



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Ms Jo Horne

AND

Respondent
Cornwall Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth ON 11 and 12 January 2021

BY CLOUD VIDEO PLATFORM

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In Person
For the Respondent: Mr A Gloag of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant's claims of unfair dismissal and for discrimination arising from her disability are both dismissed.

REASONS

1. In this case the claimant Ms Jo Horne claims that she has been unfairly dismissed. She also brings a claim for discrimination arising from her disability. The respondent contends that the reason for the dismissal was gross misconduct, and denies the claims.
2. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 552 pages, the contents of which I have recorded.
3. The parties also gave their written consent for this matter to be determined by an Employment Judge sitting alone pursuant to section 4(3)(e) of the Employment Tribunals Act 1996.
4. I have heard from the claimant. I have heard from Ms Jane Hampton, Mr Jack Cordery and Mr Trevor Doughty on behalf of the respondent. I also accepted statements from Ms Jillian Ellis and Ms Zoe Lofthouse on behalf of the respondent which the claimant did not seek to challenge.

5. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
6. The claimant Ms Joanna Horne was born in 1975 and was employed by the respondent Cornwall Council as a Senior Family Worker and then a Student Social Worker from 25 August 2014. She was summarily dismissed for gross misconduct on 11 July 2019 in the following circumstances.
7. The claimant had been issued with a written statement of the terms and conditions of her employment, and these incorporated the respondent's related written procedures. There were a large number of these procedures which applied to the claimant's employment, and she was aware of these procedures and related obligations.
8. There was a detailed Disciplinary and Capability Procedure. This included a non-exhaustive list of examples of gross misconduct which was said to be likely to lead to dismissal. This list included "Behaving in a way that has harmed or may have harmed someone" and "physical abuse ... psychological abuse ... emotional abuse."
9. When the claimant became a Trainee Social Worker she had a Role Profile which required her to "Actively contribute to team working, supporting colleagues, covering for colleagues in their absence and take part in and contribute to team meetings and team development events." This Role Profile also required the following Key Objectives: "to improve collaborative working with other services and professionals, including adult services supporting vulnerable adults; to make a positive contribution to the improvement of safeguarding services to children and young people in Cornwall." The Required Behaviours included working together collaboratively, and taking personal responsibility "for your work your environment and your development".
10. The respondent also had in place an Employee Code of Conduct. Its aims and objectives made it clear that the public is entitled to expect the highest standards of conduct of the respondent's employees and that the aim of the Code is to ensure that the rules and standards which the respondent expects of its employees are clear. Breaches of the standards set out in the Code were to be dealt with through the previously mentioned Disciplinary and Capability Procedure. This Code provided that: "It is the responsibility of all employees to read, understand and conduct their day-to-day work in accordance with the Code of Conduct and to: maintain conduct of the highest standards, such that public confidence in their integrity is sustained; to be fair and honest in all activities at work; incorporate and promote equality and diversity in all that is done; and ask for clarification on any aspects of the Code where there is uncertainty."
11. This Code of Conduct also had a section on Personal Relationships, which required: "Employees must declare to their manager any situation where their impartiality, objectivity, or honesty may be compromised due to their being related to or having a personal relationship with someone at work." The Code also had a Confidential Reporting Procedure in place which referred to a more detailed Whistleblowing Policy.
12. The claimant had started employment with the respondent Council as an Outreach/Senior Family Worker in the Child in Need Team, which was written later renamed as Family Assessment and Support, or FAS Team for short. In October 2016 she successfully applied to join the respondent's traineeship program in order to become a qualified social worker. The claimant commenced this traineeship program as a Student Social Worker on 9 January 2017. She was well thought of by the respondent who had encouraged her personal development.
13. With effect from October 2016 the manager of the FAS Team was replaced by Ms Kathleen Prinsloo, as Service Manager. There were difficulties in the team, and in July 2018 the respondent commenced an initial investigation into allegations of bullying which had been raised against an employee, namely Lora Pryn. Then in August 2018 an anonymous letter was sent to Mr Jack Cordery, the respondent's Service Director for Children's Social Care (from whom I have heard), and the letter was copied to Ms Prinsloo's partner (who was

- also an employee of the respondent). This letter alleged that the claimant and Ms Prinsloo were in a relationship and were having an affair.
14. Mr Cordery was concerned about the impact of any such potential breach of professional boundaries on the functioning of the team. He appointed Ms Jane Hampton, from whom I have heard, to undertake an investigation. She was an experienced senior manager with no prior knowledge of the allegation and no line management responsibility for any of the people involved.
 15. Ms Hampton commenced an investigation which initially was aimed at considering the dynamics in the team and the potential issues related to Ms Prinsloo's behaviour as Service Manager. There was also the issue of Lora Prynne's conduct. Ms Hampton interviewed the claimant informally on 6 September 2018, and again on 5 October 2018. The claimant was asked about her relationship with Ms Prinsloo, but did not volunteer that they were having an intimate relationship, as she was required to do under the relevant provisions of the Code of Conduct. In any event, matters relating to Ms Hampton's investigation were partly resolved by Lora Prynne leaving the respondent's employment in November 2018, and subsequently Ms Prinsloo deciding to resign her employment and leave the area. However, Ms Hampton's investigations also unearthed other potential difficulties in the FAS Team.
 16. Other individual members of the team had given Ms Hampton unsolicited information about their perceptions of bullying within the team, and complained that the claimant was responsible for bullying them. There were three members of staff in particular who said that they had been adversely affected, namely Jasmine Ainslie, Suzanne Sutcliffe and Dionna Carey. Ms Ainslie had been on maternity leave and said that she had been partially shielded from the effects of any bullying in the team, but did complain about treatment received from the claimant. Ms Carey made allegations of bullying and also of racism against the claimant. Ms Carey is from a dual heritage background and stated that she had had to seek counselling to deal with the situation and had taken some time off work. Ms Sutcliffe also complained that she had been bullied and undermined by the claimant. She had recently been appointed in December 2017 and a number of the team members observed that the most junior or most recent member of the team would be targeted by the claimant by way of bullying behaviour. Ms Hampton was not helped by the lack of written material available, for example by way of supervision documents, and Ms Carey and Ms Sutcliffe complained that they had raised the issue of the claimant's behaviour directly with Ms Prinsloo who had not acted on the complaints and had not shared the information with her own line manager, namely Ms Bernie Doyle, the Head of Service. Another complication was that the then Head of Service Ms Doyle and one of the complainants Ms Sutcliffe are sisters in law.
 17. Ms Carey and Ms Sutcliffe complained to Ms Hampton that the claimant's bullying had had a profound effect upon them. Ms Carey had had to seek counselling and had only recently been able to talk about the full impact of the bullying behaviour which she said she had suffered. Ms Sutcliffe had been more resilient and had continued to work despite concerns about coming into the office, and had also subsequently attended counselling. They both reported that the atmosphere in the team had changed significantly when the claimant commenced her student placement elsewhere with the respondent as part of her training as a Trainee Social Worker.
 18. Ms Carey had also raised a separate concern about the claimant's bullying behaviour direct to Ms Doyle as Head of Service, and Ms Doyle had reported this to Mr Cordery. He determined that it was not appropriate for Ms Doyle to undertake any investigation because of her family relationship to Ms Sutcliffe, and that complaint was referred back to Ms Hampton.
 19. Given the serious nature of the allegations against the claimant, which apparently amounted to serious breaches of the respondent's policies and potential gross misconduct, Mr Cordery and Ms Doyle discussed whether to suspend the claimant. Mr Cordery decided that because the claimant was undertaking a course in social work which was sponsored by the respondent and that she was due leave the FAS Team to go on a practice placement to Adult Services, any suspension would interrupt this course. He decided that she should

- be informed about the potential investigation against her, but allowed to leave the team and work in Adult Services pending resolution of any disciplinary process.
20. Meanwhile, towards the end of 2018, the claimant had raised concerns with one of her managers Ms Crewes that the investigation into Ms Prinsloo was having an impact on her morale and well-being. She felt that her personal life was under scrutiny within the team and that her relationship was having an impact on how she was managing her work. Ms Crewes referred the claimant to the respondent's Occupational Health Department, which resulted in a report dated 24 October 2018. Under "Summary of clinical findings" the report stated: "Ms Horne reports she's feeling tired and finds she wakes early. She doesn't report generalised anxiety, but does report feeling upset and emotional at times." Under "Advice about appropriate treatment" the report stated: "Ms Horne has not been to see her GP as she is at work and has not needed medication." The report suggested that the claimant did not fall under the disability provisions of the Equality Act 2010 and that there were no tasks or activities which the claimant was unable to perform. The report suggested that the only adjustment which might be considered was whether it was appropriate for her to remain in her current team given the difficulties that she perceived there.
 21. The claimant subsequently requested a transfer from the team by way of an email to Ms Doyle on 16 November 2008. Ms Doyle confirmed in an email on 17 December 2018 that she would not consider a transfer until the HR enquiries had all been resolved. In any event as noted above the claimant subsequently moved to Adult Services in January 2019 in the normal course of her training as a Student Social Worker.
 22. The claimant also commenced a grievance process in early 2019, which subsequently developed into a formal grievance under the relevant procedure, and then a subsequent appeal. She initially raised an informal complaint to Ms Lofthouse of the HR department to the effect that a fellow employee, namely Tamar Cotton, had told her that Ms Sutcliffe had spoken negatively about her and reported that she was having an affair with Ms Prinsloo and had said words to the effect that she (Ms Sutcliffe) hated the claimant and that "Lora Prynn has gone, and Jo Horne is next". Ms Lofthouse advised Ms Doyle, the Head of Service and Ms Sutcliffe's sister-in-law, that a different team manager should address the matter. However, the claimant asserts that Ms Doyle spoke to Ms Sutcliffe about the matter without anyone else present and the claimant was told that the matter had been dealt with. The claimant felt that the matter should not have been dealt with by Ms Doyle because of her family connection with Ms Sutcliffe, and raised a complaint that the matter had been dealt with inappropriately. This complaint was passed to Ms Angela Andrews, the respondent's Head of Commissioning. She interviewed Ms Sutcliffe on 13 February 2019, and Ms Sutcliffe complained of bullying from both Lora Prynn and the claimant but suggested that the claimant was worse than Lora Prynn. She complained that other members of the team had received the same treatment, including Ms Carey.
 23. Ms Andrews then interviewed the claimant on 18 February 2019, and she explained her complaint in more detail. The claimant argues that it was inappropriate for Ms Andrews to have interviewed Ms Sutcliffe first. In any event Ms Andrews went on to interview a number of other members of the team, including Ms Ainslie on 28 March 2019, Ms Cotton on 29 March 2019, and Ms Hamilton on 29 March 2019, as well as Vicki Bamthorpe and Ms Doyle. She re-interviewed Ms Sutcliffe in early April 2019, and wrote to the claimant on 21 May 2019 with the outcome of her investigation. She explained that Ms Doyle had initially tried to resolve the matter despite her family connection with Ms Sutcliffe because in the absence of Ms Prinsloo, the Team Manager Jackie Woods was the relevant manager, but she was an agency member of staff having been given the task of rebuilding the trust confidence and morale of the team, and if she had undertaken the enquiry this objective would have been undermined. Given the sensitivity of perceived relationships within the team Ms Andrews concluded that it was appropriate for her to discuss the matter with Ms Sutcliffe first. She also rejected the claimant's complaint that she had been ostracised by the remainder of the team. In conclusion she confirmed: "I do not recommend any further action in regards to the complaint you have raised".
 24. Meanwhile Ms Hampton continued with her own investigation, and there was an investigatory interview between Ms Hampton and the claimant on 4 April 2019. The

- claimant was accompanied by a work colleague at that meeting. The resolution of the claimant's complaint had delayed the disciplinary process against her, because Mr Cordery had felt it appropriate to ensure that the complaint was fully investigated and determined before the claimant should face any potential disciplinary proceedings. Ms Hampton then produced an Investigation Report on 24 June 2019 recommending that the matter should proceed to a disciplinary hearing.
25. Meanwhile the claimant had written to Ms Andrews to complain that her complaint had not been adequately dealt with. She was informed of her right to submit an appeal and by letter dated 7 June 2019 the claimant wrote to appeal the outcome of her grievance on two grounds: first, that Ms Doyle had spoken to Ms Sutcliffe about the threat which she had made about the claimant without anyone else present without a record of their conversation; and secondly the fact that no one had clarified what Ms Sutcliffe had meant by her threat "after Lora, Jo's next" and that this was threatening and distressing. By letter dated 1 July 2019 Mr Davies, the respondent's Head of Children and Family Services for West Cornwall agreed to hold an appeal hearing with the claimant on 8 July 2019. This was subsequently postponed at the request of the claimant.
 26. The claimant was also experiencing stress and anxiety as a result of the disciplinary process, and following discussions Ms Doyle referred the claimant to occupational health again. This resulted in a second Occupational Health report dated 2 July 2019 which recorded the following matters. Under "Summary of clinical findings" it stated: "Ms Horne reports she is currently experiencing high levels of stress and anxiety, this is manifesting itself in several ways; she reports physical symptoms such as skin rash, appears more prone to minor ailments, tonsillitis. She has an overwhelming feeling of the need to sleep and her concentration is affected. She uses meditation to help her sleep. Ms Ward has consulted her GP. She is currently not receiving any medication, she has tried this in the past and did not feel it was effective and does not wish to use it." With regard to the contributing factors: "Ms Horne reports that the ongoing disciplinary is the main stressor, in addition she reports a lack of communication and transparency in the process; not aware of where the disciplinary is in terms of the process or what stage and this is fuelling her anxiety levels. In addition not being able to inform current manager as advised not to discuss adding to her anxiety levels." The report also recorded that there were no reported external personal/contributing factors, and that in the opinion of the Occupational Health Advisor "Based on previous history Ms Horne is likely to be covered by the Equality Act 2010". The conclusion was that the main contributing factor was the need to progress and conclude the disciplinary process, and that recommended adjustments included providing updates and a timescale for progressing the process, weekly supervision and stress risk assessment.
 27. The claimant was then called to a disciplinary hearing by letter dated 3 July 2019. The prospective date was 11 July 2019 and the purpose was said to be to consider two allegations as follows: "You have treated some colleagues in your team in an inappropriate bullying manner from June 2016 until your most recent placement started in January 2019; and the impact of your behaviours has resulted in some colleagues accessing counselling support and having time away from work which has impacted on team morale and service delivery." The claimant was informed that given her role as a social worker if found proven the above allegations would contravene the respondent's Code of Conduct and breach the Health and Care Professionals Council's Standards of Conduct, Performance and Ethics. It was also stated that the allegations might amount to gross misconduct and that dismissal was a potential outcome of the hearing. The claimant was informed that Mr Cordery was to chair the disciplinary panel and that Ms Hampton would present the management case. The claimant was informed of her right to be accompanied by a trade union representative or a fellow employee. She was informed of her right to make written submissions prior to the hearing and/or make any statement at the hearing. The claimant was told that Ms Sutcliffe and Ms Ainslie would attend as witnesses for the respondent and that the claimant had the right to question them and to call her own witnesses. The letter also enclosed the bundle of documents that were to be referred to at the hearing together with a copy of the Disciplinary and Capability Procedure.

28. The hearing took place on 11 July 2019. The claimant was accompanied by Ms Moss her chosen Employee Representative. It was understood that Ms Carey was too unwell to attend to give evidence to support the respondent's case, but in the event she was able to do so. The claimant felt disadvantaged by her unexpected appearance, and was afforded extra time to prepare and consider her statement before the hearing commenced. The claimant had also prepared a very detailed written document by way of her submissions in response to the allegations raised. The claimant confirmed that she did not wish to expand upon this, and her submissions were accepted. Ms Hampton then presented the management case. Ms Carey, Ms Ainslie and Ms Sutcliffe all gave evidence to support the management case and Ms Hampton's report. The claimant and her representative were at liberty to question these witnesses. They had also been invited to call any witnesses of their own, and although they adduced a number of letters in support from ten different colleagues, no witnesses were called in person.
29. Mr Cordery decided to dismiss the claimant summarily by reason of gross misconduct, and he wrote to confirm his decision by letter dated 16 July 2019. This letter ran to nine pages and gave his reasons in detail. With regard to the first allegation of gross misconduct he concluded: "I find that the witnesses' descriptions of your behaviour and the impact upon them matches the definition of bullying under the Council's policy to protect staff from bullying and harassment. I also found their accounts to be convincing and that the allegation against you was corroborated. Your denials of the events they describe are inconsistent as you admitted having been unkind, part of a clique and as having contributed to the toxic environment they found themselves working in. The witness accounts describe a consistent pattern of bullying behaviour on your part, and on the balance of probabilities I therefore find this allegation to be proven.
30. With regard to the second allegation of gross misconduct, Mr Cordery concluded: "I am aware that two of the three witnesses who attended the hearing have received counselling following their experiences of your behaviour towards them. At least one of the witnesses has had periods of sickness absence due to the stress and anxiety which was contributed to by your behaviour. The negative impacts on team morale were described by yourself as well as the other witnesses, and all seemed to agree it had been a "toxic" environment. Compelling evidence of stress and anxiety was presented by the witnesses at the hearing, and distress and related absences has caused underperformance by the team. On the basis of the above evidence, I therefore find this allegation proven on the balance of probabilities."
31. Mr Cordery also explained in detail that he had considered all of the factors put forward by the claimant by way of mitigation for her actions. He considered the claimant's assertion that the witnesses had misinterpreted her actions which were aimed at separating herself from the team to assist her to cope with the emotional stress that she was under relating to her personal issues which had been ongoing from 2017. He also considered the claimant's allegations that the respondent's witnesses had been untruthful and that the investigation had been biased against her. The claimant also asserted that some of the inappropriate behaviour was acceptable because the claimant was doing nothing different from what other members of the team were also doing. Mr Cordery confirmed that he had taken into account all the claimant's views, and the letters and statements in support, but had made his findings on the balance of probabilities taking into account all of the evidence from all of the sources.
32. It is also clear that Mr Cordery considered in detail the different potential sanctions, which included written warning, withdrawing sponsorship for social work training, and/or demotion in role with a reduced grade. Nonetheless he concluded that the claimant's behaviours constituted gross misconduct and that he "had lost the trust and confidence I am entitled to have in you to fully recognise and take responsibility for your misconduct and to bring about sustainable change. It is for these reasons I have decided to dismiss you from the employment of the Council for gross misconduct".
33. The claimant appealed against her dismissal by letter dated 5 August 2019. This was a very detailed letter giving 11 different reasons which ran to 12 pages. The claimant also formalised her previous grievance on the respondent's standard form under the relevant

- procedure so that she could now proceed with a more formal appeal against the rejection of her earlier informal concerns. At the claimant's suggestion, the parties agreed that her appeal against dismissal, and her grievance appeal, should be heard by the same panel at the same time.
34. There was some delay before the hearings could be arranged, in order to ensure that an independent panel was available to hear the appeals, and that all other relevant parties could attend. In addition, there was some delay between September and November 2019 to accommodate the availability of a trade union representative who had agreed to represent the claimant. The hearing date was eventually arranged for 26 November 2019. Mr Trevor Doughty, a Strategic Director for the respondent, was appointed to chair the appeal hearing, with Louise Wood (the respondent's Service Director for Planning and Sustainable Development) as the other panel member, and Mr Cordery was appointed to present the respondent's case at the appeal.
 35. Mr Cordery then made arrangements with the assistance of HR to speak to Ms Sutcliffe, Ms Ainslie and Miss Carey who were the three witnesses who were due to give evidence for the management case. There was a suggestion in an email from HR that he wished to speak to each of them for about 45 minutes. Mr Cordery's evidence was that he did not hold a detailed meeting with the witnesses to discuss their evidence, but rather the purpose of the arrangement was to confirm in a short telephone conversation that it was important that the witnesses attended as arranged, so as not to disrupt the pre-planned hearing, and that they told the truth.
 36. The appeal hearing took place on 26 November 2019 by way of a full re-hearing of the disciplinary process. The claimant was represented by Ms Hurd her chosen Trade Union Representative. Mr Cordery presented the respondent's case. Ms Hampton, Ms Carey, Ms Sutcliffe and Ms Ainslie all gave evidence in person in support of the management case. The claimant and her representative were allowed to question each of these witnesses. They had also been given the opportunity to call any witnesses of their own, but declined to do so. Mr Cordery also drew the panel's attention to, and specifically addressed, each of the 11 specific grounds of appeal which the claimant had raised in her previous appeal letter.
 37. These 11 grounds of appeal covered the following concerns: unreasonable delays; no attempt to deal with these matters at an earlier stage and lower level; Suzanne Sutcliffe was untruthful; mental health; consideration of her grievance; new evidence; not informing her that Dionne Carey had agreed to be a witness at the hearing; lack of fair and thorough investigation; inaccurate and biased recording and paraphrasing; disputing the facts; and work record and testimonials
 38. These grounds of appeal included the fourth heading Mental Health. The notes of the appeal hearing indicate that Mr Cordery made the following observations to the panel: "There is clear evidence that Jo has experienced anxiety and stress in the past and particularly through this period. It is also clear from her work record and attendance at work that she has managed her emotional problems effectively, including taking appropriate action in referring herself for counselling. They have not had a substantial impact upon her capacity to perform the day-to-day tasks required of her. In any case some of the alleged behaviours precede the chronology in her appeal and these mental health problems cannot be an excuse for the way she has behaved towards some colleagues. The fact that she has such positive testimonials from some other colleagues indicates that she is capable of regulating her emotions and her conduct in her relationships. Her speculation that she may struggle with newcomers to the team and that this may be at the heart of the problem lacks self-awareness or a commitment to change, especially as she has disputed and denied much of her behaviour towards those colleagues and the impact upon their mental health. As the Service Director responsible for social work and for the Council's Traineeship, Jo's mental health as she describes it in her appeal letter would also cause concern in terms of fitness to practice, including the way she conducts her relationship with colleagues."
 39. There was insufficient time on 26 November 2019 to conclude both the claimant's appeal against dismissal and her grievance appeal, and the hearing was reconvened on 11 December 2019. The claimant was again represented by her chosen Trade Union

- representative. The appeal panel of Mr Doughty and Ms Wood decided to reject the claimant's appeal against her dismissal, and also the appeal against the rejection of her earlier grievance.
40. Mr Doughty confirmed the reason for the respondent's decision in a detailed 12 page letter dated 23 December 2019. This letter dealt with each of the 11 grounds of appeal against dismissal. Under the fourth heading of mental health the claimant had alleged that there had been a failure to consider her mental health at the original hearing or over the course of the investigation, and failure to make a timely occupational health referral or to put in place reasonable adjustments. Mr Doughty's letter recorded the following comments: "There is a history of poor mental health referred to by yourself and evidence of you seeking support via your line manager and also externally for your GP and counsellor. It was clear to the panel that this has been a very difficult time for you personally due to the relationship you described between you and a service manager. An Occupational Health referral was undertaken in October 2018. The panel established that you were asked if you would like any alternative arrangements or reasonable adjustments throughout the course of the process in writing and verbally to ensure that you were able to fully participate in both the investigation and that the disciplinary hearing. The panel heard your representations, which included your mitigation regarding your mental health, and considered how your behaviour may have been negatively impacted in the context of your mental health at the time. The panel concluded that any adjustment of behavioural standards or tolerance to accommodate your behaviour was unreasonable taking into account a number of factors including the wider staff well-being, the impact on the operational effectiveness of the team, and the subsequent ability of the council to carry out its duty of care to employees."
 41. Mr Doughty's letter also confirmed that the panel had considered in detail the matters raised by way of the grievance appeal, which were these: threatening comments made by Suzanne Sutcliffe; inadequate handling of the same by Ms Doyle; conflict of interest because of Ms Doyle's family relationship with Ms Sutcliffe; and dissatisfaction with the lack of feedback from the informal meeting with her manager about that issue. The panel rejected the appeal because it felt that there was no reason to overturn the conclusions already made during the grievance hearing with which it agreed, and also confirmed in any event that the claimant's grievance appeal had had no bearing on the panel's consideration into the allegations of gross misconduct.
 42. With regard to the decision to dismiss the claimant, the panel also considered the matters raised by the claimant by way of mitigation, and alternative sanctions. It concluded: "In considering whether the decision to dismiss was a proportionate sanction, the panel took into account your mitigation, your mental health at the time, and also the positive testimonials of colleagues you work with and who have not experienced this behaviour by you. The panel considered the alternative options of a more lenient approach to your behaviour and balanced this against the impact of your behaviour of colleagues in the office. The evidence was clear to the panel your behaviour had directly attributed to a poor working environment, personally impacting on work colleagues and undermining the Council's ability to ensure its duty of care to staff and jeopardising service delivery. The panel concluded that on balance, your behaviour could not be accepted or accommodated by the Council for these reasons. The panel took into account that for a period of this time by your own admission you were under significant personal pressure, due to investigations which were ongoing into matters relating to your colleagues at work. The panel also considered that whilst concerns regarding your behaviour were raised by with you by your managers, the panel concluded that it is reasonable to expect you to appreciate the required standard of behaviour and to know what is expected of you ... As the actions amounted to gross misconduct there was no alternative work within the Council that would provide a feasible alternative to dismissal. On this basis the panel unanimously concluded that the decision to summarily dismiss you from your employment was proportionate and your dismissal from employment with the Council stands."
 43. That was the final stage of both the disciplinary and grievance procedures. The dismissal of the claimant as a Trainee Social Worker for gross misconduct of this nature was effectively a career ending decision. The claimant commenced the Early Conciliation

process with ACAS on 7 October 2019 and the Early Conciliation Certificate was issued on 1 November 2019. The claimant presented these proceedings on 29 November 2019. The issues to be determined at this hearing were confirmed at two Case Management Preliminary Hearings on 6 May 2020 and 9 December 2020, and the claimant's claims are limited to those of unfair dismissal and discrimination arising from her disability as addressed below.

44. Having established the above facts, I now apply the law.
45. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
46. I have considered section 98 (4) of the Act which provides "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
47. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
48. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from her disability under s15 EqA.
49. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if she has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
50. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this 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.
51. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
52. I have considered the cases of Pnaiser v NHS England [2016] IRLR 170 EAT; Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14; City of York Council v Grosset [2018] IRLR 746 CA; Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Taylor v OCS Group Ltd [2006] ICR 1602 CA; Adeshina v St George's University Hospitals NHS Foundation Trust and Ors EAT [2015] (0293/14) IDS Brief 1027; Turner v East Midland Trains Ltd [2013] IRLR 107 CA; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.
53. Discrimination Arising From Disability
54. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious

- thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links ... the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) 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.
55. In Basildon & Thurrock NHS Foundation Trust v Weerasinghe the EAT held that the fact that unfavourable treatment might be loosely related to a person's disability, or the context in which the disability was manifested, is not the same as showing that the treatment was the result of something arising out of the person's disability.
 56. Applying Pnaiser, the unfavourable treatment of which the claimant complains is her dismissal. The next question to determine is what caused the claimant's dismissal, in other words what was the "something"? This was the gross misconduct committed by the claimant, in other words her bullying of her colleagues contrary to the respondent's procedures. The next question to ask is whether the claimant's gross misconduct was something which arose in consequence of her disability, which is a question of objective fact to be robustly assessed. This could describe a range of causal links.
 57. In this case the respondent has conceded that the claimant was a disabled person for the purposes of the EqA at the time of her dismissal, but not previously. This begs the questions (i) as to when the claimant became a disabled person such as to qualify for protection under the EqA, and (ii) whether the respondent knew, or ought reasonably to have known, that the claimant was disabled, and if so at what time.
 58. The disability relied upon by the claimant is depression and anxiety. I accept the claimant's evidence that she had historically suffered from stress, and that during 2018 she felt on occasions considerable stress at work as a result of her relationship with Ms Prinsloo, which in all probability would have been considered to have been inappropriate under the respondent's procedures and ought to have been declared. The claimant referred to an "imbalance of power" which meant that she felt unable to do so which added to her stress. When she raised the matter of her stress with her Team Manager in October 2018 she was referred to Occupational Health. However, at that stage the report clearly finds that the claimant did not "report generalised anxiety"; had not been to see her GP; did not need any medication; felt that she was under scrutiny in her team; but that there were no tasks or activities which she would be unable to perform, and did not fall under the disability provisions of the EqA. I have heard no evidence to suggest that this report was inaccurate or untrue as at the end of October 2018, nor that it was inaccurate or inappropriate for some time thereafter.
 59. This had changed by the time of the second Occupational Health report dated 2 July 2019. By this stage the claimant was described as disabled under the provisions of the EqA because she was experiencing high levels of stress and anxiety, required meditation to help her sleep, and had consulted her GP (though she had declined medication). However, the report makes it clear that there were no external or personal contributing factors and that the ongoing disciplinary process was the claimant's main stressor, which included (as she saw it) a lack of communication and transparency in the process. The respondent was aware of this report and the fact that the claimant was deemed to be disabled at the time that it took the decision to dismiss the claimant on 11 July 2019.
 60. At some stage therefore, between the end of 2018 and July 2019, the increased levels of stress had caused anxiety and the claimant had become a disabled person as a result of this condition or impairment. There is scant evidence before me on which to make a judgment as to exactly when the claimant might have become disabled, but one important clue is the report dated 2 July 2019 which indicates that the ongoing disciplinary process and what the claimant perceived to be a lack of communication and transparency was the

- main stressor which fuelled her anxiety levels. This started to take place during the early months of 2019 when the claimant knew that she was under investigation for potential misconduct, but which investigation was suspended pending the claimant's informal grievance complaint. It seems likely therefore that the claimant became disabled at some stage between say March and June 2019. There is no reason to suggest on the evidence which I have seen that the respondent knew, or ought reasonably to have known, that the claimant was disabled by reason of anxiety before this time. Furthermore, given the contents of the first Occupational Health report, there is no evidence to suggest that the respondent knew, or ought reasonably to have known, that the claimant had become disabled until she complained of stress and anxiety in June 2019 which resulted in the second referral and second report.
61. I therefore find that the claimant was a disabled person, and that the respondent knew the same, with effect from early July 2019 and the second Occupational Health report, and at the time when the respondent dismissed the claimant. However, I also find that the claimant was not a disabled person before about March 2019, and I also find that the respondent did not know, and it cannot be said that the respondent ought reasonably to have known, that the claimant was disabled before about June 2019.
 62. For these reasons I find that the unfavourable treatment of which the claimant complains, namely her dismissal for gross misconduct, was not something arising in consequence of any disability. The misconduct and bullying for which the claimant was dismissed (up to January 2019) arose at a time when she was not disabled. The behaviours for which she was dismissed were not something which arose in consequence of any disability.
 63. The respondent also seems to have reached this conclusion, although not applying the analysis above. As noted above, Mr Cordery made the following observations to the panel: "There is clear evidence that Jo has experienced anxiety and stress in the past and particularly through this period. It is also clear from her work record and attendance at work that she has managed her emotional problems effectively, including taking appropriate action in referring herself for counselling. They have not had a substantial impact upon her capacity to perform the day-to-day tasks required of her. In any case some of the alleged behaviours precede the chronology in her appeal and these mental health problems cannot be an excuse for the way she has behaved towards some colleagues. The fact that she has such positive testimonials from some other colleagues indicates that she is capable of regulating her emotions and her conduct in her relationships. Her speculation that she may struggle with newcomers to the team and that this may be at the heart of the problem lacks self-awareness or a commitment to change, especially as she has disputed and denied much of her behaviour towards those colleagues and the impact upon their mental health". Despite further representations made by the claimant and on her behalf at the appeal hearing, the appeal panel reached a similar finding.
 64. In conclusion therefore, I find that the claimant's bullying behaviour was not something which had arisen in consequence of a disability, and that the less favourable treatment of which she complains, namely her dismissal for that bullying behaviour, was not an act of discrimination which had arisen in consequence of any disability. Accordingly, I dismiss the claimant's claim for discrimination arising from disability under section 15 EqA
 65. Unfair Dismissal
 66. I now address the claimant's claim for unfair dismissal. The starting point should always be the words of section 98(4) of the Act. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

67. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
68. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors.
69. Applying the Turner decision, the band of reasonable responses test provides a sufficiently robust flexible and objective analysis of all aspects of an employer's decision to dismiss to ensure compliance with Article 8 of the European Convention on Human Rights. In addition, this test allows for a heightened standard to be adopted where the consequences are particularly grave, for instance where the decision to dismiss can be said to be career ending.
70. The claimant has raised six specific allegations of unfairness, and I deal with each of these in turn.
71. First the claimant alleges: "My employer failed to conduct a reasonable thorough or timely investigation." The claimant complains that the respondent only selected three people who made negative comments about her and did not speak to others from within the team and had not tried to gain a broader view of the situation and the dynamics in play. I reject that allegation of unfairness. There was a thorough and detailed investigation initiated by Ms Hampton, who chose to rely on the evidence of the three witnesses Ms Carey, Ms Sutcliffe and Ms Ainslie. The claimant and her representative were given every opportunity to call any other witnesses in support at both the disciplinary and appeal hearings, but chose not to do so. The claimant was able to adduce statements in support from 10 other colleagues, and it is clear that these were considered in detail by both the disciplinary and appeal panels. Both panels were entitled to reach the conclusions which they did on the balance of probabilities on the information before them.
72. To the extent that this ground of unfairness encapsulates an allegation of unreasonable delay, in my judgment the delays in resolving this issue do not themselves render the procedure unfair. Ms Hampton's original investigation was put on hold pending investigation and resolution of the claimant's first informal grievance, which was a reasonable response by the respondent given that the result of that informal complaint might have had a bearing on the potential disciplinary investigation. Any delays caused in this respect were not unreasonable. Once that process was concluded, the disciplinary hearing and subsequent appeal hearing were arranged within a reasonable period of time bearing in mind the difficulties for all concerned in making arrangements for a number of busy people to attend at the same time. This includes delays caused by the lack of availability of the claimant's chosen representative. That is not a criticism, but equally it cannot be said that the respondent was guilty of any unnecessary or unreasonable delay in resolving these issues.
73. Secondly the claimant alleges: "My employer allowed bias to influence both their investigation and ultimately the decision to dismiss me." The claimant refers to Ms Hampton's report and Mr Cordery's outcome letter in which she says that Ms Carey's evidence was incorrectly paraphrased and relied upon, as confirmed in more detail in her appeal statement. In my judgment this misses the point that the claimant and her representative were able to question Ms Carey as to her evidence at both hearings, and to question Ms Hampton and Mr Cordery on their conclusions at the full re-hearing of the matter on appeal. The claimant was able to state her case in this respect. In my judgment

- both panels were able to reach the conclusion which they did on the balance of probabilities based on the information before them, and this allegation of itself does not render the respondent's substantive decision unfair.
74. Thirdly the claimant asserts: "My employer actively ignored, dismissed and minimised evidence which supported my case including evidence that two out of the three witnesses had demonstrated ill intent towards me." However, it is clear that both Mr Cordery and the appeal panel did not ignore this evidence, but rather gave it detailed consideration. They did not dismiss this evidence, but rather preferred the evidence against the claimant on the balance of probabilities, having weighed the evidence both for and against the relevant allegations. In my judgment they were entitled to do that, and the fact that the claimant does not agree with that evidence or their conclusions, does not render her dismissal unfair.
75. Fourthly the claimant asserts: "My employer failed to consider the impact of my mental health which they have conceded constitute a disability under the Equality Act 2010, on my conduct and performance and have not acknowledged that they were aware the difficulties I was experiencing." This matter is dealt with in more detail above in dealing with the claim under section 15 EqA. However, it is not the case that the respondent failed to consider the potential impact of the claimant's mental health. It is clear from Mr Cordery's findings and explanatory comments, that the respondent did take into consideration the matter of the claimant's mental health, the stress that she complained of, and the conclusions of the two Occupational Health reports. As noted above Mr Cordery concluded that whatever stress the claimant had been suffering from at the time of the allegations of gross misconduct this did not explain or excuse the claimant's actions, particularly when she was able to forge successful working relationships with other colleagues when she chose to do so. The appeal panel effectively reached the same conclusion. There was no act of discrimination in this respect, and this allegation of unfairness is also rejected.
76. Fifthly, the claimant complains of an "Improper handling of my grievance". I reject this ground as an allegation of unfairness. In the first place the respondent complied fully with its grievance procedure in processing the claimant's initial informal complaint, and then considering her complaint further by way of a formal grievance and her appeal against the rejection of her grievance. I can understand why the claimant originally felt aggrieved that her informal complaint involving Ms Sutcliffe was dealt with in what the claimant perceived to be a secretive manner by Ms Doyle, the Head of Service, even though she was Ms Sutcliffe's sister-in-law. The claimant has repeatedly complained that there was no record of the content of the meeting, and that this was an inappropriate way to deal with her original informal complaint. I have considerable sympathy with that observation. However, the grievance process developed, and the claimant's complaints were considered in detail through the process, including by a senior independent panel at the appeal. They rejected the claimant's appeal against the original findings, but in any event confirmed that the matters relating to the grievance and had no impact on their consideration of the evidence relating to the dismissal. I reject the contention that the respondent's handling of the claimant's grievance and grievance appeal rendered her dismissal in any way unfair.
77. Finally and sixthly, the claimant asserts that: "My employer did not take into account my exemplary record of good conduct and integrity when considering the truth of my statement to them." I reject this allegation of unfairness, because on the contrary it is clear from the evidence that both Mr Cordery and the appeal panel carefully considered the evidence which was positive and supportive of the claimant. This included her unblemished disciplinary record, the valued work which she had done as an employee, and the numerous positive testimonials which the claimant had adduced to both panels. The respondent weighed that information in the balance before deciding whether or not dismissal was a proportionate response. It is not the case that this dismissal was unfair because the respondent ignored or failed take into account this information.
78. In conclusion, the investigation and process adopted by the respondent was in my judgement full and fair in all the circumstances of this case. The claimant was aware that she was being investigated for potential gross misconduct, and was made aware of the detail of the allegations against her. She was called to a disciplinary hearing at which she

- had the opportunity to state her case in response to the notified allegations, and at which she had the right to be accompanied by a fellow employee or trade union representative. She had the opportunity to question the evidence against her, and to call witnesses in support if she so chose. The decision to dismiss was taken by a senior manager on the evidence before him and the claimant was afforded the right of appeal. The appeal was dealt with by way of a full re-hearing, which of itself would have remedied any previous procedural breaches if there had been any. The appeal was heard by a panel of two senior employees who were independent of the previous process, and again the claimant was able to question the respondent's witnesses and to call her own witnesses if she chose to do so.
79. It is clear from the evidence of Mr Cordery and Mr Doughty that they genuinely believed that the claimant had committed gross misconduct, and I so find. I also find that that belief was based on reasonable grounds bearing in mind the respondent's procedures and the evidence before them, which in each case was examined in considerable detail. It is clear that the claimant does not agree with their conclusions, but in my judgment they were entitled to reach the conclusions which they did on the balance of probabilities based on the information before them.
80. In this case the respondent genuinely believed that the claimant had committed gross misconduct, and that belief was based on reasonable grounds. It followed a full and fair and reasonable investigation. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. It is not for this tribunal to substitute its view for that of the employer, and I do not do so. I find that on the facts of this case dismissal was within the band of responses reasonably open to the respondent when faced with these facts.
81. Accordingly, I find that even bearing in mind the size and administrative resources of this employer the claimant's dismissal was fair and reasonable in all the circumstances of the case, and I therefore dismiss the claimant's unfair dismissal case.
82. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 43; a concise identification of the relevant law is at paragraphs 45 to 52; and how that law has been applied to those findings in order to decide the issues is at paragraphs 53 to 81.

Employment Judge N J Roper
Dated 13 January 2021

Judgment and reasons sent to Parties
on 22 January 2021

FOR THE TRIBUNAL OFFICE