



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mr J Truscott

v

Norfolk and Norwich University  
Hospitals NHS Foundation Trust

**Heard at:** Norwich

**On:** 27, 28, 29 and 30 August 2019

**In Chambers:** 3 and 4 October 2019

**Before:** Employment Judge Postle

**Members:** Mrs M Prettyman and Mrs S Allen

**Appearances**

**For the Claimant:** Mr Graham, Counsel

**For the Respondent:** Miss Paterson, Counsel

## RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Claimant's claims under the Equality Act 2010 for the protected characteristic of Disability, under s.15 Discrimination Arising from Disability, are well founded.
3. The Claims under s.19 Indirect Discrimination and s.20 Failure to Make Reasonable Adjustments, are no longer pursued.

## RESERVED REASONS

1. The Claimant brings claims to the Tribunal under the Employment Rights Act 1996 that he was unfairly dismissed. The Claimant also has claims under the Equality Act 2010 for the protected characteristic of disability. Particularly claims under s.15 Discrimination Arising from Disability, s.19 Indirect Discrimination and claims under s.20 Failure to Make Reasonable Adjustments.

2. The specific issues contained in those claims are set out in the Case Management Hearing heard on 23 January 2019 before Employment Judge Postle and are to be found at pages 69 – 76 of the bundle.
3. The Claimant's disability is stress, anxiety and depression. Originally this was accepted by the Respondents on 17 March 2019, the Tribunal will be considering whether they constitute single or continuing acts and depending on the answer to that, whether it would be just and equitable to extend time.
4. In this Tribunal we have heard evidence from the Claimant through a prepared witness statement.
5. For the Respondents we heard evidence from Miss Rachel Cocker Investigating Officer, Professor Carol Farrow the Dismissing Officer and Mr Simon Hackwell who dealt with the Appeal. All gave their evidence through prepared witness statements.
6. The Tribunal also had the benefit of three bundles of documents consisting of 779 pages.

### **The Findings of Fact**

7. The Claimant commenced his employment with the Respondent on 8 August 1988 as a Senior Operating Department Practitioner working in the main operating theatres of the Respondent's very large teaching hospital and the Claimant had multiple clinical teaching and managerial responsibilities which had included being an Associate Tutor for the DIPHE in Operating Department Practice courses at the University of East Anglia until 11 June 2014.
8. The Claimant had an unblemished record in his 29 years of service and it is clear from his colleagues, whom were interviewed during the course of the investigation, that the overwhelming majority respected the Claimant professionally, clinically and as a colleague. Some, it is accepted, stated that he had strong views and could be forthright at times about matters he believed in passionately with regard to patient care and what the Claimant perceived, as indeed the Care Quality Commission also did, was that there was a climate of bullying by Senior Management within the organisation.
9. It is clear that since 2015, the Claimant has suffered from stress and anxiety and has been diagnosed with depression by his GP on 16 July 2015 (page 257). The Claimant also suffers with hypertension (page 244) and a related cardiac condition. All of which the Trust have been aware of. It is clear these conditions have had a profound and lasting effect on the Claimant's daily life, such that he has been prescribed on a long term basis anti-depressant medication (page 259). It is also clear that the Claimant has, since 2015, needed to attend numerous appointments with his GP regarding physical, psychological and mental health problems.

Prior to this date it would appear the Claimant did not suffer similar problems.

10. It is clear, also, that the Claimant has on a number of occasions been assessed by Occupational Health, particularly 20 May 2015 and 16 June 2015. These were followed by a period of sick leave from 29 June 2015 to 9 October 2015. Further assessments took place on 16 July 2015, 20 August 2015, 21 September 2015, 3 November 2015 and 2 February 2016. Subsequently assessments followed on 23 August 2017, 30 November 2017 and 8 January 2018.
11. In 2013, the Claimant had acted as a Senior Assessor for the Observed Structured Clinical Examinations (OSCE) of Operating Department Practitioners undertaking the Diploma in Higher Education in Operating Department Practice at the University of East Anglia. It would appear, having assessed a group of students regarding their basic resuscitation skills that the Claimant failed six of the seven candidates based on his clinical assessment and experience and deemed those students as not reaching the required standards of competence. The Claimant failed them because in his view they were not demonstrating the ability to carry out the very basic of all clinical skills; particularly basic life support. Clearly passing these students could have resulted in patients' lives being put at risk. Subsequently, the Claimant found out through a third party and without reference to him, that three of his failed assessments had been overturned by the UEA Assessment Board and that furthermore, the other three failed students had been quickly reassessed by another Assessor and had all been passed. The Claimant was seriously concerned that this could jeopardise patient safety in the future.
12. It would also appear he raised a number of concerns regarding the quality, robustness and reliability of teaching, training and assessment of the examinations referred to above. The Claimant was of the opinion that some candidates were passing when they had not reached the required standard. As a result of this the Claimant made his views known to both bodies outside of the University including the Health Education England and the Quality Assurance Agency for Higher Education and through the University's own internal processes. Apparently, an investigation was carried out by the Dean of the Medical School and recommendations made. The Claimant shared his concerns at the time to his then Line Manager Matron Janet Henry.
13. In 2014, the Claimant requested to take part in the examination but was told that his attendance was no longer required despite the Claimant's uninterrupted involvement in the previous 10 years. Without reference to the Claimant, in June 2014, the University sent a letter of complaint to the Respondents regarding the Claimant's attendance at mock examinations. Also, referring to the Claimant's formal complaints to the University and the Health Education East of England (page 217 – 218). It would appear that the Respondent immediately commenced an investigation under their

disciplinary policy but very surprisingly without informing the Claimant or indeed, reference to the Claimant, or interviewing him at any stage.

14. The Claimant, not surprisingly, in February and March 2015 being completely unaware of the complaint by the UEA and the investigation conducted by the Respondent, contacted the UEA regarding his wish to be involved in the year's OSCE exams. It was only on 17 March 2015 that the Claimant was informed by his then Operational Manager about the existence of a non-specific complaint that had been received by the Respondent at some unidentified time in the past. Not surprisingly, the Claimant requested details and a copy of the complaint. The Claimant was informed he was to be no longer involved in the DIPHE ODP course and the Claimant again requested a copy of the complaint but for reasons best known to the Respondent, this was not produced despite their own investigation into the complaint. Clearly, the Claimant was not in a position to challenge allegations that had been made against him as he had not been informed of those allegations or been interviewed within the Respondent own investigation. The Claimant again requested a copy of the complaint letter from Mr Over, Head of Workforce, and again it was refused. The Claimant deemed this as some form of intimidation or bullying under the Trust's Dignity at Work Policy (page 130) which gives examples of bullying behaviour, one of which is withholding necessary information and knowingly destroying the relationship between other people. The Claimant finally received a copy of the complaint letter from Mr Over some 9 weeks later on 20 May 2015 which is some 11 months after it was received by the Trust and this was only after the Claimant had made a Freedom of Information request to the Trust.
15. Having viewed the letter of complaint from the UEA, the Claimant felt unsupported by the Trust and aggrieved that the Trust had not recognised the impact both the letter and the Claimant's attempts to obtain access to it, had on the Claimant's moral and health. Indeed, no explanation was given to the Claimant as to the reasons for the delay and it appears no attempt by the Respondents, or the Claimant's Line Manager, following the letter of complaint from the UEA, to indeed support or address the issues that had been raised. Particularly as the Claimant's overriding concern in raising the issues in the first place with the UEA's Examination Boards was patient safety following the assessment of the students. A fact that seemed to be ignored by the Trust. It would appear that the whole matter was brushed under the carpet so as not to upset the relationship between the UEA and the Respondent, notwithstanding the Claimant's real concerns about performing students and their assessments.
16. As a result of the above, the Claimant raised a grievance on 2 April 2015 concerning the Respondent's failure to communicate the correspondence passing between the UEA and the Respondents to the Claimant at the time, in a timely manner and indeed to discuss the content of the correspondence with the Claimant, notwithstanding the fact that he was being investigated unbeknown to the Claimant.

17. It was at this time that the Claimant attended an Occupational Health Assessment, having been referred to them due to the stress and anxiety he was experiencing at the time. The Claimant then commenced a period of sick leave from 29 July 2015, initially due to work related stress and depression and on 16 July 2015 a Clinical Psychologist wrote to the Respondents confirming that the Claimant had been diagnosed with depression.
18. The Claimant's grievance in April 2015 (page 221 – 223) is in effect two grievances regarding bullying behaviour by Senior Management and the standards of teaching, training and assessment of students at the UEA.
19. Originally, the Claimant's then Line Manager Mr Bultitude was inappropriately tasked with dealing with these complaints, the very man who had been involved in removing the Claimant from further involvement with the University courses and examinations (page 219).
20. In the end, four weeks later, Mr Over Head of Workforce agreed that a more senior investigator was called for given the Claimant's grievances and Miss Eagle Deputy Director of Women and Children Services and Ashley Judd Deputy Director of Workforce were appointed to the role. Again, what seems surprising is these two individuals who were to carry out the investigation into the Claimant's grievance, appeared to be junior to those they were to investigate, the subject matter of the Claimant's grievance. Accordingly, the Claimant issued a third grievance in respect of the way in which the Claimant's original grievances were being dealt with and requesting a more senior investigator. This was confirmed to the Claimant by email of 21 May 2015 (page 234a) by a Margaret Berry. i.e. that grievances should be investigated by the next manager up the chain, (Director of Nursing). Ultimately, the Claimant issues a further grievance on 22 July 2015 citing the fact that the Trust's grievance policy was not being followed, that it was not fit for purpose and the fact that the original grievance in April (2) was not being dealt with. It would appear, in the following months absolutely nothing was done to progress the Claimant's grievance. Certainly not that the Tribunal were shown in the bundle until, and it would appear around the end of July 2015, the Claimant wrote to Mrs Eagle to reiterate his grievance, clarify the issues with the University and confirming that his health continued to deteriorate as a result of the ongoing issues, (page 260a).
21. It would appear the Respondent provided an outcome to the Claimant's grievances on 1 October 2015, where the Respondent made the following findings:
  - a. There was an unacceptable delay from the Respondent receiving the letter from the University and presenting this to the Claimant;
  - b. The Respondent was not able to ascertain whether the Claimant's Manager warned him that disciplinary action could follow (with regards to the University issue);

- c. That the Respondent was not satisfied that the Claimant was being prevented from carrying out an essential clinical educator role as a result of the University's decision; and
  - d. The Respondent considered it had acted appropriately when the University sent them the letter, however, this letter should have been provided to the Claimant earlier.
22. As a result of the above the Claimant submitted an Appeal on 9 October 2015 which was acknowledged on 20 October 2015. An initial meeting for the Grievance Appeal took place on 20 November 2015 between the Claimant and Richard Parker. This meeting was reconvened after the parties agreed that the Appeal panel was not appropriate to consider the Claimant's Appeal. Ultimately, the Claimant's Appeal hearing was eventually considered in March 2016. Quite why the delay is unclear from the evidence produced before the Tribunal. There are minutes of the Grievance Appeal of 8 March 2016 (page 287 – 303).
23. It would appear a letter was written following that meeting by Richard Parker to the Claimant on 10 March 2016 as it is referred to in subsequent correspondence of 29 June 2016. However, for reasons best known to the parties, that document was not available before the Tribunal. Therefore, it is unclear exactly what, if anything, was achieved at the meeting in March and the Tribunal are then led to the next piece of correspondence that was available, dated 29 June 2016 from Mr Parker (Chief Operating Officer) to the Claimant (page 309) which appears to be a grievance outcome of the Appeal. In that letter Mr Parker acknowledged that the original grievance process was inappropriate and that there should be more emphasis on resolving matters in a timely manner and that the Respondent had failed to initiate a proper investigation into matters raised by the University at which at the time the Claimant had no knowledge, which in turn led to the remaining matters that became flawed and muddled. In particular, his conclusions (page 310),

*"I believe that the root cause of this issue relates to two separate failures.*

*Most significant is the failure of process: that our disciplinary, grievance or other similar related policies do not expressly require the timely notification of an employee that they are under some form of conduct related investigation, including appropriate detail regarding any accusations made by either individual or organisation's role when recommending amendments to policy are made to reflect this requirement.*

*The second failure is one of case management. It is not unusual for very senior management to be kept at a distance during all types of HR process. The purpose of this is to allow appropriate escalation if and when early stage resolution fails. In this scenario, robust progress tracking of an investigation is required. Your case suggests that we do not currently operate a robust case management process and so I am recommending this be reviewed and enhanced to avoid similar issues arising in the future.*

*Overall, I believe you require my view regarding the nature of my findings and their relationship to your third grievance, specifically the failure of the Trust to manage a grievance according to the grievance policy and specifically the failure of both JO and JS in respect of this.*

*My conclusion is that your grievance is broadly upheld but with important caveats, specifically I believe the Trust failed in the first instance to initiate a proper investigation into the matters raised by the UEA. By failing at this stage, all other subsequent processes become flawed and muddled. Most importantly, I believe both the grievance and conduct, if applied correctly, are not sufficient to avoid the situation. Both require a review and amendments made to reflect the need to properly communicate with all and any accused parties at the earliest possible opportunity. I do not believe that attributing failure to either JO or JS is appropriate, the failure here is one of policy and associated process.*

*In my letter of 10 March 2016, I agreed we should look to re-establish you're your educational role in the Operating Theatre department. Whilst we initially struggled to meet with Mark Pepper (Operational Manager) due to sickness absence and latterly his role changing, you have since provided me with a broad outline of how you would see the role working. I have reviewed this and I am supportive in principal, I would suggest that we now meet with Rachel Cocker Senior Matron in order to progress this.*

*Following my letter of 10 March 2016, we met to discuss this. I also met with Senior (AFC Band 7) the team in the Theatre Department to discuss their concerns. Since this meeting there have been a number of management and senior professional leadership changes. Whilst I believe these to be coincidental, I have briefed the Senior Divisional Leadership Team and I am aware that they have become increasingly involved in the management and oversight of the department in part to improve upon the issues you and others have flagged. Whilst I do not wish to undermine the divisional team I am happy to facilitate a further meeting with the Senior Theatre and Divisional teams to ensure progress is being made.*

*Finally, and in conclusion, I believe that failures in our policy and process made your working life in NUH more difficult than it should have been. Clearly, I would like to apologise on behalf of the Trust but in addition to this I would like to both thank you for the way in which you have engaged in this off formal process piece of work and would have that we can now confidently return both you and the department to a more regular divisional line management arrangement. I trust this is in order.*

*Yours sincerely..."*

24. The Claimant did not consider the grievance or the appeal had been dealt with adequately bringing the issues he had raised and therefore wrote to Mr Davies (The Chief Executive of the Respondents) in July 2016 (page 260a) raising a further grievance (page 266),

*“The grievance raised on 11 May 2015 in which I claim that the Trust grievance policy has not been followed and is not fit for purpose has been upheld by Richard Parker the Chief Operating Officer who resolved my two previous grievances have not been properly addressed, investigated nor concluded. There has been significant detriment to myself as a result.”*

25. Mr Davies responds on 11 August 2016 (page 312a) recognising the Claimant’s grievances had not been properly investigated, but nevertheless felt they had been satisfactorily dealt with on Appeal. Mr Davies invited the Claimant to correspond with Mr Parker further if he considered there were outstanding unresolved issues.
26. It appeared the Claimant emailed Mr Davies, although again the email is not in the bundle, chasing for a reply to his grievance and eventually on 16 August 2016 (page 312c) the Claimant receives an apology for the delay in replying and then reiterates that his new grievance does not refer to new substantive concerns that are unconnected with the previous grievances that the Trust has already endeavoured to deal with. He suggests the right way to resolve outstanding issues is for a further meeting with Richard Parker.
27. Again, it would appear there was a meeting between the Claimant and Mr Parker on 22 September 2016, although there are no minutes of that meeting, the Tribunal have been shown in the bundle or referred to in the index, there is also a letter, it appears, from Mr Parker to the Claimant of 29 September 2016, (referred to in the Claimant’s letter to Mr Parker of 25 October 2016), but again the Tribunal do not have a copy of it in the bundle. What is clear from the Claimant’s letter to Mr Parker is that he was disappointed with the meeting and the contents of Mr Parker’s letter of 29 September 2016 and the Claimant expressed, in no uncertain terms, his feelings about the whole process and how it had been handled. The Claimant was robust in his views and his concerns about the future and bullying by Senior Management.
28. On 21 November 2016, Mr Davies The Chief Executive clearly had been provided with a copy of Mr Truscott’s most recent letter to Mr Parker, quite inexplicably refers to the Claimant’s letter as follows,

*“Having read your letter of 25 October I would say that it is one of the most aggressive, rude and disrespectful pieces of internal correspondence that I have come across in some considerable time. I do appreciate that you are frustrated, but taking all the circumstances into account, my strong advice and encouragement to you is to engage positively, professionally and constructively with the Trust as your employer...”*



29. The Tribunal having read the Claimant's letter, find Mr Davies' assessment of that letter quite extraordinary and an example of the nature of the culture that appears to exist within the organisation. The Claimant had expressed his views about the way he had been dealt with in a strong and robust manner and quite rightly criticised the way the process had been followed which had been acknowledged by Mr Parker. Therefore, to suggest the letter was aggressive in itself, bullying and intimidatory is quite extraordinary. The letter to say the least, from a Chief Executive, is surprising.
30. Between 3 October 2016 and 7 October 2017, the Respondents held a PRIDE Values week. This represents: 'People Focused'; 'Respect'; 'Integrity'; 'Dedication'; and 'Excellence'. Apparently, the event was to canvas the views of staff as to what it was like to work for the Respondent and then insure a better working environment. Indeed, the Respondent having encouraged staff to raise concerns that they may have at work had circulated a brochure entitled 'Speak Up, We Will Listen' prior to the events.
31. The Claimant attended this event, as indeed did many other staff and provided an open and honest account as to why he considered there was a culture of bullying within the Respondent's organisation. Other members of staff also contributed as to their thoughts about the Respondent's organisation and the culture within it. It would appear most of the Claimant's colleagues supported his views and did not describe his manner at the meeting in any way as rude or unnecessarily confrontational. After all, the event was, if the Respondents were being serious, to encourage staff to talk about the way they felt they were being treated in the work place. In fact, the email inviting staff to the meeting stated,
- "This is a genuine opportunity for staff to let us know what it is like working here to influence and improve experiences while tackling some of the important issues highlighted from the Staff Survey..."*
32. During the period of August 2016 to November 2016, the Claimant's Line Manager was Miss Rachel Cocker. During that period, Miss Cocker appears to have raised no issue at all in respect of the Claimant's behaviour, nor was the Claimant in any way reprimanded or counselled about his behaviour towards management.
33. Mr Dicker takes over in November 2016, the Line Management of the Claimant, although there appears to have been forthright views exchanged between Mr Dicker and the Claimant. However, at no stage is there any evidence that the Claimant's behaviour towards Mr Dicker was such as to be requiring some form of counsel or disciplinary process. Certainly, Mr Dicker does not raise any issues about the Claimant during that period.
34. The Respondents have a yearly programme that offers free flu vaccinations to all staff in order to help protect staff, patients and visitors

and this normally takes place towards the end of the year. It is not compulsory, and perhaps not surprisingly staff are encouraged to have the vaccination, equally staff can refuse to have the vaccination but are apparently asked to sign forms if they refuse to have the vaccination (page 375). It would appear a certain degree of pressure was brought to bear on staff over having the vaccination and there seemed to have been an implied threat that those that refuse and then suffer the flu as a result might not be entitled to their sick pay. It would appear that staff would be approached when entering the building and put under pressure to have the vaccination.

35. At the end of July 2017, the Claimant became aware of a newly updated speak up policy (page 193 – 209) which states that,

*“All staff have a duty to raise concerns and that their Senior Leaders and entire board are committed to an open and honest culture aimed to improve the working environment for our staff.”*

36. It also made it clear that the policy goes on to state (page 196),

*“If you raise a genuine concern under this policy, you will not be at risk of losing your job or suffering from any form of reprisal as a result. We will not tolerate harassment or victimisation of any one raising a concern, nor will we tolerate any attempt to bully you into raising any such concern. Any such behaviour is a breach of our values as an organisation and if upheld, following an investigation, could result in disciplinary action. Providing you were acting honestly it does not matter if you are mistaken, or if there is an innocent explanation for your concerns.”*

37. On 1 August 2017, Hilary Winch (Head of Workplace Health and Wellbeing) circulated the announcement for the arrangement of flu vaccinations requesting volunteer vaccinators to support the programme in the hope of achieving the Respondent’s targets again.

38. The Claimant sent a reply to some of the senior staff, dated 3 August 2017 (page 328 – 329) which simply stated,

*“Dear Hilary  
I do hope that there is no repetition of the appalling bullying behaviour that was evident last time around when staff were accosted as they entered the staff entrance on Level 2 West first thing in the morning.”*

39. The Claimant received a response from Aiden Rice (Senior Site Matron) advising the Claimant not to use the reply all button when sending this sort of *“rant”*. At the time, Hilary Winch certainly did not complain about the Claimant’s email.

40. Then quite surprisingly, on 3 August 2017 at 1752 hours, there is an email from Jeremy Over to Rachel Cocker and Mike Dicker (page 330),

*“As Hilary’s Line Manager I am very concerned that John Truscott would send an email including these allegations copying in hundreds of people.*

*I am sure you agree it is highly unprofessional and undermines the efforts to look after the health and wellbeing of all our staff (and intern patients).*

*I am also sure that you will be seeking to discuss this with him as soon as possible. Please can you keep me updated as to how he intends to remedy this.*

*Offering our staff the flu jab and promoting its benefits is not and nowhere near bullying behaviour.”*

41. Then quite inexplicably, Mark Davies the Chief Executive becomes involved on 3 August 2017 by an email at 1838 hours (page 330) addressing his email to Jeremy Over and Richard Parker, simply stating,

*“Folks,*

*Isn’t it about time we did something about this person?”*

42. That is then met by a response from Jeremy Over, of 3 August 2017 at 1853 hours (page 330),

*“Yep, that’s what I expect to happen through Theatre Management, I will oversee.”*

43. The Claimant’s email did not name individuals nor criticise Hilary Winch personally. The Claimant’s purpose was in line with the new ‘Speak Up’ policy to stimulate and facilitate a discussion among senior staff about the way staff were to be approached regarding vaccinations.

44. The Claimant was then summoned to a meeting by his Line Manager Mr Dicker on 4 August 2017. The Claimant assumed it would be a one to one to discuss the email. However, upon entering the room he was confronted with another member of staff Senior Matron Daniel Brewster, at which Mr Dicker expressed in no uncertain terms his disapproval of the Claimant’s email suggesting that it was false and malicious. The Claimant perceived Mr Dicker’s behaviour as bullying and not in line with the ‘Speak Up’ policy.

45. Following the meeting, the Claimant emailed Mr Dicker on 5 August 2017 (page 331),

*“Yesterday you invited me to a meeting with you in an office on Denton Ward. Upon arrival, I was introduced to a Senior Matron whom I was not aware was going to be in attendance. As a result, you were supported and I was not. As a consequence, I was anxious, in a highly stressed environment and I felt intimidated. I*

*am at a loss to understand why this meeting was conducted in this way when you are fully aware of stress induced sickness that resulted from previous such intimidating meetings. This was unfair, discriminatory and I was put at a disadvantage. This was further exacerbated when you started quoting the disciplinary policy at me stating that you were ashamed of me and accused me of bringing the whole department into disrepute. I was being reprimanded for speaking up and this is contradictory to Trust policy.*

*Furthermore, yesterday I received a highly inappropriate email from a Senior Matron, I found this to be judgmental, discriminatory, dismissive and disrespectful.”*

46. On 7 August 2017, Mr Dicker wrote to the Claimant (page 332 – 335) summarising his view of the meeting on 4 August 2017. The email was quoting (page 334) from what appeared to be an out of date ‘Speak Up’ policy (page 629) that in fact had been superseded by the recently introduced policy of 31 July 2017.
47. Mr Dicker’s letter concludes that the Claimant ought to reflect positively on the conversation they had recently had and suggested another meeting to discuss their relationship and with no suggestion that the Claimant is to be subjected to any disciplinary action.
48. In response, the Claimant emailed Mr Dicker with a copy to Miss Cocker, Mr Parker and Mr Brewster, Mr Davies and Mr Over, (page 336),

*“In response to your letter of 7 August 2017,*

*I reiterate, you deliberately and knowingly failed to mention that you would be accompanied at the meeting and therefore induced attendance under false pretences which was underhand. I would not have gone for a meeting had I known that it was not to be informal. I was then subjected to a tirade of abuse and accusations. You threatened me with disciplinary action and questioned my integrity and honesty. This caused me to suffer extreme stress and you failed in your duty of care since you are manifestly aware of previous stress induced long term sickness episodes due to high blood pressure and chest pain. You took advantage of the fact that I was unaccompanied and vulnerable. You had not carried out a risk assessment and you were negligent.*

*You failed to remotely follow the Trust’s ‘Speak Up’ policy that specifically states,*

- 1. Individuals must be informed that they have the right to be accompanied at any such meeting;*
- 2. The meeting should be scheduled and not rushed with appropriate warning;*
- 3. Any scribe attending should be agreed with the individual prior to the meeting;*

4. *Consideration to be made to undertake a telephone interview in order to mitigate stress;*

*You failed on all 4 accounts.*

*This perfectly illustrates the bullying culture that exists within the Trust that I have alluded to. I require an apology from yourself and Mr Brewster for this appalling behaviour. I am being threatened for speaking up about an extremely serious issue. Your actions do not mirror the supposed values of the Trust, in fact they are poles apart.”*

49. Despite what the Claimant sets out in his letter, this is met with a letter dated 8 August 2017 to the Claimant suspending him from work following the conversation on 8 August 2017 at which there appears to be no minutes of that meeting. The letter of suspension is at page 337 – 338. The initial period of suspension is for 28 days and the reason cited for the suspension is,

*“To allow the investigation of the following allegations and concerns:*

- *That the email you sent on 3 August 2017 regarding the hospital’s flu campaign was unprofessional and intentionally provocative. The language and tone conflicted without organisational PRIDE values, particularly in light of your position as Clinical Leader. Furthermore, that you have failed to engage constructively with your Line Manager to remedy the situation. Your failure to show insight and apologise has further acerbated the situation and the level of concern about your behaviour.*
- *This is an example of a pattern of behaviour that undermines the trust and confidence that your Line Manager needs to have in you as Clinical Leader.*
- *This unsustainable behaviour is also not conducive to the high standards of team work and professionalism that are particularly demanded in theatres, when bearing in mind issues related to patient and colleague safety.”*

The letter of suspension goes on to talk about the arrangements during the suspension, restrictions during suspension and action following the investigation. That letter is signed by Miss Cocker.

50. Miss Cocker was appointed to carry out the investigation into the allegation and on 18 August 2017, she wrote to the Claimant to provide the terms of reference for the investigation (page 343). Miss Cocker decided that it would be appropriate to commission an external investigator and the Claimant was advised of this fact.
51. The investigation involved interviewing a number of the Claimant’s colleagues, the majority of which were not adversely disposed towards the

Claimant and indeed stated he was professional in his dealings, although sometimes robust and forthright in his views about matters which he felt passionate about.

52. The independent investigator / terms of reference were as follows:
1. *In relation to an email sent by Mr Truscott on 3 August 2017 whether Mr Truscott is guilty of inappropriate aggressive behaviour that conflicts with the Trust's organisational values:*
    - a. *Mr Truscott sent an email on 3 August 2017 regarding the hospital's flu campaign that appears to be unprofessional, aggressive and intentionally provocative;*
    - b. *That, when attempting to deal with the concern, Mr Truscott sought to undermine and misrepresent the actions of his Matron Michael Dicker.*
  2. *Does Mr Truscott's behaviour as outlined above fit with the pattern of behaviour over time that engenders serious dysfunction in the working relationship between him and his senior colleagues and his ability to fulfil his leadership responsibilities, thus impacting on the operation of the service and / or team work?*
  3. *Whether taken as a whole, including his conduct towards Management over recent years, Mr Truscott's behaviour undermines the necessary trust and confidence that his Matron and Senior Matron need to have in him as a Clinical Leader, if this has broken down and if so, is that situation one that is retrievable?"*
53. 17 people were interviewed as part of the investigation including the Claimant. Notes of all the interviews are in the bundle, many of those interviewed were supportive of the Claimant, albeit acknowledging he could be forceful on occasions but in relation to patient safety and matters he felt passionate about and what he believed was the bullying culture within the Senior Management within the Respondent's organisation.
54. The investigation concluded on 26 October 2017.
55. The Investigator concluded that there was a case to answer in respect of all of the allegations.
56. On 6 November 2017 (page 469 – 470), Professor Carol Farrow wrote to the Claimant confirming the Respondents had now received the investigator's report and the matter was to proceed to a disciplinary hearing and that had been arranged for 6 December 2017. The letter set out the allegations which were identical to the terms of reference given to

the independent investigator. The letter went on to advise the Claimant of the right to be accompanied, the fact that Ms Farrow would be Chairing the disciplinary and would be joined by Mr Everitt (Head of IT) and Miss K Jones from HR and Miss Cocker (Senior Matron) who would be presenting the report's findings. The independent investigator would also be in attendance. The letter went on to ask whether the Claimant would be calling any witnesses.

57. There were then further discussions about witnesses, who was attending and witnesses the Claimant required. The disciplinary hearing scheduled for 6 December 2017 did not go ahead. It was then postponed by mutual agreement of the Trust and the Claimant. The disciplinary hearing was rescheduled for 2 February 2018, again postponed at the Claimant's request. The disciplinary hearing was rescheduled for 7 February 2018 and cancelled at the request of the Trust. It was rescheduled for 19 February 2018 but postponed at the Claimant's request.
58. Finally, the hearing took place on 19 and 20 March 2018, some 7 months after the event and there was a reconvening on 22 March 2018.
59. During the course of the hearing, the Claimant gave evidence and questioned 6 witnesses. The Claimant had also provided a pre-prepared statement dated 12 March 2018 (pages 510 – 513e).
60. The minutes of the disciplinary meeting are to be found at page 513H – 513.119. It clearly was a lengthy hearing and it is clear the Claimant at the time was suffering from stress and mental health problems. The outcome of the disciplinary was given in person on 22 March 2018. In relation to the first allegation, namely the email sent by Mr Truscott on 3 August and whether that amounted to inappropriate and aggressive behaviour, the Claimant having accepted that the email had been blunt and clumsy and accepting it was not an appropriate way to raise the concern, but nevertheless felt the subject should be raised, the panel felt,

*“It was unprofessional, aggressive and potentially provocative”*

and decided that the allegation was well founded.

61. In relation to the second allegation, namely,

*“that when attempting to deal with the concern Mr Truscott sought to undermine and misrepresent the actions of his matron Michael Dicker...”*

The panel, having considered the chain of email correspondence following the meeting concluded that the Claimant had attempted to undermine Mr Dicker and upheld that allegation.

62. In relation to the allegation,

*“Does Mr Truscott’s behaviour as outlined above fit with the pattern of behaviour over time that engendered serious disfunction in the working relationship between him and his senior colleagues and his ability to fulfil his leadership responsibilities, thus impacting on the operation of the service and / or team work?”*

The panel concluded that it did based on the documentary and witness evidence that the Claimant illustrated inappropriate behaviour over a lengthy period of time, this impacted upon the Claimant’s relationship with a number of senior managers and upheld this allegation.

63. Finally, the allegation,

*“Whether taken as a whole including his conduct towards management over recent years, Mr Truscott’s behaviour undermines the necessary trust and confidence that his Matron and senior manager Anita have in him as a Clinical Lead, that this has broken down and if so, is a situation that is retrievable”*

The panel seemingly accepting Mr Dicker’s evidence that the relationship that had broken down and upheld this allegation.

64. The panel concluded the allegations were very serious and in relation to allegation one, imposed a Final Written Warning. In relation to allegations two and three, the panel imposed the sanction of dismissal and payment in lieu of notice. Apparently, the panel did consider a transfer or down grade or demotion to a different department, but felt this was unlikely to resolve matters.
65. The panel does not appear to have taken any account of the Claimant’s mental health or the background to some of the Claimant’s concerns.
66. The Claimant’s dismissal was confirmed in a letter of 23 March 2018 and the reasoning (pages 514 – 519) signed by Professor Farrow. The letter contained the Claimant’s right to appeal.
67. The Claimant exercised his right of appeal by letter of 31 March 2018 (pages 519A – 519D). The basis of the appeal being the sanction and the finding was unfair, the disciplinary policy procedure was not properly applied and yet sanction was based on discriminatory reasons and he sets out in more detail the basis of those appeal reasonings.
68. The Claimant’s Appeal Hearing was notified by letter of 9 May 2018 and was to be conducted by Mr Hackwell.
69. The Appeal takes place on 17 May 2018, the minutes are at page 519E and page 519HHH. The outcome of the Appeal is not communicated to



the Claimant until 13 July 2018, pages 520 – 524. The Claimant's Appeal was not upheld. The overall conclusion being,

*“Having considered your grounds of Appeal very carefully and taking into account your representations, it has been decided to uphold the decision of the disciplinary panel and retain the decision to dismiss you. This decision has been taken because I do not uphold the points you have raised in your letter. Furthermore, I was not convinced during the Appeal Hearing that you are able to demonstrate empathy or insight into the impact you have had on others, certainly not to the extent that it is likely to be possible for a relationship to be rebuilt. I acknowledge the comments you made at the end of the Appeal Hearing, the behaviour you have demonstrated has been sustained over an extensive time period and has resulted in an irretrievable breakdown in working relationship”.*

70. Referring to the fact that the disciplinary panel noted the Claimant had underlying issues relating to stress, but the panel did not have sufficient evidence to conclude that this was the cause of the Claimant's behaviour over an extended period of time with so many different individuals. This is despite the fact that no additional medical evidence was sought to be obtained by the disciplinary panel, or indeed by Mr Hackwell.

## The Law

### Discrimination Arising from Disability – s.15 Equality Act 2010

71. A person (A) discriminates against the 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.
72. In essence, the Section provides that it will be unlawful for an employer or other person to treat a disabled person unfavourably, not because of that person's disability itself (which would amount to direct discrimination under s.13) but because of something arising from, or in consequence of, the person's disability.
73. Therefore, in order to succeed with a claim of discrimination arising from disability, the Claimant must establish the following:
- (a) that he or she has suffered unfavourable treatment; and
  - (b) that the treatment is because of something arising in consequence of his or her disability.
74. Clearly, if the Claimant can establish the above, the employer will be liable unless it can show:

- (a) that the unfavourable treatment is a proportionate means of achieving a legitimate aim; and / or
  - (b) that it had no knowledge of the Claimant's disability.
75. Under this claim there is no need for a comparator in order to show unfavourable treatment.

Ordinary Unfair Dismissal – Employment Rights Act 1996

76. The Tribunal first have to establish what was the reason for dismissal under s.98 of the Employment Rights Act 1996, and then go on to consider under s.98(4) whether the employer acted reasonably.
77. The reason advanced for the dismissal in this case is 'some other substantial reason' as a potentially fair reason to dismiss.
78. The Tribunal then has to decide the fairness of the dismissal by asking whether the decision to dismiss fell within the range of a reasonable response that a reasonable employer might adopt.
79. In other words, to amount to a substantial reason to dismiss there must be a finding that the reason could, but not necessarily does, justify dismissal.

**Conclusions**

80. In relation to the question of the Claimant's disability, it was finally conceded by the Respondents by email of 31 July 2019, that the Claimant was disabled by reason of stress, anxiety and depression throughout the relevant period.

Conclusions on Ordinary Unfair Dismissal

81. It is entirely clear and obvious to the Tribunal that given the Claimant's stress, anxiety and depression, there was a wholesale failure by the Respondents to deal with the Claimant's particular condition. It would have been obvious for all to see within the Respondent's organisation that dealt with him, together with the Claimant's own account and medical evidence obtained from Occupational Health Reports from 2015 what the Claimant was suffering from.
82. It was equally clear, from the Claimant's email to Mr Dicker of 8 August (page 336), that the Claimant had serious medical health difficulties and that Mr Dicker was aware of the Claimant's previous stress. There were clear failures to understand the Claimant's health in terms of his conduct and alleged breakdown with some senior management in terms of relationships.
83. There was never any suggestion that the Claimant had ceased to suffer from stress, anxiety and depression. The fact that the Claimant's

personnel file was lost, rather surprisingly for such a large organisation and perhaps mysteriously, that in itself did not stop evidence being available, certainly to Mr Hackwell had he chosen to consider it.

84. Particularly the email from Mark Ferris (Consultant Occupational Physician) to Sarah Goot (page 494), which read,

*“I saw John Truscott this morning and he raised the possibility of adjustments being made to the panel hearing on 7 December 2017, in view of stress related, psychological symptoms he is experiencing. This is in the context of a physical health condition which is being investigated and which could potentially be aggravated by stress. Given the length of time over which he has experienced psychological symptoms and the requirement for treatment, I suggest that it’s prudent to regard him as meeting the criteria for disability used in the Equality Act.*

*Mr Truscott described having experienced increased stress related symptoms over recent days and weeks as the hearing approached and being concerned as to how he may cope with the meeting. He informed me that he has recently met with Ashley Judd at a neutral venue rather than Rouen Road and thought that he may cope better with the meeting if it can also be arranged at a similar venue. His other request is for his wife to attend the meeting with him, as support, in addition to his work colleague. I explained to him, that whilst I agree with him and that both of these adjustments may reduce how stressed he feels during the meeting, it is for the organisation to decide what adjustments are reasonable and can be accommodated.*

...

*Please contact me if you have any questions regarding this advice.*

...

*Regards Mark”*

85. It would appear that Professor Farrow conducting the disciplinary was not told of this report. To the Tribunal’s mind there was no attempt by Professor Farrow to explore the Claimant’s mental health conditions, a fact which she clearly accepted in cross examination, that she ought to have obtained further evidence. Furthermore, she was not even advised of the existence of the report of the 8 August.
86. It is equally clear the Claimant’s medical condition was not properly explored at the Appeal stage and only done in a cursory manner, Mr Hackwell seemed to focus on adjustments for employment and did not focus on the Claimant’s condition and behaviour. He concluded, without any medical evidence, that the Claimant was fit for work and did not need

a further medical report. The Tribunal conclude not to explore this was fundamentally flawed and that there was a total failure to explore or understand the Claimant's mental health, which in itself would render the Claimant's dismissal unfair.

87. The Tribunal goes further in that the investigation itself into the Claimant's behaviour was fundamentally flawed. Rachel Cocker had first hand knowledge of the Claimant's behaviour and condition and indeed, there were discussions between herself and Mr Dicker over this. The fact that in a previous meeting earlier in the year between Mr Dicker, Rachel Cocker and the Claimant, they were made aware of the Claimant's previous stress and break down.

88. The Tribunal were concerned by the terms of the reference set out by Rachel Cocker (page 344) which read,

*"The investigator is asked to consider the following serious concerns:*

1. *In relation to the incident outlined below, is Mr Truscott guilty of inappropriate and aggressive behaviour that contradicts with our organisational values:*

a. *Mr Truscott sent an email on 3 August regarding the hospital flu campaign that appears to be unprofessional, aggressive and intentionally provocative; and*

b. *that when attempting to deal with the concern, Mr Truscott sought to undermine and misrepresent the actions of his Matron, Mr Michael Dicker.*

2. *Does Mr Truscott's behaviour as outlined above fit with the pattern of behaviour over time that engenders serious disfunction in the working relationship between him and his senior colleagues and his ability to fulfil his leadership responsibilities, thus impacting on the operation of the service and / or teamwork.*

3. *Whether taken as a whole, including his conduct towards Management over recent years, Mr Truscott's behaviour undermines the necessary trust and confidence that his Matron and Senior Matron need to have in him as a Clinical Leader, if this has broken down and if so, is it a situation that is retrievable?"*

89. Quite simply, those terms of reference lead one to a conclusion that the case had been decided before it had started, i.e. the decision had already been made that the Claimant was to go.

90. Furthermore, which element of the Claimant's conduct was to be considered, was it a pattern of behaviour? It is not clear from the terms of

reference, the invite to the disciplinary or the outcome letter, it is simply not clear what conduct, if any, was taken into account over recent years as there was no evidence supporting the assertion that the Claimant's conduct towards Management over recent years occurred, or had undermined the necessary trust and confidence that his Matron and Senior Matron need to have in the Claimant. It appears it was a box ticking exercise. When was there any documentary evidence from the past supporting this particular allegation? Quite simply there was none.

91. It will also appear that Professor Farrow's evidence, wrongly took into account the decision of the UEA to move the Claimant from being an Assessor. How that could have been arrived at, when there was no investigation into what did actually happen at the relevant time, she could not therefore, come to a conclusion that the Claimant was in some way culpable in the breakdown of the relationship with the UEA. It seems to be a case of, 'well the UEA complained, so the Claimant must have been in some way guilty'. She simply did not explore what had actually happened.
92. In relation to the alleged pattern of behaviour over recent years, where is the evidence? If there was, how come it was not addressed at the time it occurred? The nearest you get, is some minor disagreement with a colleague over operational matters which had been dealt with at the time and no one felt it necessary to take the matter any further.
93. In relation to the Pride meeting, there is clearly mixed evidence. If the Claimant was in some way over exuberant or more robust in his views than he should have been at this meeting, why was he not dealt with at the time? In any event, this was a meeting at which the Respondents had specifically asked staff to come forward about bullying within the organisation, amongst other things.
94. According to Mr Dicker, there would be regular conversations between himself and his Line Manager, Ms Cocker, but there is no evidence that the Claimant's behaviour was discussed or felt at the time necessary to escalate to some form of disciplinary. It appears only when Mr Over gets involved in August (page 330) following an email to him from the Chief Executive Mr Mark Davies, in which,

*"Folks, isn't it about time we did something about this person"*

95. The response was the same day within minutes,

*"Yep, that's what I expect to happen through Theatre Managers, I will oversee"*

96. It would appear to the Tribunal there was some form of hatchet job that dismissal was inevitable and to be wrapped up in a breakdown of relationships, when the Claimant's behaviour had not been questioned or dealt with in a formal basis in the past.

97. The Tribunal concludes that the decision to dismiss was wholly unfair and outside the range of reasonable responses, without addressing how to repair the relationship between the Claimant and Mr Dicker, or indeed even considering Mr Dicker's behaviour towards the Claimant in the meeting in August.
98. The Tribunal further concludes that the Respondent's mind as to whether the Claimant could remain in the employment of the Respondent, notwithstanding his long, unblemished service and the fact that he was extremely good at his job and his own peers, whilst acknowledging that sometimes he could be robust in his views, did not have a problem with the Claimant.
99. Furthermore, the Respondent should have attempted to address the Claimant's mental health problems as there appeared to be a clear link between the Claimant's behaviour in August and the preceding period linked to his mental health. That report could have addressed, whether the Claimant's behaviour and relationship with Mr Dicker could have been resolved so far as it could have been said to have broken down in any event.
100. The Tribunal conclude that the dismissal was procedural and substantively unfair and there was simply no evidence that the Respondents can point to that suggested the Claimant's conduct towards management over recent years undermined trust and confidence, the nearest one gets is the email on 3 August regarding the flu campaign and that was not complained about by Hilary Winch who was responsible for the campaign. The Claimant was, after all, expressing concern following the events surrounding the flu campaign of the previous year.
101. The meeting between Mr Dicker and the Claimant on 4 August, there are clearly two versions and the clear suggestion by the Claimant is he felt bullied and intimidated, particularly with the presence of the additional Matron. The Claimant was clearly not expecting the presence of the additional matron and yet there was no investigation into Mr Dicker's behaviour, notwithstanding the Claimant's email of 8 August where he suggests he was subjected to a tirade of abuse and accusations and asserts Mr Dickers behaviour towards the Claimant amounted to bullying behaviour.
102. The Tribunal concludes the dismissal, we repeat, was procedurally and substantively unfair and clearly outside the range of reasonable response open to the Respondents on the facts available to them at the time of dismissal.

Section 15 – Discrimination arising from Disability

103. Whilst accepted there is no medical evidence that links the pleaded disability and condition, nevertheless, all the Respondents witnesses accepted there could be a link between the Claimant's behaviour and his condition, the behaviour arose quite clearly from his disability. In those circumstances, it would not be proportionate to dismiss. The reason for that is there was no attempt to understand the Claimant's mental health condition. There was a wholesale failure by the Respondent, both at the disciplinary and at the Appeal stage to consider the Claimant's mental health.
104. Had the Respondent been properly informed of the knowledge of the Claimant's mental health condition, then the Tribunal have no doubt the relationship could have been rebuilt so far as it had broken down. Therefore, it cannot have been a proportionate means of achieving a legitimate aim to dismiss the Claimant. It was obvious the Claimant was suffering mental health, a fact that Occupational Health were aware. In those circumstances the claim under s.15 is made out.
105. From the submissions made on behalf of the Claimant, it appears that the claim for failure to make reasonable adjustments and a claim for indirect discrimination is no longer pursued as no submissions were made in respect of that.

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Employment Judge Postle

Date: .....01.04.2020.....

Sent to the parties on: .....01.06.2020.....

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For the Tribunal Office