EMPLOYMENT TRIBUNALS

Claimant Ms Jane Richardson

Respondent Your Homes Newcastle ("YHN")

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE (by CVP) On 4-6 (deliberations on 8th) January 2021
EMPLOYMENT JUDGE T.M. GARNON
Members: Ms E. Wiles and Mr R. Dobson
Appearances
For Claimant Mr J. Mc Hugh of Counsel
For Respondent Mr R. Stubbs of Counsel

JUDGMENT

Our unanimous judgment is
(a) the claims of unfair dismissal and disability discrimination are not well founded and are dismissed.
(b) the claim of wrongful dismissal is well founded. Unless the parties within 14 days of this judgment being sent, notify the Tribunal remedy is agreed, it will be decided on a date to be fixed at a two hour CVP Hearing.

REASONS (bold is our emphasis, italics quotations and numbers in brackets pages in the bundle)

1. Claims and Issues

The claims are unfair dismissal, wrongful dismissal and disability discrimination under s15 of the Equality Act 2010 (EqA). YHN concedes the claimant was at all material times disabled, but not that it knew she was. The issues are:

Unfair Dismissal
(a) What set of facts known to YHN, or beliefs genuinely held by it, were the principal reason which caused it to dismiss?
(b) Was that reason related to the claimant's conduct?
(c) If so, having regard to that reason, did the employer act reasonably in all the circumstances:
(i) in having reasonable grounds after a reasonable investigation for its beliefs
(ii) by following a fair procedure
(iii) in treating that reason as sufficient to warrant dismissal?
(d) If the dismissal was unfair what chance was there, the claimant would have been fairly dismissal at some point in the future and, if so, when?

(e) If the dismissal was unfair, did the claimant contribute to her dismissal by any culpable or blameworthy conduct?

Wrongful dismissal
(f) Does YHN prove on balance of probabilities the claimant was guilty of gross misconduct such that it had the right to terminate her contract without notice or pay in lieu?

S15 Claim
(g) Did YHN know or could it reasonably have been expected to know the claimant was disabled?
(h) Did posts she made on Facebook and/or decisions she made in how Tenants A and B were allocated properties by her arise, at least in part, in consequence of her disability?
(i) If so, the safe, fair and transparent allocation of housing is clearly a legitimate aim but was dismissal a proportionate means of achieving it?

2 Findings of Fact

2.1. We heard the claimant, her Union Representative, Mr Derek Muse, and read a statement of Mr Mark Watson for whom Mr Stubbs had no questions. We heard, for YHN, Mr Gavin Cox (Investigating Officer), Ms Sarah Walker, the claimant's line manager), Ms Suzanne Halliwell (dismissing officer) and Mr Matthew Foreman (chair of the appeal panel which included Mr Dennis Hall a non-executive Director of Asfaleia a company in the YHN Group and Mr Paul Scope a Non-executive Director of YHN. We had an agreed document bundle. The principle function of YHN is to manage council housing on behalf of Newcastle City Council (NCC). YHN Housing Solutions manages the Choice Based Lettings Policy on behalf of NCC and other registered social housing providers (the Tyne and Wear Homes Partnership) in the city of Newcastle.

2.2. The claimant commenced employment for YHN on 31 March 2006 as a Housing Adviser at Heaton Housing office. She moved the Walker Housing Office and was promoted to a Housing Officer (the full title is Housing Options Officer). She managed a geographical area rehousing tenants, dealing with anti-social behaviour, rent arrears, visiting properties to deal with repair issues and other general activities. She worked in all YHN offices at various times. She was always assigned properties for which there was low demand. Some would sit as vacant for years. To find new tenants she would ask around the estate to see if any existing residents had friends or family looking for property, approach other Housing Officers and check the "direct let" list of potential applicants not able to apply normally (called "bid for") properties because, for example, they had a history of rent arrears or anti-social behaviour. "Low demand" properties often went to ex-offenders and people who were drug or alcohol dependent.

2.3. When she was at Byker Community Trust (BCT) there was an emphasis on "fast tracking" customers. There was a belief across management no one should be homeless. Housing Officers were briefed to increase occupancy wherever possible. She loved helping homeless people put a roof over their heads. She felt part of the community, making a difference to people's lives.

2.4. In August 2015 she fell pregnant. At the end of April 2016, she left BCT to have her baby and was on maternity leave for 10 months. During that time YHN underwent a restructure. When she returned in March 2017 she worked at the Kenton Housing office where she continued to work as she had at BCT. She would discuss "fast tracking" during her annual reviews with managers and

they would praise her approach and performance. It is vital to realise there are provisions for fast tracking **within the various policies** so the phrase is not synonymous with going outside policies.

2.5. In October 2018 she was asked to work at Walker housing office and allocated a Multi Storey Block, Church Walk House (CWH), with about 23 empty properties, some of which had been vacant for two years. NCC had previously planned to demolish CWH but changed its mind and now wanted to increase occupancy. CWH already had a reputation for drugs and anti-social behaviour. It was not a desirable location to make a home. It was dated, had multiple outstanding repairs and there were few families living there. At that time, Sarah Walker became her line manager. They had worked together before and knew each other well.

2.6. Her return to work was emotionally very difficult. Her pregnancy was unplanned and becoming a mother again at the age of 44, 21 years after having her first child, was a struggle. She was already coping with depression, made worse by stopping taking medication while pregnant. She may well have had post-natal depression and in October 2018, she was still suffering low mood and anxiety, would often feel overwhelmed at work and burst into tears. She was taking 20mg Fluoxetine daily. On occasions, she told Ms Walker about her mental health as Mr Watson's statement corroborates. She declined referral to occupational health (OH) because she thought that, and sickness absence, would be a factor in staff retention. She tried to muddle on as best she could. Walker Office was busier than Kenton. The claimant felt she was not functioning to full capacity, and sometimes wondered how she got through the day but was frightened to take any time off in case it jeopardised her job.

2.7. On 10 April 2019 she arrived back at Walker office from annual leave, sat at her desk next to Lauren Anderson, a Tenancy and Estates Officer and personal friend, who was acting strangely. At about 2pm Ms Walker asked the claimant to come to YHN House but would not say why. When she arrived Ms Walker took her to a room and returned with Kay Duncan from HR, saying an informal investigation was being carried out about a Facebook post she had made on 30 March 2019 and her allocation of a property to Tenant A in November 2018. She was suspended.

2.8. On 15 April 2019, Mr Cox, only recently promoted to manager, was appointed investigating officer. The claimant attended interviews with him and her trade union representative Mr Muse on 24 April and 16 May. Eventually, the following were referred for a disciplinary hearing:

(a) Facebook posts on 30 March 2019 in breach of YHN's Code of Conduct and Looking after Information Policy
(b) allocation of a property to Tenant A in breach of YHN's Code of Conduct and Allocations and Lettings Policy and Housing Services local protocol
(c) allocation of a property to Tenant B in breach of the same Code and Policy.

Our reasons will be clearer if we set out first the claimant's case then YHN's.**The reason we set out every stage in detail, despite it resulting in repetition,is to illustrate the number of opportunities the claimant had to show her acts were "mistakes", to use her word, possibly due to her poor mental health, which would, with extra training, be unlikely to recur. YHN's reason and justification for dismissing her is they were convinced otherwise.**

2.9. First Allegation

2.9.1. The claimant and her husband purchased a property to let years earlier. When it became vacant, her 21 ear-old daughter moved in. Her 55 year old male neighbour would watch her when she was entering or leaving and make comments, such as her clothes would look better on his bedroom floor. The claimant and her husband were became concerned about her safety. The final straw was when her daughter told them someone had tried to get into her front door and the key had snapped in the lock. Gloss paint had also been poured over her car parked on her driveway. CCTV footage from a nearby property identified the neighbour as responsible. The claimant and her husband immediately removed their daughter and sold the property.

2.9.2. Screenshots of the claimant's Facebook page (322-326), show her as employed by YHN and include "*You fucking dirty little Cunt what u are putting paint all over the daughter's car, well you have truly fucked yourself, cos when I find out who the fuck you are u little Fucking mug I going to smash your fucking ugly dirty little tramp face in*". YHN acknowledges she took that post down quickly, but did not remove replies to a tagged post containing similar comments until asked to do so on 10 April. YHN has policies such as Code of Conduct (43-59) and Looking After Information (60-121) which set out how employees should behave and are responsible for anything they publish online. The claimant says, and we accept, (i) she thought her Facebook page was private and only her" Facebook friends" could gain access to it (ii) this reaction was uncharacteristic (iii) she removed it within 20-30 minutes of posting (iv) on 10 April 2019 she admitted the comment was abusive and threatening, she should not have done it and was ashamed (v) at the time she was angry, upset and worried about her daughter. It was Ms Walker who took the screenshot of the post.

2.10. **Second Allegation**

2.10.1. In late October 2018 the claimant met her uncle by chance, mentioned she had just moved to the Walker office and was now managing CWH. He asked if his son, (her cousin, Tenant A) could apply for a property and what he had to do to make that application. She had had no contact with Tenant A for some years but was aware he had been sent to prison in 2016. She thought since his release, with the help of his parents, he was getting back on his feet. She asked her uncle if her cousin had been in any of trouble since his release and he replied he had not.

2.10.2. Housing Officers had been told they were not permitted to send a property for repairs until a prospective tenant had been identified as spending had to be kept to a minimum. At the beginning of November 2018, Tenant A and the claimant viewed a one bedroom flat in CWH which had been empty for 18 months. She knew YHN have procedures for dealing with applications from relatives. When she returned to the office from viewing the property with Tenant A she mentioned the tenancy to a colleague, Ann Cowpaithwaith, who suggested she should run it past Ms Walker to cover herself. While doing so she said the prospective tenant was her cousin and Ms Walker did not tell her to refer the application to a colleague but authorised her to refer the property for works to be carried out in preparation for the tenancy, called "releasing the void". When later Tenant A was in the office to sign up, the claimant told Ms Walker Tracey Thirwell, from Advice and Support, was going to make sure his Universal Credit claim was completed correctly. Ms Walker acknowledged what she was doing and asked her to proceed. On about 19 November, Tenant A took a tenancy of that property.

2.10.3. Tenant A had earlier applied for a property in Walker but not given one, so the claimant says because a resident in the area (CN) had stabbed him in the head. While the claimant was on annual leave, Tenant A **attempted to visit CN** who raised a complaint to Sandra Johnson of "Changing Lives". On 8 April 2019 Ms Johnson sent an email to YHN saying Tenant A was the attacker. Despite attempts to rectify the error, YHN repeated it throughout the disciplinary process. Even Ms Halliwell, while summing up at the end of the disciplinary hearing, criticised the claimant for showing no remorse for the "victim" of Tenant A. Mr Muse said she had got it wrong. Mr Cox and Kay Duncan of HR flicked through their notes and said Ms Halliwell was correct.

2.10.4. Throughout the disciplinary process, the claimant repeatedly said her managers had authorised her involvement in Tenant A's application and not drawn any policy or issues to her attention. Despite having sufficient opportunity to do so, Ms Walker did not raise issues of conflict of interest and/or relevant policy documents or stop the claimant dealing with Tenant A. Had she done so, the claimant would have followed her instruction.

2.10.5. The claimant did not carry out "verification checks" on Tenant A until 16 November 2018 though she had asked for property repairs on 1 November 2018. Once Tenant A said he wanted the property, she told Ms Walker and got her authority to send it for repairs. Only when they would get an expected completion date could a tenancy start. The claimant explained during the disciplinary hearing this was a necessary process for all applicants (not just Tenant A) which explains the 15 day delay.

2.10.6. A "Safer Estate" check is necessary where an applicant declares, or is known to have, a criminal record. A request is sent to Northumbria Police asking what, if any, criminal activities had occurred, **so the claimant thought, in the past 12 months**. The lack of the Safer Estate request on Tenant A's application became an issue only when YHN received the email from Changing Lives dated 8 April 2019 saying he had recently been involved in a violent crime. During the meeting on 10 April 2019 the claimant was not told about that email. Had she been, she says she would have explained Tenant A had been stabbed so was the victim. not the perpetrator. Lauren Anderson had visited him in January 2019 and seen his injuries. The fundamental flaws in this argument are (a) his conviction was for an earlier domestic assault of his girlfriend and (b) the mere fact Tenant A sustained injury, does not mean he was not the initial aggressor. Indeed, on reading the emails, at the end of March 2019, Tenant A went to a place where CN, and a friend of Tenant A, lived **possibly looking for CN**. That is what prompted the email from Changing Lives.

2.10.7. YHN maintained her actions had caused reputational damage in its relationship with a key external partner, Changing Lives. They kept on saying Tenant A was a risk to staff and other residents. The claimant says this is" *absolutely untrue*" because there had been no restrictions placed on lone visits to Tenant A's property or any risk indicators added to his file. An email chain around page 274 says Changing Lives had refused to accommodate Tenant A due to his offending history and continuing behaviour in 2018. The Tyne and Wear Homes "partnership" of organisations in Newcastle who have the task of accommodating problem tenants must be able to rely on each other to uphold common standards. Implicit in the emails is the view YNH should not have given Tenant A accommodation.YHN say Tenant A required avoidable support from the Safe Living Team. The claimant says this has not been the case as no one contacted Tenant A in relation to this. She only has Tenant A's word for this.

2.10.8. A landlord's reference and 5 year housing history is normally required as part of "verification" before a person can become even a prospective tenant. The claimant says she believed Tenant A was staying at his mother's property in Benson Road, Walker. A family member cannot provide a reference so she asked him to get a reference from his support worker. She had understood that was in Tenant A's "void pack", which is a paper file in which the claimant would keep information as it arrived and upload it all at once later.

2.10.9. YHN maintain she should have referred Tenant A to the Central Housing Team because he was in supported accommodation provided by Changing Lives. She had understood Tenant A to be living with his mother. However, even if she had known otherwise, she did not know of the requirement for supported accommodation applicants to be referred to the Central Housing Team and believes not all allocation officers would.

2.11. **Third Allegation**

2.11.1. Tenant B previously lived with his former wife, arrived home from work and discovered her in bed with someone. He spat on her and was prosecuted for common assault so the claimant thought. Page 348 shows he was convicted in April 2018 and given a community based sentence, though he had broken bail conditions. He and his wife had separated then come to Walker Housing office where he signed his half of the tenancy over to her. His application for another YHN tenancy was refused in May 2018 because of his conviction. He appealed unsuccessfully. In about October 2018, his wife came into Walker Office and terminated her tenancy. The claimant was on duty when Tenant B came in very upset asking for the property back as he was homeless. She explained he could not have it back as he had terminated his part of the tenancy. She knew his wife was moving to Durham with her new partner. When she went to see Tenant B's wife to inspect the property before it was returned, the wife had requested it be returned to Tenant B.

2.11.2. Tenant B explained he was working with Social Service and getting full custody of his son but was currently "sofa surfing" with his son. The claimant told him some properties were available at CWH which he said he would take **as he was desperate**. His application for a tenancy was "non qualifying" which means he was unable to bid for a property because of his recent offence. His son was not on his application form. The claimant was unaware children could not reside in CWH. There are families in Newcastle in multi storey blocks. The claimant had taken over Mr Cox's area when he was promoted and families with children were in multi-story blocks there.

2.11.3. YHN also maintained she should have contacted MARAC (Multi Agency Risk Assessment Conference) where YHN, the police and others meet monthly to discuss victims and perpetrators. The claimant believes she spoke the Safe Living team advising she was going to rehouse Tenant B as she knew his partner was moving "out of the area". Durham is less than 15 miles away. YHN say her failure to refer to MARAC placed residents at risk from Tenant B. She does not believe this to be the case. Like Tenant A, he had been in no recent trouble nor had there been any risk indicators placed on his file. Again, that is what he told her.

2.11.4. **In early 2018, YHN were pushing to empower staff and discourage managers from interfering with Housing Officers decisions.** This drive came from Mr Foreman who instructed managers such as Ms Walker to implement those changes. **With those instructions in mind**, **the**

claimant thought she was making the right decision regarding Tenant B because YHN as a social housing provider do not want people to be homeless. She said she was sorry if she should have taken other steps like sending Tenant B to the Housing Advice Centre (HAC) in Newcastle. She believed the reality was he would have been given homeless priority by HAC, placed on the "direct list", provided with housing from that list but left homeless in the meantime, sofa surfing and without his son over Christmas while all the paperwork circulated through the various channels. **She thought her actions would be a quick way of achieving the same outcome and keeping him with his son. This is very important. With greater autonomy comes greater responsibility. In the case of Tenant A the claimant is critical of Ms Walker's failure to stop what she was doing. She seems to want it both ways. On at least two occasions (eg page 283) in the disciplinary process the claimant said words to the effect " *I am paid enough to have the responsibility to decide if someone should be allocated a property*". She mentions senior managers, including Mr Foreman, saying they were "sick of" Housing Officers going to their managers to get decisions ratified which they could make themselves. The danger is of a Housing Officer going to the opposite extreme of making decisions which no-one in YHN should make without consultation with some agency or agencies outside it, eg the police, probation or social services.**

2.12. She rehoused Tenant A and Tenant B within a week of each other at a time was suffering from low mood. She says she should have really been off work but was scared because managers advised they had to be interviewed for their jobs and they might look at sick absence. She now says she believes the change to working in a busier housing office with pressure to drive down high levels of voids may also have caused misjudgments and oversights.

2.13. In December 2018 she says a colleague, Lewis Brown, rehoused a tenant without doing any checks. That tenant had been arrested for arson in the bin shoot at Eastfield House. Ms Walker requested a Safer Estate check after the arrest and it came back he had previously been prosecuted for arson and assaulting his girlfriend. A decision was made the tenant had to be removed from the block of flats for the safety of other residents. Ms Walker told the claimant the tenant should never have been rehoused by Mr Brown. Mr Brown remains employed. Mr McHugh did not put this to Ms Walker in cross examination.

2.14. On 3 July 2019, the claimant attended a disciplinary hearing accompanied by Mr Muse. On 12 July 2019, she received confirmation her employment had been terminated with immediate effect on the grounds of gross misconduct in respect of the 2nd and 3rd allegations. Her appeal was dealt with by Mr Foreman. The claimant took references from Changing Lives stating Tenant A was a good tenant and no level of support was needed. She took an email from the police stating Tenant A was the victim of CN not the perpetrator and had no conviction since his release from prison. The panel would not accept there was no evidence to suggest Tenant A or Tenant B were a danger to the public and to staff. The claimant reiterated in respect of both tenants there had been no risk indicators on their file and no alerts to make a safe guarding report to Social Services. A safeguarding report is a document completed by the Housing Officer when they become concerned about a tenant. It requires the Housing Officer to specify the nature of the concerns and forward the document to Social Services to review. In the case of Tenants A and B, the claimant says she had no indicators to report. She was also aware Tenant B was already involved with Social Services about his son, so though a safeguarding referral unnecessary.

2.15. Before the appeal a number of jobs were advertised in YHN, hers included, and Ms Walker's husband Stephen got the job. We asked if the claimant was suggesting she was dismissed to make way for him. She replied she was and thought that was why Ms Walker had been so keen to bring her Facebook posts to everyone's attention.

2.16. The claimant also believes YHN failed to give appropriate consideration to her 13 years of unblemished employment. We find they did consider it, but to her disadvantage in the sense that her long service meant she should have known better where to draw the line between using her initiative and exceeding the remit of her job description.

2.17. We also find they were not "*oblivious*" (her word) to the issues relating to Tenant A and Tenant B arising within two weeks of each other at a time she had mental health issues and was new to the changing demands and pressures at Walker office, which she now believes caused misjudgment on her part. In fact a panel member at the appeal (Mr Scope) went to great lengths to afford her an opportunity to say she had done wrong but only due to her health and circumstances at the time. In cross examination Mr Stubbs put to the claimant the officers who investigated, dismissed and rejected her appeal could not reasonably have been known she was disabled because she had introduced it as an afterthought so they did not attribute her decision making to any mental impairment which, with hindsight, existed. The claimant became upset thinking Mr Stubbs was saying she was using her mental health as an excuse for what she had done. He was not. Rather he was suggesting what she said to various people in the disciplinary process made them think there was a risk of her acting in the same way again because she gave cogent reasons for thinking she had done nothing wrong.

2.18. YHN say the claimant received training on the Lettings Policy dated 1 April 2017 (122). She has no recollection of attending such training. YNH provided a document "Lettings Policy 2017 Briefing and Training Guidance for YHN Staff' (192). She does not recall seeing that. Notification of training was provided to employees via an electronic diary entry. A copy of those entries (320) show her training attendances. Mr Cox reviewed her training record and was satisfied she had received training in all areas relevant to the investigation. She is unable to identify her attendance at any such training. Mr Stubbs showed in cross examination everything pointed to her being trained, but not recalling it.

2.19. Mr Derek Muse at the time was YHN's UNISON Convenor. He believes they demonstrated the claimant did inform Ms Walker of her relationship to Tenant A, and she was aware the allocation had been made. He is in no doubt the decision to dismiss was heavily influenced by the false allegation Tenant A was the perpetrator of a violent act. In relation to Tenant B, he accepts the claimant's performance standards had slipped due to her mental health but she did believe she was acting within the remit YHN were trying to instill into employees to take a lead and ownership on decision making and to "*think outside of the box*". He argued during the disciplinary process this was a performance issue and not wilful misconduct. **He says, while some processes were missed, Tenant B was a suitable candidate for rehousing.**

2.20. Dr A. J. Gall of Heaton Road Surgery wrote a letter on 16 December 2020 to the claimant's solicitor confirming the claimant attended an appointment on 9 March 2018 as she had symptoms of anxiety and low mood since the birth of her second daughter. She was commenced on Fluoxetine daily and reviewed at the end of March 2018. She was starting to feel some benefit

from the medication but continued to feel low in mood, tearful and anxious so the dose was increased to 20mgs daily. On 25 April, at a review Fluoxetine 20mgs daily was continued. As for whether her ongoing anxiety and low mood would in any way impact on her judgment ability, the GP wrote Fluoxetine was helping her, but "*she would be vulnerable to any additional stressors*". The GP, in our view, did not answer the key question directly.

2.21. Reading the claimant's version set out above, dismissal for a first offence rather than a warning and re-training seems harsh. The respondent's case provides more information. Ms Sarah Walker has worked for YHN for about 19 years, been a manager since 2008 and was the claimant's last line manager. She knew how the claimant felt about her unplanned pregnancy so long after her first child as she was very open with everyone. Ms Walker denies she knew about long term medication and did not see her crying at her desk, maybe because she has her own separate room and at the time of the two allocations had been her manager for only 4-6 weeks. Ms Walker remembers the claimant saying she liked having a busy patch.

2.22. Ms Walker says a referral to OH or taking time off sick would not have impacted on her employment. YHN was going through a reorganisation but sick absence was not a factor for redundancy selection. She accepts there are a lot of empty properties in Walker. She accepts the claimant told her of the allocation of a property to Tenant A. Her recollection is the claimant asked, "in passing" if she could send a couple of empty properties to be made ready to let as she had interested prospective tenants. The claimant told her one was a relative and her reply was she should follow the proper protocol for dealing with a family member. She denies a second conversation about Tenant A, but she may simply have forgotten it.

The investigation

2.23.1. Mr Cox has been employed by YHN since 4 January 2011, previously as a Housing Officer and a Manager since 27 August 2018.

2.23.2. He understands the NCC Allocations and Lettings Policy, legislation/best practice in housing and allocations process. A strong emphasis is given to safeguarding customers while reducing voids. All applications are verified and banded in line with the Allocations and Lettings Policy and Procedures, ensuring decisions are **robustly evidenced and transparent**. In his role he supported Housing Officers by making sure the housing options and pre-tenancy risk process was delivered consistently and YHN **had information** to identify, manage and mitigate against any risks. **On receipt of each new application the reason a customer is seeking housing must be checked. If it relates to domestic abuse or other adult or children's safeguarding issues, a prompt safeguarding referral must be made**.

2.23.3. In April 2019 he was asked by Kay Duncan of HR to carry out the investigation supported by her. This was his first disciplinary investigation. Ms Duncan ensured he was familiar with YHN's Disciplinary Procedural Policy and had access to further links. He knew the claimant before as a work colleague who took over his former patch. They had a good working relationship.

2.24. He began by reviewing the notes of the meeting on 10 April 2019 between the claimant and Ms Walker (255-256) and a statement Ms Walker had produced following it (272-273). He was also given a copy of an email dated 11 April 2019 from Stephen Janes, Income Collection

Manager (279-280) in which he recounted a conversation between himself and the claimant before that initial meeting. Emails just before this in the bundle show the trigger for investigation was the email from Changing Lives which found its way to Lauren Anderson who, realising it concerned the claimant's cousin told Ms Walker she would rather not deal with it because she sat next to the claimant. In the call to Mr Janes, the claimant was hysterical and worried she would be sacked over what she thought was one of two things -the Facebook posts or an argument she had with her sister who also works for YHN. Mr Janes in his email said he had previously known the claimant had spoken to a rent officer at the time of the let to Tenant A saying she would ensure Tenant A's rent was paid. Emails also show Tenant A had, according to the police, 30 arrests between 2006 and 2017, including one in November 2017 after his release from prison for breach of the peace, possession of Class A drugs and drink driving. No prosecution resulted on any of them but, the statement he had "been in no trouble" since his release was not exactly right.

2.25. Mr Cox tried to ensure the investigation took no more than 8 weeks as outlined in YHN's disciplinary investigations guidance. It took slightly longer, for good reasons. He, with Ms Duncan, first met with the claimant, represented by Mr Muse on 24 April 2019. Craig McLellan from HR to took notes (281-288). The purpose was to outline the allegations and get the claimant's response. That day Mr Cox sent a letter extending her suspension, confirming Dave Fletcher as her independent contact and reminding her of the independent and confidential support available via the employee assistance programme provider (259).

2.26. He met with Ms Walker on 1 May 2019 (289 -295) to understand how she became aware of the allegations, what approach her team followed when verifying applications for rehousing, in the management of void (empty) properties and what, if any, advice the claimant sought in relation to the allocation to Tenant A. During this meeting, Ms Walker disclosed concerns regarding an allocation to Tenant B which would require further investigation.

2.27. Mr Cox met Lauren Anderson on 13 May 2019 to discuss how she became aware of the allocations to Tenant A and Tenant B, if the individuals were known to her, and what concerns were raised. He ascertained the impact of these allocations on YHN, and subsequent actions required by YHN (296-301). That day he sent another letter extending the claimant's suspension.

2.28. He met the claimant again on 16 May 2019 to clarify her knowledge of the application management system used by YHN, "verification", allocations, safeguarding procedures, and her rationale in the allocations to Tenants A and B. Ms Duncan, Mr Muse and Mr McLellan were there (304-310). At no point did the claimant say she was disabled. He was aware she was on medication. She did not say how her condition impacted on her ability to do her work but said her "*head was all over the place*". On 24 May 2019 he sent another letter extending her suspension.

2.29. On 29 May 2019 he interviewed Mr Janes about his conversation with the claimant prior to her attending the meeting with Ms Walker on 10 April 2020 to ask about assurances made by the claimant following the allocation of property to Tenant A rent would be paid (311-319). On 7 June 2019 he sent a final suspension extension letter saying he had concluded investigations and was in the process of writing up the report (265).

2.30. The report details his findings in relation to each individual allegation and highlights areas of concern. Unlike some we read, although it is, metaphorically, “the case for the prosecution”. it is balanced and fair. He believed she had breached YHN’s Code of Conduct, the Looking after Information Staff Handbook the Allocation and Lettings Policy and Housing Services local protocol.

2.31. On allegation 1, the first post used inappropriate and threatening language. Although she removed it, she made further comments on a second post she was tagged into, similar in nature, which remained live on her Facebook wall until 10 April 2019. There would be reputational damage to YHN, which was shown as her employer on her Facebook page, and many of her friends knew anyway employed her. It was impossible to ascertain how many people viewed the posts.

2.32. On allegations 2 and 3, a Housing Officer must ensure all applications are verified and banded in line with the policy, and decisions are **robustly evidenced and transparent**. In both instances by failing to verify and ‘screen’ applications, she allocated property to persons who at that time were deemed unsuitable for a tenancy with Tyne and Wear Homes, so should not have had social housing. The paperwork did not identify the nature of Tenant A’s offence(s) from a non-exhaustive list of examples of unacceptable behaviour in the policy. She told colleagues and her manager of her relationship to Tenant A, so Mr Cox did not believe her actions were motivated by the family connection. That said, she failed to identify causes for concern and follow the agreed procedure when making an offer of accommodation to a family member. She stated she was aware of the protocol. She apologised for accepting the word of Tenant A’s father and failing to do a Safer Estate check. She appeared to Mr Cox to prioritise the allocation of properties, reducing voids and view affordability as a primary criterion when assessing qualification rather than safeguarding. **By reversing decisions** of colleagues she failed to recognise **potential** risks and safeguarding concerns.

2.33. She stated she had **and would continue to** “fast track” applications and move away from policies and procedures when allocating low demand properties. NCC, and its partner landlords, expect certain standards of behaviour from prospective tenants which **neither Tenant A nor Tenant B could demonstrate**. Thus, she caused damage to relations with partners, namely Changing Lives, NCC and Housing Advice Centre. The Tyne and Wear Homes partnership is founded upon transparency, trust, and **sharing of best practice through collaborative working**.

2.34. YHN must now manage two tenancies held by persons deemed unsuitable and carry the financial and time burden of investigating any concerns and taking any action required. Mr Cox says information obtained during this investigation has indicated ongoing behaviour by Tenant A and Tenant B which is not acceptable. The claimant disputes this. However, what may or may not have happened is largely irrelevant because Mr Cox’s point is **if anything did happen** to cause harm to another resident, or the son of Tenant B sustained foreseeable injury, and it came to light checks were not made **and recorded** YHN would not have a leg to stand on in defending its actions, all the more so if it came to light Tenant A had been given a tenancy by his own cousin.

The Disciplinary Hearing

2.35. Ms Halliwell has been employed by YHN since September 2002, since 2007 in senior positions and held her present post as Senior Manager since May 2018. She manages about 70 staff. She has had training in the disciplinary process and previously chaired three disciplinary

hearings, though this is the first time she dismissed someone. YHN is a large organisation operating across numerous sites so she did not know the claimant before but did recognise her by sight at the hearing. She received Mr Cox's report, and agreed with his recommendation the hearing should be heard at stage 3 which applies if dismissal is **a possibility**.

2.36. She sent out a letter dated 25 June inviting the claimant to a disciplinary hearing on 3 July 2019 including copies of the papers to be presented. She chaired the meeting and Stefanie Findley, HR Adviser was there to give support and advice. The claimant attended with Mr Muse. Mr Cox presented the management case supported by Ms Duncan. Ms Findley made notes during the hearing (365- 386). There were three allegations

Breach of YHN's Code of Conduct and Looking after Information policies by posting inappropriate comments and threats of violence on social media, whilst acknowledging YHN as your employer
Breach of YHN's Code of Conduct, YHN's Allocation and Lettings Policy and Housing Services local protocol in relation to the allocation of a tenancy to a family member
Breach of YHN's Code of Conduct and YHN's Allocations and Lettings Policy by failing to follow policy and procedure in the allocation of a property in November 2018.

2.37. Mr Cox set out the management case by reading out his report. Ms Halliwell asked questions as did Mr Muse. On Allegation 1 there were screenshots of the Facebook comments of an offensive, threatening and violent nature and YHN as her employee visible on her Facebook profile to the public (322-326). he claimant stated she did not know her profile was open to the public nor that it showed YHN as her employer, but most of her "friends" knew where she worked. Mr Cox confirmed she had shown remorse and not understood her profile could be viewed by the public. Mr Muse asked if there was any investigation of YHN staff "liking" the post. Ms Duncan replied Mr Cox had written up some wider recommendations for YHN, which included to remind all staff about the Code of Conduct. The claimant expressed remorse and said sorry. She stated at the time of making the posts she was depressed had been taking Fluoxetine for 2 years but did not want to go into problems at home. She said Ms Walker was aware of her health problems. The claimant also said she herself was aware of the potential for YHN's reputation to be damaged by these posts.

2.38. As for Allegation 2, Mr Cox specifically referred to extracts from documents
(i) YHN Code of Conduct – Section 2 – Working to Standard (46) "*employees are expected to carry out your duties in accordance with the law and our internal policies and procedures, be honest, impartial and efficient and to perform your duties to the best of your ability, never take advantage of your position for your private interest*"
(ii) Section 2.2 & 2.3 – Conflict of Interest (47 & 48) "*you should take steps to avoid such conflict, you should disclose to your manager as soon as you become aware of it and that employees are expected to inform YHN of any conflicts of interest in relation to service users*".
(iii) NCC's Allocation and Lettings Policy 2017 (138) "*applications from relatives….must also declare an interest, these applications will be assessed in the normal way but offers of accommodation will not be made without the approval of the manager*..,
" *the following details should be forwarded to the manager: the applicant's name and reference number, the property address and the date their bid was made and any other relevant information – including details of their …relationship*…"

2.39. Mr Cox's main points were:

(i) The allegation came to light following an email from a partner agency raising a concern about Tenant A. The claimant did not **put on the application** Tenant A was a relative (341). She did not follow any procedure to inform her manager, so there was no paper trail, though she told her when asking for the property to be repaired. The claimant knew the procedure for dealing with families as her sister previously needed a property and she had had nothing to do with her allocation (286).

(ii) The claimant did not follow the letting procedures in not getting a reference from Tenant's A then landlord **and it is set out in his application he lived at a hostel** (333). The claimant stated she thought he lived at his mother's (287) but she had added his Universal Credit letter dated 16 November 2018 with his hostel address on the same day as she signed him up to the tenancy on 19 November 2018 (342).

(iii) The claimant did not get a Safer Estates check. She knew Tenant A had an offending history. Another officer, Doreen, had dealt with Tenant A's earlier application which said he had an offending history of Domestic Assault (338) so she asked him to complete a consent form for YHN to request a Safer Estates check. He did not return the form, so Doreen closed the application, putting in the notes all proofs were to be resubmitted (339). The claimant on 19 November 2018 made the application live and signed Tenant A up for the tenancy. She stated (284) she did not do a Safer Estates check because her uncle said her cousin had not been in any trouble recently and thought if someone had not offended for 12 months they can be made "live" to bid for properties**.** She was apologetic for taking her uncle's word, not getting a Safer Estates check or a landlord reference. Mr Cox did not believe it was for personal gain. Rather her motivation was prioritising letting properties and reducing voids over other concerns such as safeguarding and making sure **there was evidence** customers are suitable to be tenants.

(iv) She had told Ms Walker her cousin was going to rent the property at the beginning of November, but no proof of income was provided until 16 November.

2.40. Ms Halliwell asked Mr Cox if it was well known by staff housing applications for customers living in hostels would be dealt with at the Central Housing Office. He said he thought most staff would know. Ms Halliwell replied, based on her own knowledge, a lot of staff do not know. **This shows Ms Halliwell was not accepting whatever Mr Cox said, but making her own judgment.**

2.41. She then asked what Mr Cox thought the claimant's understanding of spent convictions was. He replied it was confused, she took a blanket approach about how long ago the offence was (over 12 months) but did not account for the severity. Ms Halliwell asked what training is there for understanding spent convictions. Mr Cox replied it is set out in the policy and guidance notes.

2.42. **A person who is ineligible to "bid" for an advertised property may be housed in a "always available" property like CWH, but page 143 makes clear some checks must still be performed and risks still assessed.** Ms Halliwell asked whether CWH flats are always advertised. He replied that depends on demand, but they are not generally advertised. Letting properties this way, to the first person saying they are interested, one would still need to carry out verification checks, such as housing history, landlord reference and Safer Estates check if required. Ms Halliwell asked what flexibility there is for staff letting properties. Mr Cox stated staff

must follow the policy, particularly when a tenant is non-qualifying due to offending, as it is there to protect others. Mr Cox believed no checks were done before the property was shown to Tenant A.

2.43. Ms Halliwell asked what a manager should do if a staff member mentioned letting to a family member. Mr Cox replied he would expect a manager to explain to follow the procedure and **consider** whether to remove her from the offer. Ms Halliwell asked where the line is, what are staff not allowed to do. He cited the Code of Conduct "*you should be honest and impartial and not have a conflict of interest, you should not offer property without manager's permission*".

2.44. Ms Halliwell asked whether YHN operate a rent guarantor scheme (where someone other than the tenant promises to pay the rent if the tenant does not). He confirmed it did not but a tenant can allow YHN to speak with a third party by a box ticked on computer system. The box was not ticked in this case so YHN should not talk to anyone else about rent. Mr Cox did not believe the claimant tried to give advantage to her family, rather wanted to let properties quickly. **We find Ms Halliwell did not simply accept Mr Cox's views, she pressed him to justify them.**

2.45. Mr Muse asked what should a staff member do if letting to a family member, should they give it to another member of staff. Mr Cox replied they should follow the Code of Conduct and recognise if they have a conflict of interest. Mr Muse then asked whether the response was sufficient from Ms Walker to "follow the procedure". He replied he felt confident the claimant knew what she should be doing in relation to letting to family members.

2.46. Ms Halliwell asked the claimant what her case was. She explained she was previously based in BCT which follows the same policies but wanted to fast track people into properties. She then went on maternity leave, was not aware of any new lettings policy and had no training. She started working in Walker, managing CWH with over 20 vacant properties**.** Because she was used to working at BCT **she had moved away from policy**. She knew her cousin had been in trouble, but her uncle said he had not been in any more since release from prison. She thought her cousin was living with his mother. She realised it looked like she had only considered any evidence in relation to the application on the same day she signed him up for a tenancy but this was not the case. For empty properties, she could get repairs done once she has identified a tenant, so she spoke to Ms Walker who said she could send it to repairs. She and all her colleagues knew it was her family member. She did not do a Safer Estates check because **she did not believe** he would be a threat to anyone. She would not have put Mr Cox in that block because she knew **he would not survive.** She let properties there by knowing people who needed one and Ms Walker encouraged her saying she should put a sign up outside saying 'Jane's Lets'. Tenant A had been there since November 2018 and there had been no problems.

2.47. Ms Halliwell asked her to explain the timeline. The claimant replied the properties were listed as "always available" so she had told Tenant A he could have one. Ms Walker who confirmed she could send the property to repairs. Once it was ready to let, she updated the IT system and put Tenant A in on 19 November 2018 though she had him in mind for it from the beginning of November. She signed him up and input all information needed to allow the let to go ahead on the same day. She had no reason to disbelieve he was living with his mother. She had let a property that had been empty let for a long time. She knew Tenant A had not been in any trouble from what her uncle had said so no Safer Estates check was required. She would have done all the

verification required before the sign up date but believed she scanned it into the IT system all together, possibly on 16 November, when Tenant A brought in his ID & Universal Credit letter.

2.48. Ms Halliwell asked when she had seen her uncle, she replied she believed at the very beginning of November, the same day she asked Ms Walker about the void property. Ms Halliwell commented that meant, at the point of asking Ms Walker to release the void for repair, no verification checks had been done and asked whether this was normal? The claimant answered it was not but she was "thinking outside the box" like when she was at BCT. We find it surprising an officer of the claimant's experience could ever think an instruction to "think outside the box" could be interpreted as licence to act as she did, especially when the prospective tenant was a relative. She said she did not believe she had done wrong, had cleared the let with her manager and her actions were not malicious. She felt Tenant A's crime was unacceptable but he had served his time, had not been in any trouble for 12 months and was working with "Advice and Support" (YHN's internal tenancy support team). As an experienced Housing Officer she wanted to give Tenant A a chance to prove himself to his parents and to her. She stated she would not put her job at risk, felt she was doing a good thing, believed her uncle and asked "*why would he lie to me*?". **This speaks volumes. Her uncle may well not have lied to her but relayed what his son had told him, and maybe the son had not told his father the full truth**. When asked if she had referred somebody to be rehoused who was a friend of an existing tenant, would she do the same, she replied she probably would. She does not do a Safer Estates check if nothing is **declared** and would take on face value someone who said he had not offended in the last 12 months. Ms Halliwell asked if someone came in with a serious conviction such as rape from 3 years ago, would she do a Safer Estates check? She replied she might if it was rape but if the person had not committed any crime in the last 3 years, YHN would still have to rehouse them as it had a duty of care. Her understanding of spent convictions was if someone had not been in trouble for 12 months they could be eligible for housing. **That is true, but by a safer route with higher authority and external checks**. Ms Halliwell was plainly giving the claimant a chance to accept she does not have the knowledge to assess risk which a body like MARAC do, but she did not.

2.49. Ms Halliwell asked if she understood what it meant to be impartial. She replied she understood what a conflict of interest was, but did not think she had one in dealing with Tenant A as she never sees him. **This speaks volumes, because impartiality and conflict of interest are not the same.** Ms Halliwell asked if she felt she was being impartial in taking the word of her uncle. She replied she had no reason to believe he would lie to her because he was her uncle.

2.50. Ms Halliwell asked if she thought contacting the Income Team about Tenant A's rent account was appropriate. She replied her colleague had asked if Tenant A was her cousin, to which she replied yes and his father would pay the rent. She did not feel this was unprofessional, would do so on other occasions and everyone knows to contact Tenant A's father. Ms Halliwell asked on reflection would she do anything differently, she **said** she would not touch the application, would not take things on face value and would check, **then added** she thought Mr Cox report was unfair, Tenant A was not a burden and there are a lot of tenants worse than him.

2.51. Ms Halliwell asked Mr Cox if any spot checks were done on allocations, to which he replied it yes as a randomised sample. Mr Muse asked how many of the claimant's allocations had been

checked, Mr Cox replied the last 10 in CWH had been, 8 were correct but officers other than the claimant had done the verification checks on them.

2.52. On allegation 3, Mr Cox said the claimant breached YHN's Code of Conduct and Allocation and Lettings Policy Section 2 as quoted at 2.38 (i) above. His main points were

(i) The allegation came to light on 1 May when Ms Walker raised a concern due to Tenancy and Estates team being asked to do a background check, which brought to light no documents of verification or Safer Estates check attached to his application.

(ii) His application had been suspended by Ashley Evans, Housing Officer, in August 2018 **following** a Safer Estates report which made it non-qualifying **until April 2019**. Mr Cox had established (25) on 23 April 2018 Tenant B submitted a housing application, on 10 May 2018, a Safer Estates check was requested due to content of a letter from a Solicitor provided by Tenant B, on 15 May 2018 his application was made non qualifying due to offending history. On 24 May 2018 he appealed, on 31 May 2018, the non qualification was upheld and Tenant B told he remained non qualifying until April 2019. On 23 August 2018 a note was added to the system by YHN staff who attend MARAC meetings in relation to safeguarding related to domestic abuse. **This speaks volumes too.** An application made non-qualifying can be re-submitted after **about 12 months, then checks done again**, which, if they show no offending in that period , may lead to the application being granted. The **12 months "practice" does not mean the Housing Officer need not check again , or can accept someone's word he had been in no further trouble.**

(iii) On 22 November 2018 the system showed the claimant updated Tenant B's application to make herself the responsible user, reversed the non-qualification decision, activated the application and matched Tenant B to the tenancy. No new evidence or attachments were made to show any change in Tenants B's status or circumstances. The claimant failed to complete verification checks before activating his application. She failed to identify causes for concern labelled on his application and so disregarded the Allocation Policy and YHN's commitment to safeguarding customers. She failed to recognise risks and identify safeguarding concerns. Finally, she stated she would continue to fast track applications outside policy and procedure.

2.53. Ms Halliwell asked if allocations of properties at CWH are allowed for households including a child under 16. Mr Cox replied the minimum age is 16 for safeguarding reasons. She asked how applications involving MARAC should be dealt with by staff. Mr Cox replied staff should contact MARAC first and any other support service involved, as it is important for safeguarding. The officer needs to understand the wider recommendations given by MARAC and the need to consider the property offered and its location. Mr Muse asked if there is an age limit on multi storey blocks generally. Mr Cox replied under 16's have been allowed in some for several years.

2.54. Ms Halliwell asked the claimant and Mr Muse to set out her case in relation to allegation 3. She stated "hands up" **but** she had seen proof of child benefit , **knew** Tenant B had a child living with him, was not aware of age restrictions as she had worked in areas where children are allowed in multi storey blocks. Tenant B as his partner had given up a tenancy so she already **knew** his situation. He came into the office with his son. His ex-partner had moved to Durham. The claimant made the application active and allocated him the property, **believing** she had a duty of care to

rehouse the son. She did not involve MARAC as the ex partner had moved to Durham. She was thinking about the son and would not have rehoused Tenant B if he was on his own.

2.55. The claimant added she was having problems at home at the time, had been at her desk crying and probably should not have been at work. She had had an operation in November 2017 and did not want to take time off. She was advised she could be referred to OH but declined.

2.56. Ms Halliwell asked how she **knew** Tenant B's ex partner had moved to Durham. She stated Tenant B had told her and she had done an inspection of the property when the ex-partner was moving. Ms Halliwell asked whether when the property Tenant B was subsequently allocated became empty. The claimant replied she could not remember or if it was ready when she showed it to him. Ms Duncan stated there was an inspection when the property was empty on 1 November 2018. Ms Halliwell asked if the claimant had any prior connection to Tenant B. She did not and was not aware Tenant B was already rejected for rehousing. She explained to allocate the property on the IT system one goes into it and changes from another user to oneself. We find she would have been aware he had been rejected had she bothered to look, which tends to support YHN's view she was single mindedly intent on housing Tenant B and his son and nothing would deflect her. She thought she had a duty of care to rehouse the son who was sofa surfing with his father in CWH prior to allocation of the property. Ms Halliwell asked why the son was not included on the application. The claimant did not appear to know this was the case and did not know why proof of child benefit was not scanned onto the application but thought it may be in the "void pack". She said she was sorry she had messed up but understood non qualification and the process of re-applying. She should have written up a direct let, but was "thinking outside the box". She accepted she had stepped outside the allocation policy, but believed she was rehousing the son, there was no personal gain and she had a duty to rehouse. It was not intentional. She thought it was "always available" as it was a low demand property.

2.57. Ms Halliwell asked how she dealt with safeguarding. She replied the household had been working with Social Services and Tenant B **told her** they were closing the case though she had not checked, so she did not make a referral. In relation to MARAC and any ongoing risks to the ex-partner in relation to domestic abuse, she had moved out of the area. She **believed** the child would be safe with his father, was aware they had been sofa surfing for 3 weeks but thought if she got them rehoused they would be OK. **She said on reflection she would have** got in touch with Social Services and MARAC. She stated she had family problems at home at the time was on Fluoxetine, had depression but did not want this to be an excuse. **The whole point of any multi agency conference is to try to ensure each agency knows facts not known to all of them. There are many examples of one agency, or person in it, taking a decision which would not have been taken had they known what all the others knew.**

2.58. Mr Cox and Mr Muse provided a summing up of their cases. Mr Cox stated the claimant had not followed the Code of Conduct, Looking after Information Policy or Lettings Policy and, in allegations 2 and 3, allocated tenancies to people not eligible for social housing. She failed to identify concerns and safeguarding risks associated with both tenants. She caused reputational damage with Changing Lives and NCC and increased risk to the wider community. Mr Muse stated the claimant understood the safeguarding concerns and would not do the same again, was remorseful and an honest person. The Facebook post was made in a temper, but quickly removed.

In relation to allegation 2, **she thought** the let was in the public interest, and informed her manager. She believed her cousin had not been in trouble for 12 months and was living with his parents. **Maybe** she should not have had a conversation with Income Team but this was not raised by her manager. In relation to allegation 3, she had taken a shortcut to help a child and **twenty years ago** it was OK to do lets like this. She would not **make the same mistake** again. A stage 3 disciplinary was over the top and he was disappointed with management's summing up. The claimant had misplaced enthusiasm and was a hard working person who had sat in meetings with Senior Management where it was stated staff should "think outside the box". In cross examination Mr Stubbs took the claimant to several documents which showed, conclusively in our view, the claimant had been given all the necessary training, though she may have not read everything sent to her or accessed documents she was told she could. **We were in no doubt she knew, or should have known, the respects in which her actions breached policies, but had done them anyway because she thought she knew best**.

2.59. Ms Halliwell adjourned at 1.40 pm to consider all the evidence, reconvened at 3.50pm said she had considered in coming to her decision the following.

(a) the Facebook posts were threatening and offensive and showed the claimant as a YHN employee so reputational damage was caused. Whilst the 2nd post was up for a long time, it was a tagged post. The claimant was genuinely remorseful and took the 1st post down very quickly. She found misconduct had occurred which was uncontested and obvious. **However, in circumstances where the claimant credibly assured her this would not happen again, she would not have dismissed for this act in isolation**.

(b) on Allegation 2 the claimant told her manager but did not follow the procedure about a tenancy of a relative. No verification checks were done at the point she asked her manager if she could get repairs done on 1 November. For those low demand properties a tenant must be identified as able to cover his rent before repairs can be done and no such checks was done until 16 November. This showed a lack of impartiality. Whereas Mr Cox statement focusses on the breaches of policy, the result of this case will turn why they were potentially serious and likely to occur again. **Ms Halliwell's thinking, which we find completely reasonable, was**
(i) the claimant knew her cousin's offending was of a violent nature, but did not get a Safer Estates check because of what she said **she knew** about her cousin
(ii) the claimant failed to check the online application or look at the Universal Credit letter, both of which showed her cousin was living in supported accommodation not at his mother's. This meant she did not get a landlord's reference, which **could have** shown him unsuitable to be a tenant.
(iii) the claimant caused reputational damage to YHN's relationship with Changing Lives
(iv) in allocating a property to someone with a violent offending history **who may have turned out to be unsuitable to be a tenant**, the claimant failed to safeguard colleagues or the wider public. YHN may have had to spend time and resources in dealing with a tenant who should not have been allocated a property in the first place.

(c) Ms Halliwell accepted the claimant was not motivated by personal gain had health problems at the time and was taking medication. She said she would act differently in future, but clearly did not understand why her failings were so serious and believed a Safer Estates check need not happen as her own views were correct .

(d) The claimant did not know people living in supported accommodation should have their applications assessed by the Central Housing Team, but had not looked at either the system or his Universal Credit letter, which both had the supported accommodation address, so would have meant a landlord reference must be requested. Ms Halliwell believed the claimant had attended training on allocations and safeguarding in the last 2 years. Therefore, she found allegation 2 proved. It did not appear to her the claimant was saying her actions arose in consequence of her disability. Indeed she kept saying she did not want to use her health as an excuse. **Ms Halliwell was left with the overriding impression the claimant felt she knew better than to follow the policy and it was more important to let difficult properties than follow it**.

(e) on Allegation 3, the claimant overturned a non-qualifying decision made by another officer with no good reason. She did not check any information relating to a MARAC alert on the application, She stated a child of 12/13 had been sofa surfing for 3 weeks, and Tenant B stated Children's Services were planning to close the case. She did not check with Children's Services, or make a child's safeguarding alert in relation to the sofa surfing. She did not contact the Housing Advice Centre about a family with a child being statutorily homeless. She thought by accommodating them, she was alleviating their homelessness, but this was not for 3 weeks. Vitally, the claimant had placed a child of about 12/13 in CWH which she had described as a place where someone like Mr Cox "*would not survive*" with no reference to Children's Services. When we deal with the appeal, we will set out what Ms Halliwell said should have happened, which was better for all.

2.60. Her reason in coming to a decision to dismiss was the repeated failures to safeguard and the minimise risk to the wider public, colleagues and victims of domestic abuse and a child. Also, by allocating properties to customers who posed **a risk** of violence towards others and not undertaking checks she put at risk colleagues, people close to the applicant and the wider public. She had 13 years' experience so should know better than to disregard due processes for involving others who had wider knowledge. She appeared to think she was justified in doing so if the ends the tenants wanted, and she thought they deserved, were achieved. Ms Halliwell felt if she allowed her to return this could be repeated. If only allegation 1 had been proved, she would not have dismissed. She put her decision in writing on 12 July (387-391)

2.61. An Appeal was received on 30 July 2019. In preparation Ms Halliwell read the appeal letter, Unison's statement of case in support of it (429-462), the disciplinary hearing notes made by Ms Findley(365-386), emails to and from Northumbria Police (393-401) and Changing Lives (402-415) and a statement by Tenant A (463). There was no mention in the appeal letter of the allocations to Tenants A and B being caused by a disability. Although the union referred to the impact mental health could have had on her decision making (437), they never presented any evidence to connect it to the decisions made at the time. Ms Halliwell prepared a response (418-428).

2.62. At this point we observe the Appeal was the claimant's last chance to show she had learned a lesson. As it transpired, she made matters worse for herself.

The Appeal

2.63. Mr Foreman, now Managing Director of Dumfries and Galloway Housing Partnership,was employed by YHN as Customer Service Director from January 2017 to 23 February 2020. His job there involved leadership of a team of approximately 400 employees with responsibility for council

tenants across Newcastle, including the allocation of homes, anti-social behaviour, and support to vulnerable customers. He has significant experience of carrying out investigations, disciplinary and appeals panels. He has worked in Social Housing for 23 years. Before the appeal, he had no previous knowledge of the claimant. He chaired the appeal panel. The other panel members were, Paul Scope a Partner of Ward Hadaway law firm who specialises in employment law, and Dennis Hall who has over 35 years of experience in local government in the North East as a Solicitor and latterly as a Commercial Manager at Gateshead Council. Alizon Carr, HR Lead Specialist made a note of the hearing (464 to 496).

2.64. The grounds of appeal presented were:
Based on the evidence produced, the decision to dismiss was disproportionate;
Dismissing on gross misconduct was unfair and could have been dealt with by alternative YHN policies and procedures;
Some of the findings in the outcome letter were incorrect and potentially misleading; and
Mitigating circumstances had not been given serious consideration.

2.65. Ms Halliwell's response to the appeal showed her considerations before dismissing as set out above. On **Allegation one,** the claimant had removed the post soon, was provoked, admitted fault, apologised and was genuinely remorseful. In contrast on **Allegation two,** though she referred to herself as an experienced housing officer and had completed training which she could not recall attending but the LMS (online learning management system) and the claimant's online diary showed she probably had, she allocated a property to her cousin without proper reference to the earlier housing application form, proof of income, a landlord reference and importantly without a Safer Estates check. The claimant gave a good account of her thought processes at the time and how differently she would have acted had it been her sister applying for a property which demonstrated she was aware of the process for a family member. She took a conscious decision not to do relevant checks and instead followed her own instincts. On **Allegation three,** Tenant B's application was assigned 'non-qualifying' status following a safer estates check that showed an offending history, this decision was appealed but remained in place. It was subsequently overturned by the claimant for no good reason, without verification, missing key information such as the MARAC warning, and Tenant B having responsibility for a child was not put on the application. She had not referred to the Housing Advice Centre or made a safeguarding referral to Children's Social Care. She allocated a property in a high rise block which she acknowledged had some risks within it. She may have been unaware of the local protocol of not allocating children under 16 years to CWH, having recently moved to the Walker Office. but if the child been on the application, the IT system would not have allowed for a match of property in that block. In short she went beyond the authority of her role, and in doing so failed to safeguard and minimise risk to the wider public, colleagues and victims of domestic abuse and the child.

2.66. Ms Halliwell attended the Appeal on 12 September 2019 to present management case and explain her decision to dismiss. Before they started, she clarified an error in her report saying allegation 1 was gross misconduct, but it was simple misconduct (419). Also, in the pack she had sent through a draft of the outcome letter but the correct copy had been included later.

2.67. Mr Muse said the claimant understood safeguarding concerns, had acted in good faith, it was not as serious as misconduct because she had done nothing underhand and been honest

2.67.1. On Allegation 1, he stated the post was in the heat of the moment, taken down quickly, the claimant understood reputational damage but thought her Facebook page was locked to friends only not open to public and was "*no good on*" Facebook privacy settings. She was really sorry. Mr Scope asked if she understood allegation 1 of itself would not have resulted in dismissal. She did.

2.67.2. On Allegations 2 Mr Muse stated the claimant may have rushed back from maternity leave does not recall attending allocations training, should know not to allocate to a family member, but her manager did not ask another officer to do it. All that was accepted. He then appeared to try to justify what she had done raising again points neither he nor the claimant could know were correct eg. Tenant A had no offences in the last 12 months. He said the claimant had always been in offices with hard to let properties knew Tenant A had been in trouble, but was working with Changing Lives had good support from his parents. He was not a violent person and not known to carry knives. She also felt she was being singled out, another colleague let a property to someone who set fire to bin sheds, when check was done he had been in prison for arson, but nothing happened to this officer. **This is a valid point if correct,but two wrongs do not make a right .**

2.68. Ms Halliwell asked the claimant, as she seemed confident a Safer Estates check was not needed what offence Tenant A had committed. She replied he had beaten his girlfriend up" ***she beat him, he beat her back***". She **must have got that version from Tenant A or someone to whom he had given it**. Tenant A went to prison, his family disowned him, but he served his time and the claimant said he should not be punished for the rest of his life or be homeless. Tenant A had a 2 year custodial sentence in 2016 for assault, but this did not come to light from the Police until April 2019. Judges in criminal courts sentence in accordance with published guidelines. This sentence indicates either the injury to the girlfriend was serious or Tenant A had a bad record. The claimant must have known a Safer Estates check would fail to qualify him . **Mr Scope asked Ms Halliwell if she was saying the claimant cleared the system so checks did not need to be done and Mr Foreman asked if anyone looking at this application should have realised the need to do checks? Ms Halliwell said yes to both.**

2.69. The claimant said she thought she was doing the right thing, did not want anyone to be homeless, and it would not happen again. **She added that if she thought she had done something really wrong she would not have appealed. This speaks volumes as we will explain after dealing with the appeal on allegation 3.**

2.70. She also said Ms Walker had told her she should put a board up outside CWH saying "Jane Richardson House" as she had let properties successfully. She thereby created the clear impression getting properties occupied, and reducing homelessness, was her main goal. It is laudable, but not if it involves taking risks on safeguarding of others.

2.71. When earlier asking about spent convictions Ms Halliwell had used rape as an example of a serious offence which could pose a risk for longer than 12 months. The claimant said rape and domestic abuse were totally different, but she had rehoused rapists. Mr Foreman asked were such customer's applications approved by manager or officer? She replied Manager. Ms Halliwell accepts the claimant will have been asked to rehouse offenders through MAPPA (Multi Agency Public Protection Arrangements). It is the process through which various agencies such as the

police, the Prison Service and Probation work together to protect the public by managing the risks posed by offenders living in the community, which could be in council housing, but monitoring where they are living to reduce risk of re-offending. Again, if another offence happened to a neighbour and everyone had followed the precautionary steps to attempt to ensure it did not, neither YHN or any other agency could be blamed. Offenders who are not incarcerated for life have to live somewhere. If a Housing officer takes it upon herself to re-house such a person and another offence happened to a neighbour, there would be an outcry and probable legal liability on YHN. The claimant gave the impression of thinking she could make such decisions alone.

2.72. Mr Scope asked if she thought relying on her uncle's word was impartial? She accepted it was not , but said Tenant A would have still got property. Mr Muse had stated information from police about Tenant A's offending was *"anecdotal*", but the police record showed 30 arrests and a conviction for domestic assault. Mr Muse stated what Changing Lives had said was wrong. Ms Halliwell accepted it was, and a slight contributing factor to her decision, but the main factor was the domestic abuse and no checks being done, so her decision would be the same .

2.73. The whole point is the claimant should not have taken people's word and said she would not have if it was a stranger. A Safer Estates check and landlord references protect YHN if something does happen. Their absence, especially coupled with Tenant A being a relative, left YHN wide open to criticism and possible liability. Mr Foreman asked if a Safer Estates check would be done on anyone declaring a conviction? Ms Halliwell said yes but now says it had to be an "unspent" conviction. After a custodial sentence of 2 years, it would not be spent until 4 years from the date on which the sentence (including any licence period) is completed.

2.74. Mr Scope asked what the claimant meant when she had said she had a hard time. She told him about her new baby, a 21 year gap between children, post-natal depression , her crying every day, her marriage problems and 2 stepdaughters but did not want to use that as an excuse**.** Mr Scope asked "*are you saying that's not why you did it*?" She replied her "*head was all over the place*", she was drinking, her GP had upped her medication. Mr Scope asked "*so you're not saying you made decisions because of that?*" It may have been better put as "*are you saying these factors made you do thing you would not have done normally*?" She said no, but was not concentrating, did not want sick absence in case it went against her in the service review and was worried time off could mean she did not get a post. She said she should have taken time off.

2.75. Mr Foreman asked Ms Halliwell if she knew about this at the hearing. She answered the GP information was new, the claimant is a proud person who did not want to discuss it so only hinted at it in the original hearing. Nevertheless, Ms Halliwell said she took her health into account, but had to balance it against the seriousness of the case and felt she still needed to dismiss**.** Mr Hall asked what tipped the balance on dismissal, Ms Halliwell's main points were (i) **multiple** failures to follow policy (ii) a "*near miss*" on safeguarding and (iii) she was not confident the claimant would do anything different if presented with the same situation again. Mr Hall asked why. Ms Halliwell said she felt the claimant did not think domestic abuse was serious, had minimised it in the original hearing and been able to give considered reasoning for allocating the properties the way she did . Mr Muse said this case was "*not a near miss, no-one was hurt or dead*". It is clear from this comment he and the claimant do not understand what a near miss is. A drunk driver could drive at

high speed past a school and, by good luck, hit no-one. It is the offence for which he would be sentenced, not the absence of tragic consequences.

2.76. Mr Muse stated the claimant now realised she had not performed to the best of her ability. She used her local knowledge and took working autonomously literally. Although everyone thinks domestic abuse is serious there is a massive difference between spitting at and beating a women up. If Tenant B only did the former, the sentence shows Tenant A did the latter.He said the claimant had rehoused many victims of domestic abuse in her 13 years of work and would know cases go to MARAC if they attracted custodial sentences. **This is why Ms Halliwell did not think the claimant would do anything differently** .

2.77. The facts of allegation 3 show allegation 2 was not family favouritism During the appeal she said she felt sorry for Tenant B and thought she could help (490). Mr Muse said Tenant B's Domestic Assault only involved spitting. Ms Halliwell asked how the claimant knew that. She replied Tenant B and his ex-partner had come into the housing office to end their joint tenancy, she had done an inspection at the property, the ex-partner had moved to Durham, Tenant B told the claimant he was to have the son live with him, wanted the tenancy back and thought no-one was helping him. There was a note on the system Tenant B was to be discussed at MARAC on 30 August 2018 (358) so a partner agency was worried his ex-wife could be at risk of future harm. The claimant stated the offence happened as Tenant B caught his wife in bed with another person, **she had attacked him** so he had spat on her. Tenant B and his son had lived living with a friend in CWH. He saw there was a flat available, which he thought would make him and his son happy. He said Social Services were involved. Again the claimant took his word **for everything and made a series of assumptions which other agencies could have known to be wrong** .

2.78. Ms Halliwell asked if other sources of information should have been checked. The claimant replied she should have checked if any there were anti-social behaviour entries, but Tenant B had a son and she did not feel she could send him away with his son. She did not send him to the Housing Advice Centre (who deal with homeless applications) **as she thought he would have waited longer**. The policy states if someone is homeless their case should be sent to the Housing Advice Centre, and the claimant knew this but chose not to because she thought she could help him quicker. He had been a previous tenant, nothing on file said he had been a problem and if he was a danger social services would not have let him keep his child. Again, she is leaping to conclusions she has neither the shared knowledge or qualification to make.

2.79. Mr Foreman stated the claimant should have considered other agencies that could help and she made the allocation knowing she should not have. She replied she was living the values of YHN not running to her manager but putting the customer first. Ms Halliwell asked if she accepted if she had put the child on the online application form, which she did not, the system would not have allowed a match to this property because it has been set up to block one not deemed suitable for children. She replied she did not know that , had put a note on the application to say "*offered two bed multi as has full custody of child*" (363) but did not add the child, so his date of birth and name were unknown. All proposed occupants should added in the normal fields where it asks for members of household to be accommodated. Also, she had previously said she did not know allocations were not allowed to children in these blocks, which Ms Halliwell accepted is possible, as she had not been at that office very long.

2.80. Ms Halliwell asked why she did not just send Tenant B to the Housing Advice Centre. The claimant said she used her own autonomy. A housing officer with 13 years experience should know is common for people to present as homeless and be referred there. The child was sofa surfing for 3 weeks. Ms Halliwell accepts the claimant thought she was helping, but had she sent them to the Housing Advice Centre they would have been housed **immediately and together** in Cherry Tree View (homeless accommodation). Again, the claimant gave the impression of thinking she knew best and can take "shortcuts" if they result in what the customer wants.

2.81. The claimant said Tenant B and his son was not a safeguarding issue as child was allowed to be with father. This showed she did not understand safeguarding properly despite training on it shown on her training record (320). Decisions about where a child lives are made initially by trained social workers and then by Judges who specialise in the field. Again, the claimant was making assumptions she is not qualified or authorised to make, and appeared oblivious to the need to protect herself and YHN from criticism .

2.82. Ms Halliwell had asked the claimant what a "dynamic risk assessment" meant, when it was mentioned at the appeal. She did not know. Where she says her local knowledge negated any concerns over safeguarding, she was making a judgment a social worker is trained to make but she is not. **At the heart of this is the claimant's view, which others may share, YHN and NCC procedures are slow and not always effective so she can bypass them and if nothing actually does go wrong the taking of "shortcuts" by a Housing Officer is justified.**

2.83. Mr Scope again asked if she was saying being on maternity leave and post-natal depression caused this her to act as she did and she replied "*now I am looking at it differently* " Mr Scope asked " *did you make conscious decisions*". **She replied at the time she did what she thought was right.** He asked " *you're not saying you didn't know what you were doing*?" She could not explain but accepted she should not have done it.

2.84. The claimant said Lewis Brown failed to carry out checks on a client who was rehoused. Ms Halliwell says his name was not mentioned in the original hearing, nor the nature of the conviction, which was arson. It was mentioned at the appeal to which Mr Foreman agreed ensure the matter was investigated (472). Mr Cox did so and on 2 October 2012 sent an e-mail saying the claimant had alleged Mr Brown had allocated a tenancy in Hexham House (sometime after the Grenfell tragedy), to an alleged convicted arsonist who, after imprisonment, had gone on to set fire to the bin shoot. Mr Cox reviewed reports, created by YHN Housing Partners, using computerised data, highlighting all allocations made in Hexham House from May 2017 and all allocations made by Mr Brown in the same timescale. Both reports confirmed Mr Brown was not the named responsible user/allocating officer for any new tenancies at Hexham House during this period. By utilising the knowledge and expertise of the Safe Living team and reviewing the information contained on the REACT database it was possible to cross reference links to arson/unacceptable behaviour with named tenants, but again, no evidence was found so YHN was not able to take any further action. We asked if Mr Cox had spoken to Ms Walker, and he had not. Either the claimant is not telling the truth or Ms Walker is not. Mr McHugh did not challenge Ms Walker on that point.

2.85. Mr Muse, summing up, said the claimant was remorseful, understands protocols, would attend any training but had acted with misplaced enthusiasm. She had not done anything covertly

or maliciously, her manager was aware of her actions, and did not stop her. Allegations 2 & 3 did not reflect her ability shown over last 13 years and was not typical behaviour. She had used her local knowledge, this was a performance issue not gross misconduct. He added there is "leeway" in the lettings policy, this was not a "near miss", **the decision making was sound, there was just a lack of paper trail and there was a connection between her performance and health issues at the time.** He said Ms Halliwell was **heavily** influenced by the wrong information in the Changing Lives email. He finally said the decision to dismiss was disproportionate

2.86. Ms Halliwell summing up said, although the claimant expressed remorse she had known what she was doing. The lack of checks with MARAC and Social Care were most concerning to the extent that after the hearing Ms Halliwell submitted a safeguarding alert in relation to the son of Tenant B. She argued YHN has to uphold standards around safeguarding otherwise children and victims of domestic abuse will be put at risk. She took the claimant's health into account but on balance because of the seriousness of allegations decided to dismiss. Ms Halliwell did not think, then or now, this was a matter of capability rather the claimant knew what to do but chose not to. The wrong information in the Changing Lives email had a minor influence on her initial decision but it would have been the same now had she had the correct information

2.87. The claimant was represented by a very experienced Trade Union officer at both the hearing and the appeal but neither he nor she stated her health problems were the reasons why she had made the "errors" and omissions in letting the 2 properties. Many months after the event, she was able to recollect with accuracy the timeline which showed she was thinking in a rational manner at the time and her decision making was not impaired. A further example was her clear rationale in allocating the property to Tenant B, because she believed she had a duty of care to rehouse his son, and did not involve MARAC because his ex-partner had moved to Durham. She said she was thinking about the son and would not have rehoused Tenant B if he had been on his own.

2.88. In countless disability discrimination cases we have seen claimants show depression impairing their ability to remember, concentrate, learn and understand but it is not always so. Many people with the impairment perform demanding jobs well. It cannot be assumed everyone with depression has impaired judgment. To Ms Halliwell and everyone else involved the reason the claimant had not followed the allocation or safeguarding policies was not anything arising in consequence of her disability but that **she felt the ends justified the means**, so it was acceptable not to follow the policy if the result was someone was rehoused, and empty properties were filled.

2.89. The Appeal Panel agreed allegation 1 on its own would not have constituted gross misconduct. As part of the appeal the claimant presented evidence the conduct of Tenant A since November 2018 had not been an issue. The panel did not make judgment on his behaviour. Instead they considered this was irrelevant because the charge was about preventing **what might have happened**, not what in fact did not. The Panel formed a view the claimant had **knowingly** operated outside of policy, processes and protocols in place to support the fair, transparent and safe allocation and lettings of property. Whilst the panel recognised, her personal and health problems it did not consider they **explained or justified** her actions. Throughout the appeal hearing she articulated conscious decision making at the time of the allocations and the panel was not confident. despite her expressed remorse. she understood the significance of those decisions or, vitally, that she would not do the same again. They rejected her appeal.

3 The Relevant Law

3.1. Section 98 of the Employment Rights Act 1996 (ERA) provides:
"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it relates to ..... the conduct of the employee."

3.2. In Abernethy-v-Mott Hay & Anderson, Cairns L.J. said the reason for dismissal is a set of facts known to the employer or may be beliefs held by it which cause it to dismiss. The reason must be established as at the time of the initial decision and/or at the conclusion of any appeal. Although it is an error to over minutely dissect the reason, one must determine its constituent parts.

3.3. Thomson-v-Alloa Motor Company held a reason relates to conduct if, whether inside or outwith the course of employment, it impacts on the employer/employee relationship. The ACAS Code of Practice talks in terms of "the employment implications" of the conduct. In Gunn-v-British Waterways, the effect on the employer's reputation was held to be relevant. Misconduct and incapability are sometimes hard to differentiate. Sutton and Gates (Luton) Ltd-v-Boxall held a reason related to capability if the claimant is trying her best and nevertheless failing, but relates to conduct if she is failing to exercise to the full such talents as she possesses.

3.4. Section 98(4) says
"*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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

3.5. At the first stage an employer does not have to prove "guilt", even on a balance of probability, only show its genuine belief. The Tribunal must then determine, with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable British Home Stores-v-Burchell and Boys and Girls Welfare Society-v-McDonald. In A-v-B 2003 IRLR 405, Elias J (as he then was) said *"In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations .., where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges. Employees found to have committed a serious offence .. may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances, anything less than an even-handed approach to the process of investigation would not be reasonable.*

3.6. If the circumstances of two employees are essentially indistinguishable, it may be unfair to dismiss one but not the other - Post Office-v-Fennell and Hadjioannou-v-Coral Casinos . The latter case contained guidance approved in Paul-v-East Surrey District Health Authority by the Court of Appeal. An argument one employee received a greater sanction than others is relevant where (a) there is evidence employees have been led to believe certain conduct will be overlooked or dealt with by a sanction less than dismissal (b) other evidence shows the purported reason for dismissal is not the genuine principal reason (c) in truly parallel circumstances it was not reasonable to visit the particular employee's conduct with as severe a sanction as dismissal.

3.7. In Polkey-v-AE Dayton Lord Bridge of Harwich said :
"*Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal the reasons specifically recognised as valid by (Section 98(2)). These, put shortly, are:*
(b) that he had been guilty of misconduct
But an employer having prima facia grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus; …in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or an explanation or mitigation; …

3.8. Ladbroke Racing-v-Arnott held a rule which states certain breaches will result in dismissal cannot meet the requirements of s 98(4) in itself. The statutory test of fairness is superimposed upon the employer's rules. The standard of acting reasonably requires an employer to consider all the facts relevant to the nature and cause of the breach. But rules are not irrelevant. Employers are entitled to place weight on matters important to them. In Meyer Dunmore International-v-Rodgers, where the rule was against fighting, Phillips P put it thus:
"Employers may wish to have a rule that employees engaged in, what could properly and sensibly be called fighting are going to be summarily dismissed. As far as we can see there is no reason why they should not have a rule, provided – and this is important – that it is plainly adopted, that it is plainly and clearly set out, and great publicity is given to it so that every employee knows beyond any doubt whatever that if he gets involved in fighting in that sense, he will be dismissed.

3.9. British Leyland-v-Swift says an employer deciding sanction can take into account the conduct of the employee during the disciplinary process. Retarded Children's Aid Society-v-Day held where an employee appeared not to recognise he had done anything wrong, and was "*determined to go his own way*", it would be reasonable for an employer to conclude warning him would be futile.

3.10. In all aspects substantive and procedural, Iceland Frozen Foods-v-Jones , HSBC-v-Madden and Sainsburys-v-Hitt, hold a Tribunal must not substitute its view the employer's unless that view falls outside the band of reasonable responses. In UCATT-v-Brain, Sir John Donaldson said:
"Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the

error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.

3.11.Taylor-v-OCS Group 2006 IRLR 613 held, whether an internal appeal is a re-hearing or a review, the question is whether the procedure as a whole was fair. If an early stage was unfair, the Tribunal must examine the later stages "*with particular care… to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open mindedness (or not) of the decision maker, the overall process was fair notwithstanding deficiencies at the early stage* " (per Smith L.J.)

3.12. At common law, a contract of employment may be brought to an end only by reasonable notice unless the claimant is guilty of "gross misconduct" defined in Laws-v-London Chronicle (Indicator Newspapers) as conduct which shows she is breaching the employer/employee contract and relationship fundamentally. Dishonesty towards the employer is the paradigm example of gross misconduct. Another is wilful failure to obey lawful and reasonable instructions, which may be in the form "standing orders" made known clearly as essential for employees to follow. In wrongful dismissal the standard of proof is not the "Burchell test", a Tribunal may substitute its view for the employer's, and take into account matters the employer did not know about at the time (Boston Deep Sea Fishing Co-v-Ansell). Unless the respondent shows on balance of probability gross misconduct has occurred, the dismissal is wrongful.

3.13.1. Behaviour may fall into the category even where there is no intention to make personal gain. In Adesokan-v-Sainsbury's Supermarkets Lord Justice Elias, with whom Lord Justices David Richards and Longmore agreed, dismissed an appeal on facts which have much in common with this case. **but also important distinctions**.

3.13.2. Mr Adesokan was employed by Sainsbury's for some 26 years before he was summarily dismissed for gross misconduct. He was a Regional Operations Manager, one of the more senior posts in the company. He sued for wrongful dismissal. The question for the High Court was whether he had committed gross misconduct. It held he had and summary dismissal was therefore lawful. Mr Adesokan appealed. The case against him was that by his actions, or more accurately inactions, he undermined Sainsbury's "Talkback Procedure" (TP). The philosophy behind this procedure was the desire to ensure staff should be engaged, motivated, and take pride in their work. It was believed this would improve customer service and in turn lead to happier and more loyal customers.

3.13.3. In the TP it was deemed to be very important staff gave frank information in absolute confidence about their working environment and relationships with colleagues, especially line and senior management. The process was deeply engrained in Sainsbury's culture and a critical part of its strategy. The High Court judge found Mr Adesokan would have been "*under no illusion that Talkback must not be interfered with or influenced by management*." Mr Adesokan worked alongside a Human Resources Partner, Mr Briner. In June 2013 about a third of stores were involved in the TP exercise. Mr Briner sent a wholly inappropriate email to five store managers in which he encouraged them to pick staff for the TP who would paint only a positive picture. That advice offended the philosophy of Talkback and risked compromising the results. Mr Adesokan became aware the email had been sent when the TP still had ten days to run. He told Mr Briner to "clarify what he meant with the store managers". Mr Briner did not and Mr Adesokan did not check

to ensure he had. The offending email was re-circulated twice. When the TP was still running, Mr Adesokan learnt Mr Briner had not followed his order to clarify the email but did nothing to remedy the problem or alert more senior management to what had occurred.

3.13.4. After a disciplinary process, Mr Adesokan was summarily dismissed and the reasons for that decision succinctly explained the reasons for finding of gross misconduct as follows:
"*You were accountable for Talkback on your region, the key colleague satisfaction metric.*
You were aware that your HR partner had communicated to stores in a way that deliberately set out to manipulate the Talkback scores on your region.
You failed to take any adequate steps to rectify this serious situation.
Together, it is my belief that these demonstrate gross negligence on your part which is tantamount to Gross Misconduct."

3.13.5. The High Court Judge noted notwithstanding the email, the results from the stores did not lack integrity. He rejected an argument that this mitigated the gravity of the misconduct . He said
"64. *In other words the offending email's* ***potential*** *had not been realised and the results did not lack clarity.* ***But that is not the point; they might have****.*
69. … Although these were omissions not actions, in my judgment they did .. amount to a serious breach of policy or procedure .. He failed to stop it as was his direct responsibility or to report it.
70. I cannot, therefore, accept this was not gross misconduct and I do accept that, tested objectively, this did so seriously damage the trust and confidence in the claimant that the defendants could not be regarded as obliged to continue to employ him. ***It matters not to this conclusion that I have not found the claimant to have been either wilful or dishonest****. These were failures that objectively called into question the ability or willingness of the claimant to actually see to it the core Talkback process actually operated and its integrity was maintained."*

3.13.6. Elias L.J. said "*Under the contract, the employer is entitled to dismiss summarily for gross misconduct. So when can misconduct properly be described as "gross"?* Citing earlier authority His Lordship held it is a question of fact in each case and not limited to dishonesty or intentional wrongdoing, quoting Sellers LJ in Sinclair-v-Neighbour 1967 2 QB 279" *It was sufficient .. to regard what the manager did as being something which was seriously inconsistent - incompatible - with his duty ..*'The focus is on the damage to the relationship between the parties. Elias L.J. added
The question for the judge was, therefore, whether the negligent dereliction of duty in this case was "so grave and weighty" as to amount to a justification for summary dismissal. The role of this court, however, is more limited. We are conducting a review and can interfere only if the judge's decision was wrong: see CPR 52.11. ***The determination of the question whether the misconduct falls within the category of gross misconduct warranting summary dismissal involves an evaluation of the primary facts and an exercise of judgment****. The primary facts in this case are not in dispute. It is now well established where that is the case, when determining whether the judge was wrong in reaching his decision, this court ought not to interfere unless satisfied the decision of the judge lies outside the bounds on which reasonable disagreement is possible… Having said that, in my judgment the parameters available to a judge in a case of this kind are limited;* ***it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal*****.**

3.13.7. In all the circumstances of the case, in which the critical features were that Mr Adesokan was Regional Manager, and the significance placed by Sainsbury's on the TP, it was open to the judge to find gross misconduct. The dereliction of duty constituted a serious breach of policy which undermined its operation. Therefore the appeal was dismissed.

3.14.1. Section 15 of the Equality Act 2010 (EqA) says
(*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.

3.14.2. Under s15, Langstaff P in Basildon & Thurrock NHS Trust-v-Weerasinghe 2016 ICR 305 and Simler P (as she then was) in Pnaiser v NHS England 2016 IRLR 170 held there must be "something" arising in consequence of the disability, and that must "something" be an operative cause of the unfavourable treatment (it does not have to be the sole or main cause) .City of York Council-v-Grossett 2018 IRLR 746**,** held the respondent does not have **to know** the "something" arose in consequence of the disability, In A Ltd-v-Z 2019 IRLR 952 HHJ Eady QC (as she then was) gave a helpful summary of the approach to take when considering the issue of knowledge in para 23 of her judgment, which Mr Mc Hugh cited in full, but we compress

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between it and its effects which led to the unfavourable treatment, (Grosset)
(2) The employer need not have constructive knowledge of the diagnosis but **has the burden** of proving on balance it was unreasonable for it to be expected to know a person (a) had a physical or mental impairment (b) that impairment had a substantial and long-term effect
(3) Reasonableness is a question of fact and evaluation but we must be adequately and coherently take into account all relevant factors and not take into account those that are irrelevant.
(4) When assessing constructive knowledge, what an employee says can be of importance because (i) a reaction to life events may fall short of a disability (J-v-DLA Piper) and (ii) without knowing the likely cause of an impairment, it becomes much more difficult to know whether it may well last for more than 12 months, if it has not already
(5) The answer to the question is to be informed by the Code, which (relevantly) provides
"Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person".
An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.'
(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout -v- T C Group 1998)
(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code.

3.14.3. Ridout concerned a job applicant who claimed failure to make reasonable adjustments. In such a claim, the prospective employer has no prior knowledge of her and must know about not only the impairment but its effects. This lady had a rare condition, photo-sensitive epilepsy triggered by fluorescent lights. The only clues she gave were attending with dark glasses on a string around her neck and commenting on the lights in the interview room. Morrison P said

We accept what Counsel for the appellant was saying, that .. Tribunals should be careful not to impose on disabled people who are seeking employment a duty to "harp on" about their disability .. It would be unsatisfactory to expect a disabled person to have to go into a great long detailed explanation as to the effects their disablement had on them merely to cause the employer to make adjustments which he probably should have made in the first place.

On the other hand, a balance must be struck. It is equally undesirable an employer should be required to ask a number of questions about a person suffering from a disability as to whether she feels disadvantaged...It would be wrong if, merely to protect themselves from liability, .. prospective employers were to ask a number of questions which they would not have asked of somebody who was able-bodied. People must be taken very much on the basis of how they present themselves.

3.15.1. The burden of proving, again, on balance of probability, the unfavourable treatment was, at least in part, because of something arising in consequence of her disability rests with the claimant. Put shortly, can she show a causal link to her disability i.e. the matters for which she was disciplined and dismissed would probably not have happened had she been of good mental health.

3.15.2. Mr McHugh cites i Force-v-Wood UKEAT/0167/18 (3 January 2019, unreported) saying tribunals should adopt a broad approach when determining whether the 'something' had arisen in the consequence of a complainant's disability. He says the claimant made plain at various points in her evidence to the tribunal and the contemporaneous documents she was suffering with symptoms of anxiety and depression at the time the conduct relevant to the allegations took place. Whilst she said words to the effect she did not want her depression to be treated as an excuse the tribunal can, and he submits should, make a finding her anxiety and depression would have affected her judgment at the relevant times. That is sufficient to demonstrate a causal link between the 'something' and her disability. As a matter of law, we think that is right. However, she has to do more than say she **felt there was a link** or that it is **possible** there was. We must be able to elevate possibility to the standard "more likely than not".

3.16.1. Proportionate means of achieving a legitimate aim used to be called " justification. Pill LJ in Hardys and Hanson-v-Lax provided an overview first citing Sedley LJ in an indirect sex discrimination case Allonby-v- Accrington and Rossendale College 2002 ICR 1189 *:*
29. … Once a finding of a condition having a disparate and adverse impact .. had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter.

Then Pill L.J. said
32. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working

practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.
33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. …As this court has recognised in Allonby .. a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal.

3.16.2. Mr McHugh cites the EAT in Birtenshaw-v-Oldfield 2019 IRLR 946 saying the following are relevant to justification under s.15(1)(b)
(a) For conduct to be proportionate it 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.
(b) 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, although ultimately it is a question for the tribunal whether it has done so.
(c) The tribunal must not conflate the 'band of reasonable responses' test with the 'justification' test. They are distinct tests which require different considerations.
As a statement of law this is clearly right.

4. Conclusions

4.1.In this case wherever points are finely balanced, the burden and standard of proof are crucial. We start with unfair dismissal. The set of facts known to the respondent, or beliefs held by it, which were the **principal** reason which caused it to dismiss were that on allegations 2 and 3 the claimant circumvented policies knowingly, because she thought she knew best, **and would probably do so again**. Mr McHugh argues this is a capability matter not conduct. The question is whether, after an adequate investigation, YHN acted reasonably in concluding it was the latter.

4.2. We do not accept Ms Walker instigated a plot to get rid of the claimant to make way for her husband to get her job, but even if she had wanted to there is no indication the people who made the decisions to dismiss and reject the appeal were influenced by Ms Walker or anyone else. If YHN were wanting rid of the claimant they would have placed greater weight on allegation 1, for which there was clear documentary evidence. They did not. Rather they accepted in was done in temper and under provocation. We reject the claimant's allegation of any ulterior motive.

4.3. Mr Cox was not a confident witness but his investigation was adequate and balanced. He interviewed all relevant people, including the claimant ,assisted by Mr Muse, twice. He wrote a full report and his recommendation to hold a Stage 3 hearing was plainly right because dismissal was a possibility. The letter calling her to it made clear allegations and provided all the evidence in advance. Our only criticism is Mr Cox's tendency, probably due to inexperience, to talk in terms of breaches of policy only, rather than explain why such breaches cause real problems. This runs the risk of a Tribunal **forming the impression** his approach infringes Ladbroke Racing-v-Arnott, though looked at carefully, he actually did to consider the nature and cause of the breach.

4.4. Ms Halliwell clearly focused on the nature and cause of the breach and likelihood of repetition, not the fact of breach itself.Taken as a whole,the dismissal and appeal hearings were impeccable. That is not undermined by our finding on constructive knowledge of disability. Mr McHugh rightly confirmed it is not suggested the procedure as a whole was unreasonable.

4.5. There was a good deal of debate about what part allegation 1 played in the decision. The Facebook post was done in anger. We find the snapped key in her daughter's lock and paint on the car would cause anyone to be angry. We find it was not a significant cause of the decision to dismiss but shows her as impulsive, which connects to the other allegations.

4.6. On Allegation 2, the family relationship was , in itself, of minor importance to YHN's views. Had the claimant, having mentioned to Ms Walker Tenant A was her cousin, then gone on to do full verification of income, obtain a landlord's reference, housing history and Safer Estates check before signing him up for a tenancy, she would not have been dismissed. The respondent reasonably considered she had not only failed to do so but wilfully acted to "get around" policies to achieve a desired outcome quicker . She gave the clear impression had done so before and would do again. On Allegation 3, getting Tenant B housed quickly with his son in time for Christmas, somewhere like Chery Tree View temporarily could have been done. The claimant said she acted in the best interests of Tenant B and his son. We agree with Ms Halliwell allowing a child to sofa surf for 3 weeks in a block of flats she would not let to Mr Cox, "*because he wouldn't survive* is not in the best interests of that child. Then, by "fast tracking" within the policies, with "verification", a Safer Estates check and Safeguarding referral, he and his son would have been housed, permanently. somewhere better than CWH.The claimant would not have been dismissed.

4.7. Her own account of the reasoning behind her decisions appeared to show they were made with rational thought and judgment. She stated she been put on CWH with 21 vacant properties, and "*moved away from the policy*" partly as a means to the end of letting empty properties. Encouraging "thinking outside the box" does not mean any Housing Officer was authorised to work outside policy, Neither Ms Halliwell nor the appeal panel accepted the claimant ***misinterpreted*** the move towards greater autonomy as giving her freedom to do what she thought was best . Rather she prioritised letting properties and giving people what they wanted over safeguarding, recording evidence to cover YHN and herself and transparency. **That was entirely reasonable**.

4.8. The evidence showed she was (i) trained (ii) sent relevant policies, guidance and an email concerning the non-allocation of multi storey tenancies to persons under 16 (iii) aware of the Code of Conduct but had not bothered to read it. She acknowledged all the policies had aims of ensuring fair and transparent allocation of housing but did not appear, to YHN or us, to appreciate covering her own and YHN's back in case something did go wrong by having an electronic or paper trail was important. YHN concluded she knew what she should do and found **she had done the opposite so concluded that related to her conduct. That was entirely reasonable**.

4.9. As for sanction had she said, of allegations 2 and 3, her actions were clearly wrong but caused by pressures which made her act out of character and she had learned her lesson, dismissal would have been a disproportionate sanction for what she described in evidence as "two mistakes". However, at the time, and now, she said what she had done was not really wrong at all.

4.10. We disagree she did not view domestic abuse seriously, but she does "rank" its seriousness according to circumstances **she thinks** she knows. The problem is the source of her knowledge is entirely unreliable. She accepted Tenant B's version he had only spat at his wife when he found her in bed with someone and Tenant A's version his girlfriend tried to beat him so he "beat her back". Tenant A's version is wholly inconsistent with the sentence he was given. Tenant B's version may be right but only a Safer Estates check would source the full story. Mr Stubbs put to her Tenant B, while living at CWH, had put up posters protesting at a paedophile being housed there. The claimant said that is mild behaviour compared to some of the things which happen at CWH. We are under no illusions about CWH. It is not a desirable, but the aim of YHN , NCC and partner bodies is to **improve** social housing in Newcastle**.** As for Tenant B she saw it as "helping" a father and son avoid homelessness. In itself that is laudable but unless she covered her own and YHN's back if the tenant committed another crime or his son came to harm, she and YHN had no paper trail which proved they had done their job properly. Criticism and liability would fall on YHN. Safeguarding, the first substantive paragraph of the Lettings and Allocations Policy is in bold (198). Its importance is clear, as the claimant accepted. The focus on domestic abuse is illustrated by a Powerpoint presentation on the policy being dedicated to it (531).

4.11. Ms Halliwell did not just "rubber stamp" Mr Cox's conclusions or dismiss for the breaches in themselves. She considered **why** the breaches were so serious. It is plain the claimant allocated two tenancies to people, who simply did not qualify for social housing, by a route she chose, at best step outside, at worst deliberately circumventing policies because doing it the proper way would have meant someone else picked up neither tenancy should be given and prevented it. A Safer Estates check, as she acknowledged, is required **whenever** criminal activity is identified She was aware of both criminal convictions but chose to overrule what was on YHN's systems concerning both tenants. In cross examination she acknowledged she had knowingly breached the policy. She actually said she was entitled to make her own decisions and would take similar ones again, even at the end of a second investigatory interview having been suspended for over a month by that time**.** She said more than once she was paid enough to decide whether to give a tenancy, had done nothing wrong and would do the same again without the involvement of the appropriately trained services such as MARAC, Social Services or the Housing Advice Centre.

4.12.The overriding impression YHN, and we, gained is of a claimant who thinks her "local knowledge" authorises her to make judgments she is not trained or qualified to make. Having regard to the principal reason shown, YHN had reasonable grounds after a reasonable investigation for its genuine beliefs not only as to what happened but why, and for its view may well repeat her actions which would cause a continued safeguarding risk. Treating that as sufficient to warrant dismissal was well within the band of reasonableness. As said in Retarded Children's Aid Society-v-Day she appeared "*determined to go his own way*", so it was reasonable for YHN to conclude warning her would be futile. **As the member Ms Wiles put it, and we all agreed, her "heart was probably in the right place" but what she did was positively dangerous.**

4.13. When she raised the Lewis Brown issue on appeal, Mr Foreman confirmed it would be looked at, which it was, and there was no evidence of Mr Brown being responsible for allocating the tenancy in question**.** To succeed in the "truly parallel circumstances" argument in Hadjioannou-v-Coral Casinos we need to find they were. We cannot. This reveals another flawed aspect of the claimant's case. Whoever allocated that tenancy may have done his or her part to instigate checks

which failed to raise alarm or, if any had been raised, some other organisation may have said the risk could be mitigated and the tenancy allocated by a permitted route. One can never judge an act or omission by its consequences alone.

4.14. There will always be "risks" in housing problem tenants, who cannot be "left on the streets" when they are not in prison. When those risks are properly assessed on all available evidence by people who have the knowledge of facts training and experience to do so working in collaboration, the best chance of avoiding further harm to anyone is achieved. If a Housing Officer does what the claimant did the risks increase, no matter how well intentioned she may be

Section 15 EqA

4.15. The respondent concedes the claimant was at all material times a disabled person but not that it knew, or reasonably should have known, she was at the time. The burden of proving that on balance of probability rests on the respondent. Mr Cox was told the claimant had been crying at work, her mental health issues were known to her colleagues, she was on Fluoxetine and said her '*head was all over the place'*. He did not make further enquiries beyond giving her the opportunity to mention anything she thought relevant. Ms Halliwell accepts by the disciplinary meeting she was aware (i) the claimant had been on anti-depressants for over two years (ii) had symptoms of her depression and anxiety around the time of her conduct in November 2018 and March 2019 (iii) described herself as '*probably not fit for work'*. Ms Halliwell's explanation in cross examination for why she did not consider the claimant to disabled was her medication reduced her symptoms to trivial at times. When our Employment Judge asked if she knew, or was advised by HR, beneficial effects of medication should be discounted, she replied "no" to both. The claimant specifically stated her actions were not related to any mental health issues twice when asked at the appeal. YHN's belief she was not disabled was genuine but matters not. We must decide if it should have "put together" the facts it did know and realised she was. We find they should, especially with HR support throughout. We accept Mr McHugh's submission YHN had constructive knowledge of disability though, in our view, not actual knowledge.

4.16. YHN concedes disciplining and dismissing her was unfavourable treatment. Her alleged misconduct in making the Facebook Posts and housing Tenants A and B were the 'somethings' that caused the unfavourable treatment. The real dispute between the parties is whether the 'somethings' arose, at least in part, in consequence of her disability. The burden of proving that, again on balance of probability, rests on the claimant.

4.17. The mitigating factors on allegation 1 are strong. It is not unknown for people who have depression, anxiety and low mood to become short tempered, but it is not a common symptom and needs far more evidence to establish the link than the claimant was able to provide, that it did in her case . We find mental health issues played no part in her angry, but understandable, outburst.

4.18. The cornerstone of Mr McHugh's argument on the allocations to Tenants A and B is that the fact she has no record of previous rash decisions means, by a process of elimination, two bad ones in three weeks **shows** mental health impaired her decision making. We disagree because,
(a) a long history of doing something without being found to have done anything wrong, does not prove she never did take "shortcuts" before , indeed she said, and we believe, she had.

(b) she stated in her second interview she had done her version of fast tracking for ages (306), not that these actions were out of character, and experience itself can lead people to become blasé about taking precautions.
(c) she continues to be able to explain clearly her thinking behind the allocation of both tenancies and her statement explains/ justifies her decisions. The evidence is she wanted to help Tenants A and B because she was sympathetic to their situations and, in the process, she would fill voids.
(d) she now calls them mistakes or errors of judgment due to disability, without any evidence, medical or otherwise, to provide a link. The GP letter falls far short of establishing any link to disability. While impaired decision making is a common symptom of depression, it is not invariably.
(e) she accepted said she would do the same again (309). She actively chose to disregard policy as she felt she was paid enough to make the decision these tenants should be awarded tenancies.

4.19. In short, she fails to discharge the burden of proving the 'somethings' which caused the unfavourable treatment arose, even in part, in consequence of her disability. There is another possibility which we consider under wrongful dismissal.

4.20. Having made that finding, we do not need to, but will briefly, consider justification. The burden of proof rests on the respondent. Mr McHugh accepts the aim of safe, fair and transparent allocation of housing is legitimate. The issue is proportionality. Mr McHugh correctly submits the sanction adopted by YHN must be both appropriate and reasonably necessary. As it denied knowledge of disability and had not carried out a balancing exercise at the time, it faces the kind of evidential difficulties described in Birtenshaw. In particular the failure by to consider properly health related circumstances, or any alternative sanction **ought to be fatal** to YHN's arguments of proportionality. Mr Stubbs submits if YHN has a policy it has to be implemented and policed. It was a joint policy used by partnership organisations across Newcastle. Its consistent application was of great importance. The claimant said during the disciplinary process she had, and would again, breach the policy, potentially exposing people to safeguarding risks. It was proportionate and necessary to dismiss to ensure the policy protecting the legitimate interests of all those seeking housing across Newcastle was properly and fairly applied. We prefer Mr Stubbs view.

Wrongful Dismissal

4.21. Mr Stubbs submitted the claimant's conduct constitutes gross misconduct. She was an experienced Housing Officer, trained in and provided with policies she willfully disregarded creating safeguarding issues. The breach of policies and the conclusion she would do the same again, augmented by one another and by the Facebook posts constitute gross misconduct. Our Employment Judge asked him whether he agreed, in theory, dismissal could be fair but wrongful. He did, but said on the facts they did not. Mr McHugh did not make any alternative argument.

4.22. Ms Halliwell's decision is best explained as due to the claimant, despite her experience, thinking if an applicant was in need, in Tenant A's case of a chance to prove himself and in Tenant B's case of somewhere to live with his son, she should help them even if that meant bypassing policies to achieve ends she believed to be right she would. There are people who robotically follow policies. The claimant presented to Ms Halliwell and the appeal panel as the opposite extreme- a person who did not recognise the policies were in place for a good reason of ensuring neither she, nor anyone else, made decisions they were not trained or qualified to make independently of others

who are, and who may have information she did not. In effect the claimant had appeared to act as an expert on offender culpability, rehabilitation and social work. Our member Mr Dobson spotted, and put to, Mr Foreman, the disciplinary process expressly provides even gross misconduct does not automatically lead to summary dismissal. Both Ms Halliwell and the appeal panel accepted they had a discretion to give notice but explained why they did not and gave reasons for their view the claimant knew what she was doing was wrong but did it anyway and might well again which comfortably pass the “Burchell test”. But, do they pass the wrongful dismissal test?

4.23. We have seen many examples, in all walks of life, of people with greater experience disregarding safety more than novices do. The old proverb “familiarity breeds contempt“ is apt. If any employer uses phrases like ‘think outside the box’, it is foreseeable an experienced employee with a strong character may misinterpret that, and we think she may have. We do not accept Mr McHugh’s submission staff were ever told not to be too constrained by policy, but do accept the claimant instructed him they had, and she genuinely, albeit unreasonably, thought so. She had in the past been encouraged to drive up occupancy in low-demand areas. On transfer to Walker she felt pressure to make a good impression by increasing occupancy in CWH despite having some difficulties at home. Mr Cox said he can relate to the pressures of having a young child. Our finding on the s15 claim does not preclude the possibility the pressures on her, not any disability, caused her to adopt a cavalier approach to policy. Also, her years of experience made her blasé.

4.24. It is therefore quite possible the claimant was, at the time, grossly negligent rather than willfully disobedient which would clearly be misconduct. **The distinguishing features between this case and Mr Adesokan’s are (i) his seniority (ii) no ambiguity of instruction (iii) no evidence of him being under pressure.** The burden of proving misconduct was gross, again on balance of probability, rests on the respondent and we do not find they have discharged it.

4.25. Our Employment Judge has typed and checked these reasons himself, working at home due to the pandemic, without printing facilities. That may well have led to typing errors and repetition he would have spotted and excised had he been able to print a draft. For that he can only apologise

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 15 January 2021