing to a well spoken caller as “la-di-da”. She had stated this to Liz Pascoe and although she says it was not meant to be derogatory this is a term generally considered to be derogatory. She believed that the caller had not heard this comment but Naomi Humber believed the claimant could not be certain of that and had taken a risk. She stated she regretted that remark and she also accepted she had misread her rota for Sunday 26 June as a result of which she arrived an hour late and apologised for it at the time.

70. The other matters were that she had incorrectly filled in a risk incident forms, had been wrong in calling an ambulance for a caller and wrong in telling another caller his GP “would receive a letter about our call”.

71. A letter suspending the claimant from duty dated 30 June said that Clare Darker, Customer Service Manager, had been appointed to complete an investigation into the allegations, but in fact Clare Darker was never involved in this and no further investigations were undertaken save for the interview Naomi Humber had had with the claimant on 29 June.

72. The letter stated she was being suspended due to “ allegations of serious poor performance”. The bullet points said:

- “Inappropriate and unprofessional conduct on a call on 22 June;
- Not following risk incident policy in relation to procedure and reporting on 23 and 25 May;
- Not following risk incident policy and the information governance policy in relation to recordkeeping on 23 May, 25 May and 22 June.
- Poor and inadequate clinical decision making and conduct on 23 May, 25 May, 20 June and 22 June;
- Poor and inadequate qualify of clinical practice in relation to failing to follow necessary and explicit/implicit processes/procedures on 23 May, 25 May, 20 June and 22 June;
- Unacceptable timekeeping after a failure to arrive on shift on 26 June.

73. Naomi Humber’s investigation was dated 1 July. The allegations which she considered were:

(1) Call reference 176993 – inadequate risk incident form; (later this would be elaborated to concerns re 999 being called and the CQC form not being completed);

(2) Call reference 177060 – again inadequate risk incident form; (later this would be elaborated to the caller had been drinking, that she had not given a confidentiality statement and that she had called an ambulance

inappropriately and had made overall a poor assessment of the client's needs);

(3) Call reference 177724 – 27 June complaint received regarding client who understood a GP's letter would be sent out regarding his alcohol intake to which he had objected;

(4) Call reference 177782 – "la-di-da" comment;

(5) Failure of the claimant to attend shift on 26 June.

74. The claimant was accused of poor decision making on 23 May, 25 May, 20 June and 22 June; of failing to follow procedures in relation to the ambulance call; of failing to record incidents properly on 23 May, 25 May and 22 June; and also of failure to uphold the duty of candour because she had contradicted herself during the disciplinary investigatory interview.

75. There were a number of documents included in Naomi Humber's eventual report, for example an email from 13 May reminding everyone that a CQC form had to be filled in for any safeguarding not just children's safeguarding, and also when contacting an outside agency. There was also reference to the 11 February email which advised the claimant (amongst others) of the procedure to be followed. In any safeguarding call where an outside agency has been contacted, whether it was the police/ambulance/social services, irrespective of the reason for the call, a CQC notification form was required unless a GP had been contacted. The email attached the CQC notification form and some guidance, and an email of the same date where Ms Humber had advised Maurcia on auditing the call, she felt that she had not closed the matter off as she had not determined whether authorities had been notified regarding the client's safeguarding issues. She said she would need to contact the client, refer back to the call and the safeguarding statement, and then establish whether the perpetrator had been reported, contact local social services along with completing an incident risk form and a safeguarding CQC form.

76. Included in the report was also an email from Krista Welsby to Phil Taft regarding an incident on 23 May requiring him to provide details of what had happened in respect of a matter where he had handed over a client to the claimant. He said the caller had declined a call even though she had made threats of self harm, he had then asked if a counsellor would pick it up and the claimant volunteered . He admitted that he had not put any notes on the case recording system (Swift and CRM) applying to his own role in the call. The claimant was questioned about this at the investigatory interview as Ms Humber said she had not put any notes on the system whereas the claimant thought she had done.

77. Naomi Humber's report also referred to the claimant receiving training from Marjana Mahmood on 9 March 2016 which she had passed with flying colours, which Ms Humber believed covered the issues regarding when CQC forms had to be filled in, etc. The report repeated the background information provided in relation to the first Carina Basford complaints.

78. Naomi Humber said that it was concerning that the claimant made inaccurate comments in the investigation interview. She did not appear to take into account that

the claimant was without notice being asked to comment on and recall matters occurring some weeks earlier.

79. By 29 July the claimant had still heard nothing and she raised a grievance about the treatment she had been subjected to, stating she had been unfairly treated by Naomi Humber, unfairly suspended after having failed to support her during previous months of high levels of stress and pressure. She sent to the grievance to Clare Darker by email on 4 August but did not get an acknowledgement until 22 August.

80. The claimant's grievance went through a number of incidents starting in April 2016:

- She felt that people were behaving aggressively, banging drawers, pushing on her chair.

- She complained about a picture of a dog being put up on the wall by Naomi Humber and more pictures were going up. Cats were added the following week.

- She said the investigation regarding the National Front remark was also a stressful event, particularly as she had been subjected to a severe investigation caused by the same colleague.

- On 21 April the claimant reported she was stressed and affected by the atmosphere in the room and that Naomi Humber had replied, “Make sure you have good evidence to back that up”.

- The claimant attended two meetings on the same day and was told that there was a complaint against her by a client. Naomi Humber said that the claimant would have to listen to the call and accused her of having conduct and performance problems. Also she had said the company had almost lost a big contract because of the claimant.

- On 24 April the claimant listened to the call with Naomi Humber and Nicola Bowden and Naomi Humber said, “You are working in a person centred way. BUPA does not want person centred counselling. You are giving the client a choice”. The claimant said the caller left the session happy even though it was a difficult call. Nicola Bowden said, “If we thought you were not good we would not have had you taking calls”.

- On 4 May there was talk amongst her colleagues of a complaint against the claimant with the claimant saying that staff had turned it around.

- On 12 May the claimant complained of being stressed and tired. Her holidays had been cancelled off the system from the waiting list for May and June.

- On 23 May the claimant was scheduled on administrative duties but was not on the system and could find no-one to help her access the system. A risk management case was brought to her by the nurse. The claimant did

not speak to the client and she was suspended for not informing Naomi Humber about this.

- On 8 June the claimant's supervision was cancelled.

- On 18 June the claimant was asked about her feelings in relation to Carina Basford leaving and Naomi Humber said, "It wasn't you why she left, was it?". The claimant reported she was tired and requested days off.

- The claimant asked Nicola Bowden for support again to complete systems training but she was too busy and so the training could not be done.

- There were a number of complaints about the claimant having difficulty booking annual leave. There was also a complaint about not being set up to home working properly as she did not have a laptop. The claimant therefore could not take calls at home when other colleagues were doing so.

81. The disciplinary invite letter dated 11 August stated that the allegations of gross misconduct were: that she was inconsistent in her approach to care of customers and duty of candour despite being clear evidence that she understood the serious potential consequences and that she was rude and disrespectful to a caller to the service. The investigation report was included and notes that Naomi Humber had provided on the content of the claimant's calls which were the subject of the investigation; her comments were highly critical.

82. The disciplinary hearing took place on 19 August. The claimant was represented by Sean Buckley. At this point the claimant had not had a copy of the transcript of the investigatory meeting on 29 June. She was given it with her union representative at this meeting and then left to read it. Louise Walker said no decision had been made and the outcome could be no further action, a first written warning, a final written warning or summary dismissal. The incidents were:

- inappropriate and unprofessional conduct;

- not following risk and incident policy;

- not following information governance policy;

- poor and inadequate clinical decision making and conduct;

- poor and inadequate quality or clinical practice in relation to not following necessary and explicit/implicit process/procedure.

83. The first case was reference 176993:

"Healthline nurse brought details of caller over for the claimant to call back. When system was reviewed there were inadequate notes, minimal information on incident form. Concerns expressed re 999 being called. Operator put on hold and call being terminated by emergency services. Inaccurate records of this."

84. The claimant said looking at the form now she could see more details were required; that the nurse had spoken to her about the case; the client expressed suicidal intent and blamed the company. She called the client: no answer. She spoke to the nurses and took advice. Called 999 but had to refer to the nurses during the call for information. She understood that in incident form she put summary not details. It was the first time she had used the form and did not know it had been upgraded.

85. Louise Walker said information regarding the new form was sent in February 2016 so the claimant did have the information. She disagreed that the form was not clear.

86. The claimant was asked whether she discussed with her manager that she was struggling with the form on the night, but she said no manager was on call. She got help from one of the nurses, and that she had left a message with Adeela Irfan as Naomi Humber was on holiday. She was told to just put in a summary. She agreed she could have put in more details and information. It was a learn for her. She had worked a long shift and worked 1½ hours over to complete the form, which was stressful, and she was tired but she expects it is incomplete. The claimant had not told Naomi Humber about this and she agreed she should have done.

87. The CQC documentation was also not completed and it was explained this had to be completed for every referral to an outside agency: police, ambulance, social services. The claimant said she was unaware of this, she thought only the incident form had to be completed, however it was pointed out she had been advised of this in an email of 13 May.

88. The claimant believed that she had put more details on the forms but that possibly it had not been saved, as it was recorded she had put more notes on previously. She had not recorded that she had called an ambulance. She could not believe it was not recorded on the system somewhere. It was noted she had refresher training with Margina in March which included the CQC form. She said she was aware that where there were child safeguarding issues the CQC form should be filled in. Louise Walker said it was <u>any</u> safeguarding, and that she had to inform CQC and her line manager if she had contacted Social Services. Ms Walker said the claimant should have known what to do as she was signed off and competent. The claimant said she had not been able to access the quality drive as her password and access had been changed. She summarised that they were concerned about the lack of detail on the incident form, poor reporting, the lack of a CQC form.

89. They moved onto the next call: 177060. They listened to this call. This was where the caller had been drinking and referred to the fact that she was being investigated for cancer but she had not yet got a diagnosis of cancer. It was stated that the claimant did not make the confidentiality statement. The claimant said she did, and Mr Buckley confirmed he heard it being given; Ms Walker said it was not in the entirety. Mr Buckley said that he wanted to see the policy where it says that she had to say it in the longer format. The claimant said she did not follow the whole of the script, she was covering all the salient points.

90. The claimant admitted that listening to the call again it did not sound as if the caller was in such dire straits and as incoherent as she thought when she took the

call and decided to call an ambulance out to the caller. The claimant had carried on talking to the caller because she felt like she was getting help. She discussed it with David Seddon and wanted to carry on speaking to her because she was worried about her.

91. The issues on this call were said to be that the ambulance was called; the claimant's soft skills were not good; inappropriate assessment and documentation. An incident form was completed with more information but no CQC form, and it was not escalated to a line manager. The claimant said she called Naomi Humber that night for support and that at the time the call felt differently from listening to it. She said on reflection she would call a GP but some of the things she said the claimant believed were not coming up. Ms Walker reported that the ambulance arrived and reported that the matter was not life and death and that she had a friend there.

92. Mr Buckley said that the claimant had a judgment on the night that if she had done nothing and the caller had harmed herself she would be being disciplined for that too? She was in a difficult "no win" situation.

93. Ms Walker simply said:

> "Clinically it has been reviewed and has shown her decision of calling 999 was incorrect."

94. There was a further issue in relation to this call in that the claimant said to the caller "so she was worried she had cancer" when the caller had not actually had that diagnosis nor said she had cancer; she was simply under investigation but worried about that.

95. Mr Buckley said the claimant as guilty of being over caring and that hindsight was a wonderful thing. He said he did not believe it is gross misconduct; that he thought that they had taken a few issues and divided them into separate issues, e.g. paperwork/incident form, and that he believed this could be addressed under supervision and not gross misconduct. Louise Walker said the accuracy of clinical documentation was paramount, and also the forms. She also noted that the CQC form had been completed even though the claimant said she did not know about it, but the claimant said that Ms Humber had completed the form and resubmitted it. She was pretty sure she escalated it via the system but she did not have the form that she initially completed.

96. The next case was 177724: "A man who wanted to obtain counselling where she failed to give the confidentiality statement then called him back to inform him we would write to his GP". They listened to the call. The claimant said it was the first assessment on a new tool (i.e. a technological software system). When she looked at the system she saw that a letter was automatically generated and felt she had to call him back to tell him that. He said he did not want that so she typed that he did not want a letter in his notes. She did not say she was going to write to anyone. She said that "we will be sending a letter" but she said that is why she rang him back so that he knew this would happen. Mr Buckley said, "It's the system, we need to see the system, it's not the claimant's fault". Ms Walker then said, "Well, it was the way you tell him". The claimant agreed she had been trained in the system but the training was stopped due to system issues. She believed that the GP's letter was

system generated. There was no line manager available so she asked Margina who said it should be done by a GP. Ms Walker said, “It’s about your own judgment as there’s not always a line manager available and you are trained”. The claimant said, “It’s not me. The system generates the letter and that’s why I called him back”. Mr Buckley said, “How can the business think it’s the claimant's fault then?”. Ms Walker said, “It’s about how the claimant said it”. Mr Buckley said it was the system at fault not the claimant. We note Mrs Walker does not say that she would have been able to delete the requirement to send a letter as was said by Mr Parker at the appeal.

97. The claimant said after this Naomi Humber sent an email out to all staff saying letters should not be sent. If it was clear Naomi Humber would not have needed to send out the email if everyone already knew about it. Ms Walker seemed to accept this point. The claimant said the training on the new assessment tool did not include this. It appears at this point in time that the claimant’s explanation was accepted by Louise Walker and therefore where Louise Walker’s witness statement says that the claimant offered no explanation it is incorrect.

98. They then moved on to call reference 177724: this was the “la-di-da” comment. Mr Buckley said, “She’s accepted she said it and that she’s done wrong”.

99. They then moved on to her not coming into work on the 26 June. Mr Buckley said that he was at a loss, “Is timekeeping and absence not separate?”. It is a different policy. Louise Walker said, “It’s in there as we are looking at your conduct and we are building a picture. It’s looking at the impact of your behaviour”. Mr Buckley said, “This isn’t part of gross misconduct. It’s one-off and should be treated as a separate issue under the absence policy. It feels like a scattergun effect. It was one incident. She apologised and came in”. Louise Walker insisted, though “Could MM answer the question? Do you understand the impact of your behaviour to colleagues, customers, businesses?” and the claimant said she was mortified. She had looked at the wrong day; she was shocked and got in as soon as she could. It is the only error she had made in two years. Other colleagues had made similar errors. Again Mr Buckley pointed out that he felt the allegation was not gross misconduct and that there be training and support.

100. At the end of the meeting there was a discussion about the support she had had. She had not been able to take annual leave and she felt burnt out and stressed and felt that might have led to mistakes. A further date was arranged for 2 September.

101. Prior to the meeting on 2 September the claimant sent some written information to Louise Walker. She raised the following specific points:

(1) That she admitted to using the term “la-di-da” and did not intend to disrespect the caller. It was a momentary lapse.

(2) She accepted she had misread her rota once in two years and was one hour late for work.

(3) She does not accept that the complaint was about her regarding informing his GP. The letter was to be generated automatically and sent out. It was not something the claimant would do herself.

(4) The claimant wanted to know what the rate of client satisfaction for all workers in counselling was at Salford Quays. How many complaints had been received by other members of staff? She had not faced complaints from a single client. She felt there were counsellors looking to make complaints against her.

(5) The claimant again complained about the holidays. She felt that she was not offered managerial support from Naomi Humber after 16 June, and that audits in April and her meetings with Naomi Humber were positive in May.

(6) The claimant asked the question "has any white counsellor faced three investigations inside two years?". Complaints do not arise mainly from BUPA clients but from staff and company process (this is a reference to Carina Basford).

(7) The claimant said she had challenged Naomi Humber in the meeting on 4 May for putting her under further stress when she had just returned from illness, and that the reference to her mother's death was disrespectful but many of the comments she had made that Naomi was disrespectful in talking down to her were not recorded on the handwritten notes. She said she did not sign the document for 4 May, where in the handwritten note of 5 May the tone was much more reasonable. Jonathan Fineberg was closing down the investigation and that she had mentioned ten hour shifts were difficult.

(8) The weeks of 23 and 25 May the claimant worked an eight hour, 11½ hour shift including an extra unpaid hour, and a half and a night shift of 11 hours, and these were when the errors occurred.

(9) The claimant also submitted her private clinical supervision notes which noted her difficulties with the new working patter and that she felt there was a witch-hunt or discrimination.

102. The claimant also provided further notes on 1 September regarding call 177060. She questioned why she was investigated, who authorised the investigation, why Naomi Humber did it as she had already carried out previous investigation, why she was not given management supervision during the period of the investigation and why was she not informed her work was being investigated. There were further questions regarding how accurate the transcript of the tape was.

103. The claimant denied that her handling of this call was not following the respondent's procedures.

104. On 2 September the claimant was again represented by Sean Buckley. Louise Walker said that previous complaints about her were irrelevant but the claimant said she wanted to show ongoing issues as she felt people wanted to make complaints against her. Ms Walker said regarding leave, there was no evidence that she had booked it.

105. In respect of the CQC forms the email from Naomi Humber was sent ten days prior to the incidents occurring. She did not think she saw the email. It is possible she had not had time to read it by the stage of the first complaint.

106. The claimant also said that she was not being supervised because two meetings were cancelled, the implication being that this was on purpose but Ms Walker took the view that it just sometimes happened, although the claimant pointed out that if she had had the supervision and Naomi Humber had told her about not completing the form then she would not have failed to do this the second time.

107. The claimant was also asked what was her issue regarding Naomi Humber's language? The claimant said it was an abrupt tone and Ms Walker said "tone rather than race. You state white manager, black employee". The claimant said, "Sometimes she was abrupt. I have not experienced that before". The claimant repeated it was the tone.

108. Ms Walker then later on says:

> "You question re the amount of coloured staff being investigation. Investigations are undertaken following audit incidents feedback not just on manager's decision. I am confident that managers are fair. I don't have numbers based on colour of skin."

In Tribunal Ms Walker accepted that she should not have used the word "coloured". Ms Walker said also she believed the claimant had withdrawn any allegation of race discrimination but that was not apparent from the transcript of the meeting. Ms Walker did no further investigation into the race allegations. She did not look at any cases of white counsellors who had been subject to external or internal complaints of disciplinary action.

109. The claimant said she had made that comment because the constant attempts to bring complaints against her was tiring and wearing. She had one in April. It increased her stress levels. Ms Walker pointed out that on one of the call dates Naomi Humber was available but the matter was not escalated to her. The claimant repeated that regarding the form she was very tired; it was at the end of a shift. She could hardly see what she was writing. Ms Walker she had flexible working in place, though, and the claimant said maybe she needed to raise this again. Mr Buckley pointed out that the claimant had reported stress and working long shifts. The business had put her in that position.

110. Regarding the cancer caller, Louise Walker said that "we would disagree" i.e. with the decision to call an ambulance. Other clinicians did not feel the caller was at risk. She said that phoning an ambulance was an inappropriate call.

111. The claimant still believed that people had altered her entries online.

112. Mr Buckley stated that the claimant had been struggling:

> "This is documented and highlighted. I don't feel this is gross misconduct. She hasn't followed a script but has tried her best to protect people in BUPA. As for the ambulance, hindsight is a wonderful thing. She is just over-caring and shouldn't be disciplined for caring. People should be addressed for under-

> caring not over. She misunderstood re the GP's letter but called him back to make it right. I hope she has demonstrated enough mitigation that does not evidence dismissal."

113. The claimant complained about the opinions Naomi Humber had expressed in comments on the transcript which she found degrading.

114. The meeting then adjourned for roughly half an hour and Ms Walker came back and stated:

> "To clarify, we were here to discuss the allegations of gross misconduct, inappropriate and unprofessional conduct, not following risk incident policy in relation to reporting, not following risk incident policy on information governance in relation to recordkeeping, poor and inadequate clinical decision making, poor and inadequate quality of clinical practice in relation to failing to follow necessary and explicit/implicit processes/procedure, unacceptable timekeeping. My decision on these findings is dismissal which is immediate and without notice. You will get a letter explaining my rationale behind this decision within seven days. Any further questions by all means get in touch. Do you have any questions?"

115. On 7 September Louise Walker sent a letter out confirming her dismissal decision. It stated:

> "The reasons I have decided to terminate your employment without notice is that you are inconsistent in your approach to care of customers and duty of candour despite there being clear evidence that you understand the serious potential consequences. Referencing cases 176993, 177060, 177782, 177724 demonstrated an inconsistent approach, poor clinical decision making and failure to keep accurate records and follow policies, all posing a serious risk to both our customers and the business. You were rude and disrespectful in relation to a call to the EAP services, reference case 177782 evidence confirmed this was the case. I have considered all the sanctions available to me but I have concluded that these were sufficient serious breaches of your obligations to warrant dismissal without notice and without any warnings."

116. The other sanctions she said she had considered were issuing a final written warning and further training. She said she did not consider these appropriate . In cross examination Ms Walker said that she did not consider a final written warning because she felt that the claimant had received training, had shown herself competent in the role and that support was in place. She agreed she had not taken the fact that the claimant had not been able to take leave into consideration. She was asked whether any member of staff had had the training but no previous conduct issues and had a call that had gone wrong, and they would then be subject to the misconduct procedure. However, she did not know whether that would be true. She had "not if it was a one off incident". She also agreed that the system did say a GP's letter would be sent. She did not feel the claimant's mitigation was sufficient. She could have booked leave but she had not. She was working a mutually agreed working pattern (but obviously although it might have been agreed it still left the claimant working very long shifts and feeling tired). Although she had said she was unwell she had completed a return to work form at the end of April which said she

was fit to work. In her witness statement Ms Walker said, “as the claimant demonstrated 100% results on audits she considered it an issue of conduct and not performance, and that she showed a reluctance to accept accountability for her failures, which was worrying. She could not acknowledge her misconduct”.

117. We note that there was a lack of detail and analysis in her letter of dismissal. It was not clear in particular what was being relied on in relation to the duty of candour.

118. The claimant appealed on 15 September. The grounds of appeal were:

(1) The decision was too harsh: “Although Maurcia has been subjected to repeated investigation there has been no allegation made that has resulted in any sort of warning, verbal or written”.

(2) There are many breaches in the disciplinary procedures:

(i) She was dismissed while there was an outstanding grievance against Naomi Humber, the investigating officer.

(ii) Naomi Humber had previously involved in a failed attempt to investigate her. It was inappropriate to have her investigate the claimant again.

(iii) In the BUPA disciplinary procedure it states the hearings will be chaired by an impartial manager, whereas they believe Louise Walker worked closely with people involved in the claimant's case.

(iv) That the investigation was biased and that Naomi Humber’s criticisms of the claimant's conduct were based on her distrust of personal centred counselling and her preference was CBT.

(3) That the fresh evidence was not considered properly by Louise Walker.

(4) That Naomi Humber had presented evidence relating to another black counsellor, FA.

(5) That it was unfair to penalise the claimant for the issue with the GP’s letter as she had no control over the process, it was an automated process.

(6) Some evidence was not included in the disciplinary hearing.

(7) There were many flaws in the investigation. Evidence that would have supported the claimant's contentions was not presented.

(8) Because the claimant was not advised that she had failed to produce the CQC document she also failed to do this on a second occasion. If it had been raised with her initially then that would not have arisen a second time. Naomi Humber did not raise this with the claimant even though she knew about it.

(9) The claimant had not had any holiday since January. She had had a few days' sickness absence and reported she was tired and stressed. Naomi Humber failed to help the claimant get holiday.

(10) The claimant had raised concerns about long shifts which could have caused errors in her work and repeated the long shifts she worked that week.

(11) That Naomi Humber alleged that the claimant had never shown remorse over what she had done, but that was not in fact correct. It showed that Naomi Humber was not impartial but was biased.

119. The claimant presented a further detailed statement. She said that she had not been given a verbal or written warning in the past; that she had been subject to two investigations which were lies and defamation of character, and that Naomi Humber had taken side with the complainant in both cases . The company failed to resolve that situation. The transcript of the meeting of 29 June was incorrect as she had not been provided with it at the time. Regarding case 177060, Naomi Humber took a critical view of this call although the claimant believed she had contacted Naomi Humber about that call at the time Naomi Humber had said that the claimant had handled it well. The claimant had admitted the "la-di-da" comment. Regarding the GP's letter, this was automatically generated and she was following the proper course of action to warn the individual about it. The claimant had never forgotten to call somebody back before. This was in relation to call number 1 (GP case). In respect of the fact that this particular individual had been recommended for the wrong type of counselling this was never discussed with the claimant.

120. Regarding the CQC incident form, on the training on 9 March, Margina did not say that the CQC form must be completed in conjunction with the incident forms; that defamatory and derogatory statements were made about her counselling skills on the transcripts of recordings. It stated "slow to start, low empathy, parroting", and she also pointed out that documentation from another telephone counsellor was included.

121. Regarding the first disciplinary hearing with Louise Walker, the claimant's full answers were not recorded. She believed her notes had been altered.

122. Regarding the claimant's grievance a meeting took place on 19 September which was led by Chris Rickard.

123. The claimant received the feedback from her grievance on 18 October two days before the appeal meeting. The grievance confirmed that the areas of concern were:

(1) Intimidating or bullying behaviour of other colleagues, April 2016 to July 2016, including potentially racist behaviour relating to a pictured wall.

(2) Concerns regarding the lack of support from Naomi Humber and Nicola Bowden.

(3) Concerns relating to holidays you believed you had booked and were confirmed and then were subsequently removed from the system.

(4) Concerns to fairness in the setting up of home working in that you were not able to work from home with full systems access but believe others were able to do so.

124. Regarding (1) he said that:

> "There was insufficient evidence to say that Liz Pascoe or Margina Mahmood acted inappropriately towards you in early April in the counselling room. Naomi Humber recalled discussions with you about how you were feeling but you did not provide any specific concerns."

125. She agreed that relationships between the claimant and some of her colleagues were strained at times but the professional working relationship was always maintained. It was confirmed that the location of the claimant's desk and the drawers meant that:

> "…At times it was difficult to get past you to access their personal belongings and therefore it is possible they may have brushed past you in needing access to their drawers. Both of the colleagues confirmed they had a good working relationship with you and there were no issues between you."

126. Regarding the picture wall, there was no evidence it was intimidating and potentially racial. (the claimant felt that pictures of dogs were racist as historically – for eg during slavery - dogs had been used to intimidate black people) The idea of the wall was to brighten up the visuals within the room as most employees were animal lovers. Colleagues pinned up pictures of their pet or other animals to make the room feel more homely. He commented that

> "No issues were raised by you at the time."

127. The wall was moved when refurbishment of the floor took place and the pictures were put up again. They included horses, chickens, cats, rabbits and lizards and not just dogs and therefore Mr Rickard could not conclude that the activity was aimed at the claimant or racially motivated.

128. Regarding concerns relating to 21 April:

> "Naomi Humber encouraged you to share specifics and invited you to raise an informal grievance or use the 'speak up' policy. You felt that Naomi Humber had offered a supportive approach in relation to the call that you had struggled with due to an anniversary bereavement, and AP support was offered."

129. This was documented in a note from a one-to-one:

> "Further, there was a complaint received as a result of the manner in which the call was handled and therefore it was appropriate for this to be investigated with you.
>
> Naomi also confirmed she had conducted discussions with you previously about performance conduct concerns and although there are periods when you could demonstrate competence through your ongoing audits and

> performance reviews, at times this was inconsistent and as necessary needed to provide you with guidance, support and feedback."

130. Regarding the claimant's complaint that other colleagues were talking openly about the complaint, Naomi Humber "was not aware of this neither did she recall you raising it. However, Liz and Margina in their roles as counsellor support may be aware of complaints and have needed to share awareness as follow up".

131. Mr Rickard said he found that Naomi Humber had offered the claimant support when she was feeling stressed or apprehensive. She had offered coaching and one-to-ones, and that in May at her one-to-one performance review she had rated "love working here" as 8 out of 10:

> "Regarding offering the claimant additional responsibilities because of your elements of inconsistent performance in your work, she felt it was not appropriate to offer this."

132. From his investigations Mr Rickard also felt a lot of support had been given in relation to the IT systems by Nicola Bowden. He had investigated the holidays issue and there was no evidence of holiday requests being removed from the system, rather that the claimant had not booked them properly online but was putting requests in via email, or when she did put them on the IEX system they went to a wait list status as the request was above availability.

133. The claimant was also encouraged to swap shifts to swap holiday requests where her requests fell within an over-budgeted time.

134. Regarding home working, there were difficulties with ensuring access to the necessary systems. It is only available if Citrix and full systems access was working. Previously colleagues had been allowed to work without Citrix, but a consistent approach had been adopted in that fairly soon after the claimant started it was a requirement for all colleagues to have full system functionality to be able to work from home.

135. Accordingly Mr Rickard did not uphold the claimant's grievance in any respect.

136. The appeal against the dismissal then took place on 20 October. It was held by Mr Parker was a Customer Service Manager. He had an operational not a clinical role. Mr Walker obtained the disciplinary hearing officer's documentation, including the coaching and return to work records, all her one-to-one meeting notes, all of the call recordings and the investigation report prepared by Naomi Humber. The hearing lasted for three hours. Mr Parker made notes of the matters to investigate arising out of the disciplinary appeal hearing. It was then agreed that he would also deal with the claimant's appeal against her grievance outcome and a second hearing was held in respect of this on 22 November. Mr Parker received all Chris Rickard's notes for this. The claimant was happy that the appeal against dismissal and the grievance appeal were dealt with together.

137. Mr Parker made a list of the points he needed to investigate and provided a copy of that list with the findings he had made in respect of these points. There were six points:

(1) Regarding the inclusion of FA's notes (a fellow counsellor);

(2) That the claimant, on 2 June, had found her July holiday had been cancelled and that although she had repeatedly asked for holiday from March it was declined. The findings here were that this has been investigated fully in the grievance and there was nothing to suggest the claimant had been treated any differently or holidays had been denied inappropriately.

(3) Errors were first made in May but no feedback received until her investigation.

(4) Maurcia believes there are false emails in her account. Mr Parker confirmed, however, that the information was genuine.

(5) Again Maurcia believed that her emails had been tampered with. However this was denied when Mr Parker reviewed the emails included in the investigation pack.

(6) Regarding the investigation, Mr Buckley believed it was put together with extracts to make it look more damning. However, Mr Parker believed that it was put together to show a chain of events by date with the issue and the impact based on facts from calls and documented on the system.

138. In relation to the appeal against the grievance, the claimant had commented in her appeal:

> "I will simply say that it is very difficult to deal with covert racism and also difficult to show that a procedure has been used to disadvantage me."

139. She then made a list of issues arising from the disciplinary hearing regarding Naomi Humber:

(1) Naomi Humber constructed a document that was a biased account of the claimant's work. It was not a neutral investigation. She had been involved in two previous investigations of the claimant's work and neither had resulted in any accusation being upheld.

(2) "Naomi Humber had used four cases to account for the standard of my work over a period of two years". Regular performance reviews and audits confirmed the high standard of the claimant's work.

(3) "Two of the alleged cases were on May 23 and May 25. Although I had informed Naomi of the difficult case on May 25 she denied knowledge of it. Chris Rickard's also commented that Naomi did not recall saying 'make sure you have good evidence to back that up', and that on the subject of Carina's leaving she asked you 'it wasn't you why she left

was it?'," and that she could not recall the claimant specifically raising an issue with her around 4 May.

(4) Naomi Humber has made serious allegations about the level of the claimant's documentation in relation to four cases. Two of them were in May when the claimant was still stressed from all the groundless accusations. Naomi Humber went on leave and she did not do anything regarding the difficult case. Between 25 May and 8 June when she returned from leave no-one raised any difficulties with the claimant, particularly regarding the deficient documentation and therefore the claimant carried on behaving erroneously, for example the missing CQC forms. She was verbally assaulted on the evening of June 29th by Naomi Humber and Nicola Bowden and asked to immediately account for four particular cases.

(5) That Chris Rickard has noted that Naomi had offered support, however the support was not valid as there was no trust. There was no trust because Naomi Humber had always taken the side of the colleague who made accusations about the claimant (i.e. Carina Basford) and Naomi had done nothing to arrange a "clear the air" meeting.

(6) There was a lot of personal animosity from Naomi Humber and she had not undertaken a neutral, impartial investigation of the claimant's work. She preferred CB counselling rather than Rogerian counselling and the claimant believed this affected her criticism/critique of the claimant's call handling.

(7) She has a lack of care for facts. She even introduced evidence of another black counsellor's work and represented it as the claimant's.

140. The claimant rejected Chis Rickard's conclusions that no racially motivated, inappropriate behaviour had taken place or that she had been bullied or harassed by colleagues. The claimant went on to say:

> "I totally reject this finding. Has any other member of the telephone counselling staff been subjected to three investigations in two years? Has anyone else received so few complaints and been subjected to this treatment? Has anyone else made an error of omission, not been informed about it and then been suspended and sacked without any warnings about it? Is it usual to permit a member of staff to work for a month when their line manager thinks there are serious failings? Or to work for a month unsupervised? Is it usual for a line manager to be involved in three investigations of a worker?"

141. The claimant believed that there was evidence that in 2015 the claimant's email address was accessed remotely and she believed that recorded information had been deleted from a message she had sent to MHT. That information was added to notes in red. It was escalated to Adeela Irfan. She complained again that she had never been able to book leave when she was desperate for leave due to being stressed.

142. Mr Parker met with Naomi Humber on 20 November and interviewed her. He said that he felt the investigation was carried out thoroughly and documented effectively. He recorded that Ms Humber returned from leave on 8 June with two incidents to investigate:

(1) No. 176993 which had occurred on 29 May. This issue had been identified by the healthcare quality team in that a risk incident form had not been completed correctly and not escalated, and the CQC form had not been completed when, as the police had been contacted, it should have been.

(2) Incident 177060 which occurred on 25 May. The claimant had rung an ambulance for a customer who did not require or want one and got questioned by the ambulance man about a wrong referral, gave wrong information and followed the wrong process. The claimant had alleged she had spoken to Naomi about this difficult customer, who had said she had done a good job. Naomi said she never took such a call and believes that Adeela was rung and a voice message left. Mr Parker checked this call and it was a voice message to Adeela and not to Naomi. The claimant also stated that Paul from Healthline had agreed an ambulance was the right decision. This was denied.

Following this other incidents occurred

(3) Incident 177782 which occurred on 22 June was received and started to investigate on 24 June. This was the “la-di-da” comment.

(4) Incident 177724 which occurred on 20 June received and started to investigate on 27 June. This was a client complaint which was referred to Naomi Humber from Nicola Hopkins/Nicola Bowden. There was a threat that the respondent could lose the business. This was the call referring to the GP’s letter.

(5) AWOL: That the claimant was AWOL from her shift on 26 June (i.e. the mistake regarding the rota).

143. Regarding incident 177782, the claimant had taken the initial call. It was disconnected and FA took the second call. The point was there was no evidence of any notes added to the system by the claimant. This is why FA’s notes were produced and referred to.

144. The claimant advised she came into work on 2 June and found her holiday had been cancelled and that she had repeatedly asked for holiday from March which was declined. There was evidence around the original emails confirming support about booking holidays which the claimant had not responded to or acted upon.

145. Regarding the claimant’s other complains

- that no feedback was received regarding the errors made in May until the investigation interview. Mr Parker believed this was because other issues came up which required investigation.

- Regarding the email trails, Mr Parker confirmed that having looked at the investigation pack the emails appeared to be correct.

- Emails being tampered with: again Mr Parker reviewed the notes of the investigation and all the emails and extracts appeared to be correct.

- The extracts used: Mr Parker felt that these were fair.

- whether an investigation was inappropriate before notifying Maurcia of an official investigation and suspension. Mr Parker found the correct investigation process had been followed as per BUPA policy and conversation with Chris Taylor of HR.

- Other areas to clarify: training and coaching around April-May.

  Findings: confirm there was active coaching and support in place for the claimant. She said she "loved working here at level 8".

- Change to letter process regarding GPs: What happened? Was the letter sent?

  Findings: Letters were not being set out at the time which the whole team was aware of and had been communicated. The main issue of this complaint was that the member had asked that a letter not be sent out which Maurcia ignored and said a letter would be sent. There is no evidence that a letter was sent out.

- Capitals in emails from NH: tone.

  Findings: Naomi advised that when she was in a rush she did sometimes type in capitals.

- One day in hospital due to stress in May 2016. Mr Parker's findings: he reviewed the claimant's absence and return to work documents. The claimant was off sick 25, 26 and 27 April, not May. A return to work took place and the symptoms were flu. There was a mention of stress relating to an investigation with Jonathan Fineberg but no mention of a hospital stay and Naomi Humber documented offering support and to keep talking to her manager.

- Review grievance outcomes and relevance to items in the appeal.

  Findings: After reviewing the findings in the grievance letter issued to Maurcia it was found that the grievance was rejected. Some of the areas raised in the grievance crossed over with the points raised in the dismissal appeal letter so can be considered together.

146. Mr Parker also listened to calls 1-4 on his own. He contacted Nicholas Martin in the Planning Department who oversaw the annual leave booking system and after investigation felt that the claimant was failing to action holiday requests in the correct way even though she had received support on several occasions on how to do this.

147. In relation to the grievance Mr Parker noted that there was one point raised in the grievance appeal letter which related to Chris Rickard's hearing and there were seven new points. The original point was in respect of the holidays being reviewed off the system. He said he had further investigated this and noted there were two days' holiday booked on 1 and 7 June and there was no evidence that anything had been removed from the system but that the claimant had been advised how to use the system and had not followed this advice.

148. In relation to the other issues raised in the claimant's grievance appeal Mr Parker commented as follows:

(1) "Has any other member of the telephone counselling staff been subjected to three investigations in two years?" – He said that was not relevant. If concerns are raised they are duty bound to investigate concerns.

(2) Unfavourable treatment in respect of wages by Naomi Humber and being told she would not receive an incremental increase in March due to a complaint – Naomi Humber advised that there were documented performance issues that affected the incremental salary increase along with a conduct issue on file which did place with four independent witnesses of fact. "Your performance meant that you did not achieve the level required for a salary award".

(3) "Has anyone received so few complaints and been subjected to this treatment?" – This is not relevant. Complaints were of a serious nature and have been addressed accordingly.

(4) "Complaint about an automated process of the company has been attributed to me" – Mr Parker said he had investigated this in relation to case number 177724. Letters were not being sent out at the time because the function to send a letter from the system was not activated. This had been communicated to the whole team. The main issue of this complaint was that the member had specifically asked that a letter not be sent which you ignored and said a letter would be sent. There is an option to select that the letter generated is suppressed specifically for this sort of situation which you did not select. Fortunately no letter was actually sent out".

We had no evidence that the team had been told about this.

(5) "Has anyone else's counselling work been so misrepresented in writing?" – Mr Parker felt the assessment was fair.

(6) "Has anyone else made an error or omission and not been informed about it then been suspended and sacked without any warnings?" – He said where concerns were raised in relation to staff they were duty bound to investigate those concerns.

(7) "Is it usual to permit a member of staff to work for a month unsupervised from 25 May to 29 June?" – Mr Parker said there was

evidence the claimant attended a one-to-one with Naomi Humber on 16 June and that there were quality meetings and regular emails during May and June. Adeela Irfan and Nicola Bowden were also there for support as well as external clinical supervisor.

(8) "Is it usual for a line manager to be involved in three investigations of a worker?" – In general a line manager takes the lead.

(9) Regarding intimidation, the example given Mr Parker thought was not intimidation but a concern raised due to serious feedback not being accepted.

(10) Complaint call and treatment by Ms Humber – Mr Parker had reviewed the notes and there was no evidence that the claimant had been victimised.

(11) Evidence the claimant's email address was accessed remotely – This was raised with IT at the team and there was no evidence to suggest the claimant's system had been accessed.

(12) Accusations from Naomi Humber "I am lacking candour and consistency" – This was an appropriate quote due to the nature of the breaches in relation to individuals having a duty of candour under the Health and Social Care Act 2008.

(13) Seeking to book annual leave when under stress but never being able to – Mr Parker repeated his previous answer.

(14) "I felt hurt when every new person commencing the role at BUPA increased in their development and I was prevented from advancing" – Mr Parker said he investigate this further with Naomi Humber and advised that "due to the ongoing support that you required in your day-to-day role with your calls, overtime sheets and the IEX system it was not appropriate to consider further development of your role at that time".

Again this was a pointer to the claimant having performance issues and begs the question why did the respondent not implement a formal performance improvement plan?

149. Regarding the issues comprising the appeal against the disciplinary hearing outcome were considered by Mr Parker.(There was some overlap with the grievance). He commented as follows:

(1) "I believe that the disciplinary was too harsh" – All four cases happened over a period of approximately four weeks and were all deemed to be serious breaches, have been fully investigated and evidenced. I have listened to the calls and reviewed the documents and confirm they have been investigated, evidenced correctly and understandably deemed as serious breaches.

(2) There were many breaches in the disciplinary procedures –

- Outstanding grievance – As the grievance outcome and the disciplinary appeal had been heard together, any issue regarding the disciplinary hearing taking place before the grievance was concluded was resolved.

- The appropriateness of Naomi Humber being the investigating officer – He confirmed that was the correct process.

- Is Louise Walker an impartial manager? – There was no evidence that she was not an impartial manager.

- "There was no balanced investigation from Naomi Humber" – Mr Parker find any evidence to suggest it was not fair and balanced.

- Fresh evidence – all evidence has been reviewed in both the grievance and disciplinary hearing.

- Evidence relating to another counsellor imputed to Maurcia Mitchell – FA's notes refer to that she took the second call from the same caller. The issue was there was no evidence of any notes added to the system by the claimant.

- In relation to the alleged complaint 177727 on 20 June regarding an automated letter, Mr Parker repeated that letters were not being sent out at the time, which the whole team was aware of and which had been communicated, and that there was an option to select the suppression of the letter which the claimant did not suppress.

- Evidence that was requested to be included in the disciplinary hearing was not included – Mr Parker said there was no evidence to suggest anything would be omitted and he confirmed Naomi Humber's annual leave was 30 May to 8 June.

- There were many flaws in the investigation. It had been reviewed with BUPA Human Resources and found that the correct procedures had been followed.

- The fact that the claimant was not advised about the first incorrect completion of documentation may have led to further incidents. He said it was right that the informal investigation was appropriate before an official investigation. That was the correct process.

- Regarding the fact that Ms Humber was aware the claimant had not had any holiday since January and failed to ensure she had a holiday – The claimant did have two days booked on 1 and 7 June. There was no evidence she was treated differently nor that she had requested holidays through IEX in the first half of the year.

- Long shifts and tiredness affecting health and wellbeing which could cause errors in the work – He was satisfied she had been given enough support and supervision and that she was contracted to work 21 hours over three days which was adjusted to one 10.5 hour shift after completing shorter night shifts. She had not been treated any differently from her colleagues in respect of shift lengths.

- That the investigator had accused the claimant of a lack of candour. Mr Parker noted that this was correct in relation to breaches involving the duty of candour from the Health and Social Care Act 2008.

  However we had no explanation of this.

- Other evidence in respect of Naomi Humber formed part of the grievance process and had been dealt with under that above.

150. Mr Parker then dealt with other areas raised in the disciplinary appeal hearing on 20 October. One was regarding the claimant being admitted to hospital with stress in May 2016. This had not been mentioned to the respondent and therefore her absence on 25-27 April was reported as flu and treated as such. Regarding typed emails, this was simply a mistaken made when Ms Humber was in a rush. He concluded that there was no evidence to substantiate the claimant's point or what had caused him to change the outcomes of the original hearings.

151. Accordingly he upheld the claimant's dismissal.

152. On 6 July it was also confirmed that the respondent had referred the claimant to the Disclosure and Barring Service.

153. Other relevant information provided to the Tribunal was the number of employees and their ethnicities.

- In 2014 there were eight counsellors in March of which six were white and one identified as black or minority ethnic group. In December there were 16 councillors: 12 were white and three were BME. The difference was made up by employees who did not want to declare their ethnicity.

- In 2015 in January it was recorded there were 15 telephone counsellors: 11 were white, three were BME, one was not disclosed. In December 2015 there were 19 telephone counsellors: 12 were white, four were BME, three were non disclosed.

- In 2016 there were 20 telephone counsellors in January: 12 were white, five were BME, three were not disclosed. In September there were 23 telephone counsellors: 17 were white, four were BME, two were not disclosed.

- The average was 17 counsellors, 12 white, BME three and not disclosed two.

154. Regarding FA, information was provided that FA who was black, had been also disciplined on Friday 14 October 2016. Her disciplinary was dealt with by Krista Welsby. She was given a final written warning to last for 12 months, although she was on maternity leave for virtually the entirety of the 12 months.

155. The reasons for the disciplinary sanction were:

(1) Inappropriate, unprofessional conduct on a call case reference 180120/1. She was described as "You challenged, criticised and confronted the customer rather than demonstrated empathy and compassion". She had also appeared to answer the call in a sleepy state. On the first call she appeared to have abandoned the customer at one stage to take another call and the customer is left talking to no-one saying "hello, hello, is anyone there?". Data protection was not fulfilled on the second call case, "You advised you were aware of the need to complete data protection, however you stated you recognised the caller's voice and they confirmed they had spoken to you earlier".

(2) No following risk incident policy in relation to procedure on reporting (case reference 180120). "You failed to follow process by completing a CQC form as well as a risk incident form. As a result risk incident was not adequately or accurately reported. You stated you were not aware of the CQC form and advised more training was required in this instance. You also advised nights are a vulnerable time and more training was needed. The CQC form was emailed direct to the team on two occasions and therefore expect that you have had an awareness and completed this. I uphold you failed to follow the risk incident policy".

(3) Not following risk incident policy or information governance policy in relation to recordkeeping (case reference number 180120/180121). She had failed to follow the policy in relation to recordkeeping; failed to account for the conversation that took place behind herself and a member of the Healthline staff. She stated she had read through everything and she refuted giving out misleading information and said perhaps it was a misunderstanding with the other staff member. However, it was upheld that she had failed to keep accurate records.

(4) Poor and inadequate clinical decision making and conduct (case reference number 180120/180121). It was noted there was a demonstration of poor and inadequate clinical decision making and conduct when talking to customers, failure to conduct a comprehensive mental health assessment when clinically appropriate. Poor call handling skills, inappropriate decision making and practice in relation to clinical care and management of risk incidents. Choosing to manage a customer who was not in distress who did not have eligibility to access the service over a customer who was in urgent need of help and had eligibility to access the service. "You said you needed additional training. There were gaps in your knowledge and you needed to understand the crisis call process in full and to attend more training sessions. You further stated that you felt nights are a vulnerable time

when people cannot sleep and a challenge and difficult for you to handle. I uphold the above allegation but recognise there is a training need for you here".

(5) Poor and inadequate quality of clinical practice in relation to failing to follow necessary explicit/implicit processes/procedures (case reference number 180120/180121). Here she did not advise of the confidentiality script at the start of calls and did not complete data protection on the second call. There was a lack of structure to the calls, poor call handling skills. Again FA said she needed additional training.

Ms Welsby concluded, "I uphold you failed to follow necessary processes and procedures. We discussed the standards of conduct expected of you and you are now expected to maintain the standards and recommendations set out below". This was prior to and following maternity leave "we only work on day shifts".

- You will attend and particular in regular one-to-ones side by side coaching, learning and training sessions.
- You will attend and participate in peer support and clinical lead support.
- You will only return to night shifts when your manager and clinical lead feel you are fully competent.
- When you do return to night shifts they will be in the office environment with the support of BUPA Anytime Healthline Nurses.

156. The claimant also raised the fact that another black worker, ST, had also been dismissed. However, we accepted the respondent's argument that ST was on a probationary period and her performance had been unsatisfactory because she was often late and that they were entitled to take a stricter view of individuals on a probationary period.

157. In addition it is relevant to note that in cross examination the respondent's witnesses were asked what training they had had on equality and diversity and there was no evidence that there had been any save in their induction.

158. The following excerpts of the respondent's disciplinary process are also relevant.

159. Examples of gross misconduct included:

- Deliberately disrespecting customers by, for example, ignoring or failing to act upon a customer complaint or feedback.
- Repeatedly avoiding calls in a customer facing telephony role.
- Being dishonest to a customer.

- Selling products or services that the customer does not want or need.
- Failing to report abuse or disclose information that may put the safety of customers at risk.
- Making treatment and care decision based on cost or staff convenience which is likely to result in unnecessary customer harm.

160. Under "we stay safe and well" this included:

- Ignoring safety procedures and reporting requirements to get a job done quickly.

161. Under "we work to high professional standards" this included:

- A serious breach of your professional conduct standards, BUPA policy or the BUPA Code.
- Deliberately putting the business in jeopardy.
- Serious negligence in the performance of duties.

The Law

Unfair Dismissal

162. An employee has the right not to be unfairly dismissed by his employer under section 94(1) of the Employment Rights Act 1996. The respondent must establish that the claimant was dismissed for one of the fair reasons set out in section 98(2). In this case the respondent relied on conduct.

163. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

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

164. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

> "The determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer:
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.".

165. Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

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

166. In a case of a misconduct dismissal the Tribunal has to be satisfied that the **British Home Stores v Burchell [1978] EAT** test has been met. This states the following standard must be satisfied:

> "(1) Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged?
>
> (2) Was the belief based on reasonable grounds?
>
> (3) Did the respondent carry out such investigation as was reasonable in the circumstances?"

167. One of the issues in this case was whether the claimant's situation was a case of incapability rather than misconduct.

168. In **Sutton & Gates (Luton) Limited x Boxall [1979] EAT** it was said that:

> "Where someone fails to come up to a standard through his or her own careless, negligence or idleness that is not incapability but misconduct."

169. This is also relevant in determining the steps that a reasonable employer ought to take before dismissing the employee. It can prove difficult to distinguish between the two.

170. A Tribunal is not bound by the label the employer puts on its reasons but it should consider the reason put forward by the respondent first.

171. In some cases the wrong label will not make any difference. However, in a capability/conduct case it is likely it would make a difference as the procedure for a capability process would be very different from a misconduct issue.

172. In addition, in relation to unfair dismissal a respondent must follow a fair procedure. There must be a full investigation of the conduct and a fair hearing to hear what the employee wants to say in explanation or mitigation.

173. In **Taylor v OCS Group Limited** Court of Appeal it was stated that:

> "The Tribunal should take account of the whole of the procedure including the appeal."

174. The ACAS Code of Practice sets out the minimum standards to be followed.

175. The more serious the allegations the more thorough the investigation should b e. In particular, if the claimant's future employment in their chosen field is put at risk (**Salford Royal NHS Foundation Trust v Roldan 2010]**). Here a nurse was dismissed for gross misconduct and faced not only criminal charges but the risk of deportation resulting from the dismissal.

176. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

> "The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."

177. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

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

178. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982] EAT** states that the function of the Tribunal:

> "…is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."

179. The Tribunal must not substitute its own view for the range of reasonable responses test.

Discrimination

180. The claimant brings a claim of race discrimination in relation to her dismissal. Section 13 of the Equality Act 2010 sets out the definition of direct discrimination. This is where (1) A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.

181. Section 136 of the Equality Act 2010 sets out the burden of proof to be applied in discrimination cases. This says that if there are facts from which a court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

182. The shifting burden of proof rule assists Employment Tribunals in establishing whether or not discrimination has taken place. In **Martin v Devonshires Solicitors [2011]** the EAT stressed that "While the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is facts about the respondent's motivation … they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the respondent's motivation and what is in issue as its correct characterisation in law", and in **Laing v Manchester City Council** Justice Elias then President of the EAT said that if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination then that is the end of the matter. It is not improper for the Tribunal to say in effect there is an open question as to whether or not the burden has shifted but we are satisfied here that even if it has the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race. At the same time he also said the Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to "let form rule over substance". So if the matter is not clear a claimant needs to establish a prima facie case of discrimination, which is shorthand for saying he or she must satisfy stage one of a two-stage shifting burden of proof then the burden shifts to the respondent to explain the conduct.

183. In **Laing** Elias suggested a claimant can establish a prima facie case by showing that he or she has been less favourably treated than an appropriate comparator. The comparator must of course be in the same or not materially different circumstances. A paradigm case is where a black employee as well qualified as a white employee is not promoted where they were the only two candidates for the job. However, the case obviously becomes complicated where there are a number of candidates and there are other unsuccessful white candidates who are equally well qualified. If there are no actual comparators of course hypothetical comparators can be used.

184. The question was asked in **Madarassy v Nomura International Plc [2007] CA,** is something more than less favourable treatment required? Lord Justice Peter Gibson stated in **Igen v Wong [2005]** that "The statutory language seems to us plain. It is for the complainant to prove the facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the Tribunal could conclude that the respondent could have committed such an act … The relevant act is that the alleged discriminator treats another person less favourably and does so on racial grounds. All those facts are facts which the complainant in our judgment needs to prove on the balance of probabilities. **Igen v Wong** also said it was not an error of law for a Tribunal to draw an inference of discrimination from unexplained unreasonable conduct at the first stage of the two-stage burden of proof test. It seems the difference between the approach in **Madarassy** of Mummery in saying that a difference in treatment and a difference in status is not enough, and that of Elias in **Laing v Manchester Council**,

which followed **Igen v Wong** stating that it was sufficient to establish genuine less favourable treatment if at the first stage the employer cannot rebut by evidence and it takes into account the fact that a claimant will not have overt evidence of discrimination but could have evidence of how they had been treated differently to other employees who do not share the relevant protected characteristic.

185. In the recent case of **Efobi v Royal Mail [2017] EAT** it was suggested that there was no burden on the claimant to establish a prima facie case before looking to the respondent's explanation, and that the Tribunal was required to look at all the facts of the case and draw its own conclusions as to whether the burden had shifted. However, in another recent case **Ayodele vs Citylink Ltd (2018) Court of Appeal** decided that the correct position was as stated in **Madarassy**.

186. Another approach is to consider whether a Tribunal should draw inferences from the primary facts which would then shift the burden, and if a non-convincing explanation is provided then discrimination would follow.

187. Regarding inferences Employment Tribunals have a wide discretion to draw inferences of discrimination where appropriate but this must be based on clear findings of fact and can also be drawn from the totality of the evidence. In **Glasgow City Council v Zafar [1998]** unreasonable conduct by itself is not sufficient. However, where it is said that the unreasonable conduct is displayed ubiquitously an employee would need to provide proof of that, i.e. A was treated badly not because of his race but because the employer treated all employees badly. There must be some evidence of this and it not just be an assertion, and likewise with unexplained unreasonable conduct.

188. Inference can be drawn from other matters such as breaches of policy and procedures, statistical evidence, breach of the EHRC Code of Practice, failure to provide information.

Polkey

189. In addition, if it is found that the claimant's dismissal was unfair, in relation to remedy the following issues must be considered (**Polkey v A E Dayton Services [1988]**). If the Tribunal finds there was a failure to adopt a fair procedure and the consequence was that dismissal was unfair then the Tribunal can consider whether, had a fair procedure been followed the claimant would still have been dismissed? If the procedure failings were so severe that no reasonable employer acting reasonably would have dismissed the claimant then **Polkey** does not act to reduce any compensation.

190. In **Software 2000 Limited v Andrew & others [2007] EAT** the President of the EAT reviewed all the authorities on the application of **Polkey** and summarised the principles to be extracted from them. These included:

- "In assessing compensation for unfair dismissal the Employment Tribunal must assess the loss flowing from that dismissal which would normally involve an assessment of how long the employee would have been employed but for the dismissal.

- If the employer contends that the employee would or might have ceased to be employed in any event had a fair procedure been adopted, the Tribunal must have regard to all the relevant evidence including any evidence from the employee.

- There will be circumstances where the nature of the evidence for this purpose is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made.

- However the Tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation even if there are limits to the extent to which it can confidently predict what might have been. It must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

- A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can be effectively ignored."

191. The President stated that:

> "The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example there may be insufficient evidence or it may be to unreliable to enable a Tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the Tribunal to conclude that on any view there must have been some realistic chance that he would have been some. Some assessment must be of that risk when calculating the compensation even though it will be difficult and to some extent a speculative exercise."

Contributory Conduct

192. Section 123(6) of the Employment Rights Act 1996 says:

> "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the…compensation award by such proportion as it considers just and equitable."

193. There must be a causal link between the blameworthy conduct and the dismissal.

Conclusions

194. Our conclusions include the submissions made by both parties.

Unfair Dismissal

195. The Tribunal does not accept that the respondent has established that they had sufficient evidence to find the claimant guilty of all the allegations against her. The Tribunal finds that the respondent has not established the reason given for the claimant's dismissal which was that she had, at its lowest, seriously,negligently failed to undertake her job properly which they characterised as a conduct issue.

196. Broadly we find this because there was insufficient evidence that the claimant did this negligently in particular that the claimant had had sufficient training to know what to do . In addition the claimant's actions did not in all cases fall within the respondent's own description of gross misconduct which referred to 'serious negligence in the performance of your duties'. Whilst it is not necessary to establish gross misconduct in a conduct unfair dismissal we note that the respondent relied on definitions of gross misconduct to justify the claimant's dismissal. However we have approached this on the basis of 'conduct'.

BHS v Burchell Test

197. We find the respondent did not meet the criteria of the **Burchell** test because they overstated the evidence that the claimant was guilty of misconduct as alleged for the following reasons:

(a) Re the "GP call":

- It was reasonable of the claimant to advise the caller that a GP's letter would be received. There was evidence a letter would be automatically sent. This gave the caller the opportunity to disagree. The claimant behaved in a responsible way by calling the caller back and drawing this to his attention. It would have been more difficult had such a letter gone out.

- Whilst at the appeal it was asserted that this instruction could be cancelled, at the time the claimant's managers issued a new instruction to staff to draw their attention to this issue **)**and therefore we find it was not apparent that this instruction could be cancelled. Further Ms Walker accepted the claimant's point in respect of this at the disciplinary hearing. In any event, the claimant was attempting to do that; without speaking to the caller about it she would not have known whether to cancel the letter or not, as the caller's vehement opposition to it would not have been known. Further in the appeal she advises that it was not possible to 'go backwards' but Mr Parker appeared not to have tested this or taken it into consideration.

(b) Re: the "cancer" call:

- The claimant argued here that she was reflecting back to the caller her worse fears that she was reluctant to voice; that she was worried that she actually had cancer when she had not had such a diagnosis. This appears superficially an exaggeration by the claimant but the claimant said this is a therapeutic technique. If the claimant erred in doing this it was a matter for discussion and professional opinion.

- She said at the time the caller appeared more distressed than it appeared when the call was listened to in the cold light of day on a recording. This showed the claimant was open to reflection.

- Further, the claimant did not have access to any immediate management support that day to enable her to consider whether or not she should have called an ambulance. However, we cannot see how calling an ambulance was a misconduct issue. The claimant was erring on the side of caution.

(c) Re client comment:

- Regarding the “la di da” comment, we accept this was evidenced. The claimant admitted it and she agreed it was unacceptable and she accepted this. We accept that this does come within the description of “gross misconduct”.

(d) This refers to the claimant not arriving for work. This was a mix up over her shifts and it was the first mistake she had made in three years. The claimant conceded she had made a mistake and came in as soon as possible. By itself the respondent could not have genuinely believed that this was an example of gross misconduct. There was a separate policy for absence and lateness which the union official said this incident should have been dealt with under.

(e) Regarding the CQC documentation, it was accepted by the claimant that some of it could have been filled it in more generously. The claimant was concerned that she had filled it in more generously but she had failed to save it. This appears to be a problem with training and IT skills, and no improvement plan to improve her performance was put in place. Had this been drawn to the claimant's attention on the first occasion then the other occasions would not have occurred, but due to the way the investigation was conducted this was not raised with the claimant during the investigation period and therefore other examples came forward when the claimant had not been advised she was filling it in incorrectly. This was a serious failure by the respondent. They were aware the claimant had completed one form incorrectly but then allowed her to carry on filling in forms incorrectly and yet regarded this as an extremely serious issue. Possibly it was; but if it was surely the claimant should have been counselled immediately that she had done it wrongly rather than letting her repeat her error. The respondent took the view that the claimant had been trained on all of this in March with Margina and no further training was necessary. This contrasts to

the attitude they took with FA. Further there was no evidence that Phil Taft was disciplined at all for his failure to make notes in respect of the call the claimant had volunteered to deal with.

198. (c) was potentially gross misconduct but was unconnected with the respondent's overall concern about the claimant's inconsistency in doing her job (d) and (e) were potentially simple misconduct.

199. In relation to (e) there was insufficient evidence to establish that the claimant knew what to do and failed to do it ;we also find the respondent culpable in allowing the claimant to continue with her erroneous practice after they had been alerted to it; this was a matter whereby the claimant could have been advised and undertaken re-training; that would have been the obvious response.

200. Re (a) we find it was unreasonable to conclude the claimant had done anything wrong, and re (b) the claimant may have been exaggerated in her response but she could have been counselled and the need to seek management advice when she was not sure emphasised. Our finding is there were so many nuances to incidents (a) and (b) that to find misconduct on the basis of them was not credible.

Reasonable to Dismiss

201. It is outside the range of reasonable responses to dismiss for the matters even if they were misconduct/gross misconduct.. Firstly, the respondent did not properly consider the claimant's mitigation i.e. stress over the two investigations involving Carina Basford, the anniversary of her mother's death and the difficulties in booking any holiday. The claimant had been given support in booking her holiday so we understand the respondent's frustration with this matter being raised on numerous occasions. However, the truth of the situation was she was under a great deal of stress and apparently had only had two days off in six months which was clearly insufficient given the actual stressful nature of the job and her particular circumstances. The respondent failed to take this into consideration, simply consigning it to the claimant's fault for her failure to properly understand the system or to book the leave too late which meant that she went in to the "waiting" queue.

202. Secondly, they treated matters as gross misconduct at first instance, which were training or counselling matters. Within the range of reasonable responses we believe an employer would have considered those to be training issues. Had the claimant repeated her errors after further training and warning the respondent would have been acting reasonably to consider dismissal in respect of this.

203. Further, we rely on how the respondent treated FA in respect of this, as they were content in her case to treat these matters as training issues. There was a striking inconsistency here. We can see no relevant difference between her case, and in fact she was described as being rude and judgmental with a caller directly, which could not be laid at the claimant's door.

204. Further it was unfair, even if this was misconduct, to consider dismissing the claimant without giving at least one warning that if her performance did not develop more consistency she would be subjected to disciplinary proceedings. Whilst there was evidence of some criticism of the claimant from her manager's notes, there was

no evidence the claimant was aware that her occasional lapses would lead to disciplinary procedures. Indeed, being called in to discuss a recording was not that unusual, according to the respondent's evidence

205. In addition, had the claimant known that this was a possible development she may have made more determined efforts to take time off.

Procedural Deficiencies

206. We find that the Naomi Hunter should not have undertaken the investigation as she had been heavily involved in the issues with Carina Basford and in our findings had taken Carina's side in these matters, and that there was internal evidence of bias in the investigation interview and report. For example Ms Humber relied on the fact that the claimant had not shown remorse when she had shown remorse.

207. Further, Ms Humber appeared to have made up her mind by using language suggesting that the claimant was being dishonest or at least that Ms Humber did not believe her, saying in that report in relation to the "la di da" episode she comments, "She (i.e. the claimant) reportedly regretted her actions", and in respect of calling the ambulance, "the concerning aspect was the blatant misuse of the emergency ambulance service with a situation that was not life and death" (Tribunal underlining).

208. In addition Naomi Humber was a witness to the claimant's alleged misconduct and as such should not have been investigating her; neither did she take into account that some of the inconsistencies she recorded in the claimant's discussion and the investigatory interview could be down to poor recall and the fact that she was being asked without any notice about several intricate matters that had happened four weeks previously.

209. We acknowledge that Mr Parker did an intricate investigation in some respects but at times his approach was simplistic and dismissive ie 'it's the line manager who does the investigation',that it didn't matter whether other white employees had been subjected to two complaints etc, the G.P. letter situation was not 'bottomed out'. Given that the situation was one to which **Roldan** applies we find the investigation was insufficient.

Discrimination

210. The Tribunal has considered whether the claimant has established a prima facie case. She does have a potential comparator, FA. However, as FA is also ethnic minority and black, this is not an appropriate comparator for the purposes of a race discrimination claim. We have therefore considered whether inferences can be drawn to establish a prima facie case.

211. There were a number of matters from which inferences could be drawn as follows:

(1) The bias assessment in the investigation report.

(2) Failure to properly investigate the claimant's claim versus Carina Basford and allowing Carina Basford to exclude the claimant from mentoring.

(3) The rebuttal of the findings of the complaint versus the claimant. Naomi Hunter asserted that the incident had happened even though the investigation did not establish that.

(4) Referring the claimant to a disciplinary hearing on two occasions on weak evidence, and both instances involving the same other member of staff, rather than first attempting to deal with the matter informally.

(5) The failure to deal with the claimant's appeal regarding her capability warning.

(6) The failure to deal with the claimant's allegation of race discrimination in the disciplinary hearing.

(7) The failure to follow up on Mr Fineberg's recommendations.

(8) Reference by Louise Walker to coloured staff

(9) The fact that the proportion of black employees who had been subjected to disciplinary action and/or dismissal compared to white employees was disproportionate.

(10) The issue regarding another employee (Phil Taft) who had also not completed records correctly but who was not even upgraded and certainly not disciplined for this.

(11) The fact that the respondent's employees had had virtually no training on equality and diversity issues.

212. Whilst there are numerous grounds on which the Tribunal could consider that the claimant has established a prima facie case and the burden of proof shifts to the respondent, however some of the potential grounds for drawing an inference which we have identified above are not as strong as others, for example number 10 because the group is so small it would not be regarded as statistically significant. We have bourne in mind the accumulation of small matters can cause the burden to shift.

213. More significantly we find the inferences are outweighed by the fact that in very similar circumstances another black employee was not dismissed (FA). Accordingly we find that the burden of proof does not shift. The claimant's race discrimination claim fails and is dismissed.

Polkey

214. In respect of Polkey we find that a fair procedure would have been to manage the claimant under the performance action plan, giving her the opportunity to improve within a framework of knowing that if she did not there was a prospect of

dismissal. However, we feel it is far too speculative to say whether the claimant would then have been dismissed for capability.

Contributory conduct

215. However, in respect of contributory conduct we do accept that there were serious performance issues with the claimant, and that she did make the "la di da" comment, which was unacceptable, but we feel this is also balanced by the fact that the claimant was allowed to go on making mistakes rather than, in the period May/June, her failings being immediately brought to her attention which could have prevented further incidents arising.

216. Accordingly, we find that a reduction in any award of 30% would be appropriate to reflect the claimant's contribution to her dismissal.

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Employment Judge Feeney

Date: 13th June 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
4 July 2018

FOR THE TRIBUNAL OFFICE