Case Numbers: 3303876/2019, 3326033/2019; 3303857/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Morgan	v	Buckinghamshire Council

Heard at: Aylesbury

On: 12-16 and 19 October 2020 and (in private) 20 October and 6 November 2020

Before: Employment Judge Hyams

Members: Mr W Dykes
Mr T Poil

Appearances:

For the claimant: Ms M Cornaglia, of counsel
For the respondent: Mr L Davidson, of counsel

UNANIMOUS RESERVED LIABILITY JUDGMENT

1. The claimant was not dismissed unfairly.

2. The claimant's dismissal was a proportionate means of achieving a legitimate aim and was therefore not in breach of section 15 of the Equality Act 2010.

3. The claimant's dismissal was not direct disability discrimination within the meaning of section 13 of that Act in that she was not dismissed to any extent because of her disability.

4. The claimant's claim of harassment within the meaning of section 26 of the Equality Act 2010, contrary to section 39 of that Act, was out of time in part but succeeded in part, namely in that the respondent harassed the claimant within the meaning of section 26 when it implied in the letter dismissing the claimant's appeal against her dismissal that she had acted deceitfully by "masking" her disability of autistic spectrum disorder.

5. The claimant was not victimised by the respondent within the meaning of section 27 of the Equality Act 2010.

REASONS

The claims

1 In these proceedings, the claimant claims (in three separate claims) that she was discriminated against because of a disability through the respondent contravening sections 13, 15, 26 and 27 of the Equality Act 2010 ("EqA 2010") read with section 39 of that Act. The claimant was dismissed by the respondent without notice on 4 September 2019 and she claims that the dismissal was unfair within the meaning of section 98 of the Employment Rights Act 1996 ("ERA 1996"), as well as a breach of section 15 of the EqA 2010.

2 The respondent accepts that the claimant has at all material times been disabled by reason of Dyslexia, Dyspraxia, Auditory Processing Difficulties, Complex Vestibular Migraines and Autistic Spectrum Disorder.

3 The claim form for the first claim was presented on 15 February 2019. The early conciliation certificate was issued on 19 November 2018, the date of notification of ACAS in that regard having been 19 October 2018. Accordingly, the claim was in time in respect of any act or omission that occurred on or after 16 October 2018 and out of time in respect of any act or omission that occurred before then, unless time was extended on the basis that it was just and equitable to do so.

The issues

4 The case was the subject of two preliminary case management hearings, at neither of which were the issues determined. They were agreed before the hearing before us, however, and, having considered them, we agreed that they were apt in substance. EJ Hyams (with the agreement of Mr Dykes and Mr Poil) rewrote the liability issues slightly, so that they fitted better our understanding of the applicable principles, in the following manner, which in some cases state the claimant's case, the issues being implicit in that statement of the claimant's case.

Unfair dismissal

5 What was the reason, or principal reason, for the claimant's dismissal? Was it (as the respondent claimed) the claimant's conduct?

6 Did the persons responsible for deciding that the claimant should be dismissed genuinely believe that the claimant had committed that conduct?

7 Did the respondent conduct a reasonable investigation into the alleged misconduct of the claimant before deciding that she should be dismissed for that conduct, i.e. was that investigation one which it was within the range of reasonable responses of a reasonable employer to conduct?

8 Were there reasonable grounds for the belief of whoever decided that the claimant should be dismissed that the claimant had committed the misconduct for which she was in fact dismissed?

9 Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?

The claim of a breach of section 15 of the EqA 2010

10 The claim of a breach of section 15 of the EqA 2010 related only to the claimant's dismissal. It was the claimant's primary case that if (as she denied) she had committed misconduct and was dismissed for that misconduct, then such dismissal arose in consequence of her disabilities in that the misconduct arose from her disabilities, and that dismissal was not a proportionate means of achieving a legitimate aim. In that regard, the claimant relied on the following consequences, or manifestations, of one or more of her admitted disabilities:

10.1 cognitive impairment

10.2 hearing difficulties

10.3 stress, and

10.4 emotional vulnerability.

The claim of direct disability discrimination

11 The claimant claimed that she had been dismissed at least in part because of her disability, i.e. that she had been discriminated against directly within the meaning of section 13 of the EqA 2010 by being dismissed. She did not rely on any specific comparator, and therefore relied on a hypothetical comparator only.

The claim of harassment

12 It was the claimant's case that she was subjected to unwanted conduct which (1) related to her protected characteristic of disability and (2) was done for the purpose, or had the effect, of violating her dignity or creating for her an intimidating, hostile, degrading, humiliating or offensive environment, in the following ways:

12.1 on 19 June 2018

12.1.1 subjecting her to an investigation and

12.1.2 moving her from her substantive post;

12.2 on 14 August 2018 and 4 September 2018, refusing to move her back to her substantive post;

12.3 on 21 September 2018 instigating disciplinary proceedings against her; and

12.4 stating, in determining the claimant's appeal against her dismissal, that she had committed deception.

Victimisation

13 The claimant's claim of victimisation was that she had been treated detrimentally because she had stated a grievance in May 2018 which relied in part on the EqA 2010, by the respondent doing the things referred to in paragraphs 12.1-12.3 above.

The evidence which we heard

14 We heard oral evidence from the claimant on her own behalf, and, on her behalf:

14.1 Mr Daniel Otto, who is (and was when the claimant was employed by the respondent) employed by the respondent as an Independent Reviewing Officer, and

14.2 Ms Beverley Walton, who was, when the claimant was employed by the respondent, employed by the respondent as a Social Worker.

15 We heard oral evidence from the following witnesses on behalf of the respondent:

15.1 Mr Nathan Whitley, who is (and was from January 2018 onwards) employed by the respondent as Head of Children's Care Services and Children's Commissioning;

15.2 Mr Gareth Morgan, who is (and was from 13 May 2018 onwards) employed by the respondent as Head of Early Help Services; and

15.3 Ms Debbie Sarstedt McCarthy, who is, and was at the time of the claimant's dismissal, employed by the respondent as "HR & OD Consultant".

16 The respondent proposed to call as a witness Ms Ella Palmer, who has been employed by the respondent since 1 April 2020 as its HR Consultant and Advisory Manager. Ms Cornaglia stated that she did not intend to cross-examine Ms Palmer and we therefore with Ms Cornaglia's agreement treated Ms Palmer's witness statement evidence as accepted by the claimant to be accurate.

17 A bundle with 2674 pages was put before us. Having read the documents in that bundle to which we were referred, and having heard the above oral evidence, we made the findings of fact stated below. While the evidence before us was

extensive, the claim was in the main about the claimant's dismissal and most of the factual background was either not contested or in practice incontestible. As a result, and for the reasons stated in paragraphs 19-21 below, we focus in what follows on the evidence relating to that dismissal.

The facts

18 The claimant was employed by the respondent as a Supervising Social Worker in the Fostering Team from 1 August 2016 until she was dismissed for gross misconduct by a letter dated 4 September 2019 written by Mr Gareth Morgan (who is not related to the claimant). We agreed with Mr Davidson that the claim was principally about the claimant's dismissal (although, as is clear from what we say above, the claim was not only about that), and as a result, we first focus on the reasons for her dismissal.

The reasons for the claimant's dismissal

19 The reasons given by Mr Morgan for dismissing the claimant were that the claimant had

19.1 on 12 September 2018 at a meeting with a girl in the care of the respondent (as a "child" who was looked after the respondent within the meaning of section 22(1) of the Children Act 1989) to whom we shall refer as "SH", for the arrangement of whose placements with foster carers the claimant had until that point been responsible (that date being the end of the claimant's responsibility for such arrangement), given to SH two unauthorised gifts and a greetings card worth in total £37.64;

19.2 without authorisation (and at a time when the claimant was absent from work because of sickness) given Christmas presents in 2017 to SH;

19.3 included in the case note relating to her meeting with SH of 12 September 2018 (at page G229-G232 of the hearing bundle [2453-2456]; any reference below is, unless otherwise stated, to a page of that bundle, with the page numbers in square brackets being those of the single pdf file consisting of the bundle as it stood in total at the start of the hearing) "inappropriate and unprofessional" material in the form of

19.3.1 her "own thoughts, views and feelings, rather than an account for the child or a social work analysis" and

19.3.2 "criticism of carers actions on the basis of their faith";

19.4 on 12 September 2018 given SH a "long heartfelt hug";

19.5 in the case note at G229-G232 not described in full the gifts given to SH on 12 September 2018; and

19.6 failed to follow management instructions given to her by Mr Dan Jones, the claimant's line manager from February 2018 onwards until 21 September 2018. (Mr Jones was the claimant's line manager from February 2018 onwards until the claimant was dismissed, but the claimant was on 21 September 2018 put on management leave and then on 18 October 2018 formally suspended by the respondent, and the material period during which Mr Jones was in a position to give the claimant management instructions ended on 21 September 2018.)

20 In fact, the latter factor (stated in paragraph 19.6) was, we found, regarded by Mr Morgan as part of the background, justifying the conclusion that the claimant had, by doing the things referred to in paragraphs 19.1 to 19.5 above, acted in a manner which was, in Mr Morgan's view, such that the claimant could not be trusted not to breach the respondent's code of conduct again, and that she should as a result be dismissed.

21 With that caveat, we accepted that evidence of Mr Morgan about his reasons for deciding that the claimant should be dismissed. The claimant appealed against Mr Morgan's decision to dismiss her (see paragraphs 65-87 below), but the appeal was unsuccessful and Mr Morgan's decision was upheld on appeal.

22 We therefore now turn to the relevant events in (largely) chronological order. After setting out what we regarded as the most important evidence concerning those events, we refer to several specific factual matters.

The claimant's employment with the respondent and the documents associated with it

23 The claimant described her employment with the respondent in this way in her witness statement (which we accepted):

> "3. I started work at Buckinghamshire County Council (BC) on the 1st August 2016 as a Supervising Social Worker in the Fostering Team (Contract D33-52). ...
>
> 4. The role is a specialist one because it requires the Supervising Social Worker to work with both adults and children. I was employed to supervise and support foster carers and focus on their work with children, their training and development, and oversee their care for the children they looked after. In particular I had to ensure they met and maintained the minimum standards as set out by the Fostering Service Regulations (2011) and Fostering National Minimum Standards. Each child had their own social worker and my focus was to work alongside the child's social worker and foster carers to ensure care plans were implemented, the needs of children were met, and they were safeguarded.

5. I had additional responsibilities which included Family Finding which meant that I was tasked to find long-term matches for children whose care plan was long-term fostering. BC was unusual for a local authority in that a Social Worker could supervise a Foster carer and also look for long term placements of those children being cared for. This could potentially lead to a conflict of interest."

24 The claimant's letter of appointment and contract of employment was at pages D33-D52 [592-611]. The contract was at pages D36-D52, and at page D43, there was this passage in it:

> "**Health and Care Professions Council**
>
> As part of your employment with Buckinghamshire County Council it is a requirement that you are registered with the Health and Care Professions Council. Failure to register successfully with the Health and Care Professions Council may impact on your ability to perform the role and fulfil your contract of employment that could result in dismissal.
>
> You will also be required to maintain the standards expected of the Health and Care Professions Council".

25 At pages D44-D45 [603-604], there was this passage:

> "**Safe Working Practice for Adults working with Children and Young People**
>
> Safe Working Practice Guidance produced by the DCSF Allegation Management Advisors (AMA) sets out a range of advice for people working directly with children and young people. It is important that you read and understand this information. It can be accessed on the Council intranet under Safeguarding in Employment in the A-Z. Full details of the DCSF guidance can also be accessed on www.dcsf.gov.uk/everychildmatters by typing in 'Guidance for Safer Working Practice' on the search engine. There is further information in the leaflet 'Professional Boundaries: Your Role with Children and Young People' which should have been issued as part of your pre employment correspondence.
>
> **Disciplinary Procedure**
>
> The disciplinary rules applicable to you are set out in the Council's Conduct and Discipline procedure which is updated from time to time and is available on the Council's intranet."

26 The Health and Care Professions Council's "Standards of conduct, performance and ethics" of which there extracts in the bundle had a statement of those standards at page B86 [358]. There were seven, and the seventh was this:

> "**Maintain appropriate boundaries**
>
> You must keep your relationships with service users and carers professional."

27 The respondent's code of conduct was at pages B42-B49 (314-321). Paragraph 1, on page B43, included this under the heading "Introduction":

> "The Code of Conduct should be read in conjunction with Guidance for Safer Working Practice for Adults who Work with Children and Young People (Appendix 1)".

28 Under the heading "Safeguarding", on page B44 [316], there was this passage:

> "Employees who work with or come into contact with children, young people or vulnerable adults must refer to the following documentation in relation to their working practice:
>
> - Guidance for Safer Working Practice for Adults who Work with Children and Young People. (See Appendix 1) ."

29 On page B49, it was said that "Failure to comply with this guidance and the associated Council policies may result in disciplinary action being taken."

30 The document referred to as "Guidance for Safer Working Practice for Adults who Work with Children and Young People. (See Appendix 1)" was at pages B3-B33 [275-305]. The key passage in it was paragraph 10, which was on page B17. That was in these terms:

> "10. Gifts, Rewards and Favouritism
>
> The giving of gifts or rewards to children or young people should be part of an agreed policy for supporting positive behaviour or recognising particular achievements. In some situations, the giving of gifts as rewards may be accepted practice for a group of children, whilst in other situations the giving of a gift to an individual child or young person will be part of an agreed plan, recorded and discussed with senior manager and the parent or carer.
>
> It is acknowledged that there are specific occasions when adults may wish to give a child or young person a personal gift. This is only acceptable practice where, in line with the agreed policy, the adult has first discussed the giving of the gift and the reason for it, with the senior manager and/or parent or carer and the action is recorded. Any gifts should be given openly

and not be based on favouritism. Adults need to be aware however, that the giving of gifts can be misinterpreted by others as a gesture either to bribe or groom [that term being defined in a footnote as "the act of gaining the trust of a child so that sexual abuse can take place"] a young person.

Adults should exercise care when selecting children and/or young people for specific activities or privileges to avoid perceptions of favouritism or unfairness. Methods and criteria for selection should always be transparent and subject to scrutiny.

Care should also be taken to ensure that adults do not accept any gift that might be construed as a bribe by others, or lead the giver to expect preferential treatment.

There are occasions when children, young people or parents wish to pass small tokens of appreciation to adults e.g. on special occasions or as a thank-you and this is acceptable. However, it is unacceptable to receive gifts on a regular basis or of any significant value.
This means that adults should:

- *be aware of their organisation's policy on the giving and receiving of gifts*
- *ensure that gifts received or given in situations which may be misconstrued are declared*
- *generally, only give gifts to an individual young person as part of an agreed reward system*
- *where giving gifts other than as above, ensure that these are of insignificant value*".

The claimant's line managers

31 During her employment with the respondent, the claimant stated a number of grievances about the manner in which she was line managed. She was initially line managed by one of the two Assistant Team Managers of the fostering team, but after complaining to their line manager, Ms Yoni Ejo, about the behaviour of those Assistant Team Managers towards her, the claimant was managed by Ms Ejo until Mr Jones was appointed as the manager of the team, which was in January 2018. These things were never expressly stated to us in evidence, but they were stated in paragraph 6.1 of the grievance report of Ms Jo Whiteley, at page F55 [2011]. Ms Whiteley was commissioned by Mr Whitley to investigate the claimant's grievance to which we refer in paragraph 36 below.

32 The claimant was absent from work on account of sickness from 20 November 2017 to 2 February 2018 "with a historic diagnosis of vertigo, and a more recent diagnosis of work-based stress" as stated in the occupational health report at page H62 [2632]. On her return to work, the claimant was, as indicated in the preceding paragraph above, now line managed by Mr Jones. The work-related

stress arose from the claimant's relationships with colleagues, and resulted as far as she was concerned from them doing what she experienced as bullying of her.

The events after 2 February 2018 which preceded the claimant being put on management leave

33 At first, the claimant's experience of Mr Jones as her line manager was positive. That was clear from the fact that she herself said to Ms Andrea Smith in the course of the investigation which led to the decision to discipline her (to which we refer further below) as recorded in the document at page G256 [2480], that she had given Mr Jones a birthday card on 12 September 2018 in which she had written:

> "Dear Dan
> This year has been eventful and your support has been especially important".

34 The claimant was recorded also on that page to have said that even at that time, shortly before she was put on management leave (which was on 21 September 2018, as we describe below):

> "I felt the relationship being developed between DJ and I was one of mutual professional respect, care and support."

35 However, there was during the period from 2 February 2018 to 21 September 2018 a series of events which led to a growing concern on the part of Mr Jones about the manner in which the claimant was dealing with the case of SH. Also during that period, the claimant continued to feel that she was being bullied by her colleagues (but not Mr Jones at least initially), and on 10 May 2018, the claimant was told by Mr Jones (as recorded in the note of the supervision meeting with him of 10 May 2018 at page C55 [502]) it had been decided that a recent email raising concerns "about her treatment by the assistant team managers in the Fostering Support Team", in which she said that she felt "bullied harassed and that her work is sabotaged" raised "serious and significant issues" and that they would be "treated as a grievance formally". In response, the claimant is recorded to have said that she had "no intention of moving team or leaving", but she was, however, on 19 June 2018 (as recorded in the note at pages D204-D205 [763-764] of the meeting of that date of Mr Whitley, Mr Jones and the claimant) moved by Mr Whitley to work on a temporary basis in the respondent's Quality Assurance ("QA") Service, in which she would be "auditing cases". The only alternative was to go on management leave. The claimant reluctantly agreed to working in the QA team. In that role she was managed by Mr David Glover-Wright, a Principal Social Worker employed by the respondent.

36 The events which concerned Mr Jones were ultimately not disputed to any significant extent, although the manner in which they should be seen was disputed. We now turn to the evidence relating to those events.

37 In March 2018, the claimant asked to be allocated to be SH's family finder. That was recorded by her at pages G230-G231 [2454-2455], in the case note which was one of the principal reasons why she was dismissed.

38 On 20 March 2018, the claimant wrote to SH in the email at page G214 [2438]:

> "I hope you feel reassured that both me and Bev [i.e. Ms Walton] are doing our very best to help ensure we secure the best possible outcome for you. I know this is an anxious time, but you are coping and doing extremely well with the uncertainty you face right now. Use Bev for support whilst we work out plans for you, and just keep focused on your education and doing well. You have so much potential [SH] and Bev and I really believe in you and want the absolute best for you. Everything Bev and I are doing comes from our hearts because we care about you [SH] and this is unconditional."

39 On 2 May 2018, Mr Jones wrote the email at page G215 [2439], which arose from the fact that the claimant had recommended a particular school as one at which SH could be educated, but had not made it clear until the meeting which he described in that email that her (the claimant's) daughter had been educated there. The email was in these terms:

> "Hi Miranda,
>
> I'm just going to try to catch our discussion about this in writing so things are recorded; appreciate it's a been a difficult chat but we needed to clarify. Hope this is helpful.
>
> You clarified that your daughter had attended the Stoner school for her secondary education aged 11 -16 years. You explained that you had made others (Bev) aware of this early on but agreed that this had not been mentioned to me by you prior to today. You had shared last week that you had a personal connection but the detail was provided today. You shared that you could not think of a specific reason why this was not mentioned to me previously but were clear that you felt there was no issue in terms of your current work as your daughter attended that school some time ago. You felt you had been entirely professional in your approach to SH's case.
>
> I asked if this information had been shared with SH and Enid [another social worker involved with SH's case] and you confirmed it had.
>
> I explained that whilst the above may be true in terms of your practice it's is a matter of perception - by SH, carers etc. We discussed how your role

as family finding is influential in the selection of school and that things must be done fairly and perceived to be done fairly. I explained my expectation that this should, in my view, have been shared with me at the earliest point and that in future I would except openness. We agreed this and agreed the priority now is to work together to achieve a successful transition for SH.

I hope you will find this a fair summary but if there is any correction or clarification you need to make please just provide a response.

Kind regards

Dan"

40 Mr Jones was interviewed by Ms Smith during the course of the latter's investigation to which we return below. At page G247 [2471] there was this note of what he said to her on 14 November 2018 about what happened next and how he saw the situation:

"AS – When has MM stated that she recognises it was appropriate advice and would change her conduct as a result?

DJ – MM sent me a supervision agenda on the 10th May in which she stated "*I value your boundaries and direction with [SH] following her phone call to me. I understand why you put this in place. I guess when involved in such an emotional case it is hard to see what is going on and this is where I rely on my manager who is on the outside looking in to protect me as practitioner. I am glad I followed your direction.*" [The original of that document was at page G221 [2445].] Following that agenda and an email from MM I felt that I was getting somewhere and we could move on but during the summer I became concerned again about the time that MM spent on SH. The celebration with SH during the summer when she had her ears pierced for example. That was not usual, not normal for a Family Finder and I am not aware of her doing it before with any other child. Although it was not a big issue it was again that MM didn't come back to talk to me about it. There was always something more that MM was doing with SH, for example the photos and the memory box, always something that left me wondering and then the gifts were the high-water mark.

AS – How did you become aware that MM had a personal connection with Stonar School?

DJ – It was from another team member. There have been occasions when team members would express a concern about MM but those team members, her peers, wouldn't put their name to it. I was clear that if anyone held concerns they would need to evidence these and be

accountable for them. As such I didn't raise those issues with MM unless there was something concrete that I knew, this is because I felt MM could legitimately ask me why I was asking if I raised those things with her.

In this case I asked her in front of BW. MM said yes but I didn't ask further in the meeting as I did not wish to put MM on the spot. Before I had a chance to follow up MM emailed me and said her connection was with another foster child being placed but she also had a personal connection. I asked what that was and she simply replied 'historical'. I then emailed and explained that I needed detail with no sufficient response. I then went and spoke to her face to face and asked again. She told me then that her daughter had attended. I emailed her again reflecting our conversation and giving advice.

AS – What advice did you give?

DJ – I spoke about perceptions and that she should have shared the information with me at the earliest opportunity rather than sharing it with SH, the carers and BW. I spoke about how influential she was as Family Finder in choosing and commissioning the school; I advised that things must be fair and seen to be fair. MM emailed me back and wrote *'I will respond to the email below with my reflections but just not yet*.' MM never did respond.

I felt that I had given MM guidance but she was really sad and felt she had broken my trust. I tried hard to say that if it was a genuine mistake we could move on. I don't think she was trying to be deceptive but she was evasive with me. I said in those situations I would challenge her but that it is not personal, not that I don't like her. On it's own that is where it was left but in the context of other discussions and events it concerns me.

AS – Once you asked did MM direct did she [sic] tell you straight away?

DJ – I felt I really had to dig.

AS – Are Social Worker's [sic] expected to declare such interests?

DJ – Yes. I didn't specifically ask but I wouldn't expect to. MM is an experienced senior SW [i.e. social worker]. If it were me I would have mentioned it immediately and I would expect any qualified Social Worker to do so."

41 It was not contended by the claimant that that passage was an inaccurate statement of the relevant facts, and in any event we accepted that it was an

accurate statement of those facts. The next passage in the notes of Ms Smith's interview with Mr Jones was also material. Long though it is, it bears repeating in full:

> "AS – Did MM seek permission to go with BW when SH had her ears pierced?
>
> DJ – Not that I remember.
>
> AS – Would you expect her to do so?
>
> DJ – A Social Worker wouldn't normally seek my permission; they arrange their own diaries. I was surprised that MM didn't have a conversation about it or mention it in passing though; it was unusual for a Family Finder to be involved in something like that and we had discussed boundaries before. MM went with BW so I assume she made all the arrangements. It was the online memory box that I was most concerned about because that was not MM's role.
>
> The trip out was similar to the 'orientation' visit and shopping in Northampton; that is really the role of the child's Social Worker. When MM advised me of her intention to undertake the orientation visit I told her to do nothing until she had put a proposal together which would be shared with BW's manager as well. Both the other manager and I agreed it was not appropriate for MM and we stopped it.
>
> AS – Is taking photo's for a memory box part of the role of a Family Finder?
>
> DJ – Not particularly no, although taking the photos is not the issue, providing they were on a work phone and not used personally. They should be passed to the Social Worker and that is what I asked her to do. The memory box was definitely not right, and it was an on-going piece of work when I had explicitly said that her role would come to an end.
>
> AS – Do you wish to make any further comment?
>
> DJ – A team member said very early on that they overheard MM state 'I don't know where I end and SH begins'. I made a mental note but this was a team with grievances and difficult team dynamics. I didn't put huge weight on it in the absence of proof; this was before MM's comment to me that she would be in SH's life for a long time. MM never said anything like that again but little comments about her involvement with SH and why SH gets so much attention are made.

When I was discussing the cost of gifts I found MM extremely evasive. This is unusual, we have had some extremely difficult discussions but MM generally answers questions. The only times she did not was regarding Stonar and the gifts. I repeatedly asked. I told MM I didn't believe that she could not remember the cost. I pushed and pushed but still MM was not precise. What I know from her own admission is that it was at least £50.00. I was shocked that MM thought that amount was trivial and secondly because she criticised my own Social Work values. I felt that we were going over old ground, it was another boundary issue. I was quite cross and MM said "Aren't your Social Work values all wrong Dan?"
I was still feeling uncomfortable after the meeting and took some days to reflect and explore. MM had emailed me after supervision to say she felt attacked. I spoke to the then Assistant Director for Quality and Performance, Gail Hancock. She knew MM's work and SH's case; both of which she had supported. I went to her for an independent view. I didn't give names but explained the situation and said I had been told by the worker that my values were out, she was very clear that my instinct was right. Feeling less confused I went and spoke to HR and took advice. I sought a LADO referral so that I was making the best decision. The LADO didn't feel that it met the threshold for them but that it should be investigated formally and that MM should be suspended, that there was nothing to suggest it was a CP [i.e. child protection] matter but it was a breach of professional boundaries.

I arranged to meet MM and instruct her not to come into work, management leave. I then tried to arrange a time for a formal suspension meeting which was concluded by Julie Davis - Head of Service for Quality, and Performance.

I'm concerned that MM thinks I am doing it to be unkind and have an agenda. I want to be incredibly clear it's not that. I have seen good practice from MM and I have evidence of her thanking me for being a good manager. This is about appropriate boundaries. I haven't seen her behave this way in any other case and she has not treated SH equally to others. MM did extra work as Family Finder for another young girl but not on this scale. There were no gifts as far as I am aware. It has all focused on SH.

An example of my concern about her focus on SH was when we had a transport issue for a taster week SH was going on. Transport became a big issue, no-one had sorted it and it looked as if we couldn't get SH there, it was needed on a Sunday. MM offered to do it but it was her daughter's birthday and MM had planned to go to London to visit her. I said no then MM offered again to rearrange her daughter's birthday. I said it was a kind offer in a crisis but no, it was her

daughter's birthday and she should do that. Everyone was trying to do a little extra but again I was just concerned about MM's priorities around SH. It was laudable but not recognizing boundaries; in the end it could have waited until Monday. It is good to go the extra mile but I felt this was over the top.

I am not left with any confidence that MM takes on board the spirit of what is being said and transfers it to other situations. I think she may repeat her behavior [sic] in future with another child she has an emotional connection with. I have not seen her have any insight as yet.

The points I have raised today aren't a summary of the whole case nor all the issues there are, it doesn't reflect everything that went on and it is not intended to. Where there are concerns they have been investigated. I fully acknowledge that there are other issues within the team that need to be looked at, but they are not like this, not giving gifts and this level of favouritism for a child. There is a clear conduct matter here that needs review and the behaviour of others to not, in my view, excuse practice here.

23rd November 2018

Additional Questions

AS – During the Selection Meeting on 7th September, in discussing MM taking SH to her new school with DF, did you tell MM "It's your personal goodbye, do whatever you need to do, then come back and complete your background tasks"?

DJ – I don't recall this exact phrase but I do recall something along those lines. As discussed above, I would not expect a Senior SW to need to take me through a detailed plan of a fairly straightforward visit. The plan was clear in the selection meeting that this was to say goodbye to SH and to see her placed in school. I would expect any experienced social worker to be clear that the usual professional boundaries apply to all of their work. As such 'do whatever you need to do' would not, in my view, offer any instruction or permission to breach those boundaries.

During the meeting it was clear to me that this discussion and discretion was limited to Miranda and Dee planning the visit together and not an invitation to engage in further pieces of work ie 'add ons' I would expect all involved to behave professionally

AS – During supervision on 13th September 2018 did MM raise with you that you had made the above statement "it's your personal goodbye..... " in the meeting held on 7th September 2018?

DJ – As above, I do not recall using that exact phrase or Miranda referring to it on the 13th September though she/I may have done so. I recall discussing, the further work (online memories 'book' I think), the case note and gifts. There was a clear difference in view with Miranda expressing the gifts were nothing significant and appropriate in her view. I differed strongly. The same can be said for the case note and on line memories book.
I acknowledge fully that I had agreed that Miranda take part in some kind of 'ending' with SH and that in itself was appropriate to do so for the reasons detailed in the selection meeting. Any reference to a personal goodbye would have been a reference to this. As stated above, in the event I did say, "it's your personal goodbye .... " This would not, in my view, offer any instruction or permission to breach those boundaries.

Miranda is an experienced social worker, appointed at a senior range. She has highlighted her knowledge of the HCPC [i.e. the Health and Care Professions Council] values and regulation relevant to her role to me regularly. I have the impression Miranda is an informed Social Worker. I'm of the view that had any SW who felt their manager was being permissive of, or instructing breaches of professional boundaries would challenge that manager; not use it as cover to breach boundaries.

I feel certain that no implication or permission was given to Miranda to make gifts, memory items, to embrace SH or to write in the way she did. I think it reasonable that I left discretion to Miranda and Dee planning the visit together.

To be expected to detail all acceptable and unacceptable behavior for every visit seems unreasonable to me. Given that Miranda had given a clear indication of what she would do to say goodbye (card with quote) I assessed that she had taken on board my general guidance. I was shocked to find, after the event, she had not."

42 We pause to say that the claimant's evidence on the ear-piercing incident was that she happened to have agreed to drive Ms Walton and Ms Fisher to a meeting at which they would introduce the latter to SH on 6 July 2018 and at which the claimant would tell SH that two days before, the respondent's Resource Panel had agreed (with Mr Whitley in attendance) to fund a boarding school place for SH and to ascertain her views on that. Once those three social workers had met up with SH, Ms Walton announced that she had in her possession a "permission

slip" relating to SH's ear-piercing. SH had had to wait 12 months to be given permission by the respondent to have her ears pierced, and Ms Walton suggested at the meeting that they went and got SH's ears pierced that day. Both the claimant and Ms Fisher were keen to get home, but they agreed to the proposal, and since the claimant was going to drop off both Ms Walton and SH after the meeting, the claimant and Ms Fisher went along to the ear-piercing. We accepted that evidence. Thus, there was nothing untoward in the claimant being present while SH's ears were pierced.

43 Earlier on in Ms Smith's interview of Mr Jones, there was this note of what Mr Jones said (as recorded on page G245 [2469]):

> "DJ – On the thirteenth September prior to supervision I reviewed the case note which detailed the St Christopher necklace, it was within 24 hours of the gift being made. MM. disclosed the Next voucher in supervision when questioned her about the necklace. There was no sense in which I thought MM was trying to hide that she had given a gift. I got no sense that she thought she had done anything wrong.
>
> AS – Did MM seek advice prior to giving the presents to SH?
>
> DJ – She didn't formally seek advice. At the selection meeting held on 7th September, this is when she and the Social Worker demonstrated how and why the placement meets the child's needs. We briefly discussed endings in the presence of the Social Worker. MM said she was giving SH a card with an inspirational quote. I was not overly disturbed by this. MM hadn't agreed the content with me but I wouldn't expect her to. We discussed that it was important for SH and MM that there was a proper goodbye. So it was agreed that on the day SH was due to transfer to school Dee Fisher (DF), the new Social Worker, would take her and MM would also go along and see SH settled. I wouldn't see that as a huge task. There was no request to go out or have a celebration. SH was also moving to another foster-carer so it was agreed that MM could go to that meeting. SH would not be there as she would be in school. That meeting would be the final piece of work. There was no request from MM to give anything more than a card. Our conversation was that SH needed to see that it was an ending, that she would not have a Family Finder on hand, she had a good placement and a good school.
>
> AS – Are you aware of any other gifts made to SH?
>
> DJ – In our discussion on 13th September MM made me aware of the necklace and the gift voucher. I had great difficulty gleaning any information about the cost. MM said that she didn't remember, that she wasn't sure. I was aware that the value of a necklace can vary

> greatly. The voucher was a particular issue for me because MM had objected to the amount of money SH received for clothing and felt it wasn't enough. MM had disagreed with the Children's team manager about it and I felt that she was using personal gifts to circumvent the decision. The case note refers to MM having given SH hair oils for Christmas. I don't recall MM ever mentioning that to me before."

44 There was a document entitled Record of Personal Supervision concerning the supervision of 13 September 2018 at pages C102-C107 [549-554]. On page C104, there was this record, made by Mr Jones:

> "b. MM advised that she had provided a card, a St Christopher Necklace and a Next voucher to SH to the value of about £50.00 – DJ felt that a card and a positive message was appropriate but the value of the gift is excessive. We did not agree on this matter. ...
> c. DJ asked MM to review her case [note] dated yesterday as it contain[s] more personal reflection/narrative than case actions or analysis".

45 That supervision record was signed (on page C107) by the claimant on 17 September 2018.

46 The claimant herself wrote this at page D570 in the document at pages D570-D573 [1129-1132] which she put before Ms Jackson at the latter's hearing on 25 October 2019 of the claimant's appeal against her dismissal:

> "The next voucher, this is a far richer matter. Although I mitigated the value of the voucher in light of my colleague's generous gift, it is set against the history of financial reduction of funding within my clients budget. An example of this the agreed set up cost was removed from £300 to £100. It is little wonder that in order to help success for SH external help was required as budgets are reduced to a third of their original expected norm. Again, no malice was intended in this as each gift was a point of encouragement, without expectation in return."

47 On 20 November 2018, the claimant said this to Ms Smith, as recorded at page G256 [2480]:

> "*I refute the claims that I stated the necklace cost £30. I said in total it was fess than £50. I could not do the maths quickly enough because my manager did not allow me the time and space needed to process and respond. The cost was as follows; St Christopher's £15.95, Next voucher £20, Card £1.69.*
>
> I couldn't answer how much I had spent when DJ asked me. I said I didn't know, it was irrelevant, it is a gift. I think it is rude to ask the price of gifts. So I just said less than £50.00 as I couldn't calculate it. DJ was aggressive.

I had been minded to ask for a contribution towards the gift because DJ had not set a value, but this did not happen given DJ's anger so I thought best not to ask at this time. However in supervision he did mention something about £5. I think he was going to agree to contribute £5 towards the gift, but he has not formally clarified this to date."

48 Later on in the same interview, this was noted (at page G283 [2507]):

"AS – I have a final question, you have explained that the cost of the gift was about £35.00 in total; on reflection do you think that is excessive?

MM – I think I would probably have kept to my limit of £20.00 that I usually have for gifts but I had a conversation with BW. She was not involved in delivering SH to boarding school but I knew she would have given a gift if she could have afforded it so it was like one from me and one from BW.

AS – Who did you tell SH it was from?

MM – From me." [Emphasis by underlining added.]

49 As the claimant's line manager in her then-current role in the Quality Standards department, Mr Glover-Wright provided supervision to the claimant in that role only, but she asked him on 19 September 2018 to look at her case note of 12 September 2018, which was the subject of allegation 3, as referred to by us in paragraph 19.3 above. That case note (at pages G229-G231 [2453-2456]) made no reference to a voucher. Mr Glover-Wright said to Ms Smith on 27 November 2018 as recorded at page G321 [2545] that the claimant had not asked him for advice about the gifts which she had given to SH, and that if she had done so then he would have told her that it was "inappropriate to give children gifts", as doing so "crosses that boundary". Mr Glover-Wright is then quoted to have said to Ms Smith:

"As a member of HCPC, and having written policies about it, I am very clear that we are not to give gifts to children and young people. It could be perceived as grooming. All Social Workers would be aware of that, it is in the public domain and there are cases on the HCPC website. Managers would also be reinforcing it. I don't believe there is any local custom and practice."

50 The claimant, Mr Otto and Ms Walton were not aware of any policy of the respondent concerning the giving of gifts. That is not surprising, since the respondent did not have an express such policy, i.e. of the sort referred to in the passage from the guidance set out in paragraph 30 above, namely "an agreed policy for supporting positive behaviour or recognising particular achievements". However, the respondent did expressly incorporate that passage in the

claimant's contract of employment. We return below to the evidence before us, including that of Mr Otto and Ms Walton, about the extent to which social workers employed by the respondent did in fact in practice give gifts to persons to whom they were providing social work services.

The claimant's management leave

51 The claimant was put on management leave on 21 September 2018. She was given a letter stating that she was being put on such leave and it was at pages D235-D236 (794-795). One of the things said in the letter was this (at page D235):

> "I require you to surrender the Bucks CC laptop and mobile phone to me immediately."

52 Notes were made of the meeting at which the claimant was put on management leave and given that letter and they were at pages D233-D234 (pages 792-793). They were the most contemporaneous record of the reasons for the claimant being put on management leave, and in our judgment they were accurate. They contained this passage:

> "Dan outlined that we were 'here to talk about S (young person)' and issues relating to this case.
>
> Dan said he had some serious concerns about the lack of professional boundaries observed in this situation and in particular the gift given to the young person by Miranda.
>
> Miranda did not seem to be overly surprised at the nature of the conversation.
>
> Dan said 'you have reflected a bit and I have too'.
>
> Dan said he has 'read the case note several times' (where Miranda had noted in detail about the gift she gave to the young person) and 'have now taken HR advice and professional advice and come to a conclusion about the practice shown in your work with the young person'.
>
> Dan said he has serious concerns about Miranda's conduct in this situation.
>
> Dan said Miranda appears to have 'breached professional boundaries'.
>
> He said 'I feel this has persisted over time and you're a senior SW [i.e. social worker]. You have been given advice over this before (observing professional boundaries in practice with young people). Despite the advice

given, Dan said he finds himself 'discussing an issue about a personal gift to a child'.

Dan said a decision has been made 'to place you on a management leave'.

DGW [i.e. Mr Glover-Wright] asked Miranda if she was able to understand the reasons for this.

Miranda said 'other things have been happening when seeking advice from you (Dan)'.

Miranda said she had reflected on the discussions she had in supervision about this and said 'I have taken this right to the boundaries. I accept I should have sought advice about the endings'.

She said she had not done this as she felt 'there was a barrier between us' (indicating herself and Dan)."

53 Mr Jones made a referral to the local authority designated officer (frequently referred to as the "LADO", and referred to as such in the document at pages D596-D600 [1155-1159]). The date when he did so was either (as stated at page D596) 19 July 2018 or (as stated at the bottom of page D597) 20 September 2018. The LADO's response was recorded by the LADO at the top of page D598 in the following terms (below which the name of the LADO was stated, and it was stated that the LADO referral form was returned to the referrer on 26 September 2018):

"This would not meet the threshold for LADO oversight as a child has not been harmed. However, it is clear that professional boundaries have been crossed and LADO would recommend that a full internal investigation using county conduct and disciplinary procedures be implemented.

LADO will log this as consultation and advice.

LADO considers that it would be proportionate to suspend while the investigation takes place.

Please inform LADO of the outcome."

54 In the letter dated 17 October 2018 at pages D280-D283 [839-842], the claimant was informed of disciplinary charges which were levelled against her and suspended. In numbered paragraph 2 on the first page, it was recorded that it was put to the claimant on 21 September 2018 that she had given "Christmas presents to child SH". In the document at page D362 [921] onwards, which was a statement made by the claimant to Ms Smith (to which we return in paragraph 96 below), at page D364, the claimant wrote that she admitted that in 2017 she

gave SH a Christmas present "(along with her foster carer MP and care leaver SP which was authorized by my team manager YE)".

55 The claimant elaborated on that assertion that the gift had been authorised by her line manager, Ms Ejo, at pages D369-D370 [929-929]. What the claimant said there, in two separate places, was this:

> "I had sought approval from my manager, this was discussed on the 17th November."
>
> "I had text or emailed my manager at some point during that week to seek approval and this was given."

56 Ms Smith did not interview Ms Ejo to see whether she had in fact, as alleged by the claimant, approved the Christmas gifts which the claimant gave in December 2017 to SH (via SH's foster carer). What Ms Smith did do, however, was (as she recorded in paragraph 7.1.6 of her report of her investigation into the allegations against the claimant which led to the claimant's suspension; that paragraph was on page G49 [2273]) examine the claimant's mobile telephone to see whether there was a text from the claimant to Ms Ejo "about giving Christmas gifts". The whole of paragraph 7.1.6 bears repeating:

> "Despite examining all messages between YE and MM on MM's work mobile phone from 19th November 2017 the IIO was unable to find any text to YE about giving Christmas gifts on MM's work mobile phone. YE no longer works for Buckinghamshire County Council."

57 We did have, however, in the bundle at pages F191-F196 [2147-2152], a note of an interview carried out by telephone by Ms Whiteley in the course of investigating the claimant's grievance to which we refer in paragraph 35 above. That interview took place on 24 August 2018, after Ms Ejo had left the respondent's employment which (as she was recorded on page F191 by Ms Whiteley to have said) she did "at the beginning of May 2018".

58 During the course of the investigation which led to her dismissal, the claimant asked to be given access to her work mobile telephone and her work computer, but she was never given access to her mobile telephone, and it appears from what she said in oral evidence (which was not challenged) that she was given access to only some of the contents of her work laptop. In supplementary questions in evidence in chief, she said this (i.e. words to this effect; it is a tidied-up version of EJ Hyams' note of what she said to us):

> "I was given brief access on 17 January 2019 but it was controlled. A person from the data protection team and Sam Ivory were there. My folders not in place on the laptop, so it had been tampered with. As a result, I could not find files and they made it difficult for me to look. They put the documents

> that they were allowing me to see in a folder. The documents I asked for were provided in part but also in part they were not provided. Key documents that I had asked for were not included in the list of documents."

The case note which was the subject of the allegations stated in paragraphs 19.3 and 19.5 above

59 The part of the case note at pages G229-G232 [2453-2456] which was said to have criticised "carers actions on the basis of their faith" was on page G231, which was at the end of the following passage, starting at the bottom of page G230:

> "In March 2018 driving back from Telford I am speaking to my Team Manager asking him to officially allocated SH to me as her family finder. I have known SH since August 2017 and been dipping in and out of family finding alongside the then allocated family finder. I am disturbed about her placements when I return from sick leave and I feel a responsibility, because she was placed with my carers and they've given up on her. I felt had I not been on sick leave she would not have experienced rejection in the way she did when with the [B's]. I learnt they had ended the placement at Christmas and I found this difficult as they are a Christian family and I could not understand why they'd do this to a young person at some [sic] a poignant time of year."

60 The claimant accepted before us, and during the disciplinary proceedings against her, that that case note included material that it should not have done, as it was in large part a record of her own responses to the situation of SH at various points, which she accepted was not appropriate. Mr Morgan recorded her case as put to him in the course of the hearing after which he decided that the claimant should be dismissed in his letter of dismissal dated 4 September 2019 at pages D474-D488. At pages D482-D483 [1041-1042] he wrote this about the claimant's case note at pages G229-G232]:

> "I considered the oral and written evidence in relation to this allegation and reviewed the case note which is at its core. Primarily this evidence comes from the IO [i.e. Ms Smith], witnesses and through your testimony and mitigation, (see mitigation paragraph). There is no doubt in my view that the case note as it stands, is inappropriate and not in line with the standard expected from a senior social worker. You put forward a number of elements by way of explanation for its style, content and standard. These include the influence on your writing of your medical conditions and that the content was actually in draft form and was mistakenly finalised.
>
> Whether this note was in draft or not, I have concerns about the content and approach being taken. This is a note on a young person's case record – which can be accessed by them at a later date to help them understand

> their journey and the involvement of caring professionals. Whether draft or not, the tenant [sic] of the text and the stance from which it is provided are inappropriate from a professional, working as a family finder within children's services. You have subsequently acknowledged that the content was inappropriate on a child's record. You stated that you usually prepare work in draft and then re-visit and finalise and that the case note here, was in your opinion a first draft and so should be viewed with that in mind. Evidence was presented by both the IO and a witness that challenges that view. As an experienced user of LCS [i.e. the respondent's digital case recording system], not only is the recording of drafts not a recommended practice (DGW) [i.e. Mr Glover-Wright] it is also not, in their submissions plausible that a draft can be inadvertently finalised as you propose, as the process requires more than a single erroneous computer click to finalise any entry.
>
> You indicated that you sought advice on how best to correct the entry; however this was not until some days later - outside the required 48 hour completion standard for case notes to be finalised. I find that this weakens the credibility of your account. This is not in my view, as has been suggested a 'simple mistake' – it is a fundamentally inappropriate case note, draft or not – which majors on the author's feelings and emotions and makes inappropriate comments about the faith and practice of foster carers."

61 However, the claimant's own reflective record, of which there was a copy at pages D97-D196 [656-755] contained this passage on page D174 [733]:

> 'Dan said "I've had read you [sic] case note and it's fine if you are a student writing a journal". I said "its in draft"?. Dan looked at me, he seemed annoyed. I felt really upset. Why is he having a go at my case note?'

62 Thus, the claimant was at first not of the view that her case note was in inappropriate terms.

The procedure followed in dismissing the claimant

<u>The disciplinary hearing</u>

63 The disciplinary hearing after which the claimant was dismissed was conducted by Mr Morgan on 27 August 2019. That hearing was convened by Mr Morgan, who sent the claimant the letter dated 31 July 2019 at pages D891-D894 [1450-1453]. There were notes of the hearing at pages D418-D473 [977-1032]. The claimant was represented at the hearing by Ms Lyse Hurd, of the BASW, and accompanied by Mr Alan Castellaro, who was described in the notes as "AS Mentor, Specialist Mentoring & Employment Support" ("AS" being short either for Autistic Spectrum, we inferred, or Autism Specialist, which was how he was

described in the notes of the appeal hearing to which we refer in paragraph 65 below). The hearing started at 10:15 and ended at 18:00. Written submissions were sent to Mr Morgan in writing after the end of the hearing. Those for the claimant were at pages D410-D417 [969-976]. In regard to the evidence given during the hearing, we noted the following passages of Mr Morgan's evidence, which were not disputed.

63.1 In paragraph 41 of his witness statement, Mr Morgan said this:

> 'David Glover-Wright denied being asked by the Claimant to help remove the case note and said "no, once it's there it's there on LCS but you can add an addendum" (D448).'

63.2 In paragraph 42 of his witness statement, Mr Morgan said this:

> 'David Glover-Wright didn't feel social workers should give gifts to children. In regard to whether the Claimant would have had any guidance on these points David Glover-Wright said "there are HCPC guidelines. The guidance is available on Tri-X should she have wanted to consult about giving gifts to a child. The Council also has policies associated with giving of gifts" (D448).'

63.3 However, the final sentence of that extract was not correct, since (as we say in paragraph 50 above) the respondent did not have any written policy of the sort to which the "guidance ... available on Tri-X", in other words as set out by us in paragraph 30 above, applied, so that that guidance had to be read in isolation rather than as supplemented by such a written policy.

64 The submissions for the claimant included the following passages (the italics being in the original):

64.1 On page D410 [969] Ms Hurd opened her closing submissions in this way:

> "This case is not about safeguarding and it never has been. This child was never at risk of harm from MM and she never will be. This case is not about boundaries. There is actually no evidence in this bundle, or from any of the witnesses that MM had done anything to try and infiltrate SH's life in any way other than as a family finder – however, this case wasn't just about finding a family. It was about finding a family *and* a boarding school. In that respect, it was unusual in the realm of fostering. However, what is very clear in the evidence is that MM was trying to ensure that the team around the child were consistent and that MM understood whose role was what.
>
> Now, you've seen and heard evidence in here that MM bought the child a bottle of shampoo, a necklace and a voucher. Contrary to what you

are being led to believe, MM *does* understand why that has been raised as an issue. She also understands that she has no evidence to support having sought permission from her manager about that. She is simply asking you to believe her. This has been used to compile evidence that MM was overly involved with this child. She made it clear that the bottle of shampoo was a secondary thought after finding out from the foster carer that SH was staying with her. The answer to this is as MM has stated in her evidence, she will not use her own money to buy gifts for service users. She will seek permission and then seek the funding up front. She has done what is expected of a social worker, she has reflected on this and fully understands the concerns and how to resolve them.

MM has been criticised for 'showing this child favouritism'. And doing things for this particular child that she hasn't done for others. Well, I would submit that, if you are doing social work right, you will do something, one thing at least, for *every* child that you do not do for the others. Treating children equally does not mean treating them the same. If you treat them the *same*, you lose sight of the individual child. I don't know very many *good* social workers who have not had at least one child who seemed to be the 'underdog' of their caseload - in this case, SH was technically the only child on MM's caseload. You do what you can to make that child feel special. You tell them things like 'I care for you unconditionally.' In other words, she is telling the child that 'there is nothing you can do to sabotage this particular professional relationship.' A social worker has the power and ability to make a child feel loved and cared for, yet still maintain professional boundaries. If that ability is not used by *every* social worker who works with children, then maybe they need to consider a different profession.

Therefore, in relation to allegations one and two: yes, MM bought a gift - one at Christmas and then a voucher and necklace when she was saying goodbye to the child. No, it was not to the value of £50 and no, she did not force this gift onto the child. I will remind you that, even the policies upon which BCC are currently relying in relation to gift giving is not clear about *value*, (App 20, page 15 of the policy)."

64.2 At the bottom of that page and the top of the next, Ms Hurd wrote this:

"MM made the child understand that she is worthy of receiving gifts. The 'golden thread' that Dan was criticising in his evidence for some reason. Every child, looked after or not, needs a 'golden thread' though their lives. That simply means that children should have good memories from their childhood that they can then reach for when times are tough, or even if it's just to tell their children about it someday. There is nothing to criticise in that. Was there a secondary gain for MM in relation to this

giving of a gift and this good-bye? I would say that it is most likely that there was.

For MM, however, that secondary gain will, again, be more related to her professional status, rather than personal, as she very eloquently stated yesterday. Is that gross misconduct to actually get a professional excitement that you are moving a child on to another phase in their life? Is it gross misconduct to say to yourself, 'Well, done. You made a success out of that one.'? Of course it isn't. MM should have been more specific with her manager about her good-bye. She admits that. She has given a full and clear response regarding her learning about gift giving in her statement and in her evidence yesterday. The only allegation here is that she did not get permission from her line manager about the specifics regarding the gift. The mitigation here is the vagueness of the manager's instructions and, of course, MM's understanding of those instructions. In relation to whether gift giving is an appropriate way to provide an ending for a child or whether it is appropriate at all, I would like to remind you that, the culture in BCC is not straightforward in relation to gift giving. The policy is vague at best (page 15, app 20) and the '*Guidance for Safer Working .. in education settings*' refers you back to 'local policy', (page 9, appendix 21 says that '*settings should have policies in place and that any reward given to a pupil or student should be in fine with local practice*', only that policy does not exist."

64.3 On page D415 [974], Ms Hurd wrote this:

"DGW [i.e. Mr Glover-Wright] had also attempted to assert that HCPC forbids or provides guidance on gift giving. It does not. This is important. As a PSW [i.e. a Principal Social Worker], he should know the HCPC standards as well as I do as a BASW rep, if not better. He is making an assertion to back up his already strongly held belief that social workers should not give gifts. He is very entitled to hold that belief, even though it is unrealistic and absolutely does not reflect reality. I don't know many public sector employees who've not provided a gift of some sort for a child with whom they are working. Some social workers get carried away with this. They do it constantly and to a high degree for all sorts of reasons-primarily some sort of secondary gain. That is not what has happened here. What happened is that MM saw a child who had a particularly tough time since she has been in care. She has had several placements that have ended abruptly and MM wanted to give her one good memory from her childhood of a good bye that was good for her. Does that make MM a bad social worker? It does not. The mistake is as MM said in her evidence, she should have written up a detailed good-bye plan, shared it and tweaked it with her line manager and then

> gotten the funding for any agreed gifts from management. That is a learning point, not gross misconduct."

64.4 In relation to the case note at pages G229-G232 [2453-2456], at page D412 [971], Ms Hurd wrote this:

> "She [i.e. the claimant] wrote it as a draft."

64.5 And at page D413, Ms Hurd wrote this:

> "With looked after children, life story work is absolutely crucial. It is good practice. MM was adding to this child's life story from her involvement. That is good practice. That is being a social worker. She turned everything over when instructed to. There is no issue here. Thank goodness she did something though, because the social worker was clearly unaware that she should be doing it."

The appeal hearing

65 As stated above, the claimant appealed against Mr Morgan's decision that she should be dismissed. The appeal hearing was conducted by Ms Karen Jackson, the respondent's Chair and Service Director ASC Operations. The appeal hearing took place on 20 January 2020. There were notes of the hearing in several places in the bundle, but the clearest were at pages D557-D573 [1116-1132], and they incorporated, by appending it, the claimant's document to which we refer in paragraph 46 above.

66 The claimant was again represented at the appeal hearing by Ms Hurd and accompanied by Mr Castellaro.

67 During the hearing, there was this exchange, noted at the top of page D561 [1120]:

> "LH [i.e. Ms Hurd] wanted to know how GM [i.e. Mr Morgan] had concluded that autism played no role in MM's [i.e. the claimant's] case recording. GM said he had read the medical evidence and associated documentation which formed part of the hearing pack. GM concluded that as a Senior Social Worker the case note was focussed on opinion rather than the child in question. He said that we needed to bear in mind that the diagnosis was made after the date of the original issues. LH wanted to know what significance the timing of the diagnosis had, as MM still had the condition whether she was diagnosed or not. GM said that diagnosis does not have a material impact. From reading the information presented, GM concluded that MM's case note was inappropriate. LH wanted to know whether this

was based on fact or his own opinion. GM advised that he reached his conclusion based on all of the evidence with which he was presented."

68 At the bottom of that page and the top of the next one, there was this record:

"LH advised that legally an employer is meant to put reasonable adjustments in place as soon as an employee advises them that they may have autism, she wanted to know whether GM agrees that DJ did not do that. GM responded that DJ did do this in a limited way. LH wanted to know whether GM feels that because more was not done, this negatively affected MM's performance in Bucks. GM said that this is difficult to quantify.

LH wanted to know what research did GM do in preparation regarding MM's medical condition. GM advised that he had done some research and had read a paper on neuro-diversity which was published by the CIPD. MM requested a copy of what he had read."

69 Ms Jackson dismissed the claimant's appeal in the letter dated 3 February 2020 at pages D542-D556 [1101-1115]. There were in that letter the following key passages.

70 At pages D543-D544 [1102-1103] there was this passage:

"I have set out below my response to each point which I have taken from your Appeal letter and provided a response against each one accordingly:

1. **The outcome letter fails to detail exactly how the chair concluded that autism played no role in any of the recordings she made or any of the interactions that she has had with management at Buckinghamshire County Council.**

    a. **It is unclear how he reached that conclusion other than it was his own opinion. It is not evidence-based.**

Findings:

It is my view that once you shared your medical condition with Dan Jones (DJ) he followed the Council's health and attendance procedures. It has been evidenced throughout your employment at Buckinghamshire County Council that you have had a number of OH referrals (July 2016, August 2016, December 2017, February 2018 and May 2019) and I acknowledge you sought your most recent OH referral as it was not progressed until October 2019 due to your ill health. I referred you to OH again on the 9th January at 17:02 via email. You have declined a specialist referral with an Independent Employment Psychologist. I find from the evidence submitted that DJ shared his concerns regarding your behaviours, as he would any

other person in his team displaying inappropriate conduct in their duties in supervision.

From the evidence submitted GM clearly did take into consideration the role that autism played. In the Mitigation section of Gareth Morgan's (GM) outcome letter, you have admitted to deploying 'masking' for many years as a coping technique to operate as a 'neuro- typical' individual. GM had also completed further reading around the neurodiversity in the document (CIPD) which is attached to this e-mail.

Having listened carefully and considered the evidence submitted, GM concluded that *"on the balance of probabilities the condition and its impact on you does not in my view negate or explain your actions as a Senior Social Worker of many years' experience and strong knowledge of policy and process associated with the profession and your current role. You have practiced consistently for a number of years since qualification yet your decisions and actions in relation to SH including gifting are in contravention of guidance and policy and appear to be deliberate, planned actions once 13 months before diagnosis and again 5 months prior, acts which you chose not to share with your manager"*.

I believe the above provides a reasoned explanation of how GM concluded that autism was not what caused your misconduct."

71 At pages D545-D547 [1104-1106] there was this passage:

"**4. The Chair has erroneously stated that Dan Jones acted appropriately when MM alerted him to her potential autism. The evidence is clear that the OH referral was not made until 2 months later, and only at MM's insistence and did not cover the aspects of MM's potential diagnosis that was necessary. Although that fact is acknowledged, the chair implicates that Dan Jones' actions were appropriate. The lack of response does not appear to have been considered by the chair.**

a. The chair failed to consider how MM's autism may have impacted on her during the time she was being supervised by Dan Jones.

b. There was no consideration for DJ's lack of knowledge about autism.

c. No consideration was given to the fact that DJ had no professional curiosity about what a member of his staff was saying.

d. The fact that DJ was a social worker and should have known better was not even considered by the chair.

Findings:

We referred you to OH again on 9th January at 17:02 via email and you have declined a specialist referral with an Independent Employment Psychologist around what should have been in place

I would like to acknowledge the information you have provided, which has been helpful reading and on top of my already prior knowledge and experience in dyslexia, neurodivergence and autism.

There was no formal diagnosis prior to your suspension or any basis prior to this whereby the Council could reasonably have known that suspected childhood autism entailed a mental impairment which would sufficiently interfere with your normal day to day activities as to amount to a 'disability'. An Occupational Health (OH) referral was directed by DJ. From your evidence around the Dyslexia in the Workplace, adjustments were put in place such as flexible working hours, use of coloured paper, 1.5 spacing with size 12 Arial font.

Taking into consideration your formal diagnosis at the point of dismissal it would not have stopped you following procedures. As an experienced Senior Social Worker, you should have been aware that giving gifts to an individual may have been seen as a form of favouritism and grooming.

DJ appropriately referred you to OH and there were delays that you acknowledge. In addition, I reviewed your supervision notes dated in 2018, pg. 3 that confirmed Access to Work reports and OH support which was funded by Buckinghamshire County Council for counselling sessions which took place during February – April 2018. Extra sessions had been recommended on the 17th May 2018 to which you had declined further PAM Assistance (discussed in your supervision notes dated 13 Sept 2018). Based on the evidence my view is that DJ was aware and had taken appropriate steps in order to support you further."

72 At pages D548-D549 [1107-1108], there was this passage:

"**7. The Chair failed to consider the ambiguity of the policies regarding gift giving, including the fact that a local policy and a social work specific policy does not exist.**

a. The Chair has considered the allegation of gift-giving as though gift-giving is not accepted practice in

Buckinghamshire County Council and social work as a profession.

b. There was also no consideration given to the positive impact that the giving of this gift would have had on this child specifically.

Findings:

Social work ethics books talk clearly about not accepting gifts, so giving gifts will not be appropriate either. The issue is not about whether the child viewed the gifts positively, which remains unclear. The Council's Code of Conduct draws together existing policies (including Conduct & Discipline) and guidance and should be read in conjunction with Guidance for Safer Working Practice for those working with Children and Young People in Education Settings and the Safeguarding Code of Conduct for all those working or Visiting Vulnerable Adults. Your signed contract of employment requires you to adhere to these accordingly.

I find it is specified in Guidance for Safe Practice of Adults Working with Young People, Powers and Positions of Trust, that singling out children, is not equal and consistent. It clearly says adults should always have professional boundaries and consideration how actions may be viewed by others. You not only put the child at risk through your actions but also made yourself vulnerable by giving gifts to a child. It is inadvisable to give personal gifts which could suggest coercive behavior which might also give a perception of grooming. Any reward should be in accordance with agreement and not based on favouritism. You left this open to interpretation. With regard to ambiguity around the policy, I find that it is clear in the two policies in the hearing bundle (Guidance for Safer Working Practice for Adults who Work with Children and Young People [page 15/ Section 10] & Guidance for Safer Working Practice for those working with Children and Young People in Education Settings [page 9 / Section 9) that a discussion should always take place before this happens with management. As a Senior Social Worker who has clearly done considerable academic work and research, I would have expected you to have understood the policies and social worker values."

73 At page D550 [1109] there was this passage:

"**9. The Chair seems to have upheld all the aspects of the disciplinary and terminated MM's contract without considering that none of MM's actions had any kind of negative impact on this child whatsoever. In fact, all of the evidence is the opposite. The evidence indicates that MM's interventions were very positive toward this child; therefore, a dismissal does not make sense.**

Findings:

It is not about the positives or negatives for the child, but about your actions as a Senior Social Worker in a professional role failing to follow the policies and procedures which has brought into question key social work ethics. This undermined the relationship of trust and confidence between yourself, your clients and a vulnerable child. Clearly a big part of this is about professional boundaries and those have been seriously overstepped and particularly as a social worker needing to work within our professional HCPC which Social Workers are expected to follow. This was not a one off, as by your own admission you referred to giving other gifts to SH and to foster carers, and even when you were on sick leave you went to a foster carer's home to deliver presents. Furthermore, your comment to SH that your care was unconditional and your invitation to her to call you at any time that she wanted for an update shows a concerning wider blurring of boundaries."

74 At pages D551-D552 [1110-1111] there was this passage:

"**12. And, perhaps the most significant aspect of this appeal is that there have never been any reasonable adjustments put in place regarding MM's high functioning autism, nor has she ever been properly supported by any manager at Buckinghamshire County Council in respect of neurodiversity, including autism; therefore, terminating at this stage is premature.**

a. There is no evidence as to how MM will perform with the adjustments in place and now that the grievance was upheld and the bullying was acknowledged.

Findings:

Buckinghamshire County Council was under no duty to make reasonable adjustments before it was aware that your autism potentially entailed a mental impairment which would sufficiently interfere with your normal day to day activities as this only came to light after your suspension. Reasonable adjustments had already been made in relation to other medical conditions you had made known to the employer including flexible working and change of paper. From your supervision notes you agreed that the changes were making a positive impact.

As previously mentioned, the grievance was dealt with separately. GM was clear in the previous letter about the adjustments put into place when you joined Buckinghamshire County Council. There had been a pre-employment fit for work assessment, numerous return to work interviews,

access to a work report, OH support, extra counselling sessions and extra PAMS Assist, which you declined. All adjustments were in place and you acknowledge in your supervision notes the adjustments were having a positive impact. Reasonable adjustments were also put into place to support you at the disciplinary hearings.

It is also of great concern that you chose to withhold your autism through 'masking' throughout much of your employment potentially putting at risk the vulnerable children with which you were working."

75 At pages D552-D553 [1111-1112] there was this passage:

"**13. There is no evidence in the outcome letter that the Chair considered any other alternative to termination, especially given the circumstances of this case. I would have expected him to specify why those other options were not appropriate in this case.**

Findings:

In the questioning at the appeal hearing GM was very clear that he did consider and review all appropriate sanctions available to him prior to reaching the decision to dismiss you. GM reiterated that he took full account of everything discussed during the original conduct and discipline hearing and all the evidence provided in the hearing bundle. He confirmed that he considered a final written warning and possible redeployment into another team within Children's Services.

I have checked myself to see whether there may have been another role that you could have been offered as alternative to dismissal. However, I understand that all roles within Children's services require individuals to demonstrate and understand boundaries. I therefore agree with GM's findings that your repeated behaviors and lack of appreciation and understanding for the significance of the breaches would make it difficult for him to allow you to continue to be employed by the Council."

76 At pages D553-D554 [1111-1112] there was this passage:

"**14. We would also like to request that someone completely independent of Buckinghamshire County Council chairs any appeal and that this person has the right to make a decision on behalf of the council. We would also request that this person has knowledge of, and training in regard to autism. We no longer have trust and confidence in Buckinghamshire County Council's ability to consider the facts in this case in a fair and impartial manner.**

Findings:

I find that the Service did make reasonable adjustments with regard to your request by arranging for a different senior manager, outside of the Children's Service, to hear your appeal in line with Buckinghamshire County Council policy and procedures. I can also confirm that I have some knowledge with regard to Autism and Neurodiversity. I am not an expert in this field but I can confirm that I undertook my own research into some of the medical conditions you have as well as I reviewing all the information provided by you.

In addition, I also requested your consent to participate in an Occupational Health referral (letter dated 12.12.19), to support me in taking account of your autism in relation to my findings. You had the opportunity to review the content beforehand, which you did. Amendments were included and I also confirmed that the appointment would be with a Chartered Occupational Psychologist, skilled in the assessment of neuro-divergence conditions (email dated 09.01.20). You refused to attend despite my explanation and revisions I had made to the referral form which took into consideration your comments. I have therefore had to reach my conclusions without the insight which such medical advice might have provided."

77 We were puzzled by the claimant's refusal to undergo any kind of further assessment (referred to by the parties as an occupational health assessment) as mentioned repeatedly by Ms Jackson. As a result of our making that clear, a documentary trail was put before us which showed that the following events occurred in that regard.

78 On 12 December 2019, Ms Jackson wrote a letter to the claimant, inviting her to the appeal hearing which took place on 10 January 2020 as we describe above. In that letter, Ms Jackson wrote this:

> "I would like to ask for your consent to participate in an Occupational Health referral as I would like to obtain further medical advice to assist me whilst deliberating the conclusions of this case. This is because you have stated that your condition may have contributed towards the behaviours and actions which were under investigation. Please be advised that I will share the content of the OH referral before it is sent. Can you please confirm your consent to attend an OH appointment in writing by close of play on the 19th December 2019."

79 On 20 December 2019, the claimant wrote that she was "agreeable to attend an OH referral."

80 However, on 23 December 2019, Ms Hurd wrote this to Ms Jackson:

> "[C]an you please clarify your reason for asking Miranda to attend an OH appointment? Your letter reads as though you want to rely on this to make your decision. If that is the case, your OH doctor is not qualified to provide you with information regarding Miranda's complex medical issues."

81 Before receiving a response to that email, Ms Hurd then, on the next day, 24 December 2019, wrote this to Ms Jackson:

> "I've had [a] chance to look at your referral to OH and I have advised Miranda not to participate for the following reasons:
>
> 1. I do not see how a psychological assessment is going to assist you. Miranda has ASD and dyslexia. These conditions were exacerbated by the bullying she experienced by 3 of your managers at BCC. This is historical, so an assessment of her mental health at this stage is moot. Furthermore, ASD is not a mental health issue.
>
> 2. OH is not the appropriate setting in which to assess Miranda's 'fitness to practice' social work. That is a matter for a panel of her regulatory body. Her current regulator has all of Miranda's medical information and are aware of her condition. Therefore, I fail to see what OH can tell you.
>
> 3. You are also asking them to discuss Miranda's professional judgement when assessing a child. I have seen nothing that would indicate that Miranda's assessments of children, fosterers or families has ever been called into question, therefore, I fail to see the relevance to the question with the allegation of completing an inappropriately written case recording.
>
> 4. You are also asking OH to be mind-readers and determine Miranda's ability to adhere to policies. To what end? What will this question achieve? Again, these allegations are historical and you are asking OH to assess Miranda in 2020, on issues that occurred in 2017.
>
> 5. I am disappointed that the OH referral does not seem to cover the issues that are being put forward in our defence, nor do the questions appear to demonstrate an understanding of autism. This is counter to ACAS guidance that you should be seeking information to exonerate the employee as well as prove their guilt. There is nothing in your questions about the bullying that Miranda was subjected to. You do not ask about the number of managers she's had and how that may have impacted on her autism and

> dyslexia. You do not ask about how this could impact on the writing abilities of someone with two types of neurodivergence with resulting physical damage.
>
> Therefore, Miranda will not be participating in the OH assessment as it is currently written. I am also officially expressing concern that there remains no attempt on the part of BCC to understand autism or how it might impact your employees."

82 Ms Jackson responded on the same day to the first of Ms Hurd's emails (i.e. of 23 December 2019):

> "As stated in my letter I am obtaining additional medical advice, which Miranda has consented to, to assist me whilst I deliberate all the factors of this case including what I hear on the day of appeal hearing."

83 Shortly afterwards, and on the same day, Ms Hurd responded:

> "Thank you for your responses. Because of your answer to my second question, I am going to assume that you wish to use the further OH assessment to assist you in your decision making. That being the case, it is my view that this is not in Miranda's best interest. Your OH doctors do not specialise in autism, neurodiversity or neurogical issues, therefore, this would be a pointless exercise. She has always been willing to submit medical evidence from her consultants to you, therefore, I will speak to her about doing that.
>
> If Miranda feels otherwise to what I've said above, she will clarify that."

84 On 27 December 2019, the claimant wrote to Ms Jackson:

> "To clarify, I'm formally withdrawing my consent for OH referral for reasons stated below in the email sent by Lyse."

85 Ms Jackson then, on 9 January 2020, wrote a detailed response to Ms Hurd's email of 24 January 2019 set out in paragraph 81 above. Ms Jackson's text was in blue font in the original with the parts of Ms Hurd's email of 24 January 2019 in black font. In the following repetition of the complete text of the email, we have instead simply underlined the parts of Ms Hurd's email which were repeated by Ms Jackson, so that the underlined text is that of Ms Hurd:

> "Dear Miranda and Lyse
>
> I write with reference to your email dated 24th December 2019, in relation to my request for you to attend Psychological Assessment.

Please be advised that I have taken your points into consideration and I [have] been liaising with our Occupational Health provider. I have responded to each of your points below as a result. I have also made some amendments to the questions in the attached draft OH referral. I have provided two versions, one with tracked changes and a 'clean' version. This will help to see where the specific changes have been made.

Can you please review my revisions in the OH referral and let me know whether you would re-consider attending the appointment. Can you please let me know by tomorrow, Friday 10th January.

1. I do not see how a psychological assessment is going to assist you. Miranda has ASD and dyslexia.

OH have confirmed that their clinician Paula Kopiowski, is a Chartered Occupational Psychologist regulated by the BPS. She is skilled in the assessment of neuro-divergent conditions. These conditions were exacerbated by the bullying she experienced by 3 of your managers at BCC. This is historical, so an assessment of her mental health at this stage is moot. Furthermore, ASD is not a mental health issue. I would like to clarify that the outcome of the grievances in October 2018 found none of the allegations to be substantiated. This was confirmed in letters dated 19th October 2018. You exercised your right of appeal. The outcome was to uphold the original grievance decision made at Stage 1 and a letter dated 11.03.19 confirmed this.

2. OH is not the appropriate setting in which to assess Miranda's 'fitness to practice' social work. That is a matter for a panel of her regulatory body. Her current regulator has all of Miranda's medical information and are aware of her condition. Therefore, I fail to see what OH can tell you.

This response is similar to the previous response. OH have advised that Paula is a fully a [sic] qualified, independent and experienced Psychologist who would be able to carry out the assessment in accordance with the request in the revised referral.

3. You are also asking them to discuss Miranda's professional judgement when assessing a child. I have seen nothing that would indicate that Miranda's assessments of children, fosterers or families has ever been called into question, therefore, I fail to see the relevance to the question with the allegation of completing an inappropriately written case recording.

The purpose of the question relates to the completion of the assessment/case note content. I have revised the question in the referral.

4. You are also asking OH to be mind-readers and determine Miranda's ability to adhere to policies. To what end? What will this question achieve? Again, these allegations are historical and you are asking OH to assess Miranda in 2020, on issues that occurred in 2017.

The question has been revised. OH have advised that Paula has worked in this sector for many years and since joining PAM over two years ago, she has undertaken a number of similar assessments

5. I am disappointed that the OH referral does not seem to cover the issues that are being put forward in our defence, nor do the questions appear to demonstrate an understanding of autism. This is counter to ACAS guidance that you should be seeking information to exonerate the employee as well as prove their guilt. There is nothing in your questions about the bullying that Miranda was subjected to. You do not ask about the number of managers she's had and how that may have impacted on her autism and dyslexia. You do not ask about how this could impact on the writing abilities of someone with two types of neurodivergence with resulting physical damage.

I have taken your comments into account and made revisions to the attached OH referral, pls review."

86 We were not shown the revised "OH referral" which the claimant and Ms Hurd were asked to review, but it was not material since Ms Hurd responded to Ms Jackson's email set out in the preceding paragraph above on the same day:

"Dear Karen,

Thank you for your letter which we are considering, however, your comment about Miranda's grievance goes a very long way to explaining why BCC has never taken the bullying outcome in 2018 seriously and referred these managers on to their registering bodies. Miranda has made this referral on her own and these three women, Sarah Woolcott, Lisa Thomas and Yoni Eto are now facing fitness to practice proceedings. I would have assumed you would be aware of that.

Just to clarify with you the outcome of Miranda's October 2018 grievance:

In respect of Sara Woolcott: 1 (c) ii was partially substantiated, 2 a, b, f, I, j were substantiated, c was partially substantiated.

In respect of Lisa Thomas: 2 c and j were partially substantiated

> In respect of Yoni Eto 1 a, b, d, 2 c, e, f, I, l, n and 3 c-e and 4 a and b were substantiated. 2 g and 3 a, b were partially substantiated.
>
> Furthermore, the allegations that were upheld fell largely into the 'bullying and harassment' category with 'aggression and humiliation' being mentioned throughout. I have attached all three outcomes so that you can read these for yourself. I would like reassurances from you tomorrow and I want it recorded in the minutes that you acknowledge that Miranda was bullied and harassed by three of your managers during the time that these allegations were being formulated against her. If you are not prepared to acknowledge that and minute it, I do not see any point in continuing with these proceedings.
>
> I have been utterly baffled why Gareth never took Miranda's bullying seriously and now, with the response you just gave, indicating that you are of the belief that this grievance was not upheld, I can see that either you have been provided with misinformation about the grievance, or your interpretation of it is that the issues that were substantiated against these three women does not constitute bullying in the minds of BCC management. Either way, it does not ensure faith that this process has been fair and impartial all along.
>
> I will see you at the hearing tomorrow and I will be raising this as a preliminary matter as it is crucial to the continued victimisation Miranda continues to face at BCC."

87 In addition, as it was made clear to us during the hearing before us and as was clear from the appeal hearing notes and Ms Jackson's outcome letter, to which we refer above, the claimant did not reconsider her decision to refuse to attend the referral to (in the event) "a Chartered Occupational Psychologist regulated by the BPS [who was] skilled in the assessment of neuro-divergent conditions".

One aspect of the claimant's oral evidence

88 Before turning to the relevant law, we record several further parts of the evidence before us. One aspect of the claimant's evidence given to us which was in our view significant was that the claimant said to us when giving oral evidence about what happened at the "selection" meeting of 7 September 2018 to which Mr Jones referred in the extract from the record of what he said to Ms Smith that we have set out in paragraph 43 above:

> "At that selection meeting I was not even going to be part of the transition to boarding school so in my mind the ending of my work with the child was the CLA [Children Looked After] review; so it was not even in my thought process so it came as a surprise that my manager said end it on 12

> September when you have delivered SH to boarding school. On 7 September we were still in the process of finding the family placement so the natural ending was at the CLA review; on 7 September Dan said to end my role on 12th and to go with DF [SH's social worker, who had replaced Ms Walton] to do the transition. So up to then I had not had it in mind to be involved in that direct work. So I cannot already have had gifts in my mind."

89 However, that was not borne out by the record at page G255 [2479], which was a record of what the claimant had said to Ms Smith on 20 November 2018. The relevant part was in these terms:

> 'This was a double transition because SH had a new school and a new carer. I would normally attend the next CLA review and then exit. DJ asked about closure. I had already spoken to DF that morning on our way back from Luton and said I needed to move on and that it would be really great to exit by seeing SH into boarding school and then end my role rather than waiting for the next CLA review. I acknowledge that this was perhaps about my needs; this has been a very difficult and stressful case. I tentatively suggested attending the boarding school introduction day. DJ responded that he was thinking the same. I was surprised and happy. DJ said "yes, do your endings, it's your personal goodbye, do whatever it is you need to do". He actually said "It's your personal goodbye, do whatever it is that you need to do, then come back and complete your professional background tasks." I took that to be whatever I felt was appropriate; to just do it. I took it as a management instruction and followed it.'

90 Thus, the claimant was capable of mis-remembering something highly material. (We did not see what she said as being in any way a deliberate misrepresentation of what had been in her mind at the time.)

Professional boundaries

91 In addition, in the first part of her cross-examination the claimant was asked a number of questions by Mr Davidson about boundaries and their importance. The boundaries were between the social worker and those to whom the social worker in question was providing social work services. The claimant was reluctant to accept as a general proposition that such boundaries were important, and eventually said this (as recorded by EJ Hyams in notes which were improved after the hearing, so the exchange may not be a completely accurate record of the precise words which were said) in the following exchange which she had with Mr Davidson about them:

> "Q: It is not acceptable for a social worker to take his or her own view of what is in the best interests of the child and not have regard to the applicable guidance, is it?

A: You have to assess the needs of the child before you determine the intervention; you have to look at it in the context of the law, for example the Children Act 1989 or NICE [i.e. the National Institute for Health and Care Guidance] guidelines. You are working with so many structures and guidance and laws and policies and procedures and the child's own culture and heritage; so you are constantly working with all of that to make a decision about what is in the best interests of the child to ensure that the child has his or her needs met.

Q: Boundaries are one of the key aspects of social work?
A: I think that "boundaries" is an interesting concept in social work; there is a lot of work being done on boundaries. The British Association of Social Workers is doing a lot of work on this. It is important to know your boundaries and there is a reason for boundaries. I accept that therefore in the context that it is not something that – it is a living, progressive framework that develops over time in line with changes in society. So for example if you think about the history of social work and where it has developed from; it developed from middle class women at home who wanted to do something good for their communities and it was not regulated. The first regulation was the social care council.

Q: It is universally accepted in social work that boundaries are important?
A: I think that at the time and currently boundaries are part of our profession; how you interpret them can be open to debate."

92 The claimant was then referred by Mr Davidson to paragraph 1.7 of the HCPC's document entitled "Standards of conduct, performance and ethics" which we have set out in paragraph 27 above, namely (for convenience):

"**Maintain appropriate boundaries**

You must keep your relationships with service users and carers professional."

93 Mr Davidson then put it to the claimant that as a result of that sentence, "any competent and experienced social worker should always be mindful of the need to maintain appropriate boundaries", to which the claimant said: "I do agree".

94 There was then the following exchange between them (taken from the judge's notes and tidied up, so, again, it may not be precisely verbatim):

"Q: And in particular one should seek advice from others, including, if not especially, from one's manager on all ethical questions including on appropriate boundaries?
A: Yes.

Q: The first person you would go to would be your manager where you had a question about boundaries or you were going to embark on a course of conduct that engaged the question of boundaries?
A: So your question is?

Q: Given the need to maintain appropriate boundaries, when your work throws up a question of boundaries, it may be advisable for you to consult in particular your manager on the question of boundaries?
A: When I spoke to the HCPC they said that your manager should not have used the term "personal goodbye". So my manager gave me an instruction that, now we look at it in more detail, does not fit in with what you are telling me here; so he also breached professional boundaries.

Q: Blurred boundaries can take a number of forms?
A: Yes.

Q: There can be an explicit relationship with a boundary. That was not so here. And there is at the other end of the spectrum a blurring of the lines between a professional relationship between carer and caree and the incidence of personal feelings? And what I put to you is that at the latter end the reason that that is important is that it could interfere with the promotion or protection of the interests of the young person if the carer is motivated by their personal feelings as opposed to their professional judgement? That is a concern is it not?
A: You talk about reflective practice which borderlines into therapeutic practice; it is the emotion of the foster carer, birth children and adopted children and professionals around them. You have to be careful to avoid projecting your own feelings onto the situation which is why supervisor/supervisee relationship is very important. If that does not happen then you will see poor practice and chaos and poor management. Social workers will struggle in their roles; some get too involved; some cannot cope. As social workers we take a lot; we work constantly in trauma and can take on secondary trauma.

So here there was a child with trauma; where there is no good management behind you, you can run into difficulties. I had been raising that for quite some time. But you have to have a manager who understands trauma and you have to have an environment in which you can process what you are feeling.

In the 1980s we used to have reflective and [words missed] practice, then we moved into managerialism. Now there is a move back."

95 Later on in her cross-examination, the claimant said that she had developed a practice in her 16 years as a social worker of seeking permission from her manager and case-noting it, which, she said, was what she had done. She then

went a little further and said this about what happened when she gave a gift to a service user:

> "I have always sought permission from my manager and case-noted it."

96 That was consistent with what the claimant had written in the statement which she had given to Ms Smith of which there was a copy at pages D362-D397 [921-956]: at page D377 [936], the claimant had written: "My practice for gifting children is to always seek manager's approval before hand". It was also consistent with what she was recorded (at page D453 [1012]) to have said at the hearing before Mr Morgan of 27 August 2019: the claimant is there recorded to have asked Mr Glover-Wright: "Do you recall had my manager not given approval, I would not have purchased a gift?" When it was put to the claimant in cross-examination before us that she had not sought her line manager's permission in relation to the gifts which she had given to SH on 12 September 2018, she said that Mr Jones had given her permission for those gifts. Her precise words were in response to the question "That is not what you did here?":

> "It is. He gave me permission. It is his language."

97 At the resumption of the claimant's cross-examination at the start of the next day, there was this exchange (as recorded by EJ Hyams and tidied up):

> Q: The minimum standards; the policy that you said you applied to yourself is a standard of behaviour around gift giving that every social worker should abide by? We are talking about your own policy of seeking approval etc; and in fact it is a standard which would apply to every social worker?
> A: I think every social worker is responsible for their own practice and within that I think that there is a vast difference of opinion going on here. What the respondent is implying is that every social worker follows guidance to the letter but in practice and on the ground that is not true which therefore means that not every social worker does restrain themselves in terms of gifts; most have a good heart and are human and some wear their hearts on their sleeves. So some will give gifts and some could be to reward a person. It could be to meet needs whether emotionally or physically; and we are talking about taking people out for lunch, giving them money for a bus fare, or giving them vouchers. Some social workers will buy furniture for a house; some will provide for example a kettle or a toaster when a young person is moving into their own place.
>
> Some social workers will buy nappies, or food, or give money for electricity or gas. There is a wide range of gifts and even in the educational setting [i.e. schools] people [i.e. teachers] are buying for example food for pupils.

> So, gifting is widespread; you are right that there has to be a level of constraint and it is right that some may use and abuse the idea of gifting and the intentions behind it, and that is worrying. It would be right for every local authority to put into effect a policy. So I do not think it is as straight cut as the barrister is saying. But prior to being given guidance ... and I am grateful that after 16 years of practice I have some access to some.
>
> I will from now on not use my own money; I can understand that now so I have now changed my practice; I will never use my own money and I will always seek permission."
>
> The profession's boundary setters say that use of your own money for example even for Christmas on an anonymous basis is a blurring of the boundaries.
>
> It will have to be the responsibility of the employers to fund appropriately the work we do."

98 We noted that the claimant had written in the notes of her interview with Ms Smith of 20 November 2018 (at page G265 [2489]) this:

> "I have high Emotional Intelligence which enables me to be deeply compassionate towards others and easily able to empathise and provide deep understanding to a person's situation. This is what makes me the brilliant social worker I am, someone who is forward thinking, creative, innovative and original, who spot[s] patterns and trends easily, and has ideas and is not afraid to express them."

Gifts: the evidence of Mr Otto, Ms Walton and Mr Whitley

99 In paragraph 21 of his witness statement, Mr Otto said this:

> "Gift giving in Social work is widespread and seems to have increased especially since the recession when many of our service users had suffered real hardship and long-term unemployment. Social workers usually work with families who have lived often for generations in impoverished and deprived circumstances. Therefore, giving gifts is a common practice that I have also observed across all Local Authorities I have worked in."

100 He went on to say this in the next paragraph of his witness statement:

> "I worked in teams where the team members put money together in order to reward special achievements or to support a young person or family during special events or in times of crisis when no other support was

available. Often, staff would even get their family involved in collecting items that were urgently needed. In Buckinghamshire Council it is also common, and I buy the children I review gifts to celebrate special occasions or achievements, as do many of my colleagues."

101 Ms Walton's witness statement contained this passage about the giving of gifts to children and young persons in the respondent's care:

> "21. Gift giving at BCC is widespread. I was not told of any policy nor was any guidance given although it is good practice to record the gift. Due to cuts in funding to social work departments it is not unusual for social workers to buy things for children and there is no guidance on amounts. Due to my circumstances I would not spend £36 on a gift for one child but others will spend more.
>
> 22. BCC conducted a Christmas gift campaign for looked after children. The idea was that staff could donate £5- £10 gifts to the department which would then be distributed. Whilst this is not the same as an individual giving a gift it contributes to the blurred boundaries that stem from the lack of clear guidance.
>
> 23. Miranda and I discussed the giving of a gift as an ending for YP as Miranda's role was ending and I was upset as I could not contribute to a gift. Miranda told me DJ had authorised her to do what she needed to do and I felt that was sufficient permission. It did not occur to me that she should not give a gift as she had had that permission. We were aware that this child had insufficient clothing so a voucher with a clothes company was helpful. To this Miranda wanted to add a personal gift.
>
> 24. I cannot understand why when the matter of Miranda's gift to YP was discussed at supervision it was taken further. When a member of staff I supervised was found to have bought an expensive gift for a child without recording it I raised it at supervision. I then asked HR about what action should be taken as I was concerned about the gift. I was told I had already dealt with the matter, so no further action was needed. In this case Miranda's supervisor had dealt with the matter so HR should not have advised further action and it appears she was treated differently."

102 Mr Whitley was asked one supplemental question by Mr Davidson: "It is said that gift giving in the service was prevalent. Is that your understanding?" Mr Whitley's short answer to that was: "No."

103 Later on, he said this in answer to a question asked by EJ Hyams:

> "I have never given things to children; not in all my time; and I have never known anyone else to give such a substantive gift [i.e. of the sort that the claimant gave to SH on 12 September 2018].
>
> The reason for that is that there is a risk about favouritism; you could be accused of using your authority; it is about compliance; there are safeguarding concerns around gifts.
>
> There are multifaceted possible issues which could arise. We could be accused of maybe changing a child's view on something, such as the way they were supported; or it could be at worst covering up an inappropriate relationship or a dangerous one. As far as children in care are concerned, reward systems work for some in residential care but for some there are real dangers with reward systems."

104 When EJ Hyams asked him about the evidence of Mr Otto and Ms Walton about gifts, which we have set out in the preceding paragraphs above, Mr Whitley said this:

> "Paragraph 21 of Mr Otto's witness statement is an unusual paragraph to see in a witness statement. It has no relevance to the way I understand social workers.
>
> Paragraphs 21 and 24 of Ms Walton's witness statement come as a surprise to me; I cannot add to that. It [i.e. gift-giving as described by Ms Walton] would seem unusual."

The claimant's disabilities and the evidence about their likely impact on her judgement

105 As the claimant said in paragraph 81 of her witness statement, she was "formally diagnosed with Autism on 18th January 2019". The document in which the claimant's diagnosis of Autism was stated was at page A180 [194]. It was dated 18 January 2019 and was very short. It was preceded by the letter dated 18 December 2018 at pages A166-A179 [180-193]. Both letters were signed by Ms Kim Watkiss, who described herself under her signature as (and only as) "Autism Assessor". The letter dated 18 December 2018 stated the conclusion which plainly was the reason for the sending of the short letter of 18 January 2019 at page A180 [194]. The letter of 18 December 2018 contained the following material passages:

105.1 At pages A169-A170 [183-184] this was said:

> "In the workplace, there has been a repeated pattern of difficulties but you are never sure why they keep happening. You said that managers find it difficult to manage you and sometimes colleagues

say it is because you can appear to be a threat due to your high intelligence, knowledge and skills within your field. You are an independent thinker and able to work independently to a high standard. Managers seem to think that you do not follow instructions and do your own thing but they do not understand the way that you work as you always carry out the direction given, but do so in your own way. You work best when you are told the objective and then left to meet it in your own way.

Whilst you tend to do what is asked of you, you struggle to work in a way that is not natural to you. You struggle to limit meetings and to stay on subject and within a particular prescribed time frame. If this happens then you forget significant pieces of information and the quality of the interaction is affected; the person who you are working with may not feel listened to or you may not have had time to adequately allow them to express any concerns. Finishing within a certain time becomes your main focus and the quality of your intervention is of a lesser quality because of your processing difficulties.

...

You are very detailed with your report-writing and the standard of work far outweighs the requirements. Your recent manager told you that reports only have to be 'good enough' but you are unable to do this as it makes you feel anxious to perform at less than an optimal level. You strive for perfection and best practice. You also take everything literally including legislation, policy and procedures, and if this is not achieved, you can feel anxious that the rules are being broken. This can lead you to confront others over breaking rules and procedures, but you are inclined towards peaceful reconciliation, despite the misinterpretation that you may be being deliberately antagonistic.

You struggle to work fixed hours and enjoy the flexibility of working your hours over a different time frame, for example starting late and working late. You said that you "do not feel dyslexic" in the evenings and like to write reports at that time but you find it extremely challenging to function within a 9-5 framework. You said that you do not like too many constraints as it interferes with how you function.
At work, you like to be given clear direction, both verbally and written to ensure that you understand. You cannot read between the lines and communication needs to be direct. Despite this, when working with foster carers, you said that you use your intuition to guide you, and can tell when carers are not being honest with you.

You are good at picking up on things like this in a professional setting because you have been trained to do so and through your experience of working within child protection."

105.2 At page A177 [191] this was said:

"• **The Empathy Quotient - scoring 36**. A score of between 33 and 52 indicates that you have an average ability for understanding how other people feel and respond appropriately. You know how to treat people with care and sensitivity.

As mentioned before, in order to give a diagnosis of autism, a person must provide evidence of lifelong pervasive difficulties across the triad of social communication, social interaction and social imagination. The evidence gathered is documented in this report.

There is a great deal of overlap amongst developmental disorders and it is very difficult to draw clear boundaries between different diagnostic categories, particularly also in the context of trauma and abuse. There are no physical or psychological tests that can be used to diagnose an autism spectrum disorder. The decision has to be made based on particular aspects of the person's history from childhood and their current behaviour.

...

You appear to have some difficulty imagining another person's perspective and seem to have to think this through rather than it being more intuitive. You are an intelligent, compassionate individual with considerable experience of your own difficulties and of working with people, as well as having been formally trained in counselling. Despite this, you can struggle to understand how someone else is feeling unless you are focussed upon the task. You are extremely self-reflective and can sometimes see where things have gone wrong retrospectively but, at other times (such as with your current difficulties concerning your manager), you rely upon other people to give you that perspective."

105.3 The concluding substantive paragraph of the letter, at page A179 [193] was in these terms:

"Unfortunately, diagnostic processes such as this one tend to focus on the aspects that an individual has difficulty with, rather than focus on their strengths due to the need to demonstrate evidence that someone meets the criteria for a developmental condition. It is

> important that you do not use this as further confirmation to yourself of what you perceive to be your failings, but rather use it as an explanation for why you struggle to manage with some aspects of life and perhaps recognise you are able to address some of these difficulties, and move towards a life in which you are more fulfilled."

Relevant legal principles

The law of unfair dismissal

106 It is for the employer in a claim of unfair dismissal to prove the reason (or if more than one, the principal reason) for the dismissal: section 98(1) of the ERA 1996. Only the reasons stated in section 98(1) and (2) are capable of being fair. They include "conduct".

107 There is no definition in the ERA 1996 of "gross misconduct". The significance of conduct being properly regarded as "gross misconduct" is that it is so clearly conduct for which an employee could be dismissed that it would be within the range of reasonable responses of a reasonable employer to dismiss the employee for it even though the employee had not formally been warned in advance that he or she might be dismissed for it.

108 The question whether or not a dismissal was fair is not to be determined by the tribunal on the basis of what the tribunal would have done in the circumstances. Rather, the question is whether or not it was within the range of reasonable responses of a reasonable employer to dismiss the employee in the circumstances for the reason for which the employee was in fact dismissed. That is clear from an abundance of authority. The best statement of the applicable principles is in the decision of the Court of Appeal in *J Sainsbury plc v Hitt* [2003] ICR 111, to which we paid close attention here. We also took into account what was said by the Employment Appeal Tribunal in *British Home Stores v Burchell* [1978] IRLR 379 (but bearing in mind the fact that the test at every stage is whether what was done or omitted was within the range of reasonable responses of a reasonable employer):

> "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried

> out as much investigation into the matter as was reasonable in all the circumstances of the case."

109 The reason for a dismissal is not a label but a set of facts and if appropriate beliefs. In *Abernethy v Mott, Hay and Anderson* [1973] ICR 323, Cairns LJ said this about the reason for the dismissal:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness or because he might have difficulty in proving the facts that actually led him to dismiss; or he may describe his reasons wrongly through some mistake of language or of law."

110 In *Paul v East Surrey District Health Authority* [1995] IRLR 305, the Court of Appeal emphasised the need, where it is claimed that a disparity in treatment was unfair, for the claimed comparable case to be truly comparable with that of the claimant. The importance of bearing in mind that there may be different individual circumstances justifying a different approach was also emphasised in that case.

The burden of proof when considering a claim made under the EqA 2010

111 In considering the issues, we were obliged to apply section 136 of the EqA 2010, which is in these terms:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (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."

112 However, in some circumstances, it is possible, or even necessary, either instead or in addition to apply the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 and therefore to ask why that which is the subject of the claim occurred.

113 When applying section 136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the

respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's explanation for the treatment. That is clear from the line of cases discussed in paragraph L[807] of *Harvey on Industrial Relations and Employment Law*, as follows:

> "Whether considering, then, the legacy legislation or the Equality Act burden of proof provision, the two-stage process remains the starting point. In the first place, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. According, to the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246, [2007] ICR 867, CA, 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it (also restated in *St Christopher's Fellowship v Walter-Ennis* [2010] EWCA Civ 921, [2010] EqLR 82). That means that the claimant has to 'set up a prima facie case'. In *Madarassy* it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically; Underhill P in *Hussain v Vision Security Ltd and Mitie Security Group Ltd* UKEAT/0439/10, [2011] All ER (D) 238 (Apr), [2011] EqLR 699 warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act. A note of caution, however, is necessary against taking from *Igen* [i.e. *Igen Ltd v Wong* [2005] ICR 931] a mechanistic approach to the proof of discrimination by reference to RRA 1976 s 54A. In *Laing v Manchester City Council* [2006] IRLR 748, [2006] ICR 1519 Elias P observed as follows:
>
> > ''71.We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.
> >
> > 72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination,

whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.

73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.''

In *Commissioner of Police of the Metropolis v Maxwell* UKEAT/0232/12, [2013] EqLR 680 it was emphasised that particularly in cases where there are a large number of complaints the tribunal is not obliged to go through the two stage approach in relation to each and every one."

Harassment

114 The law of harassment within the meaning of section 26 of the EqA 2010 might be thought to raise issues which are different from those which apply when considering a claim of direct discrimination within the meaning of section 13. However, the test for determining whether or not conduct was unwanted within the meaning of section 26 is in many cases the same as that which applies when considering a claim of direct discrimination. That is for the following reasons.

115 Section 26 of the EqA 2010 provides so far as relevant:

"(1) A person (A) harasses another (B) if–

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of–

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account–

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

116 There is in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 a very helpful discussion about the impact (or otherwise) of the use of the words "unwanted conduct related to a relevant protected characteristic" in section 26(1) of the EqA 2010 instead of the words in section 13, namely "because of a protected characteristic". Only rarely will a claim of harassment add anything to a claim of discrimination. In addition, as Underhill LJ confirmed in paragraphs 83-101 of that judgment, a mental element is required in a claim of harassment as much as in a claim of direct discrimination.

117 The provisions of section 26 of the EqA 2010 have been considered by appellate courts on a number of occasions in helpful ways, including by the Employment Appeal Tribunal in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 and *Land Registry v Grant (Equality and Human Rights Commission intervening)* [2011] ICR 1390, where Elias LJ said in relation to the claimed harassment in that case:

> "the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

118 In paragraph 22 of *Dhaliwal*, the Employment Appeal Tribunal (Underhill P presiding) said this:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of

hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

119 In *Betsi Cadwaladr University Health Board v Hughes* (unreported; UKEAT/0179/13/JOJ, 28 February 2014), the Employment Appeal Tribunal (Langstaff P presiding) said this in paragraphs 12 and 13 of its judgment having just set out paragraph 22 of the judgment in *Dhaliwal*:

> '12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.
>
> 13. It was agreed, too, that context was very important in determining the question of environment and effect. Thus, as Elias LJ said in *Grant*, context is important. As this Tribunal said, in *Warby v Wunda Group plc*, UKEAT 0434/11, 27 January 2012:
>
> > "…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;".'

Section 15 of the EqA 2010

120 Section 15 of the EqA 2020 provides so far as relevant:

> "(1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

<u>Causation</u>

121 That section requires a tribunal to ask

121.1 whether the claimant's disability caused, led to the consequence that there was, or resulted in, "something", and

121.2 if so, whether the respondent treated the claimant unfavourably because of that "something".

122 In *Pnaiser v NHS England* [2016] IRLR 170, Simler P (as she then was) sitting in the Employment Appeal Tribunal ("EAT") gave (in paragraph 31 of her judgment) the following guidance about the manner in which the question whether there has been unfavourable treatment for the purposes of section 15 of the EqA 2010 should be addressed:

> "In the course of submissions I was referred by counsel to a number of authorities including *IPC Media Ltd v Millar* [2013] IRLR 707 , *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14/RN and *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893 , as indicating the proper approach to determining section 15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:
>
> (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so.

> Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.
>
> (i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

123 Another judgment of Simler P in the EAT provides clarification in regard to whether or not there has been unfavourable treatment within the meaning of section 15 of the EqA 2010. That is the case of *Charlesworth v Dransfields Engineering Services Ltd* UKEAT/0197/16/JOJ, where Simler P made it clear that it may in some cases be necessary (or at least lawful) "to draw a distinction between the context within which the events occurred and those matters that were causative", and then to conclude that the "something" that caused the claimed unfavourable treatment was no more than "the context within which the events occurred".

Proportionality

124 As for whether or not unfavourable treatment was a proportionate means of achieving a legitimate aim, we took into account the following passages from *Harvey on Industrial Relations and Employment Law* ("*Harvey*").

125 In paragraph L[377.01], this is said:

> "The EAT in *Hensman v Ministry of Defence* UKEAT/0067/14/DM, [2014] EqLR 670 applied the justification test as described in *Hardy and Hansons Plc v Lax* [2005] ICR 1565, CA to a claim of discrimination under EqA 2010 s 15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. (Applied *Monmouthshire County Council v Harris* UKEAT/0010/15 (23 October 2015, unreported)). As stated expressly in the EAT judgment in *City of York Council v Grosset* UKEAT/0015/16 (1 November 2016, unreported), the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the

respondent, taking into account medical evidence available for the first time before the ET. The *Court of Appeal in Grosset* ([2018] EWCA Civ 1105, [2018] IRLR 746) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

126 In paragraph L[377.06], this is said:

> 'In *Birtenshaw v Oldfield* [2019] IRLR 946, EAT, the tribunal upheld a claim of discrimination arising from disability where a job offer was withdrawn after receipt of an OH report which gave the decision-maker cause to doubt whether the applicant was mentally well enough to do the job – which could involve working with vulnerable children. The EAT warned that a tribunal's consideration of the objective of proportionality question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim, provided he has acted rationally and responsibly. He was satisfied that the ET had however awarded such respect, and satisfied that it had not erred when finding that more proportionate means could have achieved the objective of ensuring staff were fit for their work. Contrasting the necessary exercises when considering claims of reasonable adjustments as opposed to s 15 justification Soole J, held (at [36]–[37]):
>
> > "Under s 20 the duty comprised in each of the three requirements is to take such steps as it is reasonable to have to take in order to achieve an objective, ie to avoid the identified disadvantage (s 20(3) and (4)) or to provide the auxiliary aid (s 20(5)). In consequence the chance of success in achieving the objective is one of the factors to weigh up when assessing the question of reasonableness: see *South Staffordshire [& Shropshire Healthcare NHS Foundation Trust v Billingsley* UKEAT/0341/15 (29 April 2016, unreported)] and the cited authorities.
> >
> > Under s 15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, ie the relevant legitimate aim. As summarised by HHJ Eady QC in *Ali [v Torrosian (t/a Bedford Hill Family Practice)* [2018] UKEAT/0029/18 (2 May 2018, unreported)], the authorities on this objective balancing exercise show that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim: see paras 16 and 17. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the

time, the ultimate question for the Tribunal is whether it has done so: see para 27."'

The time limit for making a claim to an employment tribunal of a breach of the EqA 2010

127 The primary time limit for making a claim of discrimination contrary to sections 13 and/or 26 and 39 of the EqA 2010 is three months, but time may be extended if it is just and equitable to do so. In determining the latter question, the principles in the relevant case law (most notably *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 237) must be applied. There, in the headnote, in the headnote, the following helpful comment of Sedley LJ was quoted:

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing employment tribunal proceedings, and Auld LJ is not to be read as having said in *Robertson* [i.e. *Robertson v Bexley Community Centre* [2003] IRLR 434] that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it."

128 However, it is clear that there has to be an evidential foundation for a decision that it is just and equitable to extend time.

<u>The parties' submissions</u>

129 We do not set out all of the parties' submissions as it would lengthen an already long set of reasons. We record here, however, that Ms Cornaglia's written submissions included this passage:

> "50. GM accepts that he only took into account disability in the "mitigation" section of his outcome letter. There is no evidence in the outcome letter that he considered the causative impact of C's disabilities (D482-4). KJ did not give evidence and her findings in the disciplinary appeal are curt. They do not evidence that KJ duly considered the causative impact of C's disabilities, thus indicating that the appeal did not cure GM's omissions. In *Chamberlain Vinyl Products Ltd v Patel* [1996] ICR 113, [1995] Lexis Citation 3601, the EAT (Smith J presiding) held that an employer had acted unreasonably in failing to explore more fully the

employee's claim that his misconduct had been caused by a psychiatric illness. The same can be said on the facts of this case.

51. This failure is particularly concerning because C's disabilities were highly relevant to the allegations against her. There is a large amount of evidence suggesting that her disabilities at least *contributed* to the conduct in question." (Original emphasis.)

Our conclusions on the claims made by the claimant in these proceedings

Unfair dismissal

130 We concluded that the principal reason why claimant was dismissed was her conduct, in the form of the giving of gifts to SH on 12 September 2018 without the prior authorisation of her line manager, Mr Jones, and then writing a case note which was in inappropriate terms, consisting largely of her own thoughts and feelings rather than reflecting those of SH. We concluded that while the giving by the claimant of Christmas gifts to SH in 2017 was a factor in Mr Morgan's decision, he saw it as part of the background against which he assessed the claimant's conduct on and after 12 September 2018 in the form of the gifts given to SH on that day and the claimant's case note at pages G229-G232 [2453-2456].

131 While that conduct could perhaps be described for the purposes of section 98 of the ERA 1996 as "capability", it was, we concluded, best classified as conduct within the meaning of that section and in any event it was a potentially fair reason for the claimant's dismissal.

132 We had (as we indicated during the hearing) considerable misgivings about the manner in which the respondent investigated the background to that conduct. The conduct itself was, however, the subject of no real conflict of evidence. Such flaws as there were in the investigation (and we concluded that it would have been rather better if Ms Ejo had been asked whether she had in fact authorised the Christmas gifts to SH of 2017, and to have given the claimant at least supervised access to her work mobile telephone and her computer in the state it was in when she surrendered it to the respondent when she was suspended, so that she could herself check them), including those relied on by Ms Cornaglia in paragraphs 43 and 44 of her written closing submissions, were not such as to take the procedure followed in deciding that the claimant should be dismissed outside the range of reasonable responses of a reasonable employer.

133 We also concluded that there were plainly reasonable grounds for concluding that the claimant had committed the conduct for which she was dismissed. In that regard, while the claimant asserted that Mr Jones had, by saying words to the effect that she should do whatever she needed to do, given her permission to give the gifts which she gave to SH on 12 September 2018, she had certainly not

got his express permission to do that, and it was in our view well within the range of reasonable responses of a reasonable employer to conclude that he had not given any kind of implicit permission to give those gifts.

134 The critical issue here was the fairness of the claimant's dismissal, i.e. the question whether it was within the range of reasonable responses of a reasonable employer. We eventually (after much careful consideration) agreed with Mr Davidson's submissions on the importance of boundaries. We concluded that another employer might well have given the claimant a final written warning instead of dismissing her. We also found it a matter of considerable concern that the respondent's HR department had, according to Ms Walton (whom we found to be an honest witness, doing her best to tell us the truth and whose evidence we accepted in its entirety), not advised that at least some sort of warning be given to the employee to whom Ms Walton referred in paragraph 24 of her witness statement, as set out in paragraph 101 above, so that there was an apparent inconsistency of treatment as between the case of that employee and that of the claimant. However, applying *Paul v East Surrey District Health Authority*, and bearing in mind the fact that here the factual situation concerned a sustained course of action towards SH which was evidenced in a number of ways, we concluded that we could not by reason of an apparent disparity of treatment conclude that the claimant's dismissal was outside the range of reasonable responses of a reasonable employer.

135 Similarly, if, as it appeared from the evidence of both Mr Otto (and, as with Ms Walton, we found Mr Otto to have been an honest witness, doing his best to tell us the truth, and whose evidence we accepted in all regards) and Ms Walton, as well as that of the claimant, there was a practice of gift-giving to the persons to whom the respondent's social workers provided services, then it was a matter of considerable concern that the claimant was dismissed for doing that without having been given some sort of clear warning that she should not do it. However, while, as we say in paragraph 50 above, the respondent had not created any kind of "agreed policy for supporting positive behaviour or recognising particular achievements" which the document extract set out in paragraph 30 above envisaged, the claimant was (as we record in paragraph 96 above) herself well aware of the importance of obtaining her line manager's approval for a gift to for example SH. In addition, the respondent could not, without risking severe criticism from the relevant inspectorate (the Care Quality Commission) to whose inspections the respondent is subject, permit social workers, either routinely or at all, to do things which were materially inconsistent with the guidance set out in paragraph 30 above.

136 That guidance was (we concluded) to the effect that in the absence of an agreed policy, it was necessary for a social worker to have his or her line manager approve in advance an intended gift to a person in the respondent's care. We arrived at that conclusion for these reasons. Although the guidance envisaged the creation by a relevant employer of a specific policy concerning "The giving of

gifts or rewards to children or young people", one possible (in fact literal) implication of there not being such a policy was that no gifts other than ones of "insignificant value" should be given to children or young persons. However, reading the guidance in a purposive way, it was possible to conclude from it that if a gift was not of "insignificant value", then it should be "first discussed ... with the senior manager". Furthermore, given the guidance set out in paragraph 30 above, we concluded that (1) the claimant was warned that she should not give presents other than ones of insignificant value to persons to whom she was providing services without her line manager's prior approval, and (2) the claimant should have known, from both the sentence on page B49 set out in paragraph 29 above and the sentence on page B86 set out in paragraph 26 above, that a clear and knowing failure to act in accordance with the guidance could be regarded by the respondent as gross misconduct for which she could be dismissed.

137 If the claimant had not had the disability of autistic spectrum disorder, and she had been able to accept unequivocally that she had been at fault in (1) giving to SH those things which she (the claimant) gave on 12 September 2018 without having previously discussed with Mr Jones her plan to give those gifts and obtained his approval for them and (2) showing an initial lack of insight into the inappropriateness of the case note at pages G229-G232 [2453-2456], then doing more than giving a final written warning might very well have been outside the range of reasonable responses of a reasonable employer. We did not come to a conclusion in that regard, however, because

137.1 the situation here was different in that the claimant's explanation or excuse for doing those things stated in paragraphs 19.1 and 19.3 above was (see paragraphs 71, 74, 76 and 129 above) that her disability of autistic spectrum disorder had (to the extent that she accepted she had erred) at least in part led her to err in those regards, but

137.2 she refused to be seen by what was in our view plainly an appropriate expert to assess the likelihood of her (the claimant) repeating conduct of the sort for which she was dismissed and to advise on the possibility of measures which could be taken to minimise the risk of a repetition of such conduct.

138 We concluded that the critical issue for the respondent was whether the claimant was likely inadvertently in the future to err by breaching boundaries which no competent member of the social work profession would have breached, and that in the face of the claimant's refusal to assist the respondent (in the form of Ms Jackson, who, contrary to Ms Cornaglia's submissions, we concluded considered carefully the "causative impact of C's disabilities") to assess that likelihood in the light of appropriate expert evidence, it could not be said to have been outside the range of reasonable responses of a reasonable employer to dismiss the claimant.

139 Thus, the claim of unfair dismissal failed.

The claim that the claimant's dismissal was in breach of section 15 of the EqA 2010

140 As for the claim of a breach of section 15 of the EqA 2010, while we were inclined to accept the claimant's claim that her dismissal was for conduct which was a result of her disabilities, so that the test in the first limb of section 15(1) was satisfied, we concluded that the test in the second limb of section 15(1) was not satisfied. That was for reasons which were similar to those for our conclusion on the reasonableness of the sanction of dismissal for the conduct for which the claimant was dismissed. In this regard, the test was different from whether or not the claimant's dismissal was outside the range of reasonable responses of a reasonable employer: it was for us to decide whether the claimant's dismissal was a disproportionate means of achieving a legitimate aim.

141 However, we could see that the claimant's conduct towards SH had indeed breached boundaries the maintenance of which was, for objectively good reasons, a legitimate aim of the respondent. In the circumstances that (1) the claimant herself alleged that to the extent that she had breached those boundaries she had done so because of a disability, (2) such evidence as there was before us about the claimant's disability of autism and its likely effects on her (and we have set out what we regarded as the most relevant parts in paragraph 105 above) was inconclusive, but (3) she refused to permit the respondent to have her assessed by an expert whose evidence would assist the respondent to determine the likelihood of a recurrence of the claimant's errors and the measures that could be taken to minimise the risk of such recurrence, we concluded that the respondent had satisfied us that the claimant's dismissal was a proportionate means of achieving that legitimate aim.

The claim of direct disability discrimination

142 Turning to the claim of direct disability discrimination, we could see nothing in the circumstances from which it would be possible to draw the inference that the claimant's dismissal was to any extent because of her disability, i.e. direct discrimination within the meaning of section 13 of the EqA 2010. In our view in any event, bearing in mind (1) Mr Morgan's clear and consistent oral evidence about the matter, and (2) the overtly cogent and objectively supported reasons of Ms Jackson for dismissing the claimant's appeal against Mr Morgan's decision that she should be dismissed, the real and only reason why the claimant was dismissed was her conduct, and not the fact that she had one or more disabilities.

The claim of harassment within the meaning of section 26 of the EqA 2010

143 As for the claim of harassment within the meaning of section 26 of the EqA 2010, the claim was out of time in so far as it related to the events referred to in paragraphs 12.1 to 12.3 inclusive above since (1) in our view they did not constitute conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010, and (2) the claimant had put no evidence (or at least no cogent evidence) before us to justify the conclusion that it was just and equitable to extend time for the making of her claim in relation to those events.

144 The claim in relation to the event stated in paragraph 12.4 above was, however, well in time. It was in our view, mistaken to say that the claimant had (as recorded in paragraph 74 above) "chosen" to mask her autism, so that it was implicitly deceptive to do that. Indeed, in our view it was clear that the claimant had simply learnt behaviours which had led to a masking of her autism, and that it was offensive to suggest that she had acted deceitfully in doing so. In our view the test in section 26(1), read with section 26(4) of the EqA 2010 was in the circumstances satisfied in the claimant's favour as a result of the respondent using the words set out at the end of paragraph 74 above in that (1) those words constituted unwanted conduct which was related to a disability of the claimant and (2) although they were not done for a purpose within the scope of section 26(1)(b), those words had the effect of violating the claimant's dignity. If it was possible consistently with the proper interpretation of section 26 to conclude in addition that the respondent had created for the claimant an intimidating, hostile, degrading, humiliating or offensive environment, despite the fact that the claimant was by the time of the dismissal of her appeal by Ms Jackson no longer working for the respondent, then in our view the respondent had also created such an environment for the claimant through the use of the words set out at the end of paragraph 74 above. In any event, we concluded that the claim of a breach of section 26 by doing that which is described in paragraph 12.4 above was well-founded.

The claim of victimisation

145 The claim of victimisation was, however, in our view, plainly not made out. That is because there was in our view no evidence before us from which we could draw the inference that the claimant had been treated detrimentally to any extent because she had stated grievances about the manner in which she had been treated as described in paragraphs 12.1 to 12.3 above. In addition and in any event, we were satisfied by the evidence before us that the claimant's treatment was in no way detrimental because of the stating by the claimant of those grievances.

In conclusion

146 As a result of our above conclusions, the claim succeeds in one respect, and in one respect only. We emphasise, however, that we arrived at our conclusions on the claims of unfair dismissal and a breach of section 15 of the EqA 2010 by

reason of the claimant's dismissal only after much deliberation and after taking fully into account the fact that the claimant was dismissed for doing something which resulted from goodwill on her part towards SH. We did not need to decide whether what the claimant did constituted gross misconduct and therefore was such as to justify in the law of contract her summary dismissal. Nor did we need to decide the extent to which any compensation payable to the claimant in respect of that dismissal should be reduced by reason of for example contributory fault. All we ended up deciding was that the claimant's dismissal was not outside the range of reasonable responses of a reasonable employer and that her dismissal was a proportionate means of achieving a legitimate aim, which could just as easily be characterised as not being a disproportionate means of achieving a legitimate aim.

Remedy hearing

147 We agreed with the parties at the end of the liability hearing that if the claim succeeded then we might need two days to determine the remedy that the claimant should receive. We then agreed the provisional dates of 14 and 15 January 2021 for a remedy hearing. Given the limited extent to which the claim has succeeded, we have reduced our time estimate for the remedy hearing to one day, and we have determined that the hearing should take place on 15 January 2021. What we say here should be regarded as notice of that hearing. We see no need for any further directions in that regard.

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Employment Judge Hyams

Date: 24 November 2020

JUDGMENT SENT TO THE PARTIES ON

10 December 20

FOR THE TRIBUNAL OFFICE