EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Miss S Billing		**Driving and Vehicle Standards Agency (DVSA)**

Heard at: London South Employment Tribunal
On: 11, 12, 13, 14 & 15 November 2019 in Chambers on 7 February 2020

Before: Employment Judge Hyams-Parish
Members: Members: Mr N Shanks and Mr M McDonald

Representation:
For the Claimant: Miss S Berry (Counsel)
For the Respondent: Mr J Dixey (Counsel)

RESERVED JUDGMENT

The claim of unfair dismissal is well founded and succeeds.

The claim of wrongful dismissal is well founded and succeeds.

The claim of direct disability discrimination fails and is dismissed.

The claim of unfavourable treatment for something arising in consequence of disability is well founded and succeeds.

The claim of indirect disability discrimination fails and is dismissed.

The claim of failing to make reasonable adjustments is well founded and succeeds.

REASONS

Claim(s)

1. By a claim form presented to the Tribunal on 26 March 2018, the Claimant brings claims ("the claims") of unfair and wrongful dismissal, and disability discrimination against the Respondent.

Legal Issues

2. The following questions were agreed by the parties as those which the Tribunal need to answer in order to determine the claims. These have been used as the basis for the Tribunal's analysis and conclusions at paragraphs 106 onwards below.

Unfair dismissal

a. Did the Respondent genuinely believe the Claimant to be guilty of misconduct?

b. Was that belief based on reasonable grounds?

c. At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?

d. Was it reasonable for the Respondent to regard that conduct as gross misconduct on the facts of the case?

e. Did the dismissal fall within the range of reasonable responses open for the Respondent to take?

f. Was the dismissal procedurally fair?

g. If the Claimant's dismissal was unfair, should there be a "*Polkey*" reduction in the compensation awarded and if so, by how much?

h. Did the Claimant contribute to the dismissal and if so, by how much, if any, should any basic and compensatory awards be reduced?

Wrongful dismissal

i. Did the Claimant commit a repudiatory breach of contract entitling the Respondent to treat the contract as at an end and dismiss the Claimant summarily?

Direct discrimination

j. Did the Respondent treat the Claimant less favourably, than it treats, or would treat, others, by:

   i. Failing to support the Claimant.

   ii. Deciding to carry out an investigation notwithstanding her disability.

   iii. Not taking steps as recommended by Occupational Health ("OH").

   iv. Proceeding with the investigation and suspending the Claimant notwithstanding her disability.

   v. Not making allowances for the Claimant because of her disability during the investigation.

   vi. Dismissing the Claimant without properly considering the recommendations of Mr Cogo.

k. Was the reason for that less favourable treatment that the Claimant was a disabled person?

Discrimination arising in consequence of disability

l. Did the Respondent treat the Claimant unfavourably by:

   i. Failing to support the Claimant.

   ii. Deciding to carry out an investigation notwithstanding her disability.

   iii. Not taking steps as recommended by OH.

   iv. Proceeding with an investigation and suspending the Claimant notwithstanding her disability.

   v. Not making allowances for the Claimant because of her disability during the investigation.

   vi. Dismissing the Claimant without taking into account the recommendations of Mr Cogo.

m. Was the above unfavourable treatment because of something arising in consequence of disability, the something being the Claimant's conduct towards others and her manner towards them which the Respondent managers perceived in a certain way.

n. Can the Respondent show the unfavourable treatment to be a proportionate means of achieving a legitimate aim?

Indirect discrimination

o. Did the Respondent apply the following PCPs?

   i. Considering its employees' conduct in accordance with the policy's definition of bullying at paragraphs 4 and 10 of the Respondent's Dignity at Work policy and holding its employees to account to the obligations at paragraph 6 of the said policy.

   ii. Instigating performance plans and/or formal disciplinary proceedings for employees when they reached a certain level of customer complaints and/or when customer complaints were upheld.

   iii. Judging the adequacy of conduct towards customers by reference to standards in the customer satisfaction policy.

   iv. Instituting or continuing formal disciplinary proceedings when the OH report recommendations or other reasonable adjustment suggestions were outstanding.

p. Did the Respondent apply these PCPs to persons who do not share the Claimant's protected characteristics?

q. Did or would the PCPs place those who have the same disability as the Claimant at a particular disadvantage compared to those who are not disabled?

r. Did the PCPs put, or would they put, the Claimant to that disadvantage?

s. Can the Respondent show the PCP to be a proportionate means of achieving a legitimate aim?

Failing to make reasonable adjustments

t. Did the Respondent apply the following PCPs?

   i. Considering its employees' conduct in accordance with the policy's definition of bullying at paragraphs 4 and 10 of the Respondent's Dignity at Work policy and holding its employees to account to the obligations at paragraph 6 of the said policy.

ii. Instigating performance plans and/or formal disciplinary proceedings for employees when they reached a certain level of customer complaints and/or when customer complaints were upheld.

iii. Judging the adequacy of conduct towards customers by reference to standards in the customer satisfaction policy.

iv. Instituting or continuing formal disciplinary proceedings when the OH report recommendations or other reasonable adjustment suggestions were outstanding.

v. Suspending employees under investigation in accordance with paragraphs 14-19 of the disciplinary policy.

vi. Conducting disciplinary proceedings in accordance with paragraphs 19-52 of the disciplinary policy.

u. Did the above PCPs place the Claimant at a substantial disadvantage compared to non-disabled persons? The substantial disadvantage relied on is the risk of a deterioration in her condition caused by having to deal with stressful situations and not being able to cope with those stressful situations.

v. Did the Respondent fail to make the following reasonable adjustments that would have avoided the above disadvantage?

i. Not advising the complainant that management was “working with the Claimant to improve her customer service”.

ii. Involving the Claimant in the complaints handling process and discussing or explaining to her the response to be made to complainants.

iii. Postponing the disciplinary process, pending the outcome of a reference to OH.

iv. When the report was received, rather than proceed with the disciplinary process, instead implementing its recommendations namely:

(a) Making available bereavement counselling.

(b) Arranging external arbitration to help deal with the Claimant’s relationship with management.

(c) Making available psychotherapeutic support.

v. Avoiding the suspension of the Claimant for a period of almost four months.

vi. Acknowledging that a person suffering from the Claimant's mental health condition would be more likely to encounter difficulties with colleagues and candidates.

vii. Following the advice of Mr Cogo (having regard to the fact that he advised that the Claimant had only now recognised that she was unwell), namely:

(a) Acknowledging that the Claimant's condition would make it harder for her to deal with the Respondent's increased customer focus.

(b) Providing on-going support.

(c) Considering work adjustments, such as:

(i) A phased return to work.

(ii) Changing her working hours.

(iii) Allowing the Claimant time off to seek appropriate therapy.

(iv) Providing her with a buddy to work with.

(v) Implementing continual supervision.

(vi) Providing her with alternative work.

Practical and preliminary matters

3. As part of the Claimant's case the Tribunal heard evidence from the Claimant and one witness:

(a) Mr Cogo, Employment Manager at a charity called Choice Support.

and as part of the Respondent's case, the following two witnesses:

(b) Ms Kelly Galton, Operational Delivery Manager and dismissing officer.
(c) Mr Ian Neave, Local Driving Test Manager and investigating officer.

4. The Tribunal was referred throughout the hearing to documents in a bundle extending to 527 pages. References to numbers in square brackets in this judgment are to pages in the hearing bundle.

5. The Respondent initially objected to the evidence of Mr Cogo, his witness statement having been served after exchange of other witness statements. Counsel for the Claimant said that it only came to light that a witness statement would be needed from Mr Cogo when they saw Ms Galton's witness statement. Counsel for the Claimant said that witness evidence was required by Mr Cogo to rebut an assertion made by Ms Galton in her witness statement.

6. Having considered the witness statement of Mr Cogo, the Tribunal concluded that his evidence was clearly relevant. The Tribunal noted that whilst his witness statement had been served later than other witness statements, the Respondent had been in possession of Mr Cogo's witness statement ten to twelve days before the hearing, which gave ample opportunity for the Respondent to take instructions on it.

7. The Tribunal asked Mr Dixey whether any application arose from the Tribunal's decision regarding Mr Cogo's witness statement. Mr Dixey said there was none, save that he would wish to cross examine Mr Cogo, which of course the Tribunal said it would allow.

Background findings of fact

8. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all the evidence given by witnesses during the hearing, together with the documents referred to. Only findings of fact relevant to the issues necessary for the Tribunal to determine, have been made. It has therefore not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

9. The Claimant commenced employment with the Respondent on 16 May 1983. During the entirety of her employment, the Claimant was employed as a driving examiner. The Claimant was initially placed in the Respondent's Sutton driving test centre although from time to time she was redeployed and worked in a number of other test centres. She returned to Sutton in 1998 and then moved to Morden in 2000. She has worked in the test centre at Morden since 2000.

10. It is not uncommon for examiners, like the Claimant, to be, what was referred to during the hearing as, "displaced", which essentially means being required to work at other test centres for a limited period of time for business reasons, such as where a test centre is short of examiners and requires additional support. Since 2000, the Claimant has been displaced to test centres including Lancing, Isleworth, Slough and Ashford.

11. The Claimant said in evidence that when she joined the Respondent it was rare for a woman to be a driving examiner. She said that perhaps one in ten examiners were female but by the time the Claimant was dismissed, that ratio had become one in two examiners. She said that this caused her to

develop a tough attitude as a way of coping with what she perceived to be the "difficult" style of her male colleagues which varied from being dismissive to "outright bullying". The Claimant said that her tough style meant that, unlike some colleagues, the she was prepared to be more forthright in putting across her point of view. She described her manner when dealing with strangers or those she said "were not in sympathy with her" as direct, but not aggressive - and certainly not confrontational.

12. The Claimant said that historically she did have a difficult relationship with certain managers whilst she also claims to have got on well with others. She alleged that those managers she did not get on with invited examinees to complain about her, whereas she gave one example of a good relationship she had with John Frow, with whom she worked at the Lancing test centre, when she said she only received two complaints from examinees.

13. The Claimant described her approach to her job in evidence as being "*strict but fair*". She accepted that this meant that she would sometimes post the lowest pass rates in the centres where she worked. She also said that her approach led to her gaining something of a reputation among driving instructors whose students she sometimes failed. She went further to say that such was the view of driving instructors, with whom the Claimant says that she was unpopular, that they would incite their students to complain about her in the hope that she would be moved or dismissed, or at the very least that the test fee would be refunded. She said that the point came when the Respondent would regularly make a refund in order to placate a complainant, which she said simply lead to more complaints.

14. The Tribunal accepts, particularly in the absence of any evidence produced by the Respondent to rebut the assertion by the Claimant, that she had a clean disciplinary record and had not been subject to any disciplinary warnings during her employment.

15. Notwithstanding the suggestion by Ms Galton that there had been a history of underperformance by the Claimant going back beyond 2014, the evidence before the Tribunal was concentrated on the period since 2014. The Tribunal was shown a letter of complaint by an examinee who complained, inter alia, that the Claimant's manner had been rude and disrespectful. The Tribunal was also shown the reply which included the following extract: "*I am sorry if you found Sheila's attitude upsetting. I can assure you that this was not her intention. The test centre manager, Rowland Beddison, has read the test report and has spoken with Sheila. He is satisfied Sheila conducted your test in accordance with all of our guidelines…"* The author then goes on to state: *"Sheila intended to be polite and professional, I can see that you interpreted her behaviour in a different way. Roland is aware of your [not decipherable] and is working with Sheila to improve her customer service*".

16. The Tribunal was shown evidence of concerns about the Claimant's mental

health and well-being dating back to 2013 when the Claimant's then line manager, Local Driving Test Manager ("LDTM"), Rowland Beddison, wrote to the Claimant out of concern that she appeared to be struggling at work and had pinned a suicide leaflet to the notice board, together with a teddy bear with a noose around its neck. This resulted in a referral being made to OH on 31 December 2013.

17. In January 2014 a report was prepared by OH [434] which included the following references:

> ***……..She reported she suffered a period of anxiety and depression in 2003/2004 as a result of previous work issues and was then absent from work for about six months. At the time she did not have any treatment, medication or psychological intervention.***
>
> ***Ms Billing indicated to our doctor she had an issue at work and after investigation which was completed in early 2013 a number of adjustments were instituted such as undertaking no LGV testing. She feels she has now limited scope in her current adjusted role and as a result feels bored and frustrated…***
>
> ***…Our doctor comments Ms Billing has not attended her GP with any of the symptoms described. She is not on any medication and although she had made contact with the Employee Assistance Programme she was very distrustful of their responses and was worried about confidentiality. She therefore did not pursue counselling…***
>
> ***Ms Billing reported ongoing symptoms of low mood, depression, reduced motivation and diminished concentration.***
>
> ***Currently I understand she is able to undertake daily activities without restriction and at the time of the assessment she completed a psychological questionnaire which she scored in the range indicative of moderate depression.***
>
> ***Despite her symptoms Ms Billing is fit to undertake her role and it would be helpful for management to discuss her perceived dissatisfaction to determine whether there are any adjustments that may be of benefit to her……***

18. In February 2015, the Claimant was seen by OH again. The report dated 27 February 2015 [436], acknowledges that the Claimant may be disabled under the Equality Act 2010. It said: "*From a medical point of view she remains fit to undertake her full contracted role and I cannot see that she should pose a risk to the public*".

19. By March 2016, the Claimant was managed by LDTM Sean Cartwright at Morden. He wrote to her by email on 23 March 2016 [96] to follow up a discussion regarding "*poor behaviours*" shown at a meeting between them when in response to a request to complete a Health and Safety induction form, the Claimant said in an abrupt manner "*when you do your job*". Mr Cartwright also referred to a customer service issue. He wrote to her again on 24 March 2016 [98] about a further behavioural issue.

20. On 11 April 2016, the Claimant wrote a somewhat cryptic email to Rowland Williams (Area Operations Manager) [99], copying in Mr Cartwright, which ended "*sorry I am so depressed*". This was followed up by Mr Cartwright on 14 April 2016 [101] expressing his concern for her welfare and suggesting that she visit her GP. In fact, by that stage the Claimant had seen her GP and had been referred to an organization called Sutton Uplift. In the referral form [94], the GP stated the reason for referral was "*stress, anxiety, and low mood. Mostly related to a very stressful job as a driving test examiner. Dysfunctional work atmosphere and relationship with colleagues. Highly stressed. Would like coping counselling*."

21. In May 2016, the Claimant was working at the test centre in Isleworth and the Tribunal was shown an email from LDTM David Rogers [103], commenting on a debrief given to a candidate by the Claimant which Mr Rogers described as a "*telling off*".

22. By January 2017, the Claimant was being managed by LDTM David Brick, who reported to Ms Galton. The Tribunal was shown an email from Mr Brick to the Claimant dated 6 January 2017 [108] in which he enclosed data on pass rate trends for males and females and pointed out to the Claimant that she was "*below the Test centre averages for males*" with a similar pattern for females.

23. On 6 February 2017, Mr Brick sent an email to the Claimant [111] which was a complaint dated 2 February 2017 that had been forwarded to him by customer support. It was a complaint from a candidate who described the Claimant's tone as "*rude and aggressive*". The Claimant described the complaint as "*a most vicious attack without cause*" and proceeded in the email to explain why.

24. On 20 February 2017 a complaint was again forwarded to the Claimant by Mr Brick [116]. The complainant described the Claimant as "*very uninterested and annoyed*" as well as "*rude and blunt*". Also, in the complaint, it included the following extract:

> ***Driving examiners that use Morden driving test centre told my instructor that this woman 'is the worst' also described as 'Godzilla' even one instructor said: 'she would give you a minor for blinking too much'. Having this sort of reputation why is she allowed to be an examiner?"***

25. The Claimant maintains that this reputation was perpetuated by driving instructors who did not like her and encouraged their students to complain about her and seek a refund of the test fee.

26. On 4 April 2017 the LDTM in Ashford, where the Claimant had been displaced for a short period, wrote to Mr Brick [118] to inform him that he had received three complaints about the Claimant's conduct and

assessment of driving tests. Copies of those complaints were included in the bundle [119]. He also referred to having received numerous "*verbal complaints from the local driving instructors about Sheila*". He went on to say: "*This is causing the resident Examiners considerable problems with instructors that they normally have a very good working relationship with*". This last point is relevant because the Claimant maintains that there is, what she described as, "*a cozy relationship between some examiners and instructors*".

27. On 18 April 2017 there was a meeting between the Claimant and Mr Brick which is significant in so far as this case is concerned. In the meeting there was a discussion about the complaints the Claimant had received and the common themes arising from them. The Claimant's behaviour during this meeting was the subject of a later complaint. In his email following up the meeting on the same day [130], Mr Brick said:

> ***Once I highlighted this to you, I was shocked and distressed by your reaction towards me and was unable to continue until later as to what steps we can agree on to support you.***
>
> ***Banging on the desk in an aggressive manner (as witnessed by our Operations Delivery Manager) is not an appropriate way to behave in an office. I was simply highlighting themes so that we could move forward. If this is how you respond to me within the office, I worry about how you conduct yourself when out on test.***
>
> ***Also, I need to mention your Customer Service towards fellow LDTMs having received emails evidencing your behaviour towards them, one in particular from Robert Loveday which says that you were rude and your response to me was that he was too lazy to find the report.***
>
> ***For you to move on from this you need to be more self-aware and accountable for your customer service not only towards me, your colleagues and to our customers.***
>
> ***Therefore, the informal plan we agreed to move forward and draw a line under this is as follows….***

28. Mr Brick then set out a three-month informal performance improvement plan, discussed and agreed during the meeting, including a target that the Claimant was not to receive any more than one complaint regarding her conduct/manner for any tests from 18 April 2017. It was also suggested that she buddy with Steve Taylor on a number of specified dates, observe a colleague conducting a test during which she would be required to comment on the customer service provided, and conduct a test with a colleague observing and giving feedback through discussion.

29. The Operations Delivery Manager who is referred to in Mr Brick's email (referenced at paragraph 27 above) and who it is said witnessed the Claimant's behaviour, is Ms Galton. She wrote to the Claimant [132], also on 18 April 2017, as follows

Dear Sheila,

Following the meeting that I attended between yourself and David Brick, I feel compelled to write to you to ensure that you fully understand the consequences of your behaviour today and make it clear that DVSA does not tolerate inappropriate behaviour.

At the start of your meeting you banged your fist on the table between yourself and David and began to shout directly at him. Your behaviour was intimidating and completely unacceptable and may be considered as upwards bullying. You would not accept David treating you in such a way and he quite rightly does not expect this behaviour from you.

During the meeting you informed me that you felt that I had taken away your freedom to express your anger in the office by telling you that you are not to shout and bang your wallet on your desk when you return from test. As explained, you are free to express your concerns and feelings, however shouting in an office is not an appropriate way to do so and will not be tolerated.

I refer you to the dignity at work policy which can be found here which explains your responsibilities for your behaviour at work to ensure that you treat your colleagues, including your manager, with dignity and respect, therefore contributing to a work environment which is free from bullying and harassment.

I would like you to fully understand that if such behaviour is witnessed again, I will have no alternative but to take disciplinary action, in accordance with the disciplinary procedures set out in chapter 3: Personal Conduct of the Staff Handbook.

Kind regards

Kelly Galton

30. On 21 April 2017 [134/5], there was a further meeting between the Claimant and Mr Brick during which Mr Brick attempted to give the Claimant feedback as to a candidate's perception of her manner when debriefing driver faults to a candidate who had passed their test. During that meeting the Claimant apparently told Mr Brick to "*stop bashing her over the head with it"* and "*that she had got it the first time*". At that meeting Mr Brick says that he noticed that the Claimant seemed unwell and appeared dizzy. The Claimant said that she felt sick and at that point Mr Brick stopped the discussion with her and asked whether she wanted to go home.

31. On 8 May 2017, Mr Brick emailed Ms Galton [140] to inform her of an incident that had occurred when attempting to discuss some recent complaints. The email included the following:

I was asking her about a scenario:

If you had been taken off route and made a comment do you think it would be over blown or taken the wrong way. If Steve or I said something

> ***it may go over the candidate's head but do you feel your words can be twisted.***
>
> ***Sheila then got very angry with me, stood up and walked away and said I was accusing her and making accusations against her supporting the lies from a claimant.***
>
> ***I was merely trying to discuss a scenario and hopefully find a way forward. This was witnessed by Steve Taylor.***
>
> ***This is the third time Sheila has reacted in such manner which is inappropriate. She is clearly not willing to talk things through. She said I am not supporting or listening to her one bit.***
>
> ***Steve made some observation of the ADI and how it went very quiet when Sheila went into the waiting room and how the ADI hid from the test vehicle at the end. Another ADI ran over to the test vehicle once he and Sheila left the test vehicle. This is Steve's observation and he believes the ADIs have something against Sheila***

32. On 15 May 2017, Mr Brick carried out a stress risk assessment with the Claimant and followed this up by email dated 23 May 2017 [147] confirming what steps would be taken in an attempt alleviate the stress felt by the Claimant. This included giving the Claimant more time to complete paperwork and ensuring the Claimant took all the annual leave she was entitled to.

33. On 16 May 2017, Mr Brick emailed the Claimant (copying Ms Galton) about their meeting on 8 May 2017 [146] which included the following extract:

> ***…Your tone of voice was aggressive towards me when I was trying to discuss a scenario on test. You became very hostile and walked away from me before sitting on the desk opposite and when you spoke back to me or I tried to continue our discussion in a reasonable manner you did not make eye contact with me. I must say I found this yet again very intimidating. You would not expect me to talk to you or treat you this way.***
>
> ***This is the 3rd time I have tried to have a reasonable work discussion with you and the third time you have reacted this way.***
>
> ***I am trying to support you by having these discussions, but you are not showing any sign of willingness to listen to another point of view and a new way of working or even to meet me halfway.***
>
> ***You now need to find different ways to express yourself within the office but in a professional manner. If frustration about the standard of drive is getting to you then I would suggest you talk with me or your colleagues or even have a walk outside during your breaks to de-stress***
>
> ***Your behaviour must improve to enable us to work together so that I can support you further…..***

34. During a meeting between Ms Galton and the Claimant on 26 May 2017, the Claimant was given a letter [150] advising her that Mr Neave had been

appointed to investigate her personal conduct. The letter went on to say:

> ***"you have received a large number of complaints from our customers regarding the way in which you conduct yourself on driving tests, some of which has been evidenced by local driving test managers. Your line manager David Brick has tried on numerous occasions to provide support and development, however your behaviour has made it impossible. David alleges that your behaviour has become extremely intimidating and amounts to bullying"***

35. The Claimant was informed that Ms Galton had also arranged for the Claimant to attend an interpersonal skills course to commence on 30 May 2017. This was confirmed by email from Ms Galton on 26 May 2017 [152] in which she said that if her progress was not satisfactory, the training could continue into the following week.

36. In evidence, Ms Galton said that the trigger for this letter was the Claimant's behaviour towards Mr Brick which the Tribunal accepts was unacceptable. Ms Galton said that she believed the Claimant's behaviour towards Mr Brick had deteriorated further and that Mr Brick was afraid of meeting with the Claimant. She also referred to the fact that Mr Brick had requested that there be a formal investigation into her behaviour.

37. The Claimant attended the course arranged by Ms Galton on 30 May 2017, 2, 5 and 6 June 2017, which was led by trainer, Alison Matson. Ms Matson prepared a report which was in the bundle [153]. Ms Matson reported that there were times when the Claimant offered good customer service but there were also areas identified for improvement. Ms Matson identified little difference in the assessment of candidates given by the Claimant and those required as standard. Whilst Ms Matson commented that it was evident that the Claimant was unhappy at being required to attend the course, she said that the Claimant was receptive to advice and guidance and did try to put it into practice, thereby resulting in improvement in the areas identified as requiring improvement.

38. On or about 26 May 2017 Ms Galton made a referral to OH for an assessment of the Claimant which the Tribunal finds was specifically intended to confirm whether or not the Claimant was fit to attend meetings as part of the investigation into her performance and conduct. The Tribunal noted the HR records provided as part of the bundle but specifically a record made on 1 June 2017 which said as follows:

> ***Discussion with RM regarding the investigation – as there are concerns about the EE's mental health. RM was wondering whether to wait the outcome of the OH referral in order to establish whether EE is fit to attend the investigation interview. I have advised that since EE is in work, has been briefed by the Decision Manager regarding the disciplinary procedures and the interview, it is assumed that she is fit to attend the meeting. However I have encouraged to speak to KG and said that I or one of my colleagues will be available on the other end of the***

phone in the event of any concerns during the meeting.

39. The Claimant met with OH on 31 May 2017 and a short report was provided dated 1 June 2017 [442], suggesting that she receive some bereavement counselling as it appeared to the author that her situation was aggravated by her recent loss of her mother and having to move her aunt into a care home. The report went on to say as follows:

> ***Thank you for referring this driving examiner to Health Management for assessment of her fitness for work. I saw Ms Billing in Greystone House, Redhill on 31 May.***
>
> ***I had a long discussion with Miss Billing. Obviously communications with management are difficult I think her situation has been aggravated by her recent loss of her mother and having to move her aunt into a care home, and I think she would benefit by receiving some bereavement counselling to help with these two incidents.***
>
> ***I have suggested to her that she should take a copy of my report to her GP and ask if she will refer Ms Billing to the local Community Mental Health Team for further support. As you have documented, Ms Billing is frustrated and angry and what you are seeing in the office is some of her anger.***
>
> ***From a medical point of view, she is fit for meeting with management and discussing further performance issues.***
>
> ***Ms Billing's psychological ill-health has not been caused by work, but it has been aggravated by her perceptions of the way she has been treated by management. Obviously, I cannot comment on the veracity of what she has told me, but from her comments and your referral, as already noted, communications are obviously difficult in both directions. I wondered whether it would be helpful to look to some external arbitration to help deal with these issues.***

40. A letter prepared by Dr Thornton of OH, dated 1 June 2017 [443.1], was sent to the Claimant's GP. Extracts from the referral letter include the following:

> ***She has not been able to deal with the situation resulting in her becoming very stressed which has affected her psychologically. In chatting with Miss Billing about how she tries to cope with the problems, apparently her perception is that if she tells her line manager to stop repeating himself (in regard to comments and complaints voiced about her) this is unacceptable behaviour, and if she walks back from the line manager to put more space between him and her, this is unacceptable behaviour. They will not let her know what they consider to be acceptable behaviour.***
>
> ***She feels she is "just existing in a protective shell". She said "I am trying not to have feelings, not to be upset when the line manager plays with me, but it is not working". Consequently she is getting more frustrated and more angry. None of her coping mechanisms are helping at present, but she is tending to go home after work on Friday, close her front door, and not open it again until she goes back to work on Monday. When she***

goes back to work on Monday she feels nauseated.

Her sleep she describes as "poor". She is unable to get to sleep and when she is asleep she wakes up and cannot get back to sleep again. Her concentration is normal. Her memory has "moments". Her self-esteem is "not good" and her confidence is "so so". She is not tired but she is ruminating at times and probably catastrophising. Life is getting darker and darker for her. I understand last week she was threatened with suspension "if things do not improve" and this has resulted in a further deterioration in her mood.

I think Miss Billing would benefit from support from the local Community Mental Health Team. She obviously would need some support regarding her bereavement, but she also has issues with her frustration and anger as well as her loneliness. I would be grateful if you would consider referring her for further support. I will be seeing her again in the occupational health department in four months' time. If you think there is any more we can do to help this lady in her employment, I would be grateful if you would let me know.

41. On 19 June 2017, Mr Neave wrote to the Claimant [158] inviting her to a meeting as part of the investigation he had been tasked with conducting. The letter invited the Claimant to a meeting on 29 June 2017. The meeting did not go ahead because the Claimant claimed not to have received or read the letter that Mr Neave had sent to her by email. It was therefore re-scheduled to take place on 28 July 2017.

42. On 18 July 2017 Mr Brick wrote to Ms Galton [168] alerting her to the fact that the working relationship was very strained and that the Claimant was not responding to emails or dealing with a complaint that had been made against her. He said: '*the environment in the office is strained and I believe strong consideration should be made to suspending Sheila while this investigation takes place and while I find it impossible to manage her*". The Claimant was subsequently suspended on 20 July 2017[173].

43. At the investigatory meeting on 28 July 2017, the Claimant attended without a companion. When asked by Mr Neave whether the Claimant wished to be supported by a companion, the Claimant said that she did and therefore Mr Neave agreed to postpone the meeting for a further time having sought advice from HR.

44. The investigatory meeting between Mr Neave and the Claimant finally went ahead on 10 August 2017 [181]. The Claimant was accompanied by George Rollo.

45. The Claimant was not given any documents to consider prior to the meeting. Mr Neave had with him various emails and a table of 20 customer complaints [204] from 27 April 2016 to 21 April 2017 and incidents of behaviour from 6 May 2017 and 18 April 2017. The table gave very little detail of the complaints or incidents. It had been prepared for Mr Neave by Mr Brick. Mr Neave had some, but not all, of the actual complaints. He did

not have copies of the replies to the complaints sent by the Respondent.

46. It became clear during the hearing that Mr Neave also had two typed statements said to be written by Mr Brick detailing accounts of the Claimant's unacceptable behaviour. The first statement [134] related to the Claimant's behaviour on 21 April 2017 and the Tribunal was referred to an email in the bundle sent by Mr Brick [135] to the Claimant on 24 April 2017 referring back to the meeting, albeit not referring to everything contained in his statement. The second statement [316] referred to an incident where the Claimant allegedly swung her fist in an aggressive manner into her palm in front of Mr Brick causing him to step back to avoid her swinging fist ("the fist punching allegation"). Neither of the two statements referred expressly to the author being Mr Brick, albeit the content clearly indicated both accounts had been given by him. His name was not typed at the end of the witness statements and they were not signed. The statement relating to the fist punching allegation did not even give a date the incident took place and there was no email from Mr Brick to Ms Galton relaying the incident, unlike others where Mr Brick tended to email the Claimant and/or Ms Galton shortly thereafter.

47. Mr Neave began by informing the Claimant that he had been tasked with investigating the high level of complaints she had received and her conduct towards Mr Brick and other managers. He said that his role was to fact find and that he would not be making any judgments or decisions regarding the outcome of the case.

48. During the meeting, the Claimant referred to a breach of data protection due to details about her being provided in a customer reply. She claimed that this served to spread misinformation to instructors in the area leading to the Claimant having gained a poor reputation, together with an increased level of complaints and requests for a refund. She told Mr Neave that she had not seen the vast majority of responses to the complaints. In effect the Claimant told Mr Neave that she was being targeted. In the interview, it is noted that Mr Neave said "*so you are saying every letter of complaint is down to the response letter to a candidate about you undergoing training*" to which the Claimant replied "*yes*".

49. Mr Neave then turned to deal with the Claimant's relationship with management. He referred to the Claimant's meeting with Mr Brick on 18 April 2017 where he said that Ms Galton had witnessed the Claimant banging her fist on the table and shouting directly at him. The Tribunal notes that Mr Neave asked the Claimant only one question about the fist punching allegation. The Claimant said she did not recall it but did say that she punched her hand to relieve stress and frustration. She said that she did not do that near to anyone.

50. Mr Neave interviewed the following other witnesses as part of his investigation:

Name	Date	Time
JE (in person)	12/09/17	08.17-08.35
ET (telephone)	12/09/17	09.09-09.20
GBL (telephone)	12/09/17	10.16-10.32
DB (telephone)	26/09/17	[not stated] – 10.32
EP (telephone)	12/10/17	09.10-09.20
MK (telephone)	12/10/17	10.14-10.28
KC (telephone)	12/10/17	13.35-13.45
MKh (telephone)	12/10/17	12.38-12.48
NC (telephone)	12/10/17	11.11-11.23
ST (in person)	12/10/17	12.32-12.53

51. During JE's interview [193], she said the following:

> ***Q: Are you aware of any ADIs that are against her?***
>
> ***A: She has worked in different DTC's; you can see that a few ADIs are not happy when she takes their candidate out on test as their face drops. ADIs have asked me if she is permanent at Morden and when I say that I thought so, they said "I hope not".***
>
> ***Q: How would you describe Sheila's relationship with David Brick?***
>
> ***A: I get the impression that she doesn't like him.***
>
> ***Q: Any reason why that might be?***
>
> ***A: She disagrees with everything. As a manager, David will need to speak to her about things like the complaints. I get the impression that David gets really nervous around her.***
>
> ***Q: Would you say that David seems intimidated around Sheila, intimidated to do his job?***
>
> ***A: Yes, 100%***
>
> ***Q: Do you remember an incident involving Sheila becoming angry and making a fist gesture towards David?***
>
> ***A: Yes. I sit near the door, I can't remember why David was in the office, Sheila was ranting and raving, quite angry, as David came out she put her hand in front of his face and punched her hand very hard, this made David jump back, he actually thought that she was going to punch him. You could see the disbelief look in his face of what she just done. I don't know why she was hovering around on her feet, she was really angry, she realized that David was coming out of the office and did this punch in front of his face.***

52. During ET's interview [196], she gave the following responses to certain questions:

> ***Q: How would you describe Sheila's relationship with David Brick?***

> ***A: At the start I thought that everything was fine, then all of a sudden it switched. You can't help someone that doesn't want to be helped. David was just doing his job. Sheila takes everything personally. Trust me you would know when Sheila is in a bad mood, she would come in and throw her wallet, it's very heavy so it would make a very loud noise. If she had a candidate that was at a poor standard or if David tried to give her a complaint she would be in a bad mood for the rest of the day.***
>
> ***Q: Did you ever witness Sheila shouting at David Brick?***
>
> ***A: Honestly no, I never saw it always came in after it happened.***
>
> ***Q: Do you remember an incident involving Sheila becoming angry and making a fist gesture towards David?***
>
> ***A: No, I missed that only heard about it after it happened.***

53. During GBL's interview [199], he refers to the Claimant being quite rude and "*not the type of person you actually want to strike a conversation with*". Asked about the fist punching allegation, he said:

> ***Yes, I can't remember the exact date. I had a write up to do and wasn't really listening, but I knew things were a bit tense. As David walked in Sheila raise the palm of her left hand to David's face and punched her left hand with her right hand, David jumped back as he thought she was going to punch him. I can't tell you what provoked it, I believe that it was something to do with Sheila not replying to her emails.***

54. When interviewed [202], Mr Black was asked about the fist punching allegation and said as follows:

> ***DB described a situation where Sheila was dealing with a complaint when an ADI knocked on the door.***
>
> ***I saw her upset and I walked towards her and she swung her fist into her hand aggressively and I felt I had to back my head away. Julie said that she looked like she was going to hit me. I am not saying it was directed at me, but I did have to pull back. I went out with her to talk to the ADI and I defended her, which is what I normally try to do.***

55. The Tribunal noted that neither Mr Brick nor other witnesses gave a date of this incident; neither were they pressed to do so by Mr Neave.

56. During KC's interview [205.1] she referred to the Claimant slamming her wallet on the table. She had not witnessed poor behaviour to customers and in response to a question about whether she had witnessed inappropriate behaviour towards management, she replied "*no I might have made a negative comment*". Other witnesses referred to having witnessed the Claimant being "angry". During EP's interview, she said "*Driving instructors talk about her, about her attitude and tell their pupils if you get her you will fail*". Steve Taylor referred to the fist punching allegation during [207.1] which he said:

> **There was an incident where she punched close to Dave's face. Dave lent down to eyelevel to ask her a question, I thought that she was going to hit him, she punched her hand extremely close. I couldn't believe what I witnessed.**

57. Mr Neave did not re-interview the Claimant following his other interviews. He prepared a report dated 20 October 2017 [208]. In his conclusions he said as follows:

> ***It does appear that Sheila vents her frustration in an aggressive manner, as witnessed by colleagues, the LDTM and the ODM. She believes to question this element of her behaviour is trying to take away her freedom of expression. However, this is an extremely difficult situation to be in because if others feel her behaviour is not in line with the Civil Service Code, any form of questioning towards Sheila puts her in a defensive and often aggressive state.***
>
> ***In relation to the incident of her punching her other hand in front of DB's face. I cannot be 100% accurate of the trail of events, but I am satisfied that Sheila made a physical gesture/threat extremely close to DB's face as he walked into the door, leading him to react and duck out of the way. Two colleagues I interviewed witnessed this firsthand, and it appears that at this point Sheila's temper boiled over and manifested itself into a physical action directed towards somebody...***
>
> ***….Three members of staff have firsthand seen SB throw a "pretend punch" at DB causing him to move out of the way, as if to avoid a physical threat, when SP has become angry to a point that she feels it is the only way she can channel her aggression….***

58. He concluded with his view that Mr Brick and the Claimant could not work together in any capacity and that Mr Brick had done all that he could do to support the Claimant.

59. In September 2017, the Claimant contacted a charity called MCCH Supported Employment which is a national charity assisting people with autism, learning disabilities and mental health needs, including helping to enable them find and retain work. She saw Mr Cogo who completed an initial assessment on the Claimant.

60. On 13 October 2017, Mr Cogo made initial contact with Mr Brick [206]. He then contacted Ms Galton on 8 November 2017. The Tribunal finds that it was more likely that Mr Cogo telephoned Ms Galton as Ms Galton said in evidence that she left a meeting in order to take the call. There was a dispute in the evidence as to who spoke most during the meeting and what was said, but in any event the Tribunal is satisfied that this was a very short call. Mr Cogo said in evidence that the call to Ms Galton was different to his usual experience; he said he was more accustomed to employers being sympathetic and prepared to listen to suggestions as to adjustments that they may wish to consider. He said in evidence that his call with Ms Galton was very negative and he remembered forming the view that Ms Galton did not welcome Mr Cogo's contribution. Looking back, he said that he thought

it likely that Ms Galton had already decided that she could not accommodate the Claimant's return to work. Looking at what subsequently happened, the Tribunal finds it more probable than not that Ms Galton was not responsive to Mr Cogo's call or very interested in really listening to what he had to say or to explore whether there were adjustments that should be considered. The Tribunal considered Mr Cogo's impression of Ms Galton as being reliable and his evidence on this point was accepted.

61. Ms Galton wrote to the Claimant by letter dated 1 November 2017 [224] inviting her to a disciplinary hearing to be held on 13 November 2017. The letter said that the meeting would consider the allegations that the Claimant had bullied her line manager and that she had caused reputational damage to the agency by behaving inappropriately to customers. She was warned that the outcome of the meeting could result in dismissal. With her letter, Ms Galton enclosed a copy of the investigation report, a copy of the Examiner Development Report prepared by Alison Matson and an email from Roy Cogo.

62. On 8 November 2017, Mr Cogo sent a letter to Ms Galton [450] to follow up his call with her that day. In that letter, Mr Cogo said that since meeting the Claimant he had been able to get the Claimant to recognise that she was not mentally well. His view which he relayed to the Claimant was that she was clinically depressed. Mr Cogo said in the letter that the Claimant acknowledged and agreed that that had been the case for a while. He said that she was not sleeping properly, "*ruminating intensely on what has happened, and focusing very negatively on her relationship to work*". Mr Cogo went on in the letter to give some background to the possible reasons or explanations for the Claimant's behaviour but also said: "*it is not uncommon when a person is not mentally well to lose a sense of perspective, and allow negative feelings and emotions to dictate and undermine a person's self-esteem and self-worth*". Mr Cogo ended his letter by suggesting possible adjustments to support a return to work, such as a "*phased return; changing her working hours; allowing her to be off from work for an agreed period of time in order to seek appropriate therapy; providing her with a buddy to work with; implementing continual supervision or even providing alternative work for her*"

63. On 12 November 2017, the Claimant attended a disciplinary hearing chaired by Ms Galton [226]. The Claimant was accompanied by Mr Rollo. Mary Rackley attended as Case Work Manager and Neil Ward (LDTM) as notetaker. The meeting commenced at 10.05am and finished at 11.56. There were two breaks during the meeting.

64. During the disciplinary hearing meeting, the focus was largely about the Claimant's performance and her mental health. The Tribunal was struck by the little reference made to the investigation report and the specific allegations against the Claimant and there was hardly any discussion about the serious allegations against the Claimant regarding alleged bullying of

Mr Brick. Indeed, the only reference to her conduct was banging her wallet and slamming her fist on the desk. The Claimant's mental health was raised a number of times by the Claimant but that was often met by Ms Galton with assertions that the Claimant blamed others and failed to take responsibility. A passing reference was made to Mr Cogo's letter and there was no discussion about reasonable adjustments. The Tribunal notes that after the second break at 11.35 Ms Galton started to ask the Claimant about her mental health prior to 2014.

65. Ms Galton wrote to the Claimant by letter dated 17 November 2017 [240] informing her that she was dismissed without notice for gross misconduct. The Tribunal noted the following parts of the dismissal letter:

> ***During the meeting we discussed the two allegations regarding your behaviours***
>
> ***1. Your behaviour towards managers, in particular David Brick***
>
> ***2. Your behaviour and treatment of our customers***
>
> ***You explained that you have been suffering with clinical depression since the loss of a close neighbour in August 2014, this was quickly followed by a succession of bereavements of close friends and family. You had not realised that you were suffering with depression until recently when you visited Roy Cogo of MCHH following your suspension from duty.***
>
> ***You feel that your behaviour towards colleagues has been acceptable. You said that you have been mismanaged by managers and colleagues who you would consider 'the enemy' due to their relationships with the ADIs.***
>
> ***The crux of the investigation was around your behaviour and how it was perceived by your colleagues, managers and clients. Your perception is that you have behaved in a reasonable way. However, the perception and evidence presented by 10 centre staff and 5 managers, including the investigating officer, as part of the investigation, is very different from yours. On the balance of probabilities, I found that your behaviour towards David Brick was unreasonable and intimidating.***
>
> ***There is evidence to suggest that you demonstrated threatening and offensive behaviour towards David Brick, he along with three other driving examiners explained how you threw a punch towards his face into the palm of your hand causing him to step back. Two witnesses stated that they thought that you were going to hit him. You did not deny that you did this in your interview and said that it was a coping mechanism that you did not feel that the action should have caused intimidation.***
>
> ***You believe that the complaints that have been submitted about your behaviour of been born of a vendetta formed by driving instructors and that you have always acted professionally with candidates, therefore you accept no responsibility whatsoever for their complaints or their content.***

> ***...I have carefully considered all of the circumstances including the results of the investigation and your representations.***
>
> ***The investigation has concluded that you behaved in a way that was witnessed by many staff working at Morden DTC which is described in a dignity at work policy as bullying. This is a serious allegation of misconduct; the DVSA has a zero-tolerance policy towards bullying. It is noted that you do not accept any responsibility for your behaviour and therefore there is high potential for repetition.***
>
> ***The investigation has concluded that your conduct when conducting driving tests is inappropriate. This has been witnessed by Cardington trainers, colleagues and managers. Your behaviour poses a significant risk to the reputation of the agency.***
>
> ***…. I have taken into account the mitigating circumstances around your current mental health condition and the fact that you have now taken action to deal with the condition. However, given your refusal to accept responsibility and the fact that your behaviours were unacceptable prior to the bereavements in 2014, I do not consider that there is potential for your behaviours to improve.***
>
> ***There appears to have been an irretrievable breakdown in your trust with DVSA managers. I do not believe that you have the ability to move forwards and except management or feedback.***
>
> ***After considering all the relevant factors, I have decided that your employment with the Department for transport should be terminated. This will take effect immediately, without notice and without pay in lieu of notice. Therefore, your last day of service is Friday 17 November 2017.***

66. The Claimant submitted an appeal against the dismissal on 24 November 2017. That appeal was held on 5 March 2018, commencing at 10.05 and ending at 11.14. The appeal appears to have been a simple review of the dismissal. As the appeal officer did not give evidence during the hearing it was not at all clear to the Tribunal what process the appeal officer went through. Indeed, it was not apparent from the evidence whether she spoke to anyone or interviewed witnesses prior to giving an outcome, which was to dismiss the appeal.

Legal principles relevant to the claims

Unfair dismissal

67. The right not to be unfairly dismissed is set out in sections 94(1) Employment Rights Act 1996 ("ERA"). The test for determining the fairness of a dismissal is set out in s.98 ERA which states the following:-

> ***(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) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) 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.

68. In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal: (1) the employer believed the employee to be guilty of misconduct; (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

69. The employer bears the burden of proving the reason for dismissal whereas the burden of proving that the fairness of the dismissal is neutral. The burden of proof on employers to prove the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. As Lord Justice Griffiths put it in **Gilham and ors v Kent County Council (No.2) 1985 ICR 233** "*The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from*

dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [S.98(4)], and the question of reasonableness".

70. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

71. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

72. The Tribunal is mindful of not falling into a substitution mindset. The Court of Appeal in **London Ambulance NHS Trust v Small [2009] IRLR 563** warned that when determining the issue of liability, the Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In **Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82** the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "*substitute its view*" for that of the employer.

73. Whether an employee's behaviour amounts to misconduct or gross misconduct can have important consequences. Gross misconduct may result in summary dismissal, thus relieving the employer of the obligation to pay any notice pay. Exactly what type of behaviour amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case.

74. The ACAS Code states that the employer's disciplinary rules should give examples of what the employer regards as gross misconduct, i.e. conduct that it considers serious enough to justify summary dismissal (see para 24). The Code suggests this might include theft or fraud, physical violence, gross negligence or serious insubordination. Although there are some types of misconduct that may be universally seen as gross misconduct, such as theft or violence, others may vary according to the nature of the organisation and what it does. A failure to list certain types of behaviour as gross misconduct may mean that the employer cannot rely on them to dismiss summarily. Conversely, a dismissal will not necessarily be fair, just because the misconduct in question is listed in the employer's disciplinary policy as something that warrants dismissal.

75. In an unfair dismissal case, a Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. When considering whether conduct should be characterised as gross misconduct, employers should also bear in mind whether the dismissal also amounts to a wrongful dismissal.

Wrongful dismissal

76. Conduct justifying summary dismissal must fundamentally undermine the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract). Moreover, the conduct must be a deliberate and wilful flouting of the essential contractual terms or amount to gross negligence.

77. An employer faced with a repudiatory or fundamental breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation and terminate the contract, which results in immediate, or summary, dismissal. The Tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice

Direct sex discrimination

78. The Equality Act 2010 ("EQA") sets out provisions prohibiting direct discrimination. Section 13 EQA states:

> ***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.***

79. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?"* Put another way, *"What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?"* It is well established law that a Respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment. In ***R v Nagarajan v London Regional Transport [1999] IRLR 572*** it was said that "*an employer may genuinely believe that the reason why he rejected the applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, that race was the reason*

why he acted as he did".

80. The provisions relating to the burden of proof are set out at Section 136(2) and (3) of EQA which state:

> ***(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision.***

81. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason it dismissed the Claimant was not because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

82. When looking at whether the burden shifts, something more than less favourable treatment than a comparator is required. The test is whether the Tribunal "could conclude", not whether it is "possible to conclude". In ***Madarassy v Nomura International plc 2007 ICR 867, CA*** it was said that the bare facts of a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. However, 'the "more" that is needed to create a claim requiring an answer need not be a great deal. In some instances, it can be furnished by non-responses, an evasive or untruthful answer to questions, failing to follow procedures etc. Importantly, it is also clear from case law that the fact that an employee may have been subjected to unreasonable treatment is not necessarily, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

83. Notwithstanding what is said above, in ***Laing v Manchester City Council and anor 2006 ICR 1519, EAT***, the point was made that '*it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment*'.

Discrimination arising from disability

84. Section 15 EQA provides as follows:

> ***(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.***
>
> ***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.***

85. Section 15 EQA therefore requires an investigation into two distinct causative issues: (i) did the Respondent treat the Claimant unfavourably because of an (identified) 'something'? and (ii) did that something arise in consequence of the Claimant's disability? The first issue involves an examination of the state of mind of the relevant person within the Respondent ("A"), to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. The second issue is an objective matter, whether there is a causative link between the Claimant's disability and the relevant 'something'. The causal connection required for the purposes of s.15 EQA between the 'something' and the underlying disability, allows for a broader approach than might normally be the case. The connection may involve several links; just because the disability is not the immediate cause of the 'something' does not mean to say that the requirement is not met. It is also clear from case law that it is only necessary for the Respondent to have knowledge (actual or constructive) of the underlying disability; there is no added requirement that the Respondent have knowledge of the causal link between the 'something' and the disability.

86. If section 15(1)(a) is resolved in the Claimant's favour, then the Tribunal must go on to consider whether the Respondent has proved that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

87. In terms of the burden of proof, it is for the Claimant to prove that she has been treated unfavourably by the Respondent. It is also for the Claimant to show that 'something' arose as a consequence of his or her disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment.

Indirect discrimination

88. Section 19 EQA provides as follows:

> ***(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.***

> ***(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:-***
>
> ***(a) A applies, or would apply, it to persons with whom B does not share the characteristic,***
>
> ***(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,***
>
> ***(c) it puts, or would put, B at that disadvantage, and***
>
> ***(d) A cannot show it to be a proportionate means of achieving a legitimate aim.***

89. The matters that would have to be established before there could be any reversal of the burden of proof, pursuant to s.136 EQA, would be (i) that there was a provision, criterion or practice; (ii) that it disadvantaged disabled people generally, and (iii) that what was a disadvantage to the general created a particular disadvantage to the Claimant. Only then would the Respondent be required to justify the provision, criterion or practice by proving that the PCP was a proportionate means of achieving a legitimate aim.

90. When making the comparison required to satisfy s.19(2)(b), it is important to bear in mind that the Claimant's group is restricted to those who have the same disability. This is made clear by s.6(3) which provides:

> ***(3) In relation to the protected characteristic of disability—***
>
> ***(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;***
>
> ***(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.***

Failing to make reasonable adjustments

91. A claim for failure to make reasonable adjustments is to be considered in two parts. First the Tribunal must be satisfied that there is a duty to make reasonable adjustments; then the Tribunal must consider whether that duty has been breached.

92. Section 20 of EQA deals with when a duty arises, and states as follows:

> ***(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.***
>
> ***……***

> ***(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.***

93. Section 21 of the EQA states as follows:

> ***(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.***
>
> ***(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.***

94. The duty to make adjustments therefore arises where a provision, criterion, or practice, any physical feature of work premises or the absence of an auxiliary aid puts a disabled person at a substantial disadvantage compared with people who are not disabled.

95. The EQA says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, applying the evidence adduced during a case, and is assessed on an objective basis.

96. In determining a claim of failing to make reasonable adjustments, the Tribunal therefore has to ask itself three questions:

    a. What was the PCP?

    b. Did that PCP put the Claimant at a substantial disadvantage compared to someone who is not disabled?

    c. Did the Respondent take such steps that it was reasonable to take to avoid that disadvantage?

97. The key points here are that the disadvantage must be substantial, the effect of the adjustment must be to avoid that disadvantage and any adjustment must be reasonable for the Respondent to make.

98. The burden is on the Claimant to prove facts from which this Tribunal could, in the absence of hearing from the Respondent, conclude that the Respondent has failed in that duty. So here, the Claimant has to prove that a PCP was applied to her and it placed her at a substantial disadvantage. The Claimant must also provide evidence, at least in very broad terms, of an apparently reasonable adjustment that could have been made.

99. It is a defence available to an employer to say "*I did not know and I could not reasonably have been expected to know*" of the substantial disadvantage complained of by the Claimant.

Remedy

100. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, compensation is awarded by basic and compensatory awards.

101. Section 123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (**Polkey v A E Dayton Services Limited [1988] ICR 142**).

102. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct:

> ***Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.***

103. A reduction to the compensatory award is primarily governed by section 123(6) as follows:

> ***Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding……***

104. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111**. The Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

Submissions by the parties

105. Both Counsel had prepared detailed written closing submissions which were then supplemented by oral submissions. The Tribunal considered very carefully these submissions, including the case law referred to, before reaching its decision.

Analysis, conclusions and associated findings of fact

Unfair dismissal

What was the real reason for the Claimant's dismissal? Did the Respondent genuinely believe the Claimant to be guilty of misconduct?

106. The Tribunal is satisfied that the Respondent dismissed the Claimant due to her conduct. She was dismissed because of what the Respondent considered to be unacceptable behaviour towards Mr Brick and test examinees.

Was that belief based on reasonable grounds? At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances? Was the dismissal procedurally fair? Was it reasonable for the employer to regard that conduct as gross misconduct on the facts of the case? Did the dismissal fall within the range of reasonable responses open for the Respondent to take?

107. The Tribunal concluded that the role carried out by Ms Galton was to review the investigation carried out by Mr Neave and to reach a conclusion on the basis of that investigation, together with any representations made by the Claimant. That, in principle, is a perfectly reasonable practice for an employer to adopt but does rely, in the Tribunal's view, on a thorough and fair investigation being conducted. The problem in this case was that there were matters that were not put to the Claimant during the investigation which were not then put to the Claimant during the disciplinary hearing by Ms Galton.

108. The most significant example of this concerned the fist punching allegation. In his interview with the Claimant, Mr Neave dealt with this by asking one question. Having read out a statement by Mr Brick, which referred to the Claimant punching her fist, and which the Claimant had not seen, Mr Neave asked "*Do you remember anything like this happening*" to which the Claimant responded that it was difficult for her to recall what happened but then referred to an incident when she threw her wallet down on the table, suggesting that she was referring to a different incident. Mr Neave did not ask anything further about this incident during his meeting with the Claimant.

109. The Claimant was interviewed by Mr Neave before any other witnesses. When he interviewed others, some of them referred to a fist punching allegation but generally the accounts lacked specific detail including, for example, dates or times that it happened. The Tribunal also noted that the information given by these witnesses was in response to a leading question by Mr Neave. The Claimant was not re-interviewed by Mr Neave in order to put the accounts from witnesses to her, which made it all the more important for her to be questioned about it during her disciplinary hearing by Ms Galton. Indeed, the Tribunal finds that Ms Galton relied on this incident as a significant factor justifying summary dismissal. At no point, however, was the Claimant given the opportunity to respond to a matter which played a significant part in the decision to dismiss.

110. The Tribunal considered that this failing is significant in two respects: not

only would this have enabled the Respondent to assess what actually happened; but it would also have allowed Ms Galton to gauge whether what the Claimant did (if she did it) was done as a threat of violence, or as the Claimant said during the hearing, simply an example of her punching her fist as a release mechanism or to vent her frustration. The Tribunal concluded that the seriousness of the incident would no doubt have been influenced by its assessment of both possibilities. It was all the more important to analyse this particular issue carefully in view of the fact that during Mr Brick's interview with Mr Neave, Mr Brick is reported to have said about the fist punching allegation, "*I am not saying it was directed at me*". The Tribunal also noted that it was not clear from the interviews of other witnesses, how close they were to the incident or how clearly they saw what was going on. This incident therefore needed more probing by either Mr Neave or Ms Galton and their failure to do so, in the view of the Tribunal, were not the actions of a reasonable employer faced with the same circumstances.

111. The Tribunal concluded that a reasonable employer would have questioned the Claimant about an allegation that played such an important part of the decision to dismiss and given her an opportunity to respond to the accounts given by her colleagues. The Tribunal also concluded that a reasonable investigation would have required the following to be done by Mr Neave as part of his investigation, but which he failed to do:

    a. Consider and investigate the theory put forward by the Claimant that there was a vendetta against the Claimant and that ADIs were encouraging their clients to complain. In evidence, Mr Neave seemed to be at a loss to understand how he could investigate such a theory but the Tribunal concluded that a reasonable investigation required that selected ADI's be interviewed in order to gauge the views about the Claimant by that community.

    b. Consider and investigate the mental health issues raised by the Claimant to understand the effect, if any, of any mental health condition on the Claimant's performance or conduct. Mr Neave appeared to treat this like a standard investigation when the matter was clearly more complex. He seemed to be unaware of the contact made by Cogo with Mr Brick, which admittedly would have been in the very latter stage of the investigation process; but he also failed to explore the merit of obtaining a further OH report. The Tribunal concluded that a reasonable investigation would have necessitated this step given the issues raised by the Claimant.

112. With regards the disciplinary hearing, the Tribunal concluded that Ms Galton closed her eyes to any options for dealing with the Claimant other than dismissal; the Tribunal finds on the evidence that she had effectively decided that she was going to dismiss the Claimant from the outset of the hearing. There were other significant failings on her part which fell outside

the band of reasonable responses open to an employer and therefore rendered the dismissal unfair. These are:

a. She did not consider the Claimant's clean disciplinary record and gave her long service history little if any weight when reaching her decision;

b. She dismissed Mr Congo's offer of support and did not show any interest in suggestions he might have to improve the Claimant's performance and behaviour at work;

c. She did not consider the potential benefit in further OH guidance on the extent to which the Claimant's performance and conduct and behaviour may be impacted by her mental health problems;

d. She sought to rely on the Claimant's performance before 2014, prior to the Claimant's mental health problems becoming apparent, to justify her stance that mental health was not the cause of the poor performance. In effect she was saying to the Claimant, in terms, 'even when you were well, we had problems with your performance'. No information was available at the disciplinary hearing relating to the Claimant's pre 2014 performance record and she was not put on notice that the point would be used by Ms Galton to support her position.

e. She did not discuss with the Claimant or consider how reasonable adjustments might assist the Claimant. Indeed, the Tribunal concluded that she was not interested in doing so.

f. She failed to ask the Claimant anything about specific incidents or events referred to by witnesses interviewed as part of the investigation.

113. The Tribunal further finds that a reasonable employer would not have allowed Ms Galton to conduct the disciplinary hearing and make the decision to dismiss in circumstances where she had been so close to managing the Claimant, albeit she was not her line manager, and was a witness to one of the incidents of bullying behaviour alleged against the Claimant. Indeed, in his investigation report, Mr Neave refers to Ms Galton as a source of information that was considered as part of the investigation.

114. Finally, the Tribunal concluded that a reasonable employer would not have disciplined the Claimant for performance matters which had been dealt with as part of an informal process when there had been no review of the Claimant's performance as part of that informal process before deciding to discipline her.

115. The Tribunal was very conscious of not adopting a substitution mindset and

focused on looking at the reasonableness of the Respondent's actions and not what it would have done in the circumstances. Applying that test, the Tribunal had little difficulty concluding that the claim of unfair dismissal should succeed.

Wrongful dismissal

Did the Claimant commit a repudiatory breach of contract entitling the Respondent to treat the contract as at an end and dismiss the Claimant summarily?

116. The Respondent appears to rely in the dismissal letter on an allegation that the Claimant "*behaved in a way that was witnessed by many staff working at Morden DTC which is described in our dignity at work policy as Bullying*". In the disciplinary invite letter, the Respondent categorises the allegations concerning bullying and reputational damage as gross misconduct. Yet the Tribunal is simply unable to make findings, on the evidence available at the hearing, to support these allegations. The Tribunal is not satisfied on the balance of probabilities, firstly that the punching allegation occurred and when; secondly that it was an act of aggression as opposed to the Claimant punching her fist as a coping mechanism. As to reputational damage, the Tribunal does not have the evidence to conclude that there was reputational damage or a risk of reputational damage.

117. For the above reasons the Tribunal concludes that the claim of wrongful dismissal must succeed.

Direct discrimination

118. Based on its above findings of fact, the Tribunal is satisfied that the Respondent took the steps it did against the Claimant because of what it considered to be misconduct by her. Despite our conclusions below in relation to other heads of discrimination, the Tribunal was satisfied that such action was not *because* of a protected characteristic. Accordingly, the claim of direct discrimination fails and is dismissed.

Failing to make reasonable adjustments

119. Of the six PCPs put forward by the Claimant, the Tribunal finds that those at paragraphs 2(t)(i) and (ii) above were PCPs that put the Claimant to a substantial disadvantage compared to a non-disabled person.

120. The Tribunal is satisfied on the evidence that the standards of behaviour or requirements set out in the Respondent's dignity at work policy, in terms of setting the standards of acceptable behavior, placed the Claimant at a substantial disadvantage. This is because there is evidence that the particular nature of the Claimant's disability leads her to vent her frustration, become angry and act in an aggressive manner. Such behaviour is likely to

be construed as the type of bullying that is prohibited under the Dignity at Work policy.

121. The Tribunal finds that the Respondent required the Claimant not to be the subject of any further complaints, or disciplinary action would be taken. This put the Claimant at a substantial disadvantage because the evidence from OH and Mr Cogo satisfied the Tribunal that because of the way in which the Claimant's disability presented itself, it was more likely that she would act in a way that would result in complaints from examinees and colleagues.

122. The Tribunal finds that the Respondent failed to make the following adjustments which it concluded would have been reasonable to make in the circumstances:

    a. Postponing the outcome of the disciplinary hearing pending further reference to OH and to allow time for adjustments to be made;

    b. Failing to implement OH recommendations such as making available bereavement counselling, psychotherapeutic and anger management support, and then reviewing progress after a period of time;

    c. Working with Mr Cogo to explore what could be done to assist the Claimant cope in the workplace;

    d. Providing her with a buddy.

123. For the above reasons, the claim of failing to make reasonable adjustments are well founded and succeed.

Unfavourable treatment for something arising in consequence of disability

124. The Tribunal finds that the suspension and subsequent dismissal of the Claimant was because of the Claimant's behaviour towards Mr Brick and customers. As already said above, the Tribunal is satisfied on the evidence that the nature of the Claimant's disability leads her to vent her frustration, become angry and act in an aggressive manner. There is a direct link, therefore, between the presentation of the Claimant's disability and her behaviour towards Mr Brick, colleagues and examinees.

125. The Tribunal accepts that the Respondent has a legitimate aim, which is to have a workplace where employees can work without fear from bullying and harassment. The Tribunal also accepts that it is a legitimate aim to provide a high standard of customer service. However, weighing that against what happened to the Claimant, the Tribunal finds that whilst it was proportionate to investigate the complaints against the Claimant, even to suspend the Claimant temporarily pending investigation, it was not proportionate to

dismiss the Claimant bearing in mind no attempt had been made to implement recommendations from OH or consider and implement reasonable adjustments; also taking into account the Claimant's very long service history and the fact that dismissal brought the end to a 30 year long career.

126. For the above reasons the claim of unfavourable treatment for something arising in consequence of disability is well founded and succeeds.

Indirect discrimination

127. The Tribunal could not conclude that the Claimant had been subject to indirect discrimination because it did not have evidence before it to be satisfied of the requirement for 'group disadvantage' and it did not consider this was something that was generally well known about such that the Tribunal could take judicial notice of a disadvantage. In these circumstances, this claim must fail and is dismissed.

Remedy

128. The Tribunal wishes to hear submissions from the parties on whether there should be any reduction to compensation on the grounds of *Polkey* and/or contributory fault in light of the above findings, therefore this issue will be dealt with at the remedy hearing which will be listed in due course.

……

Employment Judge Hyams-Parish
21 February 2020