EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4100271/2019

Held in Aberdeen on 13, 14, 15 May 2019 and 25 June 2019

Employment Judge: J D Young

Mrs Rebecca Neil	**Claimant** **Mr D Neil, Husband**
Aberdeen Foyer	**Respondent** **Represented by:** **Ms R Mohammed – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that (1) the claimant was at the relevant time a disabled person within the meaning of s6 of the Equality Act 2010;(2) the complaint of disability discrimination presented to the Tribunal under sections 13, 15 and 21of the Equality Act is not well founded; and (3) the claimant was not unfairly dismissed in terms of s98 of the Employment Rights Act 1996.

E.T. Z4 (WR)

REASONS

1. In this case the claimant presented a claim to the Tribunal maintaining that she had been unfairly dismissed by the respondent and discriminated against because of disability namely poor mental health. The respondent denied those claims and maintained that the dismissal was for reason of gross misconduct and was procedurally and substantively fair. They disputed that the claimant was a disabled person as that is defined in the Equality Act 2010. In the event that the claimant was found to be a disabled person as defined then it was maintained that the respondent had no knowledge of that disability.

Documentation

2. The Parties had helpfully liaised in producing a Joint Inventory of Productions paginated 1 – 421 (JI 1-421). In the course of the Hearing certain supplementary productions were produced without objection being:-

   (a) Letter of 13 August 2018 from the respondent to claimant regarding suspension;

   (b) Sheet showing dates of complaints received by respondent and note of training received by Naria Elrick

   (c) E-mail containing certificates obtained by Naria Elrick (12 in number)

   (d) E-mail attaching record of achievement of Naria Elrick as regards post registration training and learning.

   These documents were paginated at 422/442 (JI 422/442)

The Hearing

3. At the Hearing evidence was given by the claimant; Leona McDermid, Chief Executive Officer of the respondent from 1 August 2018; Susan Elston, Chair of the respondent from around January 2018 and Bryan Mackay; Team leader with the respondent since September 2009.

Issues for the Tribunal

4. At commencement of the Hearing it was explained by Mr Neil that the claimant did not maintain that her dismissal was due to discrimination on the grounds of disability. The issues that arose in that respect were;

(a) that she was a vulnerable person whose anxiety increased by reason of being transferred to Fraserburgh either on return form illness or during investigation prior to termination of employment. There had been previous unsettling incidents at that location and it was discriminatory to have her work there;

(b) that the claimant had taken medication prior to the disciplinary hearing which hampered her performance at that hearing. The respondent was aware that medication had been taken. It would have been a reasonable adjustment for them to have adjourned or postponed that hearing.

In respect of this claim the issues for the Tribunal were:- (i) was the claimant a disabled person at the material time (ii) if so did the respondent know or ought to have known that was the case (iii) if so was the claimant discriminated against under the provisions of the Equality Act 2010 (iv) if so what compensation should be awarded.

5. Issues for the Tribunal in relation to the claim of unfair dismissal related to whether or not the claimant had disclosed confidential information regarding those who used the services of the respondent. In particular;

(a) whether the respondent could have a belief that there had been disclosure of confidential information;

(b) whether there had been sufficient investigation for them to come to that belief with particular reference as to whether they should have made enquiry of the service users;

(c) whether, if there had been release of confidential information, that was gross misconduct;

(d) whether dismissal was within the band of reasonable responses of a reasonable employer;

(e) whether there was procedural fairness within the dismissal with particular reference to the respondent's procedures and the Chief Executive Officer taking the decision to dismiss rather than being the appeal officer.

(f) In the event that there had been an unfair dismissal what compensation should be awarded with particular reference to whether the continuing ill health of the claimant was as a consequence of the dismissal and so should have no impact on any future loss of earnings.

6. From the relevant evidence led, documents produced and admissions made the Tribunal were able to make findings in fact on the issues. Given the disputed factual position it is necessary in certain instances to rehearse the evidence in coming to a finding in fact.

Findings in Fact

7. The respondent is a registered Charity working to support individuals in communities in the North East of Scotland. It has expanded beyond its initial purpose of seeking to provide employment and a home for homeless and at risk young people and now provides education training, employment support and health improvement services to people of all ages. It seeks to support those who have suffered from illness, mental health issues, addiction, social isolation or offending into a place in the community with housing and employment.

8. The claimant had continuous employment with the respondent in the period from 9 January 2012 and until that employment was terminated with effect from 12 September 2018. She commenced employment as a Support Worker with the object of supporting individual tenants in Inverurie into long term occupancy. Around August 2014 she was promoted to the position of Development Coach and commenced work in the respondent's Community

Work Programme. That programme aimed to assist long term unemployed who may be referred to the respondent in achieving permanent work. She was in that position when her employment terminated.

9. As Development Coach she was engaged in the respondent's Prince's Trust Team Programme. This 12 week programme for 16 to 25 year olds sought to build confidence and motivation while providing new skills and qualifications. That programme was run in Aberdeen, Fraserburgh, Peterhead and Ellon. It ran in partnership with North East of Scotland College. The participants worked in teams of up to fifteen over the period and developed a variety of skills including the completion of a community project.

10. From that the respondent developed their REACH Programme (Recovery Employment Achievement Challenge and Hope) and the claimant became a Development Coach in that programme. It is wider in scope than the Prince's Trust Programme and involved those aged between 16/65 years. It is specifically aimed at those in "recovery in life" consequent upon troubling life events. It followed a similar 12 week programme. It ran in partnership with Aberdeenshire Alcohol and Drug Partnership and North East Scotland College (NESCol). In that programme the participants would receive City and Guilds Certificates in Employability Skills; Food Hygiene Certificate; First Aid at Work Certificate. A Volunteering award was also available. In respect of the City and Guilds Certificate in Employability Skills the participants would be engaged in a mock interview situation.

The Claimant's Contract

11. The claimant accepted an offer of employment in her initial position in terms of an offer letter dated 25 October 2011. That offer contained certain terms and conditions. Disciplinary and grievance matters were to be undertaken in accordance with the respondent's agreed grievance and disciplinary procedures. The claimant was to comply with the respondent's policy on Confidentiality and it was also stated that the claimant should treat as confidential during and after the period of her employment all information and records relating to the respondent "business, clients, tenants and other users

of its services that is acquired as a result of your employment except as required in the normal course of your duties." The claimant also required to comply with the respondent's Staff Handbook (JI 370/379).

The Respondent's Policies

12. The claimant accepted that she was bound by the respondent's Confidentiality Policy (JI 75/88) which indicated that the respondent recognised confidentiality as a "key factor" for the organisation. It emphasised that breach of confidentiality would occur when "sensitive information is shared without the consent/authorisation of an individual/organisation". Such authorisation required to be express. The policy indicated that the respondent took breaches of confidentiality "seriously" and would investigate individual cases.(JI 79). In terms of this Policy the claimant accepted all information that came to her regarding a team member on the REACH programme was confidential and sensitive.

13. The respondent Disciplinary Policy and Procedures (JI 59/74) gave as an example of gross misconduct "breaches in confidentiality" (JI 70).

14. The Disciplinary Procedures advised that where a manager became aware of an employee's breach of policy or procedure then an investigation would take place. That investigation would be taken in consultation with HR manager or a member of the leadership team. The employee would be informed if an investigation was to take place and advised when it would be concluded. Suspension with pay may take place during the investigation period.

15. Thereafter the respondent reserved the right to proceed with an investigatory interview prior to any disciplinary hearing but was not bound to hold an investigatory interview.

16. Where there were reasonable grounds to consider that an employee had committed an act of misconduct arrangements would be made for a disciplinary hearing at which time the employee would receive advance notice of that hearing not less than 5 working days; be advised as to the purpose of the hearing; receive details of the nature of the alleged misconduct and copies

of any statements made as part of the investigation. The employee would have had a right to be accompanied at the hearing by a "fellow worker or trade union official".

17. At the disciplinary hearing the person who carried out the investigation would present the information gathered. Both the respondent and the employee may call witnesses and the employee would be given the chance to give a full explanation. The hearing may be adjourned to gather further information if that were deemed necessary.

18. Depending on the nature of the offence the outcomes from such disciplinary hearing ranged from a verbal warning to dismissal. Dismissal arose where there had been "gross misconduct"

19. In terms of the appeal procedure it was stated that "appeals will be heard by the Chief Executive". Following the appeal it was stated that the Chief Executive would inform the employee of the decision within 5 working days and the "Chief Executive's decision is final" (JI 67).

20. The claimant had received training in respect of her role within the respondent. She had undertaken "Boundaries Training" in May 2017 (JI 52). The document on "Maintaining Professional Boundaries" (JI 53/57) emphasised that individual should avoid "discussing information regarding other clients or members of staff".

The claimant's medical records

21. Medical records for the claimant were produced (JI 289/366) which disclosed that she was susceptible to depressive episodes for some years. In terms of a report of 20 March 2019 (JI 328/332) from Dr Daniel Chew the claimant had been "on and off on Sertraline since 2012 and then on Mirtazapine for the last year". He also states that she had been previously prescribed Diazepam 2mg by her GP "for which she has used on one occasion prior to a work related meeting but has found herself "spaced out" and unable to absorb what has been discussed at the meeting. Since then she has not taken any Diazepam".

22. The medical records (JI 338/366) disclose that in respect of depression the claimant was prescribed Sertraline at least from May 2016 (JI 358) and that continued until July 2017 when she was additionally prescribed Mirtazapine (JI 350). Her GP referred her to the Adult Psychiatry Unit at Grampian NHS who advised that the claimant had suffered enhanced depressive symptoms in the first half of 2017 as a result of stress at work. She had increased her Sertraline herself initially and had consulted with her GP at the beginning of July with "symptoms of anxiety including panic, tremor, sweats but also low mood and also describing poor sleep." That had resulted in lack of motivation and interest. She had been provided with a medical certificate to remain off work but that did not improve her symptoms and so she was commenced on Mirtazapine which had resulted in some improvement. However that did not last and the Mirtazapine dose was increased along with the referral to the Adult Psychiatric Unit.

23. A letter from the claimant's GP of 4 September 2018 (JI 289) advised that the claimant had consulted her since July 2017 with a depressive illness at which time there was an increase in anti-depressant medication. It was stated that her mood had improved and she was able to make a return to work in January 2018 with continuation of anti-depressant medication. In June 2018 it was reported that her mood was "stable" and the medication was capable of being reduced "slightly". However due to "recent stress" the medication had been increased with the claimant again showing a marked increase in symptoms of depression and anxiety.

24. In March 2019 Dr Chew believed that the claimant would be stabilised with continuation of medication and further counselling. His diagnosis was that she had had an episode of mixed anxiety and depression precipitated by loss of work and ongoing disciplinary action.

25. The claimant advised that without the prescribed medication of Sertraline and Mirtazapine she would suffer from low mood and find it difficult to communicate effectively. Her concentration would be impaired and she would be "vulnerable to tone of voice". Her low mood would mean that she would

be lethargic; not wish to take responsibility; not wish to get up or leave the house and feel fatigued, demotivated and easily confused.

Claimant's absence from work

26. The claimant was absent from work as from 26 July 2017. She had been involved in a REACH team programme which had overrun its allotted 12 week period. The team had decided to create a "sensory garden in Fraserburgh" as their community project. She considered she was under pressure from management to complete the programme and became exhausted. She visited her GP and was signed off work with a Statement for Fitness for Work which indicated that her absence was due to "stress at work" and also "depression" (JI 140). She remained off work under succeeding Fit Notes which stated the same reason for absence through to January 2018.

27. In the period of absence the respondent obtained consent to obtain a medical report from her GP and first received a report of 5 September 2017 (JI 145) which indicated that the claimant had been suffering from stress and depression which had occasioned the claimant feeling tired, lacking in energy, low mood, tearful and feeling "unsupported at work and at home". She had improved with medication but was due to be reviewed when further information could be given on a likely return to work date and any "ongoing disability" but "at this time I do not class her as a disabled person"

28. By letter of 29 September 2017 the respondent sought to meet with the claimant and sought the advice of her GP as to whether that would be appropriate. The respondent thanked the GP in that letter for "confirming in August that Becky was not diagnosed as disabled" and asked if there were any specific recommendations that the GP would wish to make either generally or in relation to any return to work (JI 148). In response the claimant's GP advised that the claimant's mood had "dipped" and that she was "struggling with depressive symptoms once more". The respondent was advised that the medication had been increased and a referral made to a consultant psychiatrist. It was indicated that it was not considered that the

claimant was well enough to meet face to face at that time. No opinion on disability was expressed at that time.

29. By letter of 26 October 2017 the claimant's GP was asked for a further update medical report. It was indicated that as a result of contact with Mr Neil a meeting had been arranged for 31 October 2017 with the claimant (JI 154). Again any specific recommendations were requested. The respondent asked if it was still the case that the claimant would not be considered "disabled" No report was received by the respondent subsequent to that letter. By letter of 12 December 2017 the respondent asked the claimant's GP if there was a further report. By letter of 28 December 2017 (JI 162) the claimant's GP indicated that a report had been submitted and was not sure why "you have never received this". However by that time there had been an agreement that the claimant would make a phased return to work in January 2018. There was a temporary cover in place for the claimant until mid February and with that in mind the aim of the respondent and claimant would be that from January 2018 she be included in the Fraserburgh REACH team on a phased return basis as a support to the team leader. As the claimant's involvement increased the aim was to have her responsible for the team by mid February 2018. The claimant's GP indicated that she felt that was an appropriate way of re-introducing the claimant to work after her period of absence. The respondents were advised that the claimant's mood appeared better with "good levels of concentration and her anxiety appears much less acute".

30. Prior to this exchange a meeting with the claimant took place on 31 October 2017 at which a note was taken (JI 390). The meeting was attended by Diane Gill HR Manager of the respondent. At that time the claimant advised that she had suffered from clinical depression for some time and from 2012 had resumed medication. At the time of the meeting that medication had been increased. The meeting canvassed the issue of return to work which led to the phased return agreement. The proposed return to work timetable for the claimant was produced. (JI 163/164).

Incident with Caretakers at Fraserburgh

31. Prior to the claimant's absence from work in July 2017 she required to attend the JIC Building in Fraserburgh used by agreement with the local authority.

32. An incident had occurred prior to the appellant's absence in July 2017 with the caretakers at the premises. The matter seemed to concern the booking of rooms and the time taken for meetings. The particular matter complained of by the claimant was that she had been verbally abused by the janitors on two separate occasions; one where the caretaker had "been in her face and swore at her" and another where she was "shouted at". It would appear that relations with the caretakers had then been very poor. The matter had been solved with rooms being able to be booked for an extended time.

33. On return to phased working in January/February 2018 she was to assist completion of a REACH team programme which was coming to a close in Fraserburgh. She was then to commence recruitment for the new REACH team at Ellon. The working in Ellon commenced in March 2018. At that time the claimant was to be based at the NESCol building in Ellon ("Ellon College"). At that time her line manager continued to be Bryan Mackay.

34. The claimant advised that it was "agreed that Ellon a better place for me to go back to – but I understood Fraserburgh was my contracted workplace". She made no protestation about return to Fraserburgh to close off the team programme prior to commencing work at Ellon. She indicated that "going to Fraserburgh was not a breach of any agreement – but not easy. I say should not have gone back to Fraserburgh at all given the circumstances."

The Claimant's work in Ellon

35. The claimant commenced work in Ellon in the recruitment of a REACH team in March 2018 based at Ellon College. Bryan Mackay was still her line manager. In June 2018 the team had been assembled. Up to that point she had been on good terms with the administrator/ receptionist at the College but then felt that her "attitude towards her had changed". However she went on annual leave at the end of June 2018 feeling positive about her role.

36. On return from annual leave she was asked to meet with her line manager and Anne Kain of the respondent. That meeting took place around 17 July 2018. She was told that there had been a complaint from Ellon College. The claimant was "shocked and burst into tears". Anne Kain was unable to give any detail of the complaint but advised that it was serious and that the claimant would not be allowed to return to Ellon College meantime. She would continue to work with the team but in locations other than the campus. She was told that an investigation would be undertaken led by Naria Elrick. The claimant questioned whether she was an appropriate person to conduct the investigation as she had been line managed by Ms Elrick in the past (around 2012/2014) and did not feel they had a warm relationship.

Investigation

37. The respondent received on 18 July 2018 written complaints from 2 NESCol staff regarding the claimant. (JI 176/178 and JI 179/180)

38. The claimant then received an e-mail of 27 July 2018 (JI 168) which indicated that Ms Elrick would be conducting the investigation on behalf of the respondent and wished to meet her on Tuesday 31July 2018 in Fraserburgh. Diane Gill would be taking notes of the interview.

39. In the meantime the investigating officer had conducted interviews on 25/26 July 2018 in relation to the complaints raised. Anonymity was preserved in relation to the notes taken of those meetings for reasons of confidentiality. However the claimant acknowledged that in the course of events it was not difficult for her to determine the identity of the two complainants, one of them being the administrator/receptionist at Ellon College. On 25 July 2018 information was obtained from "NESCol Employee 1" (JI181/182); and the claimant's line manager Bryan Mackay (JI 198). On 26 July 2018 information was obtained from "NESCol Employee 2" (JI 187/189) and "Foyer Employee 1" (JI 203).

40. The claimant was then interviewed on 31 July 2018 and agreed the notes gave a true account of the meeting (JI 211/214). No detail of any complaint

was given to the claimant at that point but general questions were asked of her relationships with NESCol staff in Ellon and her work with the REACH team.

41. The claimant was suspended from work on 13 August 2018 (JI 422). It was considered that suspension was necessary due to "conversations that you were raising with individuals regarding the investigation". The claimant denied that to be the case. In any event the letter of suspension indicated that the investigation related to:-

- Disclosing confidential information regarding client/s to NESCol staff.
- Unauthorised absence/ poor timekeeping.
- Rudeness and inappropriate behaviour at work.
- Not adhering to policies and procedures e.g. Confidentiality policy, Challenging Behaviour policy, Dignity at Work policy, Disciplinary policy, Information policy.
- Unprofessional behaviour in front of clients re accusing NESCol staff of unprofessional behaviour in front of clients.

42. The claimant was not to attend work while suspended with pay but should remain available for meetings. The claimant was advised that she should not enter company premises or make contact with members of staff without permission. The investigation was to continue in the meantime.

43. The investigation continued with a further investigatory meeting being held with the claimant on 17 August 2018 (JI 215/221). At that time specific matters were put to the claimant regarding timekeeping; discussing confidential/personal details of students, disclosure of personal information about herself and family members; allegations that the claimant was intimidating; allegations of rudeness. The claimant responded to those matters. In relation to confidential information she denied that she had disclosed any confidential/personal information of the students on the REACH

team indicating “absolutely not, as I work with vulnerable adults with sensitive issues”.

44. The investigation by Naria Elrick proceeded with further interviews of “NESCol Employee 1” of 20 August 2018 (JI 183/186); “NESCol Employee 2” of 20 August 2018 (JI190/197); interview with Brian Mackay on 17 August 2018 (JI199/202); interview with “NESCol Employee 3” of 20 August 2018 (JI 204); interview with “NESCol Employee 4” of 21 August 2018 (JI 205); interview with “Foyer Employee 2” of 20 August 2018 (JI 206/209); interview with “NESCol Employee 5” of 21 August 2018 (JI 210).

45. An investigation report was then prepared and submitted on 23 August 2018 (JI 169/174) with a recommendation that there were grounds for seven allegations to be considered at a formal disciplinary hearing. The seven areas of concern were stated to be:-

> “1. Concerns regarding inappropriate, intimidating and bullying behaviour.
>
> 2. Information that should not be shared about clients to employees or information to clients about employees.
>
> 3. Breach of Policies and Procedures and Guidelines of external “host” organisation. These included health and safety risks to both employees and clients.
>
> 4. Breach of Policies and Procedures at Aberdeen Foyer.
>
> 5. Poor timekeeping and unauthorised absence resulting in unattended team.
>
> 6. Rudeness.
>
> 7. Refusal to carry out reasonable instruction.”

Incident with Brian Mackay

46. The claimant advised that prior to her suspension she had asked Mr Mackay if he knew anything of the complaints being made at that time and he advised he was "none the wiser". She stated that in a meeting that afternoon she had met with Mr Mackay who had sought to comfort her on the distress of the complaint and investigation and that he allegedly asked the claimant "if it was really worth it as it was only a 12 week team" and told her to "just go home tonight and speak to your husband and son as this must be putting pressure on them." The claimant stated she said "are you insinuating I should resign" and he said "I'm not asking you to do that but you should go home and discuss it".

47. Mr Mackay did recall speaking to the claimant as to whether he had knowledge of the complaints but denied making the remarks narrated. From the evidence available I was unable to make a finding that there had been any insinuation by Mr Mackay in that conversation that the claimant should consider resigning. He may have asked the claimant to take time to talk matters over but I could not make a finding that there was a suggestion by him that the claimant's best course of action was to resign or that there was any intent to encourage the claimant on that course of action.

Disciplinary Hearing

48. Consequent upon the investigation report the respondent decided that there should be a disciplinary hearing and set that for 31 August 2018. The claimant was advised by letter of 24 August 2018 (JI 237/238). At that time the claimant was advised that six issues were to be considered summarised as:-

"1. Poor timekeeping.

2. Rudeness and inappropriate behaviour.

3. Intimidating and bullying behaviour.

4. Not adhering to policies and procedures.

5. Openly discussing clients and disclosing confidential information.

6. Unprofessional behaviour in front of clients.

49. The investigation report was sent to the claimant together with the supporting interview statements and Policies.

50. The letter advised that if the allegations "are believed to be proven" it will be considered as either misconduct or gross misconduct under the Company Disciplinary Rules and your employment may be summarily terminated". The claimant was advised that she was entitled to be accompanied by a work colleague or trade union representative.

51. The claimant then advised that her chosen representative would not be available and the meeting was rescheduled to 7 September 2018 in terms of the letter of 30 August 2018 (JI 240/241). That letter omitted "misconduct" in advising that if the allegations "are believed to be proven, it will be considered gross misconduct under the Company Disciplinary Rules and your employment may be summarily terminated". Again the claimant was advised that she could be accompanied by a work colleague or trade union representative.

52. The disciplinary hearing was chaired by Leona McDermid, Chief Executive of the respondents. She was accompanied by Kathleen Singer, Head of Service. Diane Gill, HR Manager took notes of the hearing. The notes of the hearing were produced in typed form (JI 242/248). The claimant agreed that the notes were a fair record of the hearing.

53. The claimant advised that prior to the hearing she had taken Diazepam which had been prescribed to her by her GP. She stated that Diane Gill did ask if she was "okay" and the claimant said to her "I feel a bit woozy as taken some Diazepam about 2 hours before hearing" to which Diane Gill stated "I'm sure you will be alright". She went ahead with the hearing. She did not raise the issue with the panel at the hearing. She did not hear Diane Gill advise the panel that she had taken Diazepam. She did not ask for an adjournment. She did not ask for a break in the hearing itself. She stated that she did feel

"discombobulated" and did not consider that she gave of her best at that hearing.

54. There was no evidence from Diane Gill and so there was no contradiction of this evidence. The medical report of 20 March 2019 contains a statement by the claimant that she took Diazepam prior to that hearing and felt "spaced out" (JI 329). The medical information (JI 342) shows that she was prescribed Diazepam on 4 September 2018 just prior to this hearing. In those circumstances a finding is made that the claimant did take Diazepam prior to this hearing and that she advised Diane Gill that she was feeling "woozy". She was not represented at this hearing. She explained that the individual who had agreed to be present called off at the last minute and she could find no other colleague to accompany her at this hearing.

55. The position of the claimant was that she had not felt she had done herself justice at this hearing. However as indicated there was no break or adjournment requested and in relation to the questions did try to "answer as best as I could".

56. The disciplinary notes show that the panel questioned the claimant on each of the allegations and received responses from the claimant who was able to give considerable detail in the answers made. In respect of the release of confidential information she denied that she had released any confidential information to NESCol employees and in particular the receptionist. She did indicate that she and the NESCol receptionist had familiar conversations about their own personal lives and circumstances and that the claimant felt that she had "over-shared" personal information on those occasions but had not released confidential information regarding clients. The claimant volunteered at the hearing that the receptionist had printed off information from curriculum vitae prepared by the students for mock interviews. She stated this had been kept on a memory stick and on occasion the receptionist/administrator had printed off the information as the claimant was short of access to printing facilities. She stated that the memory stick had been mislaid overnight in the premises and the following day the

receptionist/administrator had handed the memory stick to the claimant explaining it had been found on the receptionist's computer. She gave this information as an explanation as to how it was that the receptionist/administrator could say that she was in possession of confidential information.

57. The claimant had also indicated at the disciplinary hearing that the receptionist/administrator at Ellon College may have been in possession of confidential information because of information released by the members of the REACH team themselves at a health and safety briefing and their graduation both of which had been attended by the individual concerned.

58. In the notes of hearing there was no mention made by the respondent of any particular piece of information disclosed by the claimant. Reliance was placed on the statements from the interviews with "NESCol Employee 1" and NESCol Employee 2".

59. By letter of 11 September 2018 (JI 259/262) the claimant was advised of the panel's view of the various allegations. Some were considered to be acts of misconduct and others not so but the panel found that the claimant had breached confidentiality by disclosing confidential information about clients on the REACH team. It was considered that was an act of gross misconduct given the training and the importance of confidentiality and that her employment would be terminated with effect from 12 September 2018 without an entitlement to notice pay. The claimant was advised that she had the right to appeal that decision.

60. At the Tribunal Hearing it was explained by Ms McDermid that she was nominated as the individual to take the disciplinary hearing at a time when she was not the Chief Executive. The Chief Executive however had retired in the summer of 2018 and she had then been appointed as Chief Executive. In the time line originally envisaged it was thought that the former Chief Executive would still be in position at a time when any appeal might be heard. However that turned out not to be and to avoid any conflict it was necessary to involve one of the Board members to hear the subsequent appeal.

61. It was also explained in evidence by Ms McDermid that:-

(a) the respondent had confidence in the investigating officer Ms Elrick given her training with the police. In that role she had training and experience in conducting interviews and compiling witness statements. She had also had support from an external HR provider in disciplinary matters. In respect of the training certificates produced from Ms Elrick whilst with the respondent (JI 424/442) it would not appear she had specific training in relation to investigation relative to disciplinary issues at work.

(b) reliance was placed on the complaint and statements from "NESCol Employee 1" and "NESCol Employee 2" to come to the view that confidential information had been released. The disciplinary panel had not heard from these individuals directly but relied on the information within the investigation. The respondent had known each of those individuals for some time given their contractual relationship with NESCol. Each had provided information separately that they had been privy to confidential information being released to them by the claimant. There was no reason to consider that they had any issue with the claimant such that they would manufacture that information. There was no reason for the respondents to consider that these individuals were in collusion with each other. If only one individual had made a statement it would have raised issues as to whether reliance could be placed on the word of one of those individuals but each had identified that confidential information was released by the claimant and it was considered that was a sufficient basis for the finding made.

(c) If the receptionist had been the only source of information regarding disclosure the matter would have been made more difficult. However the other individual (NESCol Employee 2) had run her own training company independent of the respondent for some time before being engaged with NESCol. She was well known to them

and it was considered that the reliance could be placed on her statement in combination with the information made available by NESCol Employee 1. She maintained each of the witnesses had indicated that they had been spoken to separately and together by the claimant on sensitive information.

(d) On the issue of the memory stick this was a matter raised by the claimant at the disciplinary hearing. It was considered that there was a breach in procedures in not reporting that loss of memory stick which did contain some personal information. However that was a secondary matter. They would not have known about that issue had the claimant not raised it. The principal issue was release of information by the claimant to the two individuals.

(e) While the claimant had indicated that confidential information could be in possession of NESCol Employee 1 from the team members themselves that was not the case for NESCol Employee 2. No allegation had been made that she could have been given the information from team members.

(f) Given the seniority of the claimant and her extensive training and awareness of the importance of confidentiality it was considered that there was gross misconduct.

Appeal Hearing

62. By letter of 14 September 2018 (JI 265) the claimant appealed the dismissal decision to Susan Elston, Chair of the Board, who was to hear her appeal. The grounds of appeal were essentially:-

- The dismissal was too harsh a penalty.
- She did not act wilfully or with malice in any of the issues presented as accusations.

- There was no information on the memory stick that was deemed to have been disclosed.
- Insufficient consideration was given to the claimant's explanation.
- The REACH team had volunteered information at the first day's induction and thereafter conversations took place in public areas where information could easily be overheard.
- The long unblemished service should have been recognised.
- The notes of the hearing indicated the claimant had "chosen" not to have a companion but that was not correct as potential companion had called off at the last minute.
- Having taken the Diazepam prior to the disciplinary hearing that had left the claimant confused.

63. The appeal was to take place on 28 September 2018. The claimant wished her husband to be present but was told that only a work colleague or trade union representative should be present as a companion and she was accompanied at the rescheduled hearing of 22 October 2019 by her colleague Caroline Hoag.

64. Notes of the appeal hearing were taken and the typed notes (JI 278/282) were agreed by the claimant as being accurate. The claimant advised she felt that she had said all that she could or wanted to say at that hearing. She had not taken Diazepam prior to that hearing. Ms Elston and Sheila Sansbury , another Board member heard the appeal.

65. In the appeal she challenged the decision that Ms Elrick should have carried out the investigation as the claimant did not consider she was unbiased given she had worked with Ms Elrick between July 2012 – July 2014. She did not consider the investigation was balanced as she did not "seek anyone who would be on the side of me and did not ask any of the REACH team members or anyone I work with in the local community".

66. The appeal panel advised the claimant that they were there to address the issue of gross misconduct namely disclosure of confidential information.

67. The claimant admitted mislaying the memory stick temporarily but the CV's would not have obtained items of a confidential nature which were not already known to the NESCol being essentially names and addresses.

68. She indicated that she did not discuss personal information with the NESCol receptionist. She advised that she would be well aware that would be a serious issue.

69. The claimant also indicated that the letter to her advising her of the appeal had been sent to the wrong address (JI 267). The claimant advised also of ways in which the NESCol receptionist/administrator could have been in receipt of confidential information other than through her.

70. By letter of 5 November 2018 (JI 283) the claimant was advised that the dismissal was upheld. It was stated that it was "clear from the evidence presented that confidential information regarding clients' circumstances was disclosed by you verbally to non-Foyer employees resulting in breaches of confidentiality". There was also stated to be clear evidence of training around Confidentiality and Boundaries and that the Disciplinary Policy stated such a breach to constitute gross misconduct.

71. In evidence at the Tribunal Ms Elston advised that it was accepted that the claimant was not being malicious in any disclosure of information but that it was the case that such "had been disclosed". She did not consider that the temporary loss of the memory stick was of importance given that there was no evidence there was any information of a confidential nature disclosed in that respect.

72. She did not consider that speaking with the REACH team members would have been of any assistance. These were likely to be vulnerable people. There was likely to be confusion on their part as to what was and what was not a breach of confidence. She did consider that a thorough investigation had taken place. She also considered that if confidential information was

being disclosed by team members to NESCol employees then an experienced person would have been able to step in and halt the process.

73. She also considered that the claimant had in the appeal confirmed she had discussed confidential information and that the appeal was not around the issue of whether it had taken place but the circumstances around that. She agreed that the notes of the meeting did not reflect the claimant agreeing that she had disclosed confidential information. She thought that was an omission from the notes.

74. Ms Elston explained that it was a timing issue which had meant she was asked to chair the appeal hearing. There had been a change of CEO in the year. She also advised that she was appointed to the Board of Trustees of NESCol from September 2018. She saw no conflict between her position as Chair of the respondent and her position with the NESCol board. Her first Board meeting had taken place in October 2018 where she had been an observer.

Return to Fraserburgh

75. The claimant's position was that when she returned from ill-health in January 2018 she was to be performing work in Ellon to find a further REACH team and take that programme. However she required to go to Fraserburgh for a short period in the phased return to close off the existing programme with a person who had been taking that programme in her absence.

76. Fraserburgh was the place where she had encountered problems with the caretakers. She did not make any representation at that time and indicated that going to Fraserburgh was her contractual workplace and so there was not a "breach of any agreement" but her position was that she should not have gone back to Fraserburgh at all given the circumstances. The respondents were aware of the incidents which had taken place in Fraserburgh.

77. It was also maintained that when the investigation commenced the claimant should not have been asked to work from Fraserburgh as that would only increase stress and anxiety further given her known depression.

Events since termination of employment

78. The claimant had made application for other employment since termination of employment. She had applied for and been interviewed for roles with Scottish Association for Mental Health and Aberdeenshire Council but had been unsuccessful.

79. She had met with an officer from Aberdeenshire Council for Employment Support. Her mental health meant that she had not been able to apply for other posts from the end of 2018. She had been in consultation with her GP who had sought to advise on measures to be taken to try to lift her anxiety and depression.

80. She still saw her employment officer and would be attending a resource centre for the purpose of gaining confidence to return to the workplace.

81. The Department for Work and Pensions had made an assessment to say that she was not capable of work at the present time but could undertake voluntary work.

82. She was on benefits of £111.65 per week. She now received PIP of £234 per month from end May 2019. Her net monthly pay with the respondent ran at the rate of £1,481.47 with gross pay of £1,888.17. She estimated loss of pension at £4,059.60 and sought future loss of earnings and injury to feelings award in respect of discrimination on the grounds of disability (schedule of loss at JI 367/369).

Submissions

83. The parties had helpfully produced written submissions. No disrespect is intended in the following summary.

Submission for the claimant

84. It was submitted for the claimant that the decision not to have the CEO of the respondent chair the appeal hearing was a direct contravention of their policies. There was no provision for a member of the Board to chair an

appeal. The policy did not indicate that a member of the Board had any authority to overturn the decision made by a CEO or at all. That "so called appeal" had therefore the hallmarks of a rubber stamp rather than a genuine appeal. The claimant had been dismissed for alleged breach of policies but the respondent was in breach of its own policies.

85. It was submitted that the appellant was a disabled person in terms of the Equality Act 2010 and it was claimed that the respondent had failed in its duties to make reasonable adjustments. The reasonable adjustment was not to have asked the claimant to work in Fraserburgh particularly during investigation. In that respect the respondent claimed the claimant couldn't use the location in Peterhead "due to the ongoing investigation as witnesses may be present but the same thing was happening in Fraserburgh where they have admitted themselves staff there were or had been interviewed". The proposition was that the claimant should have been suspended right away to avoid her returning to Fraserburgh. That was not done as a reasonable adjustment because the claimant was needed to recruit the next team and the respondent needed her to attend a networking event and promote the charity.

86. It was also maintained that the investigation was incomplete. Only the answers that suited the preferred outcome were taken into consideration and the REACH team should have been interviewed. The NESCol receptionist was someone who disregarded authority according to the respondent's Prince's Trust Leader. There was no reason why the REACH team members could not have been interviewed. That would have been a proper investigation compared to the "easy attempt at ticking a box".

87. It was also maintained that the investigating officer had no training. It had been stated in evidence that the appropriate training had been given but when the certificates were produced that showed a very different position. The truth of the matter was that a "sacrificial lamb" had to be found to appease the funder namely NESCol.

88. The claimant had maintained that the receptionist could have obtained the confidential information from the team members themselves and that was why

she was in possession of that information. The respondent had not sought to question the receptionist on that matter.

89. The likelihood of collusion between the two NESCol employees was not properly considered or considered at all.

90. It was also maintained that the disciplinary hearing was unfair. The claimant was not in a competent state. The claimant maintained she had not disclosed any confidential information. The disciplinary hearing latched on to the memory stick but when they realised that was not going to be sufficient resorted back to verbal disclosure.

91. The respondent had spent considerable time attacking the schedule of loss regarding the ill health of the claimant. If they had spent as much time analysing the case as they sought to mitigate loss they would have found that the dismissal was inappropriate and unfair and that they had been discriminatory.

Submissions for the Respondent

Disability Discrimination

92. It was submitted that the claimant had not satisfied the Tribunal that she was disabled in terms of the Equality Act 2010. No medical evidence had been submitted to show that was the case from the claimant's GP. The psychiatric report came after dismissal and the report from her GP did not indicate that the claimant was disabled at time of dismissal.

93. It was the case that the claimant had been absent for 6 weeks in the course of her employment but there was no evidence subsequent to that absence to say that she was disabled or that there were reasonable adjustments that required to be made.

94. In any event a phased return had been arranged with the claimant. She had made no representation regarding any adjustments that required to be made for her in that period of return. She was in a position to do so. There was no

failure to make any adjustments. She had indicated that on her return from absence she was feeling positive.

95. In the ET1 the claimant had stated that she was "not disabled" but claimed disability discrimination. It was insufficient to say she suffered from stress.

96. No adjustments were requested regarding the disciplinary hearing or any other matters concerning investigation.

97. There was never any point made by the claimant that she could not return to work at Fraserburgh or at any time thereafter. The plan to go to Fraserburgh was made because of business needs regarding the finalisation of the project in place at that time. There was therefore a short period before commencing the REACH team programme in Ellon.

98. In any event the claimant did not suggest that her dismissal was linked to any disability. There was a suggestion that the claimant's anxiety increased as she was moved to Fraserburgh during the investigation period into the allegations of misconduct/gross misconduct. The claimant had failed to demonstrate any link between that incident and her ill health. There was no agreement in place that the claimant was to avoid being placed in Fraserburgh. There was no reason for the respondent to have known that this was likely to cause any detriment. In any event the e-mail exchanges produced showed that it suited the claimant to be in Fraserburgh from time to time as that suited her work/travel plan.

99. There was no reason for the respondents to consider that the claimant had taken Diazepam being outwith her normal prescription. There was no evidence to show that the medication was prescribed as a result of any anxiety in relation to being in Fraserburgh.

100. It was denied that disclosure had been made by the claimant of taking Diazepam. In any event the notes of the disciplinary hearing showed no indication that the claimant was in a "woozy" state. She came across as well prepared and engaged in the process. No adjustment was requested by the claimant at that time. In any event had there been a flaw in the proceedings

due to the Diazepam being taken then it was cured by the appeal hearing where the claimant indicated that she was alert and able to say all that she wished to say in the matter.

Unfair dismissal

101. It was emphasised that the respondent was a charity that worked with vulnerable people who had suffered or were suffering from mental health issues. There was a high duty of care in the respondent. The claimant well understood her responsibilities in not breaching confidentiality.

102. It was submitted that the respondent had carried out a reasonable investigation into the allegation of misconduct. The claimant had indicated that information could have come into the public domain other than through her breaching confidentiality. Those points were considered. However the information that had been obtained was sufficient to satisfy the respondent that there had been a breach by the claimant. That was an issue of gross misconduct in terms of the policies and procedures and so the respondent was entitled to treat the matter in that way.

103. The investigation was thorough. There was no conflict of interest in Ms Elrick conducting the investigation. That was a fact finding exercise only. She made no final decision on the matter as the circumstances then went to a disciplinary hearing chaired by the Chief Executive.

104. An issue had been made of the Chief Executive deciding the dismissal when the procedure was for the Chief Executive to take the appeal. That was simply a timing issue. There was a period of change within the organisation as disclosed in the evidence. The disciplinary procedure had taken longer than originally anticipated and so the current CEO had been appointed and the former CEO had left the organisation before the appeal took place. A Board member was therefore nominated to hear the appeal and that was a fair procedure.

105. Neither was there any conflict of interest in relation to the Board member hearing the appeal. The appeal member had not sat on any Board meeting

with NESCol. In any event there was nothing to suggest there was any conflict of interest in her hearing the appeal.

106. Neither was there any suggestion by the line manager that she should resign. He had denied that any such conversation took place. The evidence showed that the line manager Mr Mackay was actively preparing work on a basis that the claimant would be returning. He had known nothing about the investigation which had been ongoing. He was not instrumental in the proceedings.

107. Neither was there any purpose in seeking information from students on the REACH team about confidential matters. They would not know whether the claimant had spoken of matters of confidence to others. In any event it would be very inappropriate to involve the team members in this issue.

108. It was further submitted that dismissal fell within the band of reasonable responses. There was a clear provision within the respondent's policies that gross misconduct was committed in the event confidential information was disclosed. The respondents had a corroborated version of events. The corroboration came from a respected individual. The information provided by the claimant was insufficient to make the decision maker doubt the credibility of the evidence provided and in all the circumstances the dismissal was fair.

Conclusions

The legal framework

Disability Discrimination

109. The first issue was whether or not the claimant was a disabled person as that as defined in section 6 of the Equality Act 2010. The protection from disability discrimination applies in respect of those who fall within the Act's definition of a disabled person. In terms of section 6(2) of the Equality Act 2010 a person has a disability if he or she has a "physical or mental impairment" which has a "substantial and long term adverse effect on [his or her] ability to carry out

normal day to day activities" – section 6(1). The burden of proof is on the claimant to show that he or she satisfies this definition.

110. That is the starting point for establishing the meaning of "disability". Supplementary provisions are contained in part 1 of Schedule 1 to the Equality Act. Additionally regulations are found in the Equality Act 2010 (Disability) Regulations 2010 and guidance has been issued being "Guidance on matters to be taken into account in determining questions relating to the definition of disability" (2011) ("The Guidance") under section 6(5). That Guidance requires to be taken into account where relevant. Finally the Equality and Human Rights Commission has published a Code of Practice on Employment (2015) ("the EHRC Employment Code") which also has some bearing on the meaning of disability. Like the Guidance the Code does not impose legal obligations but Tribunals must take into account any part of the Code that appears to be relevant.

111. The time at which to assess the disability is the date of the alleged discriminatory act which is also the time to determine whether the impairment has a long term effect. Evidence of the extent of someone's capabilities after the act of discrimination may be relevant where there is no suggestion that the condition has improved in the meantime.

112. The medical evidence in this case is sufficient to find that the claimant does suffer from mental impairment namely continuing depression. The report from Dr Chew (JI 328/332) refers to the claimant's history of depression. She had been on medication since 2012 being a combination of Sertraline and Mirtazapine. There was no reason to doubt that. In any event the medical records show medication being taken at least from 2016. That medication had been increased and at the meeting at the claimant's home on 31 October 2017 with Diane Gill, HR Manager it was noted that the Sertraline medication had been "doubled" and further anxiety drug being taken. That supplemented the "Fit Notes" produced for the claimant in her absence describing that she was off with anxiety and depression.

113. A Tribunal has to be aware of the distinction between what might be referred to as "clinical depression" and a reaction to adverse circumstances at work. Both can produce symptoms of low mood and anxiety but only the first condition might be recognised as a disability by the Act. In this case while the depression suffered by the claimant might worsen in respect of adverse circumstances at work the medical evidence demonstrates that in late 2017 she had been on medication for some considerable time to deal with a depressive condition. Accordingly I do not consider that the low mood or anxiety was simply a reaction to adverse circumstances but rather a symptom of her depression which had been with her for some time. The fact that medication had been taken since 2012 to deal with the depression indicates that there is an underlying depressive state which may worsen with adverse circumstances but nonetheless is caused by a mental impairment.

114. Paragraph 5(1) of Schedule 1 to the Equality Act provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to treat or correct it and but for that, it would be likely to have that effect. The test is whether this "could well happen*" SC Packaging v Boyle* [2009] ICR 1056. So to assess whether there is a substantial adverse effect on a person's ability to carry out normal day to day activities any medical treatment which produces or extinguishes the effects of the impairment should be ignored.

115. The evidence from the claimant and medical information was that without taking the prescribed medication she would have difficulty being able to speak to people in public and in dealing with telephone calls; difficulty in taking responsibility for others; her ability to concentrate would be impaired; she would be vulnerable to changes in voice tone; be lethargic; unable to face the world by getting up and leaving the house; and becoming demotivated and easily confused. The claimant's condition therefore would have an adverse effect on her taking part in normal social interaction and being able to "be out and about" and take a part in daily social life. The adverse effect on normal day to day activity would be an inability to overcome a low mood

and get up and out of the house. A substantial effect is one that is more than "minor or trivial and beyond the normal differences in ability which might exist among people". I would consider that the evidence from the claimant was effective in demonstrating that the adverse effect on day to day activities would be "substantial" without her medication.

116. I would also accept that the condition has a "long term effect" as it has lasted at least twelve months. The evidence is that the medication was prescribed in 2012 and has continued thereafter. The medical reports refer to long term depression. That mental impairment has existed for a period of greater than twelve months.

117. In those circumstances I would accept that the claimant is a disabled person as that as defined in the Equality Act 2010.

118. It is necessary to show that she was a disabled person at the material time given the date of the discrimination of which she complains.

119. There was some confusion regarding the particular instances of discrimination complained of by the claimant. The complaint was that the claimant should not have been placed at Fraserburgh given her experience with the janitors/caretakers at that location. Requiring her to work at Fraserburgh would likely increase stress and anxiety. The material times in the evidence in respect of requiring to work at Fraserburgh after the incident with the janitors would be the period of return from absence around January 2018. In that period it was stated that she required to work in Fraserburgh on a phased return to assist with finalising the team programme which had been running during her absence. She was then to be located in Ellon to interview and proceed with the next REACH team. The alternative period when the claimant should not have worked in Fraserburgh was after she was told that there would be an investigation into complaints on her conduct namely 17 July 2018. In that respect she was to be placed at the JIC Fraserburgh. She was then suspended on 13 August 2018. Accordingly these two periods are January/ March 2018 and 17 July – 13 August 2018. At those material times

she was continuing with her medication and without that it is accepted that she would be a disabled person.

120. The other instance of alleged discriminatory treatment related to the disciplinary hearing of 7 September 2018. Again the claimant would be a disabled person at that time.

Discrimination by the claimant requiring to work at Fraserburgh

121. The true nature of this claim would appear to be that the claimant was discriminated against from something arising from disability. By virtue of section 15(1) of the Act "a person (A) discriminates against a disabled person (B) if:-

- A treats B unfavourably because of something arising in consequence of B's disability,
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim"

122. A defence is provided in section 15(2) to say that the foregoing provision does not apply if it can be shown that the respondent did not know and "could not have reasonably have been expected to know" that the claimant had a disability.

123. In terms of section 15(1) the need for a comparator is entirely abandoned and the disabled person need not show that his or her treatment was less favourable than that experienced by a comparator.

124. To succeed in this respect it needs to be shown by the claimant that there was unfavourable treatment and that treatment was "because of something arising in consequence of his or her disability.

125. The specific effects of asking the claimant to work at Fraserburgh (the unfavourable treatment) was because (in the submission of the claimant) she would suffer increased anxiety in consequence of her disability. That increased anxiety came to (a) that there had been a previous incident with

janitors/caretakers at Fraserburgh and (b) her disability made her more vulnerable to increased anxiety and stress.

126. Accordingly the "something" arising in consequence of the disability could be said to be the increased anxiety and stress.

127. The difficulty with the claimant's case in this respect is that there was no link established between any increased anxiety and stress. I did not consider that was made out. The position of the claimant on return to work in January 2018 to the Fraserburgh location was agreed without any reservation by the claimant. She was content to return to work at that time on a phased basis. She made no issue of any increased anxiety or stress. I do not consider there was discrimination in that respect.

128. In relation to working out of Fraserburgh between 17 July and 13 August 2018 neither would there be any evidence that the claimant suffered from any increased stress and anxiety as a consequence of being in Fraserburgh. She may well have suffered increased anxiety and stress because complaints had been made that occasioned an investigation but it was always the claimant's position that if complaints were made then the respondent required to make that investigation. I did not consider that there was any evidence of increased anxiety and stress on account the claimant requiring to work from Fraserburgh in the period 17 July to 13 August 2018.

129. Neither could it be considered that the respondent failed to make "a reasonable adjustment" by ensuring that the claimant did not work at the Fraserburgh location and essentially that for the same reason namely that I did not consider there was any evidence which would show that the claimant's anxiety and stress was likely to increase or did increase as a consequence of working from Fraserburgh. In short I did not consider that there was any discrimination arising or at play in requiring the claimant to work from the Fraserburgh location on either occasion. There was no evidence that stress and anxiety was likely to increase and there was no representation from the claimant that was likely to be the case at the relevant time.

Disciplinary Hearing

130. The discrimination in this respect would relate to a failure to make reasonable adjustments. Section 20 of the Equality Act states that the duty to make adjustments contains a requirement where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage – section 20(3). The case for the claimant is that she was disadvantaged at the disciplinary hearing because she had taken Diazepam and felt "woozy" and "discombobulated" and as a result did not give of her best. I made a finding that the respondent knew that she had taken Diazepam through conversation with Diane Gill prior to the hearing. The suggestion was that a reasonable adjustment would have been for the disciplinary hearing to be postponed so that the claimant was thinking more clearly.

131. This is an aspect which is not simply one of discriminatory treatment but also general fairness in the procedure that was adopted and that will be addressed in respect of the claim of unfair dismissal.

132. However as far as discrimination is concerned it is necessary for it to be shown that the respondent had a PCP which put the claimant at a substantial disadvantage. The PCP would be the requirement to attend the disciplinary hearing. "Substantial" means more than minor or trivial. It is necessary to establish the alleged "substantial disadvantage" suffered by the claimant in respect of this matter. The assessment of the alleged "substantial disadvantage" has to be based on the facts pertaining to the claimant's disability.

133. In respect of the eventual issue for which the claimant was dismissed namely allegation of breach of confidentiality I do not see that the claimant was put at a "substantial disadvantage" in that respect. Within the notes of the disciplinary hearing there appears question and answer provided in respect of all the issues. The claimant appears to respond intelligibly and articulately. She made no request for a break or adjournment. She did not advise the

panel in the hearing of any difficulties. Her position in relation to the breach of confidentiality was simply that it never happened. She seeks to advise the hearing of ways in which confidential information could have come to the complainers other than in discussion with her

134. At the Tribunal the claimant was not able to identify in what respects the disciplinary hearing might have been better addressed by her. She was not able to point to any particular matter which she did not feel was well explained or which she could have better explained in relation to the confidentiality issue.

135. Her position at the Tribunal did not change from that at the disciplinary hearing namely a denial that she had breached confidential information to those who had complained; and an explanation as to how confidential information may have got to those who did complain other than by her disclosing that information; and that she volunteered that some non-contentious information may have been released because the memory stick was temporarily out of her possession.

136. While it might be said that medication for depression might make it more difficult for an individual to concentrate clearly and answer questions intelligibly and articulately and be alert that would be an assumption and not one which is borne out by the evidence.

137. If the claimant had been able to say what it was that she did not feel she answered correctly or fully or what questions it was that she did not understand or give of her best then that might have established a “substantial disadvantage”. However that was lacking in the evidence provided. I was not able to find that there was “substantial disadvantage” arising in relation to this matter.

138. It should be said that in each of these matters namely discrimination arising from disability and failure to make reasonable adjustments it is necessary that the employer had knowledge of the disability. As regards knowledge that can be imputed knowledge. The claimant was known to be on medication for

depression. That was a matter which was disclosed to Diane Gill in the home visit in October 2017. The "Fit Notes" issued by the claimant's GP referred to "depression". While the respondent requested information from the GP about disability which indicated in August 2017 that the GP did not consider there was disability they received no response to a further letter asking if that was still the GP's view. Sometime later a letter was received from the claimant's GP who indicated that a response had been given but apparently not received by the respondent. The issue of whether or not the claimant's GP thought that the claimant was disabled was not satisfactorily resolved in that process. In any event given the indications of the claimant that she had had clinical depression "since a child" and had increased medication to Diane Gill at the home visit in October 2017 and the indications within the "Fit Notes" provided I consider that the respondent could "reasonably have been expected to know" that the claimant had a disability. That constructive knowledge would be sufficient in respect of discrimination under section 15 or 20 of the Act. However as explained that finding would not aid the claimant in respect of her claims of disability discrimination.

139. It should also be stated for the avoidance of doubt that there was no evidence that the claimant was treated less favourably than another because of disability being a claim under s13 of the Act. There was no express claim made that was the case and if it were to be implied then there was no evidence that any comparator either real or hypothetical and sharing the claimants material characteristics (but not disabled) would have been treated more favourably in respect of the placement at Fraserburgh or in respect of the disciplinary hearing.

Unfair dismissal

The Legal Framework

140. Section 98 of the Employment Rights Act 1996 (ERA) sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages, namely, (1) the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) of ERA and

(2) if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was unfair or fair under section 98(4). As is well known, the determination of that question:-

> "(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 a sufficient reason for dismissing the employee and;
>
> (b) shall be determined in according with equity and the substantial merits of the case."

141. Of the six potentially fair reasons for dismissal set out at section 98 of ERA one is a reason related to the conduct of the employee and it is this reason which is relied upon by the respondent in this case.

142. The employer does not have to prove that it actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. At this stage the burden of proof is not a heavy one. A "reason for dismissal" has been described as a "set of facts" known to the employee or it may be of beliefs held by him which cause him to dismiss the employee" – *Abernethy v Mott Hay and Anderson* [1974] ICR 323.

143. Once a potentially fair reason for dismissal is shown then the Tribunal must be satisfied that in all the circumstances the employer was actually justified in dismissing for that reason. In this regard there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

144. The Tribunal required to be mindful of the fact that it must not substitute its own decision for that of the employer in this respect. Rather it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439). In practice this means that in a given set of circumstances one employer made decide that dismissal is the appropriate response, while another employer may decide in

the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of a case.

145. In a case where misconduct is relied upon as a reason for dismissal then it is necessary to bear in mind the test set out by the EAT in *British Home Stores v Burchell* [1978] IRLR 379 with regard to the approach to be taken in considering the terms of section 98(4) of ERA:-

> "What the Tribunal have to decide every time is broadly expressed, whether the employer who discharged the employee on the grounds of misconduct in question (usually though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee and that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all there must be established by the employer the fact of that belief, that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly we think that the employer at the stage at which he formed that belief on those grounds at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of illustrating these three matters we think who must not be examined further. It is not relevant as we think that the Tribunal would itself have to share that view in those circumstances."

146. In terms of onus of proof section 6 of the Employment Act 1980 means that the onus is on the employer to show that he believed the employee was guilty of misconduct. However the test is neutral as regards whether the employer had reasonable grounds upon which to sustain that belief and whether it had carried out as much investigation into the matter as was reasonable.

147. The foregoing classic guidance has stood the test of time and was endorsed and helpfully summarised by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] IRLR 536 where he said that the essential terms of

enquiry for Employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of a dismissal in those respects, the Tribunal then had to decide whether the dismissal of the employee was a reasonable response to the misconduct.

148. A Tribunal must not substitute their decision as to what was the right course to adopt for that of the employer not only in respect of the decision to dismiss but also in relation to the investigative process. The Tribunal are not conducting a re-hearing of the merits or an appeal against the decision to dismiss. The focus must therefore be of what the employers did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer might have adopted. The Tribunal should not "descend into the arena" – *Rhonda Cyon Taff County Borough Council v Close* [2008] ICR 1283.

149. Also in determining the reasonableness of an employer's decision to dismiss the Tribunal may only take account of those facts that were known to the employer at the time of the dismissal - *W Devis and Sons Ltd v Atkins* [1977] ICR 162.

150. Both the ACAS Code of Practice on disciplinary and grievance issues as well as an employer's own internal policies and procedures would be considered by a Tribunal in considering the fairness of a dismissal. However again when assessing whether a reasonable procedure has been adopted Tribunals should use the range of reasonable responses test – *J Sainsbury's Plc v Hitt* [2003] ICR 111.

151. Single breaches of company rules may find a fair dismissal. As was said in *A H Pharmaceuticals v Carmichael* EAT (0325/03) "when a breach of necessarily straight rule has been properly proved, exceptional service, previous long service and/or previous good conduct, may properly not be considered sufficient to reduce the penalty of dismissal."

152. This all means that an employer need not have conclusive direct proof of an employee's misconduct only a genuine and a reasonable belief, reasonably tested.

Discussion

Reason for dismissal

153. The particular reason for dismissal of the claimant was stated to be "openly discussing client and disclosing confidential information". That was the reason given in the dismissal letter of 11 September 2018 (JI 259/262).

154. That letter followed a disciplinary hearing which covered a number of different matters. Clearly whenever a number of allegations are made against an individual but only one found to be of the nature of gross misconduct it has to be considered whether that finding is tainted by the investigation and consideration of the other matters. In this case there was no evidence that the reason for dismissal was so tainted. The letter was clear that there was one matter which was found to be of the nature of gross misconduct. The appeal hearing concentrated on that one issue. The Tribunal hearing did not discuss the other issues raised within the disciplinary hearing and that reflected the position of Ms McDermid and Ms Elston that the reason for dismissal was release of confidential information. That reason related to the conduct of the claimant being one of the potentially fair reasons.

155. I also accepted that there was a genuine belief by the respondent that there had been a release of confidential information by the claimant. I considered that they did believe that to be the case. The issue then becomes whether that was a reasonable belief, reasonably tested.

Investigation

156. To minimise the possibility of bias in a disciplinary procedure there should be wherever possible separate processes of investigation, decision making and appeal. Natural justice demands that the person conducting the proceedings should not be a "judge in his cause" and have a direct interest in the outcome

of the proceedings or give an appearance of bias or partiality. In this case there was a separation of investigation, discipline and appeal. The person appointed for investigation was Ms Elrick. The claimant was critical of her appointment as the investigating officer as she stated that she had worked with her sometime previously. She described her relationship as "professional" and it was taken from that that the claimant and Ms Elrick had not got on particularly well. At the same time there was no evidence of any particular occurrence or circumstance which would have put the investigating officer against the claimant. Certainly there was no obvious bias having someone with whom the claimant had worked conduct the investigation particularly given previous employment within the police force. It would appear that she had an understanding and some experience in the taking of witness statements. Additionally of course she did not take part in any of the subsequent proceedings. She did not attend the disciplinary hearing and her report is in a format which would suggest that the matter was approached on a factual basis. In those circumstances it could not be found that there was bias or apparent bias within the appointment of the investigator or in the terms of the report that was produced.

157. That report in relation to "openly discussing clients and disclosing confidential information" stated that this was an issue raised by "interviewees on more than one occasion" and summarised that there was disclosed to NESCol staff "information you would not share".

158. While the statements taken in relation to the investigation were anonymised to "NESCol Employee 1" etc there was no doubt that the claimant was well aware of the individuals who were making the allegations. Accordingly while there was an attempt at anonymity it was clear that there could be no prejudice caused to the claimant as a consequence given the acknowledgement (by both respondent and claimant) that it was clear from whom statements had been taken.

159. So far as release of confidential information was concerned. The initiating complaint put in writing referred to the claimant "openly discussing her

students and their “issues” on more than one occasion with a colleague and myself. Clearly my colleague and I would respect confidentiality but what about others who may also have had this discussion?” (JI 177). That was a complaint amongst many. It was that written complaint which initiated the investigation and was made independently.

160. This was a complaint which was made on behalf of the receptionist at NESCol. Separately within the written statement given by the receptionist it is stated “discussions about her class and the problems they have etc should have been discussed within the company and not to a work colleague”. (JI 179).

161. The investigation elicited in relation to Employee 1 that information disclosed regarding students was “enough to know who she was talking about, names sometimes, issues with dependency, information you should not share”. It was also indicated that the claimant disclosed quite personal information (statement of 20 July 2019- JI 181)

162. The further statement from NESCol Employee 1 of 20 August 2018 asked if there was any corroboration of personal information being discussed and the reply was “Yes in front of NESCol Employee 2 and me. In particular I knew 2 students from Ellon. Discussed 2 ladies’ personal circumstances and personal information. Discussed another behaviour and dynamics of the team. Another 2 knew me and they were not discussed”.(JI 183). That statement also indicated that the claimant disclosed personal information about herself and other family members.

163. From “NESCol Employee 2” there was obtained information on 20 August 2018 on many issues including that the claimant had discussed issues of her students being “Jean-concentration, illiterate issues” and “two with Asperger’s. I knew who had what problems and I didn’t think it was right”. It was also stated information was passed on regarding “money in Bank and claiming benefits” and one who was “ very nippy” (JI 191). It was also stated that the claimant had disclosed personal information about herself and family.

164. The investigation elicited statements from five respondent employees and the claimant's line manager. The investigation also included meeting with the claimant to obtain information. None of the statements from the line manager or other respondent employees pointed to the claimant releasing confidential information. In her interview of 17 August 2018 the claimant was asked whether she had discussed confidential/personal details and stated "absolutely not as I work with vulnerable adults with sensitive issues" (JI 216).

165. Essentially therefore the investigation disclosed that two NESCol employees reported that the claimant had discussed personal/sensitive information regarding the participants on the REACH team. The claimant denied this and that was her position at the disciplinary hearing.

166. While there was mention made of the temporary loss of memory stick which the claimant disclosed at the disciplinary hearing it was clear that did not amount to a great deal in the context of the release of confidential information. The primary issue for the respondent was the discussion that the claimant had had with the two NESCol employees.

167. The position of the claimant was that further investigation should be have been conducted in that the members of the team should have been questioned. That did not seem to be a step that was necessary or would have been productive. The respondent's position was that they did not wish to involve the students. However beyond that it was not clear what assistance could have been given by the students. They may have been able to indicate ways in which the two NESCol employees could have become aware of personal information other than from the claimant but that was not the nub of the issue which was whether she had been disclosing confidential information. The two NESCol employees could have got personal and sensitive information from other sources because they happened to know the people involved or had been at a health and safety briefing or in conversation but the obligation was on the claimant not to disclose personal information whether or not it was available by other means and that was of the essence.

168. Of course the fact that the two NESCol employees may have got the information from other sources raised the question of whether they colluded with each other in making the complaint against the claimant. That would mean they used the information they had gained elsewhere in making a false claim against the claimant. The position of Ms McDermid in that respect was that she knew the two employees concerned. If the allegation regarding the release of confidential information had come from the receptionist alone then given that there appeared to be difficulties between her and the claimant there could have been difficulties in deciding that confidential information had been released by the claimant. However given both were maintaining that to be the case that aided reliability. Additionally one of the employees had worked with a training company known to the respondent for many years and they had found the individual to be assured and was not a confidante of the receptionist. So in a consideration of whether the complaint might be malicious the knowledge of the individuals involved and the corroborative element was sufficient for the respondent to conclude that there had been a release of confidential information.

169. As stated a Tribunal should not substitute its decision as to what was the right course to adopt for that of the employer in respect of the investigative process. The "range of reasonable responses test" and the need to apply the objective standards of the reasonable employer applies to the question of whether the investigation into the suspected conduct was reasonable in all the circumstances.

170. While there was no great detail produced by the NESCol employees of the information given to them by the claimant there was sufficient to indicate release of confidential information had happened. The issue of collusion had been considered and not considered well founded. There was no other enquiry suggested by the claimant other than enquiry of the team. On the test of the reasonable employer it would not be considered further enquiry was necessary.

171. That would mean that the respondent in this case had conducted as much investigation as was reasonable in the circumstances and had enough information to come to the belief that there had been a breach of confidentiality.

172. There was nothing elicited at the appeal which would alter that position. The same considerations applied. Again the position of the appellant was that she had not disclosed confidential information but no new line of enquiry was suggested or other evidence sought to be introduced which might have occasioned the respondent to consider further enquiry was necessary.

Disciplinary proceedings

173. The issues involving the disciplinary proceedings were (a) whether the claimant taking Diazepam had an effect on those proceedings such that the conduct was unfair and (b) whether there was some other breach of policy involved.

174. On the issue of the taking of Diazepam I did not consider that had an effect on the disciplinary proceedings which would make then unfairly conducted. I have found that the claimant did disclose that she had taken Diazepam and felt "woozy". Despite that the hearing proceeded. I accept that information was not passed on by Ms McGill to the panel but neither was there any adjournment requested by the claimant. The notes disclose answers to questions which were put and it would not appear on the issue of confidential information there was anything left unsaid by the claimant. Her position was that she denied the matter. She gave examples of how it was the confidential information might have come to the complainers. She raised the issue of temporarily mislaying the memory stick but I could not consider that was in some way connected with her being "woozy". She may have felt that she did not give of her best but what she missed and did not include was not advised at the Tribunal.

175. It was stated there was unfairness in Ms McDermid taking the disciplinary proceedings when the respondent's policy indicated that "appeals will be

heard by the Chief Executive" and that the "Chief Executive's decision is final". The point was taken that the procedure that was followed did not follow this policy as the Chief Executive took the disciplinary hearing and a Board member took the appeal.

176. I could not consider that rendered the dismissal unfair because of breach of policy. The purpose of a disciplinary hearing is to allow the employer to find out whether or not the misconduct has been committed and for the employee to explain his/her position. It is certainly the case that the person making the decision to dismiss should not hear the appeal and that there should be separation of interest in that respect.

177. In the end what matters is whether or not the disciplinary procedure is fair and just. That procedure would include the appeal. The circumstances here were that Ms McDermid was not the Chief Executive when the process started and it was intended that the Chief Executive in place when proceedings commenced would take the appeal. However, matters were more prolonged than originally thought and by the time the matter came to disciplinary hearing Ms McDermid had been appointed Chief Executive. She then took the disciplinary hearing and the appeal was taken by a Board member.

178. I did not consider that was an issue which would render the dismissal procedurally unfair. Indeed the procedure adopted sought to make matters fair and just in having a separation of interest between the Chief Executive and Board member.

179. This was not a case where there was some defect in procedure relating to lack of consultation or the like but in the disciplinary process not being exactly conform to policy. The circumstances related to the retiral of the respondent's Chief Executive and the subsequent appointment of Ms McDermid. There was a reason for the difference and that did not render the process unfair.

Appeal

180. There was an issue raised as regards the appeal being taken by Ms Elston. The position was that she was in the process of taking up a Board appointment with NESCol as this matter unfolded. The appeal was heard on 22 October 2018. Ms Elston had been appointed a Board member of NESCol in September 2018 and the first Board meeting she attended was in October 2018.

181. The issue was whether there was any conflict of interest/bias. I was satisfied that there was no bias demonstrated by Ms Elston in her hearing of the appeal. The complaint had come from NESCol employees but given the recent appointment to the Board I did not consider there was any conflict of interest such that the process was rendered unfair. The complaints made were not made on behalf of or for NESCol. They were individual matters relating to the conduct of the claimant in her contact with individual employees. There was no suggestion that the Board of NESCol were promoting these complaints or seeking any particular resolution by the respondent. I did not consider that the appointment of Ms Elston to the appeal panel made the dismissal unfair.

Decision to dismiss

182. The final issue is then whether having a genuine belief that the claimant had released confidential information and that the respondent had reasonable grounds, reasonably tested for that belief, whether or not dismissal was the appropriate sanction.

183. The respondent's policies are clear. The issue of release of confidential information is highlighted as being gross misconduct. The claimant herself confirmed that she was well aware of the importance of confidentiality. She did not dispute it was a serious issue. The respondent is engaged in matters where confidentiality is of extreme importance. Those on the programme offered are likely to have personal issues which are sensitive. They would expect these issues not to be discussed.

184. The issue is whether or not dismissal was within the range of reasonable responses. One employer may have decided that a final warning was enough given the limited nature of the disclosures elicited in the investigation but I could not find that dismissal was outwith the range given the importance both respondent and claimant put on the issue of confidentiality

185. In those circumstances I do not find that the dismissal was unfair.

Employment Judge: **James Young**
Date of Judgment: **22 August 2019**
Date sent to parties: **26 August 2019**