EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4103225/18 Held on 23, 24, 25, 26 & 30 April, 1 May & 19 June 19 September and 2019
Employment Judge J Hendry
Members: R.Walker and S. McCabe

Miss Lisa McGregor	Claimant Represented by Mr D McGregor Father
Total Waste Management Alliance Ltd	Respondent Represented by Ms J Turner Empire HR Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is as follows:

1. **The claimant's application for a finding that she had been unfairly dismissed does not succeed and is dismissed.**
2. **The claimant's application in terms of Section 13 of the Equality Act 2010 for a finding that she was directly discriminated against by the respondent on the grounds of her disability does not succeed and is dismissed.**
3. **The claimant's application for a finding that the respondent company was in breach of Section 20 of the Equality Act by failing to implement reasonable adjustments does not succeed and is dismissed.**

4. **The claimant's application for a finding that the respondents discriminated against her in terms of Section 15 of the Equality Act fails and is dismissed.**
5. **The claimant's application for a finding that the respondent was in breach of Section 66 of the Equality Act 2010 does not succeed and is dismissed.**
6. **The respondent's application for expenses does not succeed and is dismissed.**

REASONS

1. The claimant initially brought various claims against the respondent including:

- Unfair Dismissal
- Direct Discrimination - s13 Equality Act 2010,
- Discrimination arising from Disability - s15 Equality Act 2010,
- Failure to make Reasonable Adjustments – s20 Equality Act 2010,
- Harassment and/or Victimisation – s26 Equality Act 2010,
- Equal Pay – s65 Equality Act 2010.

2. The respondents denied the claims and argued that the claimant had been fairly dismissed through misconduct amounting to gross misconduct. They denied that they had been aware or should have reasonably become aware that the claimant was disabled and in any event denied that any discrimination had occurred. The claimant's equal pay claim was opposed.

3. The case has a long procedural history. Following earlier preliminary hearings on the 15 May, 3 July, 23 August and 3 September 2018. Employment Judge Hendry in a Judgment dated 2 November 2018 struck out a number of specific claims that the claimant had advanced. The claimant was given 14 days to provide further and better particulars in relation to a number of the claims that remained.

4. A further preliminary hearing took place on the 14 January 2019 to consider the remaining claims and to consider a further strike out/deposit application. Employment Judge Kemp issued a Judgement on the 24 January 2019 striking out claims in respect of indirect discrimination under s19, of harassment under s26, in part a claim of direct discrimination under s13 and a claim for reasonable adjustments. He also set out in detail the elements of the claims that remained.

5. The claimant withdrew her claim for harassment on the ground of her sex (s26 of the Equality Act 2010 (''the EA'')). She maintained claims for discrimination in relation to her disability, namely direct discrimination and a failure to make reasonable adjustments. She also pursued a claim for equal pay "like work" and 'equal value'. That latter claim was sisted.

6. The respondents accepted that the claimant had the condition ADHD but the date from which she suffered from that condition was not agreed. They also denied that they had knowledge of the condition until a disciplinary investigation commenced (JBp537).

Issues

7. A List of Issues was also lodged prior to the commencement of the hearing.

They were noted as follows:

Unfair Dismissal – s.98

a. Was the claimant unfairly dismissed?
b. Was the claimant dismissed for a potentially fair reason under s 98(1) & (2) Employment Rights Act 1996?
c. If conduct is found to be the reason for dismissal, did the respondent act reasonably under s 98(4) in treating the claimant's alleged conduct as a sufficient reason for her dismissal?

d. Did the respondent have a genuine belief that the claimant had committed the alleged misconduct that she was dismissed for?
e. Did the respondent have reasonable grounds for that belief?
f. Did the respondent conduct a reasonable investigation before forming that belief?
g. Did the respondent act reasonably or unreasonably in treating the alleged misconduct as a sufficient reason for dismissing the claimant in accordance with equity and the substantial merits of the case? In determining that question, did the decision to dismiss, and the procedure by which it was reached, fall within the band of reasonable responses?
h. If appropriate, what award of compensation should be made?
i. Should a percentage Polkey reduction be made to the compensatory award?
j. Should a percentage reduction be made in respect of contribution?

Direct Discrimination – s.13

a. Did the respondent treat the claimant less favourably when dealing with the claimant during the disciplinary process which resulted in the claimant's ultimate dismissal, on grounds of the claimant's disability?

Reasonable Adjustments – s.20

a. Has the respondent applied a provision, criterion or practice to the respondent?
b. If yes to a. what was this provision, criterion or practice?
c. Did this provision, criterion or practice put the claimant at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
d. What steps should the respondent have taken to avoid putting the claimant at a substantial disadvantage?
e. What steps did the respondent take to avoid putting the claimant at a substantial disadvantage?

f. Were these steps reasonable?

Equal Pay – Equality Act 2010

a. What term, if any, does the claimant allege is unequal in term of s.66(2)?

b. If the term alleged to be unequal is pay, then with whom does the claimant compare herself with?

c. Is this / are these Comparator(s)

i. of the opposite gender to the claimant?

ii. a current or previous employee of the respondent?

iii. including a predecessor in the woman's job?

iv. Are they (or have they been) working in the same employment as the claimant?

v. Are they an actual and not a hypothetical comparator?

d. If yes to b. and ci – cv above, then is the claimant involved in 'like work'? s65(2)

e. On a general consideration of the type of work done and the skills and knowledge needed, is the work the same or broadly similar?

f. Are any differences of practical importance in relation to the work done?

g. If it is found that there was unequal pay on the basis of one or more of the areas at e. above, then is there a material factor on behalf of the respondent which justifies such difference in pay?

8. In addition, a claim under Section 15 of the Equality Act was pled requiring the Tribunal to consider whether the claimant was discriminated against because of something arsing as a consequence of her disability.

9. The Tribunal also had reference to the voluminous productions lodged by parties along with an additional bundle of documents lodged by the claimant.

10. Parties also agreed a Joint Statement of Facts which is incorporated into the facts found by the Tribunal.

Evidence

11. The Tribunal heard evidence from the following witnesses:

- Lisa McGregor claimant
- Donald McGregor claimant's father and representative.
- Brian Scott Investigating Officer
- Mark Beveridge Disciplining Officer
- Lynsey Paterson Senior HR Adviser
- Neil Potter Appeals Manager
- Shona Cheyne Former HR Adviser with respondent
- Alex Munro Claimant's line Manager
- John Anderson former QA/QC controller

Facts

Background and Claimant's role in the organisation

12. The respondent company Total Waste Management Alliance Ltd (''TWMA'') is a large international company who manage drilling waste from various operations in the oil and gas industry. They employ 730 employees globally. In the UK they have 225 employees, 80 of whom work offshore. They have a site at Tullos Industrial Estate, in Aberdeen, one at Peterhead and their HQ at Bridge of Don in Aberdeen.

13. The claimant applied for the post of Engineering Co-ordinator in mid 2001. She received a letter from the company on 8 July (JB29) confirming that she was successful after interview. The post was based at the respondent's Tullos site. The letter was subject to the claimant receiving satisfactory references. She also required to undergo a pre-employment medical and drugs test for the use of illegal substances. The claimant satisfied the company by providing two references and undertook a drugs test which was negative. She started work on the 15 August 2011.

14. She was required to wear PPE whist at work.

15. The claimant was aware from the outset that the respondent company took the taking of illegal drugs as a serious matter that could lead to dismissal (gross misconduct) given the safety critical nature of much of their work. Their approach was common in the oil industry.

16. The claimant acknowledged receipt of the TWMA Drug & Alcohol Policy on 12 July 2011. The Policy was noted as version "Rev: 0 approved by E Runcieman on 1 September 2009". The acknowledgement contained the following text:

"I hereby acknowledge that I have been provided with a copy of the TWMA Drug & Alcohol Policy. I understand that disciplinary action, up to and including termination will result if I violate this Policy."

A consent form provided by the claimant also gave consent for drug testing.

17. The claimant received a statement of main terms and conditions of employment from the respondent (JB32). She started work with the company on 15 August 2011 on a basic salary of £22,500. She was expected to work 35 hours per week. The statement made reference to the company's Policies and Procedures.

18. The claimant was good at her job. She did not require to have any particular qualifications. She was hard-working and well thought of. She was self-taught through experience and became adept at using the respondent's asset tracking system. She received regular pay increases throughout the period of her employment reflecting her performance.

19. In June 2012 the claimant moved to the role of Engineering Compliance Controller (JB35) based in Tullos. In April 2013 her salary was increased.

She received a new statement of main terms and conditions (JB41). She also received a Job Description (JB42). The purpose of the job was noted as:

"**3. Job Purpose:**

To manage and control company's equipment and related technical documentation, certification and information relating to the company's equipment within C-Sam. The role will be responsible for ensuring that document control and all related communication is kept to a high standard between all global locations operating TWMA equipment to allow for implementation of standardised documentation and processes worldwide."

The claimant's key responsibilities were set out as follows:

"**4. Key Responsibilities:**

- Dealing with 3rd party inspectors relating to equipment
- Technical verification of asset critical component
- To manage ECR register make modification changes in CSAM as required
- Ensuring client quality requirements are complied with."

The CSAM (or C-SAM) system was the respondents' system for keeping track of equipment or as they termed it assets. It logged equipment and noted information about the equipment or asset. The claimant also had responsibility for document control. The Job Description stated:

"**4.1 Document Control:**

- Control technical and certification files for all assets

- Create, implement and maintain standard certification and document packs
- Supply engineering team with technical information and work instructions as necessary
- Source information from third party representatives as necessary;
- Communicate globally with key contacts at each locations to ensure processes and procedures are standardised in keeping with local legislation
- Ensure all documents are complete and accurate in relation to purchase orders, delivery notes and certification
- Maintain instruction, equipment and training manuals as required
- Liaise with QHSE personnel to update procedures and work instructions as necessary
- Assist in maintaining asset tracking system;
- Attend kick off meetings as and when required to follow up communication with relevant key personnel
- Attend weekly ATEX meetings to ensure compliance at all times
- Super-User for C-Sam and undertake responsibility for training and implementation of the system and any changes required
- Conduct audits internally and externally as third-party clients, suppliers and vendors."

20. As part of her role the claimant was also required to attend engineering and project meetings as required and weekly operations meetings. As part of her general duties she had to oversee and maintain existing filing systems and control documents all in accordance with company processes and procedures. Specifically, the claimant worked to improve the C-Sam system.

21. The claimant would also have to collate relevant documentation for equipment that was leaving the premises and attach that documentation to the equipment before transport. The respondents regarded this as being a

safety critical requirement of her post to allow the end user to operate the equipment safely.

22. The claimant's talents suited her job and she quickly grasped the need for attention to detail. She got on well with the respondent's customers and in specific she received praise for attention to detail from the QA/QC adviser of Maersk Oil North Sea UK Ltd (JB46).

23. The claimant's role was integrated into the engineering team. At times she found it difficult to have the importance of her particular role recognised by other staff and managers. She perceived a lack of clarity in the organisation as to roles and responsibilities which she found unsettling.

24. As part of her role the claimant had to work closely with management and with those dealing with quality assurance to ensure that equipment sent out offshore was to the client's specifications, in efficient working order and appropriate for the task.

25. The claimant was subject to regular and annual reviews. An annual review was completed for the claimant by her line manager, Alec Munro, in July 2014 It was noted by him (JBp.432):

"Lisa is a very likable and chatty person and communicates well with others and has no issues in raising concerns and is proactive in her approach to her work. She takes great pride in what she delivers and is always eager to advise others of her findings. Lisa recognises and accepts that at times during verbal communications/discussions that she can easily expand and go off in tangencies which can be distracting on the issue which is being discussed. Lisa is attempting to work on this and routine conversations during discussions."

26. The appraisal noted that the claimant demonstrated a high level of technical knowledge and worked well within the new team.

27. A position became available in the company as a Quality Inspection Engineer. in about late 2014. The claimant applied (JB45). She was interviewed for the post but was unsuccessful. At interview she made it clear that she was keen to progress in her career and undertake further training. She was unsuccessful. A more qualified candidate, Alan Bolton, applied and was successful.

28. The claimant had her salary increased in January 2015 (JB p459).

29. In about 2016 the respondents identified a gap in their quality assurance process for an engineer to inspect and test equipment and liaise with the manufacturers of the equipment and the end users. The postholder, the Technical Quality Assurance Controller or QA/QC Controller, would have to work closely with the claimant as the Compliance Controller and provide them with testing and other information to be included in the packs of documents provided to the respondent's clients. The postholder, required an HNC/HND or equivalent technical or HSEQ discipline. They would be experienced in offshore work, be knowledgeable about welding and have a technical qualification to allow them to understand technical drawings, diagrams and take part in testing (JB p908). They would be involved with clients from the outset and attend 'Kick off 'meetings. They were also expected to develop the control of assets and associated information. The claimant had in the past attended such meetings on occasion when more senior or more qualified staff were unavailable. The claimant was not to be managed directly by the QA/QC Controller.

30. A Job Description was prepared for the post in April 2018 (JB 146) that reflected the position. A Mr John Anderson was appointed to the post of QA/QC controller in about April 2016. His role followed that of the Job Specification created in 2012 for Engineering Compliance Officer (JBP933/934) He was a qualified electrician with 15 years offshore experience as a maintenance supervisor and rig audit inspector. His

experience and knowledge of electrical equipment assisted him in understanding the wiring diagrams for the respondent's equipment. He regularly met clients and started 'kick off' meetings with them. He was responsible for the Asset Inspection Register and signing off and creating new documents. He had responsibility for the integrity for he systems under his control. (JBp935/939/942)

31. Mr Anderson's salary was £40,000 per year (JBp909). He was also entitled to a car allowance of £400 per month. His duties required him to visit the site at Peterhead. He worked well with the claimant and often delegated work to her. He reported directly to the head of HSEQ.

32. Following the reorganisation, the claimant's core tasks remained the same. She had received a Job Description (JB57) in 2015. The claimant now reported directly to the Group HSEQ manager Mr B. Scott.

33. The claimant was allowed by Mr Anderson to assist him prepare improvements to the recording of information about assets and in May 2016 an Asset Inspection Register was created (JB154). This register was then periodically reviewed. It remained the responsibility of Mr Anderson. The claimant had no direct responsibility for delivering quality control. The respondent created a Quality Plan in 2018 (JB 156). Under this plan the claimant had no direct responsibility (JBp952).

Issues at Work

34. Alan Bolton an experienced quality inspection engineer had been appointed in late 2014. The claimant found it difficult working with him. He did not seem to respect her abilities or experience. She believed that he was taking over work that she had previously carried out and was side-lining her. The claimant began to feel stressed and anxious at work.

35. On 3 November 2014 the claimant wrote:

> *"I have not being consulted by management at any way about what appears, at this moment to be a unilateral decision to remove a significant amount of responsibility. Further I understand the new "quality inspection engineer" is significantly better paid than myself despite the fact that he is undertaking work which I have been doing for two years, and that my knowledge base, time served, technical knowledge of the equipment, standard TWMA processes and procedures supersedes that of the new "quality inspection engineer" raising the question how TWMA can state in the most recently quarterly business update that "in respect of individual career progression, the Company's Policy is, where possible, to promote from within and support the development of individual skills and capabilities to enable this."*

36. An annual review was completed in March 2015 with Mr Munro (JB56).

37. The Claimant's relationship with Mr Bolton did not improve. She continued to be stressed about her work and the relationship she had with him. In about the middle of 2015 the claimant had a number of panic attacks. This coincided with further conflict at work involving Mr Bolton. On one occasion she reported to Brian Scott her line manager that Mr Bolton had been at work smelling of alcohol. She was not aware at the time whether the respondents took any action about her allegation, but Mr Bolton left the respondents employment shortly thereafter and was replaced by Mr Jim Robertson.

38. The claimant found it difficult to cope with the changes and the uncertainty in her work. She felt isolated and not part of the team.

39. The claimant had a number of ill health absences from 2015 onwards (JBp.483). These were generally self-certified. The claimant gave various reasons for her absences none of which indicated she had an underlying condition.

40. The claimant had recently been moved to the office in Bridge of Don from Tullos. The respondents had many of their 'technical staff' based there and it was thought that it would be better for the claimant to work from that office at that time as she could be better supported there and less isolated.

41. The claimant submitted a Fit Note to the company in August 2015 (JBp.470). The G.P. gave the cause of the absence as a "panic attack". She was absent from work on 19 August until the 26 August.

42. The claimant was in correspondence with Shona Cheyne the company's HR Director in relation to her sick line. She wrote on the 19 August 2015 (JB60):

"Hi Shona

Since we last spoke I am no better and am having panic attacks since this morning. They are just coming and going all the time. I am exhausted and really upset as I have no control over this. This has been happening over the last four days and it isn't getting any better. I'm going to take the doctor's advice and use the week to deal with this and let the tablets kick in. I am still with my parents just now. They have a scanner and will e-mail you the sick line shortly.

Thanks

Lisa"

43. As a consequence of the claimant's absences Ms Cheyne referred the clamant to the company's occupational health provider. The claimant attended an Occupational Health Review. The Occupational Health physician provided the respondents with a report on 28 August 2015 (JB61). They saw the claimant for assessment on 25 August. They wrote:

"Miss McGregor initially denied any anxiety at work prior to going on holiday, but later explained that her line manager had sent her an e-mail on 21 July, the contents of which she has subsequently discussed with you. I think that this e-mail, and Miss McGregor's working relationship with her line manager generally are pertinent to her panic attacks. In addition, Miss McGregor explained that until approximately one month ago she had worked in the Tullos office, but has then been transferred to the Bridge of Don office. Although Miss McGregor found it difficult to articulate exactly in what way, it seemed clear to me that she feels uncomfortable about work in the (Bridge of Don office). Miss McGregor said that this is something she has not previously discussed with you.

On examination today, Miss McGregor struck me as being anxious and unsettled. She does not feel ready to return to work at the Bridge of Don

office and I think if she did so within the next few days she would be likely to have a further panic episode.

Miss McGregor did however feel more comfortable at the thought of return to work at the Tullos office and this is a potential modification I think may assist her return to work in due course.

In answer to your specific questions, Miss McGregor is sufficiently recovered to return to work in her own or other duties although I do think she would be fit for work in due course, I think a return to work in the Tullos office may be a modification worthy of consideration, but prior to return to work I recommend that you meet with Miss McGregor and discuss again with her those work factors she has already mentioned to you, and those she has not. Miss McGregor may or may not have further panic episodes and/or absences from work, depending on her response to medical treatment, other measures implemented by her G.P, and the outcome of her conversations with you on the work factors which do indeed seem relevant to her anxiety and panic episodes."

44. On the 26 August Ms Cheyne met the claimant accompanied by her manager Brian Scott. They arranged to meet outside the work premises at Costa Coffee in Union Square in Aberdeen. It was hoped that this would be less stressful for the claimant. Ms Cheyne prepared a note of the meeting (JB62). They discussed the Occupational Health report. The claimant discussed the difficulties she had at work. She indicated that she felt there was often no direction and that her line manager Mr Bolton did not want her involved in anything. She told them that one panic attack she had were triggered by an email from him. Although the claimant had been absent through illness, she had moved to the Bridge of Don office. She discussed her current condition and the fact that she had experienced panic attacks at the thought of returning to work. She indicated that she did not feel comfortable at the Bridge of Don premises and narrated the difficulties she had felt on the 18 and 19 August. She had called her General Practitioner and obtained an emergency appointment on 19 August and was signed off unfit for work and prescribed "anxiety tablets".

45. In the course of the discussion the claimant mentioned the need to have a clear and defined job role. Mr Scott advised her that this had been

discussed and signed off in 2014 when the department was moved to HSEQ. She mentioned that she felt that she was being excluded from work by Alan Bolton She mentioned that on the day she spoke to Alan Bolton about the e-mail he had sent her he had "smelled of drink". Mr Scott advised her that she needed to approach him or Ms Cheyne if she had problems or issues with Mr Bolton. She indicated that she was returning to work on 31 August. Ms Cheyne noted that the claimant did not have a return appointment to see her G.P. but had been referred to see an "anxiety counsellor". Mr Scott indicated that he would now distribute work between her and Alan Bolton on a day-to-day basis.

46. The claimant came into conflict with the Respondent's Managing Director Ronnie Garrick on several occasions in the August, September and October 2015 in relation to her views on the correct level of compliance with regulations. This added to the stress she was feeling.

47. The claimant was transferred back to the Tullos site in September 2015.

48. On one occasion in about mid 2016 the claimant spoke to Alex Munro a Team Leader about her attendance at the Royal Cornhill Hospital during which she told him that she was attending for ADHD treatment. He responded that someone he knew was attending the same hospital ''for anorexia treatment".

49. The claimant's absences were reviewed by the Brian Scott the HSEQ Manager. He believed that the claimant's absenteeism rate was high. He wanted to understand if there was some reason or pattern behind the absences. The claimant met Brian Scott on 14 June 2016 to discuss her level of absenteeism. She accepted that she had incurred high levels of absenteeism but that she could not help being ill. The claimant was issued with a notice to improve her attendance. The position was to be reviewed again in November (JBp.487-489).

50. At this time Mr Scott asked the claimant in front of Alex Munro if there was an underlying issue behind her absences and she denied that there was.

51. An annual review was completed in July 2016 (JB72). It was a positive review although reference was made to a substantial amount of sickness absence.

52. The claimant felt that she had been treated badly by the respondent's Managing Director in two incidents that occurred in about August and September during which the claimant felt that Mr Garrick had questioned her competence.

53. An informal meeting was arranged by Ms Cheyne between the claimant and Mr Garrick to discuss her concerns. It took place in early September. It was not minuted. The claimant asked for training and technical experience to assist her development and future promotion. The claimant did not feel that her concerns had been properly addressed**.** She did not raise a formal grievance.

Disability

54. The claimant had experienced difficulties in her childhood and adolescence but her difficulties were not diagnosed as being an illness or condition. She would often find life stressful. She found it difficult to deal with uncertainty. For some years she periodically took cannabis by smoking it in the evenings as she found this calming. She would also take cannabis when feeling anxious or stressed.

55. In late 2015 the claimant was referred by her General Practitioner to the Mental Health team at Royal Cornhill Hospital in Aberdeen. Her first appointment was with Dr. Allen Shand, a Consultant Psychiatrist on 15 January 2016. This absence was agreed with the respondents but not recorded (JBp488). A further hospital appointment was recorded in February (JB p488).

56. The claimant thereafter periodically sought time off work to attend hospital appointments at the Royal Cornhill Hospital in Aberdeen where her condition was being assessed and thereafter treated. She was open at work that she was attending 'Cornhill' The fact that she was attending outpatient psychiatric appointments was known to Ms Cheyne who discussed this with Mr Scott. The nature of her condition was not known (JB 64,67,75 and 76).

57. The hospital was well known in the Aberdeen area as being the city's psychiatric hospital which provided mental health services in the area.

58. The claimant was assessed by her Psychiatrist and a diagnosis of ADHD was made by early 2016. For some years the claimant had been aware that she had various personality traits such as becoming very focussed on issues and at other points losing concentration and she was relieved to finally be able to make senses of these characteristics. After the diagnosis she saw her psychiatrist every six months. She would apply to the respondents for time off. She did not specifically or formally intimate to the respondent's managers that these appointments were with a Psychiatrist.

59. The claimant after assessment by her Psychiatrist was prescribed Ritalin for her condition. She did not like the side effects of the medication and decided not to take the full prescribed daily dose but rather to take cannabis in the evening as a substitute for a Ritalin tablet as it did not have side effects.

Further Incidents at Work

60. On the 30 May 2017 the claimant asked an employee Russell Kidd to put some certification documentation into equipment which had been placed in a shipping container waiting to be sent offshore. He became annoyed with the claimant and refused on a number of occasions to comply with her request. The container had already been sealed. He became rude and aggressive towards her. This was witnessed by another Manager, Amanda Massie, who did not intervene. The claimant was upset and distressed by the incident. She

reported it to Alex Munro who asked her to fill in an 'Incident Form' which she did. She provided a detailed statement (JB p510) The Incident form was used to report health and safety incidents. The claimant was unaware if any action was taken. The claimant did not follow the matter up and did not lodge a formal grievance.

61. The respondents investigated the incident not as a grievance but as a health and safety concern using the appropriate policy. The claimant did not query this nor did she lodge a grievance under the grievance policy.

Drug Test

62. The company introduced a new drug and alcohol policy in November 2017. It made reference to 'zero tolerance' (clause 5.3*) 'should an employee be impaired by or under the influence of, or possessing, or consuming alcohol & drugs in the workplace…..or in the course of and scope of employment'* …….

63. Clause 5.6 provided that anyone who tested positive for drugs was subject to the disciplinary policy '*including termination'.*

64. The policy was emailed to staff including the claimant on the 22 November (JBp525). It was not otherwise publicised by the company. The email enjoined Managers to check that staff had read and understood the policy. This was not done in relation to the claimant. Staff had not been consulted before the policy was implemented. It was not uploaded to the company intranet. The claimant was obliged to read such emails in terms of the respondents document control policy. The claimant read the new policy and was aware that taking cannabis could lead to dismissal. She had at stopped taking cannabis or around the time the policy was issued.

65. The policy also provided that staff who have a problem with alcohol or drugs can *'volunteer their dependency before being found in violation..*' and that this

would allow them to receive support from the company in combating their condition. (JB p 527)

66. The claimant was asked to undergo a drugs test on the 13 December 2017. She told the nurse administering the test that she had been taking Ritalin during the two weeks prior to the test and this was noted. Later she was told that she had submitted a positive test. The claimant then asked the Nurse if the test would show whether it was caused by secondary inhalation as her son and his friends had been smoking cannabis at her home. She was told that the test would not test positive if that was the only exposure. At this stage the claimant asked for Maureen Smith an HR Adviser to speak to her. The claimant told Maureen Smith about the ingestion of secondary smoke and involved her in discussions with the Nurse although she did not need to do so. She mentioned self-medicating cannabis and stressed that she was not under the influence.

67. Ms Smith told the claimant that a positive test could lead to her dismissal. The claimant was upset and distraught following the test.

68. By letter dated 29 December (JBp547/548) The claimant made various allegations about the way the company had acted including that the disciplinary process was predetermined, that she had been bullied, that the company had failed in their obligations to her under the Disability Discrimination Act, failed to make reasonable adjustments, harassed her over absences and acted unfairly by contacting her when on holiday. She asked that the disciplinary process should be put in abeyance and she should be assisted with her addiction in terms of the respondent's Drug and Alcohol policy and allowed to return to work. She made reference to her ADHD condition and the impact it had played on events. She suggested that the way she had been treated by the company and the issues she had experienced at work had caused her stress and that in turn this had prompted her to use cannabis. The claimant sought to return to work or for the company or for them to accept her resignation with notice.

69. Mr Scott wrote to her in response on the 29 December 2017 (JB 97) advising that she remained suspended pending a disciplinary process into possible gross misconduct and that resignation would only be accepted without notice. As the claimant had raised a number of issues with the company Mr Scott advised her that there would be an investigation into these matters. He asked to meet the claimant on the 3 January at what he described as an Investigation Meeting.

70. The claimant wrote in response (JB100) She asked if her father could accompany her to the Investigation Meeting and this was agreed to. She asked that the meeting should discuss all the matters she felt impacted on her health and well-being. She gave specific examples of issues she wanted to raise covering the period 2014 to date.

71. The meeting took place on the 3 January 2019. Mr Scott was accompanied by Ms Patterson the Group HR Adviser. The Claimant was accompanied by her father Donald MacGregor. The meeting was minuted (JB101). Following the production of the minutes Mr McGregor proposed certain amendments (JBp576-581) which were accepted. At the outset of the meeting when various 'housekeeping' matters were being outlined Mr Scott made a comment about not knowing where the Ladies toilets were in the building. The claimant found this embarrassing.

72. It was explained that the disciplinary hearing had been changed to an investigatory meeting to allow the claimant to discuss the various issues she had raised in correspondence and how that related to the positive drug test. Mr McGregor indicated that the claimant did not want to make any further comment at this time. Despite this the claimant went on to explain that her letter summed up her position. She explained that she had put everything into her job and tried to progress in it. She had sought help from Cornhill but the company had not given her support for her ADHD since it had been reported to them in 2015. The claimant was told that the company could accept the

letter as her explanation but this was her opportunity to speak to them and explain her position. The claimant referred to her attendance at Cornhill and the meeting over her absences with Mr Scott. She said she had been open about her ADHD but had not been supported by the company. She said that she had not realised how bad her health was until she had been suspended. The claimant explained that she did not like to admit that anything was wrong or that she was not coping. The claimant became distressed during these discussions.

73. Mr McGregor made reference to the claimant not being impaired at work and to the environment that those with ADHD needed at work namely a fixed framework and support.

74. A discussion took place around the claimant's role and she asserted that she had carried out Alan Bolton's role. She also said that she had been on her own at Tullos until John Anderson joined her. The claimant observed that he had not been brought in to support her as Mr Scott said but to be her superior and this was not clearly reflected in her Job Description. She said that she knew how to do her job but did not have enough guidance and this caused problems when she went to third parties. She confirmed that Mr Scott had told her he would support her. She said that every day was a struggle for her.

75. There was a discussion about ADHD and Mr Scott confirmed that he had not discussed the claimant's ADHD with anyone else. The claimant said that she was scared to take time off. Mr Scott responded that she had never been refused time off work. He said that on one occasion he had asked for more notice. The incident with Mr Garrick was mentioned. The claimant observed that she had been scared as she could not afford to lose her job. The claimant explained that she had to work very hard at her job and the events she had mentioned had driven her to 'self-medicating' with cannabis. Mr McGregor raised the issue that traces of cannabis lingered in the system for up to 27

days. The claimant said that she wished she had asked for more help than she had.

76. Following the meeting Mr McGregor complained that the meeting was conducted by Mr Scott as he was 'hostile and involved' and allegedly shown no understanding of the claimant's mental condition. A letter was sent to Ms Patterson (JB 103) by Mr McGregor alleging that Mr Scott had been confrontational and argumentative.

77. Mr Scott obtained a short statement from Maureen Smith who had been the HR representative at the claimant's drugs test (JB 105). She confirmed that prior to the test the claimant had disclosed that she was taking the prescribed drug 'Ritalin'. The claimant had provided a 'non-negative test' Ms Smith had asked her if there was anything else she should be aware of and was told that the detected substance must be cannabis which he son smoked and which she must have inhaled. The claimant had been very distressed.

78. Mr Scott prepared a Report (JB 106). He narrated that the claimant had given a 'non-negative' test on the 13 December and that the laboratory results showed that the test was positive for Cannabis Metabol at a level of 43ng/mis. He confirmed that she had signed the Drug and Alcohol Policy on the 12 July (This was in fact the predecessor to the current policy). He referred to the Statement obtained from Ms Smith, and to minutes of meetings with the claimant and Alex Munro. He stated that the claimant had not been truthful about her drug use and did not disclose cannabis use before the test. She had also alleged that her son had used cannabis and she had not smoked it but later she said that she had taken small amounts at night and had struggled to stop. He then made reference to her absences in early 2016 noting that it was not accepted that she had disclosed her condition namely ADHD to Mr Munro. He recorded that the claimant had been issued with an Improvement Notice and had not mentioned an underlying health condition. He noted that if a disclosure had been made she would have been referred to Occupational Health to assess health and safety issues. He stated that the role of

Compliance Controller was ‘safety critical’ He reported that the claimant had been given permission to attend appointments with her physicians. He recorded that annual appraisals were positive and no request had been indicated for support or in relation to any medical issue. Finally, he denied being confrontational or not being the correct person to conduct the investigation.

Disciplinary Hearing and Process

79. Mr Mark Beveridge the respondent’s European Regional Director was tasked with hearing the disciplinary case. He had no prior involvement in the investigation process. He was provided with the Investigation Report and the papers referred to in that Report.

80. He wrote to the claimant on the 8 January 2018 (JB p595a) advising her that a disciplinary hearing would take place on 12 January. He advised that no further evidence or communications will be accepted to or replied to until the hearing.

81. The claimant wrote to Mr Beveridge on the 9 January (JB109) indicating that her father remained her representative. She asked for a copy of her Personnel File. The claimant commented that she had not been given an opportunity to comment on the Minutes and that there were errors and omissions in the Report. She complained that Maureen Smith, who was a witness to events, was going to participate. She reiterated that she had a protected characteristic under the Equality Act. She asked for a delay in the hearing as she wanted to see her GP who was on holiday and was collating evidence.

82. Mr Beveridge wrote to the claimant on the 11 January (JB112) responding to the letter. He said that they were concerned about her well-being and were going to refer her for an Occupational Health assessment (JB 110). The claimant was invited to make comments on the Minutes which she had

disputed. The company accepted the request that Ms Smith should not take part in the disciplinary process and intimated that Ms Patterson would attend in her stead. Mr Beveridge did not agree to a postponement to the 22 January but only until the Occupational Health Report became available. Mr Beveridge had reviewed the correspondence and wrote that the various issues dating back to 2011 would be discussed as possible mitigation at the hearing. Reference was also made to the earlier request to resign with notice. The claimant was told that this would not prevent the disciplinary hearing proceeding.

83. In response the claimant wrote to Mr Beveridge (JB p614-616) enclosing a detailed diary of events and supporting documents consisting of 24 pages. She raised the reasons for her recent SAR request. The claimant contended that Mr Scott was untruthful in the Report and that the company had been aware of her ADHD. She suggested that she had not been untruthful but 'inconsistent' which she blamed on stress and her ADHD. She said that she had been stressed at work for some time. The correspondence included advice on the management of ADHD and information about Ritalin.

84. In response Mr Beveridge (JB115) wrote on 12 January acknowledging the letter. He confirmed that he would review the claimant's personnel file. He indicated that he would take into account all the information and circumstances including the allegations the claimant was making against Mr Scott. He confirmed that the Occupational Health assessment had been rescheduled for the 18 January.

85. The claimant wrote again on the 15 January (JBp643-705). She asked for the disciplinary process to be the subject of a reasonable adjustment which was to allow her father to attend as her representative at the consultation with the Occupation Health Provider. This was subsequently confirmed by Ms Patterson. In her letter the claimant set out her contacts with her GP starting from July 2015 when she said she was being bullied at work. She also suggested that following issues raised in her Appraisal by Alex Munro in

March of that year this had prompted her to go to her GP when he reviewed the situation and suggested she might have ADHD. This then led to a referral to The Royal Cornhill Hospital and a formal diagnosis of ADHD in February 2016. The claimant then narrated the issues she with sick days and the company's response. The claimant queried the competence of Iquarus in relation to assessing the impact of 'neurological' conditions. She attached Job Descriptions that were issued 2015 and 2016. The claimant blamed the absence of an up to date and accurate Job Description on her becoming confused and easily distracted at work. The claimant criticised the company for designating her role 'safety critical' and suggested that this was to frighten her and cause her distress. She raised issues regarding the signage, car parking markings, adequacy of the safety briefing, and the safety of the working environment as a whole at the Tullos site which she had observed on the 3 January when she attended with her father for the Investigation Meeting.

86. The claimant asked for Iquarus to confirm that she had a disability under the 2010 Act and that their conclusions were properly supported. The claimant reiterated that she had not been the subject of any criticism for deterioration in her performance at work which might suggest she was under the influence of cannabis at work. She asked for mediation to avoid an Employment Tribunal. The letter enclosed a number of documents such as Annual Reviews, Job Descriptions information about the effects of cannabis in the workplace.

87. The claimant met the respondent's Occupation Health providers and provided them with additional information about her condition. They in turn provided the respondents with a Report dated 20 January (JB120). The Report concluded that due to ongoing stress the claimant should not attend work but was fit enough to attend meetings with the support of a companion. The author, Dr Leiper, Occupational Physician, concluded that while normal work activity would have no impact of the claimant's medical condition there were

several work factors which may have impacted on her stress levels. The respondents were advised to proceed as if the claimant were disabled under the Equality Act. Advice was given in relation to the claimant's condition that if she returned to work that a Stress Risk Assessment should be carried out. It was noted that research showed that cannabis was often used to self-medicate. He noted that the cannabis found was 'considered to be of a low level' and this level was unlikely to cause impairment. It noted that the claimant stated that she used cannabis 'infrequently'. The claimant raised issues about the Report and a further letter was obtained from Dr Leiper clarifying matters (JB p724) He stated that the claimant's current stress related to the investigative process and the certificate that was issued by them was routine and further that the comments relating to offshore work did not apply.

88. On the 28 January the claimant asked to postpone the disciplinary hearing as she had not received documents showing that she had been aware of the 'Zero Tolerance' policy referred to by Maureen Smith and she had not received the full toxicology report from the laboratory that had conducted the analysis of the test.

89. Mr Beveridge responded by letter dated 29 January (JB 122) confirming that the disciplinary would take place on the 2 February at the offices in Bridge of Don. The claimant was provided with the documentary evidence that the company sought to rely upon. The claimant was reminded that a finding of gross misconduct could lead to the summary termination of her employment.

90. On the 30 January the claimant's father wrote to the respondents (JB123) indicating that the bundle of documents provided to them had been miscopied. Various other issues were raised by him in relation to the documents. The meeting was rescheduled for the 6 February.

91. On the 1 February the respondents confirmed to the claimant that she could contact Shona Cheyne who had left the company (JBp723).

92. The claimant wrote again to the respondents raising a number of issues about the reason she wanted to speak to Ms Cheyne and to other matters. The claimant complained that the company was continuing with a tactic to cause her maximum stress by holding the disciplinary meeting 'in a location where harassment and anxiety attacks took place' (JB p726). She made reference to her condition and to the most recent Occupational Health Report.

93. Mr Beveridge responded that the meeting would be held in a meeting room beside the Reception. This would mean that the claimant would not have to fully enter the main part of the office premises and encounter staff that she knew. He confirmed that the allegation remained unchanged namely that the claimant had provided a non -negative drugs test.

94. The respondents wrote to the claimant on the 5 February advising that they would expect to respond to the claimant's Subject Access Request by the 12 March.

Disciplinary Hearing

95. The disciplinary hearing took place on the 12 February 2018. The claimant was accompanied by her father. Mr Beveridge was accompanied by Ms Lyndsey Patterson, Group HR Adviser. Minutes of the meeting were taken by Ms Darcy Buyers. They are an accurate summary of the meeting.

96. The claimant's father at the outset asked which policy was being relied on and the respondents confirmed that it was the most recent policy. Mr Beveridge confirmed that he had looked at the evidence. Mr McGregor then lodged a covering letter from the claimant and related attached evidence pack. Mr Beveridge stated that he would need time to digest the pack of documents. He then asked the claimant to 'walk though her role at TWMA. Mr McGregor asks her to decline. The claimant then referred to a Job

Description which she had. Mr McGregor stated that the Claimant was in no fit state to answer. She commented that she had tried to clarify her job but did what she was told to do. Mr Beveridge then asked her how long she had been in her role and she responded by stating that she had a few job titles and had moved from Engineering to HSEQ. She added that she worked at Tullos in a stand-alone role.

97. Mr Beveridge asked the claimant how she valued her role and she responded that it was her whole life and she took the job very seriously. She explained that she had to often report issues which were not dealt with and this put her reputation with third parties at risk. She had emphasised the importance of compliance on many occasions. Her job had been very stressful. She did not know where her remit finished. The claimant was asked about the use of a company system called 'MDR'. She insisted that Mr Scott, Mr Munro and Ms Cheyne were all aware of her condition. Mr Beveridge advised that he had found nothing in her file about the medication she was taking. She said that Tracey from HSEQ could comment on how much calmer she was after starting the medication.

98. Mr McGregor stated that his daughter did not contest the results of the drugs test. Mr Beveridge described it as a 'Zero Tolerance' policy. Mr McGregor suggested that the test was invalid as it did not have a signature in compliance with the policy's terms. Mr Beveridge then told the claimant that by chance he was at the Tullos site on the day of the test and was aware that the policy was sitting beside the Iquarus paperwork on the table. Mr McGregor asked if the claimant could come back to work under the assisted programme envisaged by the policy. The claimant described how she felt and that she had never been impaired at work. There was then a discussion about the policy in force and whether the claimant had read it when it was uploaded. Mr McGregor drew attention to differences in the various policies and that the claimant had never seen the most up to date policy.

99. Mr McGregor's position was that the claimant self-medicated with cannabis not because of her ADHD but because of stress at work. The discussion turned to the claimant's absences which she said occurred when she was first prescribed Ritalin and the meeting that had been held to discuss them. The claimant stated that Mr Scott was hostile towards her at the Investigation meeting. Mr McGregor raised the claimant's grievance about the actions of Mr Kidd and how it was 'brushed under the carpet'. The meeting closed with Mr Beveridge confirming that he would write within five working days with his decision.

100. Following the hearing Mr Beveridge considered whether the claimant could be dismissed if he accepted that she had not seen the first policy (JBp750-753) but he considered that the earlier policy was in any event sufficiently strict to allow him to dismiss given the level of cannabis recorded. He also took the view that the claimant had not been fully candid and that this had damaged the company's trust in her.

101. Mr Beveridge wrote to the claimant on the 16 February setting out his decision (JB 134). He narrated the circumstances around the drugs test and the non-negative test result. He stated that he was satisfied that the claimant had seen the new policy and it was available on the day of the test when the pre-test procedure was being carried out. He found that she was in violation of the policy. With reference to the claimant's ADHD and her request to be put on a treatment programme he found that there was evidence that she had been taking cannabis for some time and had not disclosed this. He found that her role as Compliance Officer required meticulous attention to detail and errors could be catastrophic. He concluded that it was not reasonable to put her on such a programme. He had checked and ascertained that all employees who had failed the test had been dismissed. He found no evidence that the claimant had explicitly disclosed her ADHD condition to the company prior to the disciplinary process. He made reference to adjustments that had been made as part of the disciplinary process. He did not accept that the claimant

had been told by Maureen Smith on the day of the test that she would be dismissed.

102. He continued that the company did not need to take a statement from Shona Cheyne as it accepted that the claimant had ADHD. Finally, he stated that admitting to taking cannabis had destroyed all trust and confidence in the claimant. The claimant was summarily dismissed.

103. The claimant appealed by email dated 19 February (JBp755). The appeal points ran to three pages and an additional two relating to alleged errors Mr Potter who is a qualified Chartered Accountant and the company's Chief Operating Officer dealt with the appeal. He acknowledged it on the 23 February (JBp761/2). The claimant put further points to him in an email acknowledgment of that letter about the venues chosen by Mr Beveridge for meetings. Mr Potter wrote again on the 28 February (JBp769) explaining that the use of the offices of 'Empire' was in response to earlier objections to the use of TWMA premises and that the venue was a neutral one. He took from the letter that the claimant did not want a hearing. A date had been offered of the 2 March. He asked the claimant to confirm that she was content for the appeal to be dealt with in writing. The claimant responded that she was interpreting the company's actions as prolonging 'the agony of mental stress being applied to me'. Mr Potter proceeded with the appeal.

104. He considered the claimant's correspondence and the notes and minutes of the disciplinary hearing AND Investigation pack. He wrote to the claimant on the 9 March setting out his reasons for rejecting her appeal (JBP772-773). He was satisfied that a fair process had been followed and that Mr Beveridge had considered all the evidence. He noted that even if it was accepted that the claimant had not seen the new policy she had acknowledged the previous policy which made taking drugs a serious disciplinary offence. He upheld the finding of gross misconduct. He further stated that the company had taken account of the claimant's underlying health condition.

105. The claimant was unemployed immediately following her dismissal.

Employment Background to Equal Pay Claim

106. The claimant worked alongside three male individuals in the course of her employment namely Alan Bolton, John Anderson and Jim Robertson. Their roles were overseen by Mr Scott. Mr Anderson was employed as a QA/QC Controller. Mr Bolton and Mr Anderson were employed as Quality Inspection Engineers.

107. The claimant held a more junior position in the company at all times to these individuals who had management responsibilities for other staff and an expectation that they would be involved in developing the company's processes, documentation and procedures. The claimant was a Compliance Controller and had a narrower role than these individuals although at times she stepped up and assisted with other tasks when asked to do so. There was at times some overlap in duties carried out by the claimant and Mr Bolton, Mr Anderson and Mr Robertson. The latter were expected to have greater contact with third parties that the claimant a to inspect new assets, agree certification, witness testing and providing project documentation. These duties were not part of the claimant's role.

108. The role of Compliance Controller did not require any formal or technical qualifications. The claimant had no experience working offshore or any technical qualifications.

Witnesses

109. We found the respondent's witnesses generally both credible and reliable They gave their evidence in a straightforward and clear manner. They were all honest witnesses who candidly accepted shortcomings where they existed. The passage of time had understandably eroded some of the detail from their minds but the various events spoken to had generated

contemporaneous documentary evidence which assisted in our understanding.

110. We would comment in particular that we formed the impression that there was no ill will towards the claimant apparent from the evidence particularly that of her long- standing manager Brian Scott. Mr Scott was an experienced senior manager who was latterly Group HSEQ Manager. We did not wholly accept his evidence in relation to his likely knowledge of reasons for her absences to receive treatment at Cornhill Hospital but that was in the end of little significance. Another of the main actors in these events was Ms Cheyne who gave her evidence in a professional manner and who we regarded as credible and reliable.

111. We would also specifically record that Mr Beveridge dealt with the disciplinary hearing which was in no way simple or straightforward given the multiple issues raised by the claimant did so in a patient and diligent manner. He was a confident witness who was both credible and reliable.

112. The claimant was generally a reliable historian but someone who saw events very much from her own perspective and in hindsight, nevertheless, she was generally credible. We did not accept all her evidence and we noted that although the various explanations she had given for her cannabis use had not initially been candid her evidence before us seemed honestly given.

113. Mr McGregor strained every sinew to advocate his daughter's case. He was generally reliable as a witness to events but his credibility suffered due to his partisan position on many events and we could not accept as reasonable his advice to the claimant not to answer questions or his somewhat exaggerated views about the respondent's health and safety failing. He simply stood too close to events to be objective.

114. We would finally comment that Mr Anderson was a straightforward witness who was generally credible and reliable. He confirmed that he and the claimant worked as a team during his tenure as QA/QC controller.

Submissions

Claimant's Submissions

115. Mr McGregor in detailed written submissions set out the claimant's position. He first of all summarised the claimant's background and employment history narrating the difficulties that had arisen from June 2015 onwards and pointed to the failure as the claimant saw it of the employers to investigate the issues around her line manager Mr Bolton and also to deal with the later issues involving Russell Kidd. He made reference to the "improperly issued" improvement notice, the claimant's background of anxiety and attendance at Cornhill Psychiatric Hospital. The claimant's position was that the background to her dismissal and other claims should be seen against this history including the worsening of her mental health. The butt of this background was that the claimant was also not paid the same as male counterparts. There were a series of matters that impacted on the claimant including the delay in moving the claimant, as recommended by Occupational Health from Bridge of Don to Tullos.

116. Dealing with the respondent's knowledge of the claimant's condition Mr McGregor pointed to the knowledge that she was "taking tablets, attending hospital appointments at Royal Cornhill Hospital and the discussion she had with Mr Scott about someone he knew attending the same hospital for anorexia". The claimant's position was that she did not take Cannabis leading up to her test.

117. Mr McGregor then turned to the policy and the failure of the respondents to properly implement their zero tolerance policy to ensure the workforce including the claimant was aware of its terms. He then dealt with the test and the subsequent disciplinary in which the claimant lost all trust in her employer.

The result of the disciplinary was prejudged and no proper regard was given to a non-disciplinary sanction as provided for in the policy. The claimant suspects that the company was cutting costs and planning redundancies and that this act in dismissal failed to recognise that their own actions had caused the claimant considerable stress which in turn had led to her Cannabis use.

118. Mr McGregor then went through the investigation process in some detail and the various iterations of the policy and the failure to investigate the alleged breach of privacy during the Tullos test and what investigations surround the claimant's mental impairment holding that the respondents were not aware of the use of Ritalin. The investigation report was flawed in that it held that the claimant had not told the respondents about taking Ritalin prior to the test but in fact the declaration completed prior to the test indicated that she was taking Ritalin in the two weeks prior to the test.

119. He then turned to the detail at the investigation meeting on 3 January, the confusion of the Drugs and Alcohol Policy, the failure to recognise that the claimant's Cannabis use had not impaired in any way her performance at work. The test concluded that she had a very low level of drug in her system. He turned to the disciplinary hearing and why it was unfair, particularly that it limited the scope of the factors that were considered and then turned to discussion the letter of dismissal.

120. The submissions dealt with the issue of equal pay submitting that the claimant had demonstrated her analysis of the contracts of Mr Bolton QA/QC Inspector and Mr Robertson the QA/QC Controller and Mr Anderson, QA/QC Controller who had the same contract. The claimant would carry out the same work, whenever and wherever the respondent requested. He submitted the contracts of employment were at all intents and purposes the same. The work revolved around the use of the business CSAMS system. He disputed the disparity of pay for the claimant and her counterparts which he indicated could not be justified. Mr McGregor then turned to the issue of a failure to make reasonable adjustments. He made reference to the annual appraisals

in 2013 which should have given the respondents an indication of the claimant's ADHD symptoms and that there was reference to "tangential communication, hyper focus and detail and extraordinary technical knowledge resulting from hyper focus". She would also have been alerted by the panic attacks in 2015 and so forth. They failed to make reasonable adjustments as recommended by the Occupational Health report dated 26 August 2015 failed to take any action to support the claimant in the meeting on 28 August 2015 and failed to investigate causes of the claimant's stress and anxiety at work for instance conflict with the company director and other colleagues. The respondent's process was conducted without consideration for the mental impairment of the claimant. The respondent's failed to use conciliation and mediation to resolve the disciplinary issue. The venue they chose for the appeal, investigation hearing was not neutral. They did not take into account the impact of attending would have on the claimant's anxiety condition.

121. Mr McGregor then took the Tribunal through reasonable authorities which he felt was of assistance to supporting the claimant's various claims. Mr McGregor also helpfully made comment on the respondent's submissions which were contained in tracked changes on the respondent's written submissions at which the Tribunal have considered.

Respondent's Submissions

122. The respondents also provided the claimant with detailed written submissions. They first of all set out the history of the case and various claims made by the claimant. One issue should be noted is that the claimant's equal pay claim under s.66 of the Equality Act 2010 encompassed a claim for equal value and that was sisted in relation to the principle claim which is for unfair dismissal. The respondents submitted that conduct is one of the potentially fair reasons for dismissal. The issue for the Tribunal is whether the

respondents were entitled to dismiss the claimant for gross misconduct, the claimant having provided a non-negative drugs test on 13 December. The claimant admitted on the day of the test by taking Cannabis and was suspended. Immediately prior to taking the test the claimant had advised the nurse that she was taking Ritalin for ADHD.

123. In relation to procedural fairness the respondent's position was that the investigation carried out by Mr Scott was fair. He considered the correspondence from the claimant requesting amongst other matters that the disciplinary hearing should be rescheduled. He confirmed that the disciplinary hearing would be converted into an investigation meeting in the light of matters raised by the claimant. He confirmed that prior to the investigation meeting all the information requested by the claimant was provided to her. The claimant requested that she should be accompanied by her father and this was allowed. Prior to the meeting Mr Scott received a letter from the claimant's G.P. which confirmed a diagnosis of ADHD and that the claimant *"uses small amounts of Cannabis in the evening. She has struggled to stop."* This he believed undermined the claimant's position. The claimant provided further documentation before the investigation meeting which the Minutes confirmed as accurate. The claimant had ample opportunity to present her case and any mitigating evidence. Following the investigation meeting Mr Scott made further enquiries with Mr Munro and Mrs Smith then recommended that the matter proceed to a full disciplinary hearing. Mr Beveridge gave evidence that he was appointed the disciplinary officer and considered all the documentation that had been gathered during the investigation. He had no previous involvement with the investigation process. The claimant was invited to a disciplinary meeting on 12 January. Following a request from the claimant that Mrs Maureen Smith should be removed from the hearing he appointed Ms Lindsay Patterson instead to provide HR support. The evidence of Mr Beveridge confirmed that he had concerns in respect of the claimant's health and had arranged for her to attend Occupational Health prior to the disciplinary hearing. The report

confirmed that she was fit to attend but she would be afforded the opportunity to bring a companion. The claimant's father was allowed to accompany her at the disciplinary hearing.

124. The evidence of Mr Beveridge was in the respondent's submission clear that he considered the matters raised by the claimant identifying the venue that he thought was appropriate, the respondent's Head Office. There was substantial correspondence with the claimant's father. The claimant maintained that she had not seen the most recent Drugs and Alcohol Policy. Mr Beveridge's evidence was that this was available to her on the day as he had been present and personally seen the Policy. It had also been e-mailed to her on 22 November 2017. The claimant contended that she was not aware of the new "Zero Tolerance Policy".

125. There was evidence that the claimant was obliged to the terms of her contract to read all the correspondence sent to her and he confirmed that he considered exercising the option to "assist the claimant" with her drug use but decided against it as she told the company about the Cannabis use prior to the test and initially indicated that it was the result of secondary smoke given the role she filled he did not feel it was appropriate. The solicitor then dealt with the issue of whether the decision to terminate the claimant's employment was pre-determined submitting that the procedure followed by the respondents was in accordance with the ACAS guidelines. Adequate adjustments were made throughout to allow the claimant to participate in the process. The respondent's position was that the virtual tests were met.

126. The respondent's solicitor then turned to the issue of disability. The obligations were triggered in terms of the Equality Act. Their position was that they were not aware the claimant had a disability until the disciplinary investigations started. The claimant did not advise the respondents that she had ADHD. The claimant in her evidence confirmed that while she had an additional appointment she was first diagnosed in 2006 she tried to keep

appointments generally out with work time. The reasons given to the respondents in relation to her absence were varied. None of these were indicative of ADHD. They had no issues with the standard of the claimant's work and accordingly the respondents were not put on notice that she had a disability. They did not know and could not reasonably have known the claimant had a disability.

127. The respondent's submitted that the claimant's relation to direct discrimination or in the alternative discrimination arising out of disability was not made out. Following the various preliminary hearings the only issues that remained were:

- (i) the respondents ignored the claimant's mitigating evidence that the respondent's actions were a contributory factor causing the claimant to self-medicate (taking Cannabis);
- (ii) mismanagement and failing to state that the claimant had raised any grievances and
- (iii) reason to allow the claimant to submit any evidence either written, verbal or by e-mail prior to the disciplinary process. There was no evidence that the respondents had discriminated against the claimant because of a protected characteristic or that she was able to demonstrate that she was treated unfairly as a consequence of something arising out of her disability.

128. The respondents then took the Tribunal through the disciplinary process. They pointed to the fact that the claimant did not lead any evidence to show that there was any ongoing discriminatory course of action and in any event any event would be time-barred. In the event the Tribunal did not hold that the issues were time-barred the respondents submitted no discrimination arose.

129. Ms Turner then turned to the issue of reasonable adjustments. The respondent's position was that the claimant did not demonstrate the

necessary elements of the tests and that she had not shown any PCP that put her at a substantial disadvantage. There was no evidence lead that the Bridge of Don Headquarters was a "hostile work location". The truth of the matter was that the claimant was embarrassed going to the head office in relation to the disciplinary matter. Ms Patterson gave evidence to the Tribunal and confirmed that the selection of venues was dependant on which parties were to be in attendance and where they are based, facilities available and the IT Support. The request was that Miss McGregor had asked for the disciplinary investigation to be carried out at Tullos and this hadn't been agreed. The preliminary hearings took place at Tullos. The use of the site at Bridge of Don was successful in that it was discrete because it was at the front of the building and away from the main working areas. The neutral venue that was chosen for the appeal was the offices of TWMA's then HR Advisers and that was also a reasonable adjustment.

130. In relation to the claim for equal pay the respondent's position was that the claimant had not undertaking like work with Alan Bolton, John Anderson or Jim Robertson. The respondents made reference to the evidence of Mr Scott and the significant differences between the positions and roles including managerial responsibility and general duties. The difference was that the QA/QC role was fundamentally different from Compliance Controller and the expectations for development processes and documentation were not within the role of Compliance Controller although tasks overlapped. QA/QCs had a more important role in clearing and signing off documentation. Compliance Controller required no qualifications. Mr Anderson was a time served electrician with experience working offshore as the maintenance supervisor and rig audit inspector. He was based at Peterhead whereas the claimant's role was based in Aberdeen. The differences in roles were not challenged in evidence.

Discussion and Decision

Unfair Dismissal

131. The principal claim made by the claimant was for unfair dismissal. Indeed, it was her dismissal that prompted the other claims. The key statutory provisions that a Tribunal must apply are well-known:

> *"98 General*
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it-*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee,*
>
> *(c)…….*
>
> *(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

132. Case law assists the Tribunal in understanding the statutory provisions and the role of the Tribunal was summarised by Mummery LJ in **London**

Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 3 where he said this:

"The essential terms of inquiry for the ET were whether, in all the circumstances, the Trust 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 Trust's fair conduct of the dismissal in those respects, the ET then had to decide whether the dismissal of [the employee] was a reasonable response to the misconduct."

133. In the case of British **Leyland UK Ltd v Smith** [1981] IRLR 91 it was put in this way:

"The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said: "[…] a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate." I do not think that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair, even though some other employers may not have dismissed him."

134. The law does not require a standard of perfection to be followed by an employer and there are seldom cases in which there are not some issues that could have been handled differently especially with the hindsight that a Tribunal hearing can offer. The Tribunal had regard to the well-known cases of **British Home Stores Ltd v Burchell** [1978] IRLR 379, **Iceland Frozen Foods v Jones** [1982] IRLR439, and **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23 and to the guidance contained in those cases as to the approach the Tribunal should follow in assessing such a dismissal.

135. We would observe that under paragraph 94 (4) (a) the question of whether the employer acted reasonably, particularly where the reason for dismissal related to conduct of an employee, often involves consideration of the adequacy of the employer's investigation and thus whether a reasonable

employer could have concluded that they were guilty of the disciplinary offence , i.e. the ***Burchell*** test.

136. In relation to dismissals involving gross misconduct the Tribunal bore in mind the comments made by Lord Jauncey in the case of **the Neary v. Dean of Westminster (1999) IRLR 288 at paragraph 22**:-

"Conduct amounting to gross misconduct justifying dismissal must so undermine justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be retained to retain the servant in his employment."

137. The interaction between unfair dismissal and summary dismissal for gross misconduct and whether a dismissal is fair or unfair under s.98(4) of the ERA is not answered by deciding whether or not the employee has been guilty of gross misconduct. As Phillips J said in ***Redbridge London Borough v Fishman*** [1978] ICR 569:

> "*The jurisdiction based on* [what is now section 98(4) of the Employment Rights Act 1996] *has not got much to do with contractual rights and duties. Many dismissals are unfair although the employer is contractually entitled to dismiss the employee. Contrary-wise, some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee. Although the contractual rights and duties are not irrelevant to the question posed by* [s.98(4)]*, they are not of the first importance. The question which the Industrial Tribunal had to answer in this case was whether the* [employer] *could satisfy them that in the circumstances having regard to equity and the substantial merits of the case they acted reasonably in treating the employee's* [conduct] *as a sufficient reason for dismissing her.*"

138. This has been more recently confirmed by the EAT in **Weston Recovery Services v Fisher** (EAT0062/10) i.e. that the only relevant question is whether the conduct was "sufficient for dismissal", according to the standards of a reasonable employer and whether dismissal accorded with equity and the substantial merits of the case" (s.98(4)(a) and (b)).

139. The Tribunal was satisfied that the reason for dismissal was conduct. That was a potentially fair reason for dismissal. We rejected any suggestion that possible cost-cutting or redundancy contributed to the dismissing officer's actions. We accepted his evidence on that matter.

140. There were multiple criticisms made by the claimant of the respondent's actions going back some years. Some of which seemed to us to verge on the artificial and considerable time was spent on these issues which we ultimately found to have little relevance.

141. Some considerable time was spent on the Investigation Meeting that took place with Mr. Scott in January. We see no issue with the company turning the proposed disciplinary hearing into such a meeting or with Mr. Scott as the claimant's line Manager taking the meeting. No grievance had been lodged by the claimant about his conduct and it was apparent from the evidence that they had a good working relationship with each other. He displayed no signs of antipathy towards the claimant indeed Mr. Scott had been impressed by the claimant's hard work over the years. Mr. McGregor suggested it was not appropriate for him to chair the meeting as he was ' hostile and involved' This former criticism emerged only after the meeting. It seems based on the fact that at points he challenged the claimant, for example about getting time off, because of his own knowledge of the situation. It is true that Mr. Scott was involved in events but the extent to which he was involved in any disputed matter was not really apparent before that meeting. In a perfect world perhaps the investigation should have gone to someone wholly independent but we do not consider that this would have made any practical difference. Mr. Scott's position would have been reflected in a Statement rather than in the minutes or in his Report. It would form part of the evidence that the disciplining officer would ultimately have to consider.

142. In summary we hold that there was nothing untoward in Mr. Scott chairing the meeting nor does his conduct bear this characterisation from the detailed

minutes and evidence we have heard. As a fact we found no prejudice to the claimant and no merit in these criticisms.

143. We noted that in his letter to Ms. Paterson following the meeting Mr. McGregor complained that Mr. Scott raised how could the claimant's ADHD relate to the positive drug test. That does indeed seem to us to be the principal issue. Ms. Patterson encouraged the claimant to speak about her position and not just rely on the letters that had been sent and there was no attempt made by Mr. Scott to curtail the discussion. Even if we had taken a different view of the matter it should be recalled that this was an early stage in the process and the claimant had an opportunity to restate her position both at the disciplinary hearing and at the later appeal.

144. We now turn to the root issue in this case namely that of the application and effect of the so called 'Zero Tolerance' policy that the respondents relied upon. Mr. McGregor carefully took us through the various iterations of the policy culminating in the most recent policy which the respondents appeared to rely upon. The claimant's position was that she had not read it ,although she accepted that it had been emailed to her, and that the policy had not been introduced to staff like her in the way it had been planned by the company to raise awareness of its terms particularly the zero-tolerance aspect. There were certainly problems in the way in which the policy was introduced and the respondents had nothing more to point to other than the email sent to the claimant with the policy attached to suggest that she was aware of it.

145. The points made by Mr. McGregor in relation to a lack of consultation or discussions with the claimant and other staff to ensure they understood the differences from the previous policy, particularly in relation to the 'zero tolerance' aspect, had some force.

146. We found three difficulties with the position the claimant took. The first is that she was efficient and hardworking and we, like the respondents, found it difficult to accept that she had not opened the email when it had been sent to her. The claimant in evidence told the Tribunal that she worked usually on her own and there had not been involved in any informal conversations with other staff that might have alerted her to the significant change in the policy. On the other hand, the respondents pointed to an obligation for her to read her emails and had come to the view that it had been likely that she had become aware of the policy. Secondly the way in which the claimant reacted once she had failed the test was also suggestive that she was aware that a fail would lead to her dismissal causing her initially and untruthfully to blame inhalation of second hand smoke for the positive test.

147. Thirdly the claimant was at some pains to point out that she had stopped taking cannabis three weeks or so before the test and this also seems consistent with her being aware of the new policy. It certainly seems unusual for her to have decided to stop using cannabis at that point given her admitted use over many years. As noted earlier, the Tribunal formed the view that the claimant's reaction of distress and apparent panic when she failed the test was indicative of someone who is aware of just how perilous her position has become and who is aware that the new policy totally forbids the use of illicit substances. It was noteworthy that Mr. Beveridge stated that even discounting the application of the first policy he would still have dismissed in terms of the older policy.

148. In passing we would mention that the claimant alleged that she had been told that a failed test would lead to her dismissal and that the issue was prejudged. Even if she had been told this, in these unambiguous terms, and we do not accept that a professional HR Adviser would be likely to say this, the disciplinary and appeal were both dealt with by other individuals and in a fair manner in our assessment. If the comment was made, and the claimant was

very upset at the time, it was not made by someone who ultimately took the decision to dismiss.

149. The Tribunal considered these issues around the claimant's knowledge in some detail and at length. Looking at the matter overall the belief the respondents came to, namely that she was likely to have become aware of the terms of the policy, was within the range of reasonable responses open to them in the circumstances.

150. The principal argument advanced was that the claimant had only taken, or started taking cannabis again, following the issues with her then line manager Alan Bolton in July 2015 and that in some way her employers lack of action in dealing with those problems and other issues such the incident with Mr. Kidd in some way pushed her into impulsive cannabis use. This is not reflected in the evidence. The claimant may have used taken cannabis after a stressful day at work but her taking cannabis was of long standing. It was in no way an impulsive reaction to some particularly stressful event and latterly after the claimant was prescribed Ritalin she had considered the matter carefully and deliberately chose to use it in place of her medication. This was her clear evidence. It is apparent that if she had problems with Ritalin or indeed stress at work she could have sought assistance from her GP rather than take the decision to 'self-medicate' with an illicit drug that she knew her employer prohibited.

151. A theme that runs through both the claimant's position in this case and in her defense to the disciplinary charges was to blame her employers rather than her own deliberate actions for failing the drugs test and buttress that position with a whole series of complaints going back some years. We commented earlier that some of these seemed artificial and the subject of the application of hindsight. It was almost as if the claimant felt that a blizzard of paperwork and allegations would assist her. An example was that prior to the disciplinary hearing the claimant suggested that the absence of an up to date Job

Description was causing her ‘‘to be confused, easily distracted and often tangential’’ in her thinking. Leaving aside this rather over blown allegation we noted that she was, nevertheless, assessed as performing well in her job and had she appears to have made no approach to her employers formally or informally for such a document.

152. In the same letter to Mr. Beveridge (JBp646) the claimant raised a host of health and safety issues from the signage and markings in the car park at the Tullos site observed on the 3 January prior to the Investigation Meeting. We do not propose to comment on every last allegation made by the claimant but the foregoing gives at least an indication of the background to the disciplinary hearing and the position taken by the claimant more generally.

153. Having made these comments we would observe that the claimant appears to have had genuine difficulties with many of the symptoms she reported to her GP for some years and we do not underestimate how hard she must have worked to be a success in her job while the cause of such difficulties (ADHD) was undiagnosed and poorly understood.

154. That is not the final issue that we have to consider in relation to dismissal. In terms of the policy the company has the discretion to work with the employee who fails the test to become free of drug use. The respondent’s witnesses did not use this option and were questioned at length about this issue. We are not sure that the responses were wholly satisfactory but in essence they were that the claimant had not disclosed the problem before the test was carried out nor had she been candid when she had failed the test and this had called into question whether the company could put trust in her to adhere to the strict terms of the policy and to become drug free. Many employers might have taken a different view especially given the claimant’s acknowledged hard work and service. With some reluctance we concluded, reminding ourselves that this was a discretionary matter, that the decision not to use this part of

the policy was not perverse or irrational and once more fell within the range of reasonable responses given the circumstances here.

155. Even if we had been persuaded that the claimant was ignorant of the terms of the new policy and that the respondent company was not entitled to come to the conclusions it had the claimant's position has a number of difficulties. She acknowledged that the oil industry, more generally and her employers specifically, take a serious view of illicit drug taking and that the policy in force before the introduction of the new 'zero tolerance policy' made failing a test a serious disciplinary matter that could lead to dismissal. Despite that she chose, when prescribed Ritalin, to take cannabis on what seems to be a daily basis. This was not as Mr McGregor argued a reaction to particular stressful situations at work or her employers failing her in some way but a rational considered action on her part taken against the backdrop of the claimant being aware that her job was at risk if she failed a test to self-medicate in place of taking Ritalin. he claimant explained with some candour at the hearing that she did not like the side effects of the Ritalin and preferred not to take her full daily dose relying on the effects of cannabis in the evening. In our view the failed test would be almost certainly have allowed the employers to dismiss under the terms of the previous policy or at the very least have led to the Tribunal to conclude that no compensation or very little compensation would be appropriate given the claimant's contribution to her own dismissal.

Disability Discrimination

156. We then considered the claim made under Section 13 for direct discrimination.

Section 13 of the EA is in the following terms:

"***13 Direct discrimination***

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4)….. "

157. The claims that remained related to paragraphs 2.0 and 2.2 of the claimant's amendment (JBp282) and relate to an alleged failure to take account of the claimant's 'mitigation' and the refusal to allow the claimant to submit evidence before the disciplinary hearing in January 2018.

158. We will begin by making some preliminary observations and recording that after considering the evidence in some detail there was nothing to suggest that the respondent or their managers deliberately discriminated against the claimant on the grounds of her disability or that there was any policy or conspiracy to do so. Matters were complicated as the claimant did not know until early 2016 what her diagnosis was namely of ADHD. The respondents were aware that she had panic attacks, was on 'anxiety tablets' and that the claimant was attending Cornhill Hospital which is a well-known psychiatric hospital. The matter is further complicated in that the claimant's anxiety and panic attacks seem, in retrospect, to be in turn symptoms of the interaction between her underlying condition of ADHD with situations that arose at work and not symptoms of the condition itself. The fact that the claimant told the respondent's managers that she was attending 'Cornhill' is significant but it doesn't in itself alert the respondents to the fact that the claimant had a disabling condition.

159. The question appears to be at what point should the employer be alerted to a possible condition. The claimant in her submissions suggested that the respondents should have become aware of the claimant's condition as far back as 2013 because of her 'tangential communication and hyper focus' exhibited at work. This was patently wrong. People have many differing skills,

abilities and characteristic which would not lead an average observer (employer) to conclude that the might have a qualifying disability under the Equality Act especially absent the exhibition of any difficulties or disabling symptoms.

160. The respondent's managers did take relatively prompt action in relation to the panic attacks and by August 2015 they had taken advice from OH (JB 60). This did not flag up any underlying condition but just looked at the panic attacks. Like many prudent employers the respondents made a number of adjustments such as agreeing to meet the claimant away from work. The claimant did not seem to tell OH or Mr. Scott at their later meeting that there was any psychiatric examination or assessment either occurring or being considered although we now know that by November her GP is sending her for such an assessment. Any assessment takes time and it is not until early 2016 the claimant gets a diagnosis and mediation. It seems to us that it would be very difficult for an employer alerted to the claimant's panic attacks, her taking 'anxiety tablets' and attending 'Cornhill' without something more to conclude that a more specialist enquiry should be made. Even if the employer had acted in this way it seems unlikely that they would have known any more quickly that the claimant did that she had ADHD and the deficits that attend such a condition.

161. In any event even if the respondents had known in say early 2016 after making enquiries and having the claimant assessed that she was disabled we were wholly unconvinced that the claimant was treated unfavourably because of her disability. The fact that she was disciplined related to her taking cannabis not her disability.

162. The claimant alleges that the respondent's managers ignored the claimant's mitigatory evidence that she had taken cannabis because of the respondent's failings, mismanagement and failing to state that the claimant had raised any grievances and refusing to allow the claimant to submit evidence before the

disciplinary process. It would be more accurate to say that they did not accept the claimant's position either that her working environment was as she described it or that her condition was sufficient mitigation for her actions.

163. We re-iterate that the respondents were perfectly entitled to come to the view that any mitigation was insufficient and that their actions did not contribute to the claimant taking cannabis. That the disciplinary process was overall a fair one and not tainted by discrimination and the clamant was allowed to present her evidence and state her position at the appropriate time.

164. Prior to the disciplinary hearing the claimant had already provided the respondent with voluminous correspondence which they said they would consider (JB115). Indeed an ''Evidence Pack' was handed over by Mr. McGregor at the disciplinary hearing. The letter sent by Mr. Beveridge (JBp595a) he complains about merely calls a halt to correspondence until the disciplinary hearing at which time any additional evidence could be lodged. There is no basis for this claim.

165. The claimant in the submissions lodged on her behalf (page 24) goes further and takes a scatter gun approach. Everything that she found unpleasant throughout her employment is cited as being evidence that the respondent failed to protect her mental health for example over the various work-related incidents involving Mr. Bolton. The respondents had no knowledge that the claimant was disabled at that time. No duty under this section could arise at that point. The author also seems to fail to understand that the statutory wrong under section 13 is treating the claimant less favourably because of her disability not failing at points in some other statutory or common law duty of reasonable care.

166. We found no evidence that the claimant's treatment over any of these many issues occurred because of or on account of her disability. The claim under this section must for these reasons be dismissed.

"**Section 15 claim**
Section 15 of the Equality Act is in the following terms:
15 Discrimination arising from disability

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

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

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

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

167. The claim under section 15 was still extant and related to paragraphs 2.0 of the amendment and the events surrounding the alleged comments made by Maureen Smith that the claimant would be dismissed. The claimant's argument can be put simply that the claimant was dismissed because of something arising as a consequence of her disability. The 'something' was her taking of cannabis which she said was caused by her condition which made her more prone to risky and spontaneous behavior. The argument ran somewhat contrary to the argument that it was the stress of the working environment engendered by the respondent that had caused the claimant stress which she had ameliorated by using cannabis. The claim was made untenable by the evidence that the claimant took cannabis as a rational choice and in place of her evening dose of Ritalin.

Reasonable Adjustments

168. The first three subsection of Section 20 of the EA are in these terms:

"***20 Duty to make adjustments***

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable

Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's 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."

169. The claimant's submissions were that adjustments should have been made from 2013 or 2104. We have held that it would have been early 2016 before even the most conscientious employers would have known about the condition. No one, including the claimant, was aware that she had ADHD when she had problems with Alan Bolton. It was suggested that moving the claimant to Bridge of Don in 2015 should not have happened and that a reasonable adjustment would have ben to allow her to remain at Tullos. This was hopelessly time barred and in any event, we did not accept that the offices were as described a hostile environment.

170. The submissions contain a series of paragraphs which do not relate to adjustments to the working environment nor do they identify a PCP. It is suggested in paragraph ix that the disciplinary process was conducted without consideration to the claimant's condition but no particular adjustment is identified similarly in paragraph it is not identified how conciliation and mediation could be a reasonable adjustment. Paragraph xi narrated that he claimant offered to resign and refusing that offer and proceeding with the disciplinary action should have been subject to reasonable adjustment again which is not specified. The claimant's representative forgets to focus on why that the claimant being subject to an investigation and disciplinary process puts her at a substantial disadvantage to an employee with no such disability.

171. The adjustments that were identified were proposed changes to the venues at which meetings took place. The claimant suggested that these were hostile and intimidating. We did not accept that evidence. The claimant gave

evidence that she would be stressed and embarrassed by returning to the respondent's premises. We were not convinced that any such stress or embarrassment, which could apply to anyone in such circumstances, bearing in mind that the claimant did in fact attend and participate in the meetings, would put her at a substantial disadvantage.

172. We also found no basis for the complaints that were made. Ms. Paterson gave evidence that venue's depended on various factors such as the parties who were to attend and where they are based, the facilities that are available and IT support. She confirmed that the claimant had asked for the investigatory meeting to take place at Tullos which it did. Mr. Beveridge took the claimant's concerns seriously and the room used at Bride of Don was immediately before the main reception and discrete. Mr. Potter had considered the venue and concluded that the offices of the respondent's legal advisers were sufficiently neutral. These seemed appropriate adjustments to the Tribunal and we found the claimant's objections to the venue's a little contrived.

173. We found no sufficient basis in the evidence that would allow us to uphold any claim for a failure to make reasonable adjustments and this aspect of the claim fails.

Equality Act-'Like work'

174. The applicable provisions are contained in Sections 65 and

"***65 Equal work***

(1) For the purposes of this Chapter, A's work is equal to that of B if it is—

(a)like B's work,

(b)rated as equivalent to B's work, or

(c)of equal value to B's work.

(2)A's work is like B's work if—

(a)A's work and B's work are the same or broadly similar, and

(b)such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3)So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—

(a)the frequency with which differences between their work occur in practice, and

(b)the nature and extent of the differences.

(4)A's work is rated as equivalent to B's work if a job evaluation study—

(a)gives an equal value to A's job and B's job in terms of the demands made on a worker, or

(b)would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.

69 Defence of material factor

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b)if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.

(5) "Relevant matter" has the meaning given in section 67.

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's."

176. The claimant selected comparators. The principle contained in the Act is that people should be paid and have the same contractual conditions irrespective

of their sex if they are doing the same work. This concept is part of the requirement to treat people equally under EU law.

177. The Tribunal considered the work actually carried out considering firstly the broad nature of the work and secondly any differences in relation to important tasks. We heard evidence about the claimant's salary and conditions compared to those of her comparators.

178. The Tribunal had regard to the statutory wording of the sections and looked at the matter broadly. It was satisfied that on a day to day basis there could at times be similarities in the run of the mill work carried out by the claimant and the comparators. Mr McGregor pointed to the Job Descriptions which were rather generic in their terms and did not reflect some important aspects of the differences in roles. We would observe that there was evidence that the claimant, at times, did more than required of her under her contract in relation to developing the C-Sams system and the other side of the coin was that her line manager would have done less. It is the work required to be carried out under the contract of employment that is however, essential.

179. Let us record once more that the claimant was hardworking and enthusiastic about her job and was an asset to the respondent company. She had no qualifications for the role she performed and had learned competently and quickly 'on the job'. Mr Anderson the main comparator used was a qualified and experienced electrician. He had experience offshore which the claimant had not. He had relevant qualifications, which the claimant had not. These would allow him greater insight and knowledge of electrical issues and an ability to understand electrical drawings. He would also be able to speak to the respondent's customers with more authority and knowledge about the equipment and the offshore environment in which it would be expected to operate and of which he had direct experience. He would also have line management responsibility for the claimant and more generally for the operations, including development of systems.

180. The difference in salary, and for these purposes we include the car allowance, was about ten thousand pounds. We noted that the respondent's justification for the car allowance was that the comparator worked from the respondent's Peterhead site some distance from the company HQ and other premises in Aberdeen.

181. After looking at the matter broadly once more we accepted that the claimant carried out like work to that of her comparators and that the equality clause was engaged. It was then up to the respondents to show that the differences they relied on were of practical importance, in this case the salary/car allowance, were caused by a material factor other than sex.

182. It was within the industrial experience of the Tribunal that given the substantial salaries paid for offshore work, as opposed to similar work onshore, the salary paid to the comparators, who were land based, would have to take account of this disparity a least to an extent. In simple terms if an employer wanted a qualified shore-based electrician, with offshore experience, the salary would have to make it attractive to such qualified electricians to apply and to give up the higher financial rewards of working offshore. It is apparent that people can tire of offshore work and have many reasons for taking a job onshore but nevertheless there would usually be a premium to be paid for workers with such experience.

183. The evidence before us also indicated the higher level of responsibility this post and the post of Engineering Manager held by Mr Bolton and Mr Robertson (to who the claimant reported) had as opposed to the more administrative role that the claimant held at that point as reflected in the Job Description prepared in 2011 (JB150). In respect to Mr Anderson's post it was clearly an advantage to the respondents of having someone qualified who could understand engineering drawing and who could be involved in testing and other activities on a level that the claimant could not.

184. Taking these various factors onto such and we came to the conclusion that the respondents have justified the difference in salary and that the claimant's sex was not a factor in the setting of the salaries. The claim is accordingly dismissed.

Expenses Application

185. We considered the respondents application for taxed expenses. They had given the claimant a 'costs warning' We had some sympathy with the application. This case became overly complex and protracted despite the essential facts being straight forward.

186. The Rule governing such applications is Rule 76:-

> "*When a costs order or a preparation time order may or shall be made*
>
> *76(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that -*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or(b)any claim or response had no reasonable prospect of success*."

187. Although there have been changes to what could be described as the expenses regime over the years an award is still the exception rather than the rule. There are good policy grounds for this around ensuring that litigants deterred from making claims by the fear of incurring expenses if they lose.

188. The terms of Rule 14(1) of the earlier 2001 Rules used the same formulation as later versions of the rules namely that the trigger test was acting '*vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived*'.

189. In most cases the unsuccessful party will not be ordered to pay the successful party's costs; see ***McPherson v BNP Paribas (London Branch) [2004] IRLR 558*** per LJ Mummery at paragraphs 2 and 25:-

> "*Although Employment Tribunals are under a duty to consider making an order for costs in the circumstances specified in Rule 14(1), in practice they do not normally make orders for costs against unsuccessful applicants. Their power to make costs orders is more restricted than the power of the ordinary courts under the Civil Procedure Rules; it has also for long been generally accepted that the costs regime in ordinary litigation does not fit the particular function and special procedures of Employment Tribunals. It is, therefore, not surprising that the Employment Tribunal Rules of Procedure do not replicate the general rule laid down in CPR Part 38.6(1) that a claimant who discontinues proceedings is liable for the costs which a defendant has incurred before notice of discontinuance was served on him. By discontinuing the claimant is treated by the CPR as conceding defeat or likely defeat. The Tribunal rules of procedure make provision for withdrawal of claims in Rule 15(2)(a), but the costs consequences are governed by the general power in Rule 14*."

190. The then President of the EAT, Mr Justice Burton in ***Salinas v Bear Sterns International Holdings Inc UK/EAT/0596/04DM*** noted at paragraph 22.3 that "*something special or exceptional is required*" before a costs order would be made and, even if the necessary requirements of Rule 14 are established, there would still remain a discretion of the Tribunal to decide whether to award costs. The matter is one for the Tribunal's discretion. In ***Benyon & Others v Scadden [1999] IRLR 700*** it was made clear that the discretion given to Tribunals and courts is not to be fettered.

191. It should also be borne in mind that a litigant in person has to be judged less harshly than a professionally represented litigant. (See ***AQ Ltd v Holden [2012] IRLR 648***). The claimant here did have representation from her father. Neither the claimant nor Mr McGregor are legally qualified. They have no experience in such matters. They are, however, both intelligent and resourceful and have clearly spent a considerable time researching the legal position and working out almost every possible facet of this case and grasping every opportunity to try and move the blame for the claimant failing a drugs test to the respondents.

192. We can appreciate how drawn out this process became with numerous hearings to cut back the more fanciful claims and to identify the core issues. This must have been a frustrating and expensive process for the respondent and their very patient solicitor Ms Turner who acted patiently and helpfully throughout often in the face of some misdirected criticism from the claimant's representative.

193. The focus must be on the terms of the rule and we have no doubt that Mr McGregor acted honestly in what he perceived to be the best interests of his daughter. At times the Tribunal had to guide him as to what was relevant evidence and to be fair to him he accepted such guidance. It was in his nature to be almost obsessively concerned with detail and it was not a surprise when he told the Tribunal that he also had traits similar to those of his daughter.

194. That said it does not follow that because his intentions were honest that his behaviour could not be judged unreasonable. The claimant was advised to take legal advice and if she had done so considerable time and expenses would have been saved. The claimant was financially affected very badly and we cannot in these circumstances criticise her unduly for not seeking legal advice which would be costly.

195. The initial claims that were made had been cut down through being either withdrawn (Harassment) or struck out. These claims were fought with persistence and it is true that the correspondence, and pleadings, from the claimant's father were lengthy and in which he took every point that occurred to him. It was adversarial in tone reflecting the belief that the claimant had in some way been treated unfairly.

196. An example of the behaviour that must have been frustrating for the respondent's representative was that a matter supposedly dismissed at a Preliminary Hearing had a tendency to reappear during the final hearing and later in submissions. Needless to say, these were all identified by a vigilant Ms Turner. The complaint made by the respondent's solicitor that the case took

longer to hear than otherwise because Mr McGregor *'repeatedly raised irrelevant questions'* was the principal complaint. That was undoubtedly true but as a party litigant it was clear that the claimant was very much in her father's hands and he in turn found it difficult to grasp what was relevant and what was not. The Tribunal does not recall that he resisted instructions given by the Judge if a matter was ruled irrelevant.

197. Even if we had been persuaded that the Rule was engaged at some points during the hearing, and overall we are just not so persuaded, then we would have been reluctant to make an award of expenses in these particular circumstances and to judge the claimant too harshly.

198. Finally, we apologise for the delay in issuing the Judgment. This was not an easy case to commit to paper and required the Tribunal to meet on two occasions. That added to the pressure of the Judge's commitments over the summer made for an unfortunate and unforeseen delay.

Employment Judge: **Mr J Hendry**

Date of Judgment: **10 October 2019**

Date sent to Parties: **11 October 2019**

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