EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Ms Y Solomon **Secretary of State for Justice**

Heard at: **London South Employment Tribunal**

On: **5-16 March 2021**

Before: **EJ Webster**
Ms N Beeston
Ms J Clewlow

Appearances
For the Claimant: **Mr Brown (Solicitor)**
For the Respondent: **Mr Dilaimi (Counsel)**

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal is not upheld.

2. The claimant's claim for automatic unfair dismissal is not upheld.

3. The claimant's claims for discrimination arising out of her disability are not upheld.

4. The claimant's claims for discrimination under s20-21 Equality Act (failure to make reasonable adjustments) are not upheld.

5. The claimant's claim for whistleblowing detriment under s 47B of the ERA 1996 is dismissed upon withdrawal.

RESERVED REASONS

The Hearing

6. The hearing was conducted entirely by CVP due to the pandemic with the Tribunal panel also sitting remotely. The parties did not object to a remote hearing.

7. The issues had been agreed between the parties and were outlined at pages 48-52 of the bundle and are replicated below. These issues were considered afresh with the parties at the outset of the hearing and it was agreed again that they were the only issues to be considered by the Tribunal. The only slight variation was that the claimant confirmed that they would be suggesting an additional 'reasonable adjustment' that ought to have been considered by the respondent namely that a work 'buddy' ought to have been provided to the claimant. The respondent did not object to this and it is reflected in the List of Issues as set out below. It was also agreed at the outset of the hearing that the Tribunal would only deal with liability and that should remedy need to be decided it would be dealt with at a separate hearing.

8. The Claimant had originally brought a claim for whistleblowing detriment under section 47B of the ERA 1996 but this was withdrawn at an early stage of these proceedings and was not an issue for us to determine. For completeness however it was agreed that this claim should be dismissed upon withdrawal and that was done after submissions but is recorded above in the Judgment for completeness.

9. The Tribunal was provided with:
   (i) A digital bundle numbering over 2,000 pages
   (ii) An agreed chronology and cast list
   (iii) Respondent's written opening note
   (iv) The following witness statements:
   (a) The Claimant
   (b) Ms Lyndel Grover and an addendum to Ms Grover's statement. Ms Grover was the claimant's line manager at the time of dismissal.

(c) Mr M Nolan and an addendum to Mr Nolan's witness statement. Mr Nolan was the Appeal panel chair for C's Stage 2 grievance appeal hearing on 22 February 2017. In 2018 he heard C's appeals against her first written warning and final written warning as part of the Managing Poor Performance ('MPP') process

(d) Mr G O'Mahoney and an addendum to Mr O'Mahoney's witness statement. Mr O'Mahoney was the Claimant's line manager between 2015 and 2016 and then Ms Grover's line manager. He considered the claimant's grievances against Ms Grover and Ms Lyndel.

(e) Ms O'Prey and an addendum to Ms O'Prey's witness statement. Ms O'Prey was Head of the MHCS and made the decision to dismiss the claimant.

(f) Mr G Davison, Head of Public Protection Group and Ms O'Prey's line manager. Mr Davison heard the claimant's appeal against the dismissal.

10. We heard oral evidence from all 6 witnesses detailed above. We heard evidence until lunch time on day 5 after which both representatives took time to prepare written submissions. On the penultimate day we received written submissions from both representatives which were supplemented by oral submissions. Those written submissions were very full and the Tribunal is grateful to both representatives for the detailed outlines of the facts and relevant law some of which has been replicated below. The final 1.5 days were taken by the tribunal to deliberate.

11. Due to the needs of the witnesses, frequent breaks (at least one an hour) were taken throughout the hearing.

The Issues

12. Unfair dismissal

a). It is agreed between the parties that:

(i) The Claimant has sufficient qualifying service under section 108 of the ERA 1996 to present a complaint of unfair dismissal;

(ii) The Claimant's claim was presented within the relevant time limit

pursuant to section 111(2) of the ERA 1996;

(iii) The Claimant was dismissed

(iv) The effective date of termination was 3 December 2018;

b). Did the Respondent have a fair reason for dismissing the Claimant? The Respondent will rely on capability.

c) If so, did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason for dismissing the Claimant?

12. s103 ERA Automatic unfair dismissal – protected disclosure

a) Has there been a protected disclosure?

(i) The Claimant relies on her grievance of 9 May 2018 as a disclosure.

b) Did the Claimant's grievance amount to a 'qualifying disclosure'?

(i) What type of wrongdoing in accordance with s.43B of the Employment Rights Act 1996 does the Claimant allege her disclosure referred to and why? The Claimant relies on s.43B(1)(b).

(ii) Did the Claimant reasonably believe the wrongdoing to have occurred, or have been likely to have occurred?

(iii) On what basis does the Claimant contend the disclosure was made in the public interest?

(iv) Did the Claimant believe that the disclosure was in the public interest at the time it was made?

(v) Was the Claimant's belief that the disclosure was made in the public interest reasonable?

(c) If the Claimant's grievance amounted to a protected disclosure, was it the reason, or principal reason, for the Claimant's dismissal?

13. Disability

a). The parties agree that the Claimant was disabled, at all material times, by reason of the following impairments:

i. Lupus and related Hughes Syndrome and Sjogren's Syndrome;

ii. Depression and anxiety; and

iii. Anaemia due to B12 deficiency.

b). The parties further agree that the Respondent had actual or constructive knowledge that the Claimant was a disabled person, at least by the time of her dismissal.

c). Did the Respondent have actual or constructive knowledge of each of these conditions before this date and, if so, from what date?

14. Discrimination arising from disability s15 Equality Act 2010

a). The Claimant relies on her dismissal with effect from 3 December 2018 as the sole instance of unfavourable treatment. It is conceded that the Claimant was dismissed, a decision confirmed on 3 September 2018 by Natalya O'Prey and taking effect on 3 December 2018 (the effective date of termination).

b). It is further agreed that dismissal is treatment unfavourable to the Claimant.

c). What is the 'something arising' in consequence of her disability the Claimant relies on? The Claimant relies on relies on the following disabilities as giving rise to a lack of capability: Lupus and related Hughes Syndrome and Sjogren's Syndrome. The Claimant will state her ability to concentrate is impaired by these disabilities: that she is unable to sustain concentration for any significant

period of time and she struggles to contemplate all relevant issues in her mind to make robust risk assessments.

d). Did the Claimant suffer the alleged lack of capability described above and, if so, did this arise in consequence of her disabilities?

e). Is there a causal connection between the alleged unfavourable treatment (dismissal) and the 'something arising' in consequence of the Claimant's disability, namely the alleged lack of capability?

f). If such casual connection is established, were the Respondent's actions a proportionate means of achieving a legitimate aim? The Respondent's legitimate aim for dismissal is as set out in para 39(1) of the Grounds of Resistance.

15. Failure to comply with duty to make reasonable adjustments s20 and 21 Equality Act 2010

a) Did the Respondent apply a provision, criterion, or practice ("PCP") to the Claimant? The Claimant relies on:

i. An alleged requirement to carry out a "full" workload as a mental health case management, by which the Claimant means working 7.5 hours per day and having a case load of, on average, 340 patients. The Claimant will also say she picked up queries or matters arising on colleagues' caseloads when they were on annual leave or sick leave.

ii. A requirement to work in the Mental Health case worker team.

b) Did either of these PCPs put the Claimant to a substantial disadvantage in relation to a relevant matter in comparison with non-disabled persons? The

Claimant will say these PCPs put her at a disadvantage in that she was unable to (i) concentrate long enough to carry out risk assessments on cases; (ii) work at a normal pace as compared with non-disabled workers (the Claimant accordingly worked at a slower pace); and (iii) made a significant number of spelling mistakes. She will allege she suffered from these disadvantages from the start of her employment until the termination of her employment (in relation to Sjogren's Syndrome this arose along with associated impairments from 10 January 2018);

c) The Claimant relies on the following actual comparators, who were all apparently Mental Health Caseworkers and not disabled:

i. Jenny Etienne;

ii. Stephen Lott; and

iii. Sarah Nall.

d. Did the Respondent know, or could it reasonably be expected to know, that the Claimant was likely to be placed at the substantial disadvantage relied upon?

e. Did the Respondent take such steps as were reasonable to have to take to avoid the disadvantage relied upon? The Claimant will rely on the following adjustments:

i. Reducing the Claimant's workload;

ii. Transferring the Claimant to another team where she would have been given a lighter workload;

iii. Extending the performance management period by a further six months;

iv. Allowing the Claimant to work from home on a sustained basis.

v. Providing the Claimant with a work 'buddy'.

16. Jurisdiction

a. Was the Claimant's complaint under sections 20-21 of the EqA 2010 presented within three months of the act(s) complained of under section 123?

b. If not, is it just and equitable to extend time?

The relevant law

Unfair dismissal (s.98 ERA 1996)

17. S.98 of the Employment Rights Act 1996 ("ERA 1996") provides as follows:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> …
>
> (4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

18. The tribunal must not put substitute its opinion for what the employer ought to have done. The tribunal should look at whether the employer's actions fall within the range of reasonable responses open to an employer: Iceland Frozen Foods Ltd v Jones [1993] ICR 17. The range of reasonable responses test also applies to the issue of procedural fairness: J Sainsbury plc v Hitt [2003] ICR 111, CA.

Automatic unfair dismissal by reason of whistleblowing (s.103A ERA 1996)

19. Section 103A ERA 1996 provides that a dismissal will be automatically unfair if the reason (or, if more than one reason, the principal reason) for the dismissal was that the employee had made a protected disclosure.

Qualifying disclosures

20. Section 43A ERA 1996 provides that a 'protected disclosure' means a qualifying disclosure as defined by section 43B which is made by a worker in accordance with any of sections 43C to 43H.

21. Section 43C(1)(a) ERA 1996 provides that a qualifying disclosure is made in accordance with section 43C ERA 1996 if the worker makes the disclosure to his or her employer.

22. A 'qualifying disclosure' includes, (43B(1)(b) ERA 1996), a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

Public interest

23. In relation to whether the worker reasonably believed that the disclosure was made in the public interest, the tribunal has to ask two questions: (a) whether the worker subjectively believed, at the time s/he was making the disclosure, that the disclosure was in the public interest; and (b) whether, if so, that belief was objectively reasonable: Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] ICR 731. The tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker: Chesterton Global.

24. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: Chesterton Global, para. 30. Underhill LJ also said at para. 30: *"I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."*

Knowledge of disability

25. Section 6(1) EqA 2010 provides that a person has a disability if s/he has a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities.

Discrimination arising from disability (s.15 EqA 2010)

26. Section 15 EqA 2010 provides that an employer discriminates against a disabled employee where the employer:

    a. treats the employee unfavourably because of something arising in consequence of the employee's disability; and

b. cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

27. Section 21 EqA 2010 provides that an employer discriminates against a disabled employee if the employer fails to comply with a duty to make reasonable adjustments imposed on the employer in relation to the disabled employee by s.20 EqA 2010.

28. Section 20(3) EqA 2010 provides that, where a provision, criterion or practice ("PCP") puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement on a prospective employer to take such steps as it is reasonable to have to take to avoid the disadvantage.

29. The burden is on the claimant to establish a *prima facie* case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred (in the absence of an explanation) that the duty has been breached.

30. An actual or hypothetical comparator does not always have to be identified in a reasonable adjustments case: the question for the tribunal is simply whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person (Griffiths v Secretary of State for Work and Pensions [2017] ICR 160, CA: technically obiter on this point, but nevertheless *"clearly authoritative [on this point] and must be followed"* according to the EAT in Perratt v City of Cardiff Council EAT 0079/16).

31. The purpose of the comparison exercise with persons who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what

causes the disadvantage is the PCP: Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT.

Time limits

32. The relevant time limits provided by section 123 of the Equality Act 2010 are as follows:

> (1) Proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

The discretion to extend time

33. Section 121(1)(b) EqA 2010 provides that, where a discrimination claim is *prima facie* out of time, it may still be brought within *"such other period as the employment tribunal thinks just and equitable."*

Facts

17. We have only made findings of fact where they are relevant to the claims brought by the claimant. We have only considered documents we were expressly referred to by the parties either in their witness statements or by their representatives during the hearing.

18. The claimant was employed as a Band 4 Mental Health Caseworker by the respondent from 4 November 2013. She has been diagnosed with the conditions of Lupus, Sjogrens, Hughes Syndrome, Depression and Anxiety and Anaemia due to lack of vitamin B12. The dates of diagnosis are in some dispute but it is not dispute that the claimant was disabled by reason of these conditions at the relevant time.

19. The claimant worked within the Mental Health Case Worker team for the respondent. The team was charged with making decisions on behalf of the respondent. The claimant's witness statement (which was not challenged in this regard) summarises the function of the claimant's role as follows:

"As a Mental Health Case Manager, my role was to case manage Restricted Patients. These were individuals, who committed offences, that would attract 12 months or longer custodial sentence. However, at the time of the offence(s) the acts were deemed to have been attributable to Mental Health Disorder. Therefore under the Mental Health Act 1983/2018 the patient would have been handed a Hospital Order rather than a prison sentence to ensure the safety of the victim(s) and general public."

20. More detail was provided in the claimant's witness statement and Ms Grover's witness statement listing the numerous responsibilities of the role. It was not in dispute that it was a critical, analytical role that involved fast paced, often urgent decisions be made regarding the movement and treatment of prisoners for mental health concerns and that those decisions were being made on behalf of the Secretary of State for Justice. This meant that the service and the managers were accountable to ministers on whose behalf the decisions were being made. It also meant that incorrect decisions could have serious repercussions either for the prisoner themselves or for the public. We were taken to emails which

clearly demonstrated that senior members of the team such as Ms O'Prey had concerns that delayed decisions about transfers could, for example, lead to suicides by prisoners.

21. The claimant was dismissed on 3 December 2018 following a performance management process. The claimant's claims essentially arise out of this dismissal and the process leading up to it.

The Claimant's health

22. The claimant summarised her health conditions as follows:

"I suffer from the following conditions, which have been accepted by the Respondents to:
amount to disabilities as confirmed in the agreed list of issues (49-50):
Lupus and related Hughes Syndrome and Sjogren's Syndrome.
Depression and anxiety.
Anaemia due to B12 deficiency."

23. It was not in dispute before us that the claimant was disabled for the purposes of the Equality Act 2010. The above conditions, whether separately or cumulatively had a substantial effect on the claimant's ability to carry out day to day activities, particularly when disregarding the effect of any treatment that she received. The only dispute in respect of the claimant's health was around the timing of when the respondent was aware or ought reasonably to have been aware of the above conditions.

24. In submissions and evidence, the respondent stated that it became aware of the claimant's conditions on various dates as outlined in the timeline below. This was, in the main, not disputed by the claimant. The respondent's time line is as follows:

(i) Lupus: 28 August 2015:
(ii) Hughes Syndrome: 22 July 2016;
(iii) Sjogren's Syndrome: 5 March 2018;
(iv) Depression and anxiety: 2017
(v) Anaemia due to B12 deficiency: 11 June 2018:

a. However the claimant did challenge the dates on which the respondent knew about her Lupus and her depression and anxiety.

b. On balance we accept that the respondent did not know about the Lupus diagnosis until 28 August 2015. We were not provided with any documents to confirm the claimant's evidence that she ticked a box during the application process or that even if she did this was communicated to the respondent. We accept the respondent's evidence on this as we think it more likely than not that were an employee to disclose such a condition at the time of employment, an employer of the size and resources and processes of the respondent would refer them to Occupational Health (OH) for assessment at the outset of employment.

25. We also note that in evidence Ms Grover stated that the claimant had told her about her depression and anxiety at some point in 2016 (when she became the claimant's line manager) though she had been unaware at that time that the diagnosis dated back to 1987. We accept Ms Grover's evidence in this regard and accept that once she had been told about the depression and anxiety, the respondent ought reasonably to have been aware that this condition could have amounted to a disability as they could have referred the claimant to OH or asked for medical evidence regarding this condition which would have confirmed its long-term nature.

26. It was in dispute during the hearing as to whether the claimant's Lupus/Sjogrens/Hughes syndrome caused a lack of concentration. We find that it did. The claimant was consistent throughout her evidence that the chronic fatigue she experienced due to her Lupus (which is clearly backed up by the OH reports e.g. p1717 and p1714) caused her lack of concentration. We accept this evidence. At pg 891 (a chart prepared by the claimant regarding her eye treatment and provided to Ms Grover in May 2018) the claimant expressly states that her eyes were blurred and that this affected her ability to concentrate. The blurred eyes were caused by the Sjogren's syndrome.

Although the respondent relied upon aspects of the reports which specifically commented that the either the B12 anaemia or the depression caused the lack of concentration, we find that the claimant has established that her concentration was also affected by the chronic fatigue caused by Lupus. Impaired concentration is a common symptom of fatigue and tiredness. The claimant was clear throughout her evidence on this point and we accept that the lack of commentary on this point in the OH reports does not mean that the Lupus and associated conditions did not also cause a lack of concentration through fatigue and later, her eyes blurring.

27. There was also some discussion around the claimant's health and whether she was well enough to be at work during the formal performance management process. Despite warnings that she should not do so because it would affect her ability to get through her workload, the claimant took annual leave every Friday so that in effect she was working a 4 days week. She also stated in several emails to her managers during this period that she was 'borderline' fit. When pushed by her managers as to whether she was well enough to be at work, she said that she was.

28. She has said to us and during her appeal against her dismissal, that in hindsight she perhaps was not well enough to be at work. However she has provided no medical evidence to substantiate that assertion and when asked on several occasions at the time she confirmed that she could work. This was evidenced in emails. She stated in evidence to the tribunal that she chose to do this because she wanted to engage properly in the performance management process and saw going off sick as refusing to engage. Given that she had previously taken significant periods of time off sick without any negative repercussions (as far as we were made aware) it is difficult to understand what prompted this approach.

29. In one OH report dated 24 July 2018 (i.e. during the Poor Performance procedure) however there were conflicting messages (p1755 – 1757). Under the subheading 'Current Capacity for Work' it states:

"In my opinion, Ms Solomon is unfit for work due to her current symptoms. I recommend she is referred to Occupational Health for a review in 4 weeks time when it is hoped she would have benefited from counselling, new mental health medication and she would have completed her course of antibiotics."

However it goes on to say on the following page, in answer to a question from the Manager as to whether the claimant was able to carry out the full requirements of her job and duties:

"With the recommended adjustments, Ms Solomon is fit to perform her contracted hours and duties."

30. This report is confusing and caused the Tribunal some consternation. Nobody, including the claimant, wrote back to OH to receive clarification on this point. The claimant had sight of the report and did not challenge the contents and at no point thereafter suggested that she felt she should not be at work beyond the 'borderline fit' comments she made in emails. When asked to clarify those comments she said she was well enough to work. We saw several emails from the Respondent telling the claimant to take time off sick if she was too unwell to work. She chose instead to work a four day week using annual leave. She was unable to explain to the tribunal why she insisted on continuing to work and use annual leave as opposed to taking time off sick. She states in her appeal against her dismissal that she now, on reflection thinks she ought to have taken time off, but does not say why she did not do so at the time despite the opportunities provided to do so. She was not at risk of any disciplinary sanction due to her level of sick leave and no plausible explanation was provided to the tribunal as to why she felt unable to say she needed time off.

31. Therefore, given her assertions at the time and the lack of clear medical evidence, on balance, we find that she was well enough to be at work (subject to adjustments which are discussed below) and to work full time during the performance improvement process.

<u>Performance management background</u>

32. Between 2013 and 2016 we were taken to little evidence that suggested that there any significant concerns with the claimant's performance. The respondent operated a system of biannual personal development reviews (SPDRs). At a mid-year review (typically in around May) employees receive a provisional performance rating which is then reviewed and finalised at the end of year review.

33. The respondent had two relevant performance management policies. The first was the policy that governs the SPDR review process, and the second is a Managing Poor Performance (MPP) policy. There was also a guidance document which suggested how managers ought to deal with 'dips' in performance. In summary, the first policy deals with how the twice-yearly performance review processes ought to be conducted as well as indicating how an informal improvement required process should be used.

34. Performance ratings fell into 3 categories:
    (i) Need/Must improve or Improvement required
    (ii) Good
    (iii) Outstanding

    Pay rises were partially dependent on obtaining at least a 'good' rating.

35. The SPDRs we were taken to for the period between 2013 and 2016 show that although the claimant's line manager (then Mike Turner) rated her performance as overall' good', there were also clear comments made that the claimant was struggling or failing to achieve some aspects of the role which included themes as follows:
    (i) Backlogs of work
    (ii) Struggling to prioritise the necessary targets
    (iii) Basic errors
    (iv) Falling behind with work

36. None of the SPDRs provided for this period are 'unblemished' and all have comments about some or all of the above issues.

Improvement required ratings

37. It appears from the notes and Ms Grover's witness evidence that she became the claimant's line manager in 2016. During a return-to-work interview and in trilateral meetings with Mr Mahoney some issues of performance are raised but nothing formal is discussed at this point.

38. The first formal noted concern is on 10 August 2016 when Ms Grover states that the claimant is rated as Improvement Required in a trilateral meeting.

39. During the 2 years where the claimant received Improvement Required ratings at the mid-year and end of year reviews, the reasons given for those ratings were as follows:

"Ylaine's performance has been disappointing this year, although it is acknowledged that, in common with the other caseworkers, she has had to adapt to changes in working practices and performance measures. She has not always been willing to acknowledge the problems which have been identified, despite meeting with her Managers on a number of occasions and being given evidence in support of their concerns. Ylaine has been given guidance on expectations, and the proper management of her work, which, it is hoped, will enable her to successfully address the issues of concern. She is aware that if there is not significant evidence of improvement in the very near future, it will be necessary to implement Poor Performance measures."
24.10.16

Ylaine's performance has continued to be very disappointing this year, despite a number of discussions with her Manager and detailed advice on how to address performance concerns and improve her work. Efforts to help her organise her work better were made also by allowing her to work from home sometimes, but this was abused. Unfortunately, some limited improvements were not sustained. She has been increasingly unwilling to acknowledge the problems which have been identified, despite meeting with her Managers on a number of occasions, and being given evidence in support of their concerns with structured suggestions and plans to address issues. Ylaine has been given

guidance on expectations, and the proper management of her work, with very little evidence of improvement. She sometimes gives the impression that she is not listening when given advice or feedback about her work, and rarely learns from her mistakes. She has been made aware that if there is not significant evidence of improvement, it will be necessary to implement Poor Performance measures. 4 December 2017 (delayed due to LG's ill health).

When Ylaine returns to work, she needs to fully adhere to her performance improvement plan which has been included in this report. She also needs to fully concentrate on her work which she should always thoroughly check which will help her to avoid making mistakes. Ylaine should also regularly speak to her line manager and mentor to use his experience. She should also ask them, and colleagues, any questions or if she needs any help. Ylaine also needs to ensure that she regularly looks through her To Do List to ensure that she prioritises her work to ensure that any urgent work, such as prison transfers, Tribunal statements, and medical leaves are actioned before all other work. I would also like Ylaine to ensure that she always reads her emails as sometimes she gives the impression that she does not read them. October 2017

Ylaine's Performance Plan was delayed by her sick absence, but has been in force since her return. She has been allowed reduced caseload and given careful retraining, and her work has been closely monitored. However, despite this, and the production of some good work, the identified issues remain a considerable concern, in particular her problems in organising her To Do List effectively to ensure that statutory and urgent deadlines are met, and the missing of important factors In some, though not all, of her risk assessments. She has not been cooperative with efforts to help her improve; will not accept advice, and is being increasingly negative and challenging in her behaviour towards her Managers. She has been distracted by constant efforts to increase her already generous reasonable adjustments agreement, when she should be concentrating on her work and liaising properly with Managers. In the circumstances, a further marking of Improvement Required is appropriate. This

is the 4th consecutive such marking and the same concerns have been to the fore on each occasion. For this reason, Ylaine will shortly move to the Poor Performance procedure. Ylaine has said that she understands this, and the reasons why it is being implemented. 18 May 2018

40. Based on the information set out in the SPDRs (which included the claimant's responses to her manager's concerns) we find that the respondent was regularly and consistently raising that they had concerns with the claimant's performance in particular her ability to prioritise urgent work properly, manage her workload efficiently and stick to relevant and statutory deadlines. At each SPDR meeting the claimant was given the opportunity to discuss any concerns or justifications she had and these are recorded in the SPDR notes.

41. There is no time frame given as to when managers should move from using the performance management policy to the poor performance management policy. We heard in evidence from Ms Grover and Mr Mahoney that they moved the claimant because she had had 4 Improvement Required ratings in a row. Nonetheless we were not referred to a section in either policy, (nor could we find anything ourselves in the policies) to give this definitive prompt or time frame to the decision to move the claimant from the performance review process to the MPP process. Nonetheless, we consider that two years of Improvement Required ratings does not seem an unreasonable prompt for a shift to a more formal process. In reaching this conclusion we have considered the SPDR forms and the notes of the bilateral and trilateral meetings during this period which show the topics that were discussed, the claimant's responses and the assistance offered to the claimant during this period in terms of management support. We accept, based on these comprehensive notes and relatively regular meetings that there was no significant improvement to the claimant's performance and that her managers continued to have genuine concerns based on evidence of how the claimant was performing across various aspects of her role.

42. We also note that the claimant's response to this situation was defensive. In the notes of the meetings and in the write ups of the SPDRs, the claimant's

approach was often to deny either that the work being criticised was below the standard required by the respondent or that any faults were of her making.

43. This approach was reinforced during the claimant's evidence to the tribunal at the hearing. She was taken to numerous points in the evidence where the respondent alleged certain failures and each time she attempted to justify her work. Whilst this may be the normal position if there are no clear errors, one example of this was her continued disagreement as to what questions she needed to ask to perform certain tasks; a point that was reinforced by emails from healthcare professionals at the time and all the managers who gave evidence to us. This approach was described by Ms O'Prey as demonstrating a lack of insight – a description which we accept. The claimant demonstrated before us and throughout the performance management processes she was subjected to, an apparent lack of insight regarding her role in the mistakes that she was making on a regular basis.

Managing Poor Performance ('MPP') process

44. The decision to move to a formal performance management process was taken by Ms Grover following the fourth Improvement Required SPDR rating at a meeting on 19 April 2018. The respondent's process was to send an initial written warning (p96-97) on 27 April 2018 and then commence their MPP process. It was communicated to the claimant on 27 April that she was receiving a written warning because:
    (i) The quality of her work was not of the correct standard because she was making numerous important errors;
    (ii) She was not informing managers in advance that she was not able to meet targets including statutory targets;
    (iii) Not communicating properly with her managers when wanting to trigger reasonable adjustments
    (iv) Failing to consider emailed instructions and then failing to follow processes and take the required actions.

45. The process commenced on 4 May 2018 with a meeting between Ms Grover, Ms Clark and the claimant with another individual (KA) attending as a notetaker.

46. The claimant's concerns regarding the performance management process in terms of its fairness were the same issues that the claimant relies upon as being failures to make reasonable adjustments. Our factual conclusions regarding them are therefore set out below. However we will consider at this point the process followed by the respondent and any training or other support offered to the claimant during the formal performance improvement plan.

47. The improvement plan followed the respondent's policy as follows:

    (i) Written warning followed by a 4 week performance improvement plan with weekly meetings (4 May – 1 June);
    (ii) Final written warning issued (5 June) followed by an extended performance improvement plan to 8 August;
    (iii) 10 August – performance improvement plan concluded and Ms Grover writes a report recommending the claimant's dismissal.

48. The claimant appealed against the written warning and the final written warning. Those appeals were considered and found to be without merit. We were not provided with any evidence or submissions by the claimant that these appeals were handled in a way that was unreasonable. The claimant's concern seems to be that Ms O'Prey ought to have had regard to the claimant's ongoing sense of grievance in relation to the conduct of Ms Grover and Ms Clarke when reaching her decision to dismiss the claimant. However this is not addressed in her witness statement.

49. **SET UP TO FAIL?**

<u>Training</u>

50. The claimant had received training before the formal improvement process was commenced, namely 30 hours of training during her phased return to work in January 2018 and a further 2 hours of refresher training on risk assessments with Ms M.

51. We were also provided with a spreadsheet of all the training that the claimant had received during her employment and evidence from the respondent witnesses that there were regular email updates with processes and procedures that could/should be followed when performing their role.

52. In her witness statement the claimant accepts that she had received training and was relatively experienced but stated that she needed support due to her disabilities. She has not specified to us what training over and above that received, would have made a difference. She clearly states in her witness statement that she felt she was asking appropriate questions and generally good enough to do her job. She said that she was being held to standards that were too high as opposed to making too many mistakes. She cites the fact that she had a good rate of Green or Amber green pieces of work supporting the fact that she could do her job well. In the absence of her demonstrating what training could have assisted her further, we conclude that she was offered reasonable training in all the circumstances.

Grievances

53. The claimant brought 2 grievances. We make findings in relation to those grievances in so far as they assist us in reaching a conclusion on the claims brought by the claimant.

54. The claimant brought two grievances regarding emails sent to her private address. One was made on 4 May 2018 against Christina Clark (p1766) and the second on 9 May 2018 against Lyndel Grover (p1783). Both were dealt with by Mr O'Mahoney insofar as they concerned the data breach. In an email of 23 February 2018 Ms Grover sent the claimant some data concerning a patient to the claimant's private email address. That data included reference to the patient's health, his name and attached paperwork covering a warrant application on behalf of a prisoner including what hospital he might go to. It was not in dispute between the parties that this data was confidential and amounted to personal data as defined by the Data Protection Act. The grievance against Ms Clark concerned an email sent by Ms Clark on 2 May 2018 to the claimant's

personal email address. This was also explained as being due to human error but in any event is not relied upon by the claimant as being a qualifying disclosure.

55. The claimant did not raise a concern about the 23 February email from Mr Grover until some 2 months later. The reason for the delay was not explained to us nor to the respondent at the time. Until the claimant reported her concerns and was given instructions to delete the email, she retained it in her personal email's inbox despite being aware that it was confidential data.

56. Nevertheless, we conclude that the claimant was aware of the public interest of the email and attachments and it was not disputed by the respondent's witnesses that such information and the way that it was dealt with was probably in the public interest. As a result of the claimant flagging the issue, steps were taken to delete the emails and an investigation launched. Mr O'Mahoney concluded that there had a been a data breach as a result of human error as Ms Grover had intended to send the email to the claimant's work address but the auto fill had sent it to her personal address because she had recently been off sick and this had been the main email for contact at that time. No sanctions were imposed against anyone as a result. We conclude that there was no ill will or negative feeling towards the claimant as a result of her raising this matter from Ms Grover or Ms Clark. The matter was taken seriously by the respondent and acted upon promptly. We were provided with no evidence to suggest that the claimant's card was somehow marked by her reporting the email. Whether there were management concerns regarding the motivation behind her delay in raising the matter is probably a different question but is not one for us to determine as it is not part of the case before us.

<u>Reasonable Adjustments/Issues with fair performance procedure</u>

57. The claimant has asserted that the respondent ought to have made various reasonable adjustments and further that the failures were also the causes for the dismissal to be unfair. We set out here the adjustments that we found were made to the claimant's work and working environment and assess the ones that the claimant has set out ought to have been made in her favour but were not.

58. The claimant worked 37 hours a week which was 7.24 hours per day. It is not in dispute that other than during a phased return work she was required to work those hours. She did not apply for part time working nor was it suggested as part of any OH recommendations. The workload was in some dispute. The claimant states that a full caseload numbered 340 patients, the respondent states that it was 230+ patients. We accept that the practice being relied upon for the purposes of this claim was that the claimant had to carry out a full caseload. Given that it is accepted by both parties that the number of patients (340 vs 230) was not necessarily indicative of the number of live/active cases that a caseworker dealt with in a day or a week we do not find that much turns on this difference.

Reduction in workload

59. We find that the respondent took the following steps at various points to reduce the claimant's workload:

(i) From 23 May 2018 (at the latest) the claimant was not required to produce a full output of work in that she was only required to complete 12 pieces of what was referred as Quality Assessed work (referred to throughout by the witnesses as QAable work). We accept that this was a reduction from the normal requirement of 20 pieces of QAable work per week. The claimant submitted that other caseworkers only provided 12 pieces as well. However we were provided with no evidence of this and prefer the respondent's witnesses' evidence in this regard particularly given that it is backed up by the email at page 776 from Ms Grover to the claimant. Whilst other caseworkers may not have hit their targets every week, we accept that the normal target was 20 pieces of QAable work per week and the respondent reduced it for the claimant from 23 May 2018 and throughout the performance management process.

(ii) We also accept that the respondent did not want the claimant to carry out prison transfers. Whilst we accept that this was not a substantial reduction in workload as it was generally agreed that this amounted to 3 or 4 pieces of work a week but it was nevertheless a reduction.

(iii) The claimant was put on 'neither' for large periods of time during 2018 during her phased returns to work and at various other points. Being put on 'neither' meant that the claimant was not given any reallocation work which meant that she was not taking on work from colleagues who were off on any sort of leave. There was no evidence to suggest that this did not take place. Given that it was a small team, covering each other's work on 'neither' would have provided significant additional work when someone was off and we accept that putting the claimant on 'neither' amounted to a reduction in her workload.

60. We accept that the reductions at (ii) and (iii) above were temporary. However the reduction in QAable work represented an almost 40% reduction in the work which the claimant was being measured against for the purposes of the MPP process.

Working from home

61. The general practice at the respondent was that all caseworkers could work from home 2 days per week. The claimant asked to be able to work from home on a sustained basis. This was refused. However the adjustment that was made and remained in place throughout was that the claimant would be allowed to work from home during any Lupus flare ups. The basis for that was set out in letter 17 August 2017 and was based on the OH report dated 6 January 2017: *"Flexibilities could include, reduced hours, reduced duties, flexible working pattern, working from home, additional rest breaks, alternative work duties. This would be for a two week period, for any one period. Otherwise consider referring her back for advice if her symptoms prevents her from returning to her normal pattern of working.*

62. The reason for the delay in implementing this report was that the claimant was off sick for a significant period of time during this period and in addition a further OH report confirmed that she ought not to take on reallocation work until the grievance process had been finalised.

63. Initially after being placed on the MPP process the claimant was told she could not continue to have her 2 days per week at home so that they could keep a closer eye on her performance and offer her on the spot advice. The 2 days per week as standard was then reinstated and then withdrawn again because she 'abused' the system by working on weekends and after hours and during leave in a way that the respondent felt was skewing her achievement figures regarding her performance assessment.

64. What remained in place throughout however was that the claimant could work from home should she have a Lupus flare up. Although this was initially limited to a 2 week period, the respondent witnesses were clear that provided appropriate medical evidence was provided, the claimant could work from home for as long as her Lupus flare up continued. We accept that this was the case and that the claimant could work from home whenever she had a Lupus flare up.

Desk

65. The claimant requested a fixed desk because of her eyesight issues with the Sjogren. This took 4 weeks to be finalised because 3 desks were tried in the interim. The respondent had hoped that the other 3 would be suitable but they weren't for various reasons, some related to the problems caused by Sjogrens and others caused by unrelated issues such as the loudness of a colleague's voice and whether they were on an aisle. Ultimately however the claimant was supplied with an appropriate desk and the requested adjustment was made. Given that the guidance the respondent had was related to the lighting around the desk, we find that all three of the interim desks offered were attempts at meeting those recommendations and all met them apart from the one that had sunlight in the afternoon. The others fell short for reasons not related to the claimant's Sjogren sight issues. Therefore whilst the adjustment was not made immediately, attempts were made with the full involvement of the claimant and any delay was for a relatively short period of time.

Move to another MHCW team

66. The claimant requested that she was moved teams from as early as 2016. The request to move teams was born out of her belief that she did not get on with various colleagues including Mr O'Mahoney and Ms Grover. The requests were denied. At no point was the move of teams recommended by an OH specialist nor have we been provided with medical evidence that would suggest what effect such a move would have on the claimant's health.

67. The claimant stated before us that she felt that such a move would reduce her workload. It is not clear on what basis this is asserted given that all Teams had a similar workload. In addition we accept the respondents' witnesses' evidence that a shift in team would not have resulted in a reduction in the performance management of the claimant, it would just have moved the responsibility to a different manager.

Extending the performance management process by 6 months

68. The claimant states in her pleadings that the respondent ought to have extended her performance management process by another 6 months. However this directly contradicts what she said at the time which was that she wanted the process to be finished as soon as possible because it was, she said, having a negative effect on her health. In evidence she said to us that she wanted it to just be over and that she had all but given up trying once she received the final written warning. It is therefore unclear what an extension of time would have achieved. The claimant's solicitor suggested that if it had been done in conjunction with the other adjustments (i.e. moving teams and a further reduced workload) then it could have worked.

69. We were provided with no evidence as to why or how this would be the case and what disadvantage this combined adjustment would have ameliorated.

Buddy

70. During the hearing the claimant's solicitor suggested an additional adjustment namely that of the claimant being provided with a 'buddy'. The function of that buddy was vague but appeared to include, at the very least; checking the

claimant's work before it was sent to a third party, advice and guidance at any point about any point, and acting as a filter between the claimant and the outside world including her managers. He asserted that this would have a resource saving effect because the managers would have to have done less. However we do not accept this as we had no evidence to suggest this was the case. The claimant's oral evidence did not suggest this – it was simply an argument put forward by Mr Brown in his cross examination of the respondent's witnesses.

71. In effect the suggestion would have entailed a fellow Band 4 caseworker checking the claimant's work which would have necessarily meant that they could not do their own work or as much of their own work as they had been doing previously. The respondent witnesses stated that they did not have sufficient staff at Band 4 to provide such support given that they had lost 20% of their workforce on the move to Croydon and due to a large backlog of work that covered the whole service.

72. The claimant only addresses this issue briefly in her witness statement. She states that she had asked for a mentor (paragraph 55) to sit with her and assist her to do her work. She suggests a particular individual (GS) and says that she was discouraged from asking another individual (S) to assist her. It appears that her shadowing of GS did not take place. It was accepted by the respondent that they did not want the claimant sitting next to S (though she did in fact end up at this desk) because she distracted him and because it was feared she became dependent on him.

73. The respondent stated that the claimant was given access to all her managers to ask questions and that she could have approached any of them were she to have difficulties with any particular piece of work. We were not provided with evidence as to whether the claimant sought help from her managers save for the issues that she raised in her weekly meetings during the poor performance review. There was no explanation from the claimant as to why she did not do so.

74. The claimant asserted she could have received assistance from a colleague with her To Do List ('TDL') and how to prioritise her work correctly to avoid missing deadlines. The respondent managers kept suggesting to her that she review her List every morning for approximately 30 minutes in order to be able to properly prioritise her work. She stated that her TDL was so long that it would have taken her all day to review it and that such an exercise served little purpose in any event. In essence she said that the suggestions made by all her managers would not work and she did not seek advice or support from them, preferring instead to get it from a 'Buddy'. Given that she did not try their suggestions, it is not clear on what basis she asserted to us that it stood no possibility of working. We also learnt, in answer to a question from the Tribunal, that one of her line managers had helped her by clearing her TDL on at least one occasion to assist her with starting from a relatively 'clean slate'. She therefore did receive some direct assistance from a senior colleague in addition to them being there to answer questions should she have them – it was just not a Band 4 colleague or a permanent 'Buddy'. The constant refrain from the respondent witnesses we heard from was that the claimant was a member of staff, who had received adequate training, for whom adjustments had been made and whom they needed to demonstrate, could perform her role once adjustments had been made for her health issues.

Management Support during MPP

75. The umbrella of the OH reports stated that she was by and large well enough to carry out her work. As and when she raised issues she was referred to OH for their comments.

76. She was provided with ample training in that she got the refresher training on her return from sick leave in February 2018. This amounted to 30 hours of training over a month with Martine Green. She then got training from Angie Munley that was a session on risk assessment for 2 hours.

77. Throughout the SPDR process and the poor performance process she was also provided with assistance from Graham Copeland whom cleared to an extent,

and then monitored, her To Do List throughout the process. She was notified of any mistakes as they were made and all her work was reviewed at the end of each week. She was redirected to the policies and processes that governed the work that they did.

78. We were provided with some emails that suggested that the claimant was receiving regular requests by managers to action her TDL (e.g. p365-369). The claimant has stated that this amounted to bombardment and was unhelpful to her in improving because she felt under pressure. We do not consider that this was intended to, nor should it reasonably have had the effect of being 'bombardment'. We consider that it was clear evidence of the respondent managers attempting to ensure that the claimant correctly prioritised her work and did not miss important deadlines, including statutory deadlines. It was, we accept evidence of them strictly monitoring her progress but consider that this was reasonable in circumstances where she was regularly late with work or missing important deadlines. Further it was an attempt to ensure that she met the targets she needed to meet to pass the performance improvement plan.

79. The claimant stated that having 3 managers in the meetings (Mike, Christina and Lyndel) felt like bullying and meant that she would not succeed with the plan and was being set up to fail. We note that she had a right to invite someone to the meetings with her but did not do so at all stages. Having read the emails for example between pages 1432 and 1437 it is clear that Ms Clarke in particular does not adopt a sympathetic or helpful tone in her emails to the claimant around attending a review meeting. She uses language such as ordering (pg 1437 31 July 2018) the claimant to attend and suggests that the claimant ought to have arranged alternative accompaniment earlier. Clearly frustrations on both sides were running high at this point. The claimant had also walked out on a conversation with Ms Clark earlier that morning. However, after several emails back and forth this meeting was rearranged for the following week and the claimant was accompanied at the meeting by Steven Lee.

80. We do not accept that there was an intent, from Ms Grover or Ms O'Prey for the claimant to fail her MPP process. We accept both their evidence that they had

managed people previously through this process and obtained improvements in performance meaning that they did not have to dismiss them. In addition, the notes of the meetings and Ms Grover's extensive report on the claimant's performance over the period from 4 May until her dismissal letter dated 3 September 2018, demonstrates that there was a significant amount of time and effort put into managing the claimant throughout the period. We do not accept that such effort would have been made had the intention be for the claimant to fail.

Dismissal

81. The claimant stated that it was procedurally unfair that Ms O'Prey conducted the decision making hearing. The respondent's policy clearly does allow for Ms O'Prey to be the decision maker. The claimant states that this was unfair due to the fact that Ms O'Prey had made the decision to remove her from making prison transfer referrals at an earlier stage. We disagree. Ms O'Prey was the logical person to make such a decision as she was Head of the MHCW department. She had been involved in one decision and accepts that she was aware overall of the situation with the claimant as that was part of her job. Nevertheless, she was the most senior manager within the MHCW Team and it was appropriate that she make the decision as she had not been involved in the day to day management or decision making concerning the claimant.

82. The other procedural concern raised by the claimant in regard to the decision to dismiss was that Ms O'Prey did not have sight of the claimant's grievances when making her decision. The 3 grievances that were brought during the claimant's employment were one against Lyndel regarding her performance rating in 2016 and then two about emails being sent to her private address which are mentioned above.

83. We find that the grievances regarding the emails to the claimant's private address had no bearing on the performance management process and therefore it was not unreasonable that they were not considered by Ms O'Prey. They were an entirely separate matter. Further we consider that the earlier grievance in 2016 about the SPDR marking was not relevant to a decision taken

some 2 years later following a lengthy performance management process. Ms O'Prey confirmed in evidence that she was aware of the 2016 grievance as she had examined it and made a finding about it herself regarding its procedural fairness. She said that she was aware about it but did not think it was relevant to her decision making process.

84. Ms O'Prey was provided with evidence regarding the claimant's performance and training before the Poor performance process and in the lead up to it. She was also provided with the claimant's OH reports and Ms Grover's report recommending dismissal, notes of the meetings that had been held throughout, evidence of the levels of 'missed' targets' along with the claimant's appeals against her written warning and final written warning. We accept her evidence that she considered these reports carefully along with hearing from the claimant at the meeting on 30 August 2018.

85. Ms Grover's report and attached evidence provided evidence that the claimant was, and had throughout, failed to meet her targets of doing 12 QAable pieces of work per week, stay on top of her TDL, not miss deadlines (statutory and otherwise) or make sustained 'good' decisions regarding important aspects of her work. It was accepted that she did produce some Green or Amber Green pieces of work but she was still producing a significant level of Red or Amber Red pieces of work which meant that they were below standard.

86. Ms O'Prey met with the claimant to discuss the report and the work produced. The claimant again, at that meeting, refused to accept that her work was significantly below what she ought to have been producing nor that she was asking unnecessary questions of other professionals at various stages of different tasks. In short, at the dismissal hearing, the claimant confirmed that she was not willing to change the way that she worked.

87. Ms O'Prey stated that she did consider alternatives to dismissal but found that extending the process by 6 months or demoting the claimant would not have had the desired outcome. She stated that the claimant's refusal to accept that she might need to change the way she worked was part of the reason that the felt an extension of time would not have been appropriate as the claimant

showed no signs of improving or changing. With regard to the possibility of demotion, the claimant confirmed at the appeal in any event that she would not have considered a demotion. We have looked at the extension of 6 months above.

Appeal Hearing

88. The claimant was given the opportunity to appeal which she did. Mr Davison followed the respondent's appeals process and met with the claimant. He made further enquiries once he had met with the claimant to consider whether appropriate measures had been taken to find an alternative desk for the claimant. We note that the claimant conceded that her performance and not been what it should have been which she had not accepted previously and did not accept before us during the hearing.

89. Mr Davison upheld Ms O'Prey's decision to dismiss. The respondent's process is such that this was a review of the original decision not a complete remake of the original decision.

Conclusions

Automatic Unfair Dismissal – s103 ERA 1996

90. We find that the claimant's grievance dated 9 May 2018 concerning her email from Ms Grover does amount to a qualifying disclosure. It is clear that it contained information that the sending of the email by Ms Grover to her personal email address with confidential information attached was a breach of the Data Protection Act and the internal rules in place at the respondent (something accepted by the respondent). We find that given the sensitive nature of the information this disclosure by the claimant was in the public interest. We believe that the disclosure of a prisoner's medical history is objectively in the public interest and the respondent witnesses agreed with this when asked in cross examination.

91. We also conclude that the claimant reasonably believed that it was in the public interest regardless of the delay in her raising it as an issue. There is no longer a requirement that any such disclosure be made in good faith so provided the claimant reasonably believed that it was in the public interest, it could amount to a qualifying disclosure. We have found that the claimant did reasonably believe it to be in the public interest. She was an experienced case worker, well versed in dealing with confidential information and we find that she did know and understand at the relevant time that the sending of private medical information about a prisoner/patient outside the respondent's email system would amount to such a breach.

92. We have considered the case of Chesterton as referred to by the respondent's representative when reaching this conclusion and, in particular, Okwu v Rise Community Action Ltd EAT 0082/19. The following is copied from the respondent's submissions as it well encapsulates the position that we have considered.

"The EAT (HHJ Eady QC) held that an employment tribunal erred in concluding that the employee's disclosures relating to breaches of the Data Protection Act 1998 did not qualify for protection because she was primarily raising those matters as relevant to the assessment of her own performance. HHJ Eady QC held that the tribunal erred because *"as is made clear in Chesterton Global, that would not necessarily mean that she did not reasonably believe that her disclosure was in the public interest. Indeed, considering the nature of the interest in question it would be hard to see how it would not – in the Claimant's reasonable belief – be a disclosure made in the public interest, even if … the Claimant also had in mind the impact upon her in terms of her work performance; after all, the public interest need not be her only motivation for making the disclosure (again, see Chesterton Global)"*: para. 47."

93. However we were provided with no evidence whatsoever to suggest that it somehow caused or contributed to the claimant's dismissal. The claimant asserted in evidence that Ms Grover's decision to recommend her dismissal arose from this grievance. We were given no evidence that this was the case

and do not find it plausible. Ms Grover invested a large amount of time and effort in attempting to obtain a sustained improvement in the claimant's performance, she had no ill feelings regarding the 9 May 2018 email being flagged as there were no negative repercussions to her. Her explanation that it had been due to human error was accepted by the respondent. In contrast, Ms Grover had significant evidence from the MPP process that the claimant was underperforming in several key aspects of her role and after several years of underperformance and a reasonably lengthy formal process decided to recommend dismissal.

94. During submissions, Mr Brown did not argue that the report was in effect 'tainted' information upon which Ms O'Prey's decision was based as discussed in the case of *Royal Mail Group Ltd v Jhuti*. He also did not say that Ms O'Prey had regard to the grievance when dismissing the claimant – in fact one of his arguments supporting that the claimant was unfairly dismissed, was that Ms O'Prey did not have proper regard to the grievances when she made the decision to dismiss. The claimant cannot have it both ways – that the dismissal was unfair because the grievances were not considered properly, but also unfair because they apparently contributed to the decision.

95. Whether or not Jhuti is engaged in these circumstances is, we find, irrelevant in any event as we find that the qualifying disclosure did not 'taint' Ms Grover's report, nor that it in any way contributed to Ms O'Prey's decision to dismiss the claimant.

96. The claimant's claim that she was automatically unfairly dismissed is not well founded and we dismiss this claim.

S20 and s21 Equality Act 2010 – Failure to make reasonable adjustments

97. Both parties made detailed and complex factual submissions on all aspects of this claim by the claimant. We have therefore reached our conclusions by answering each stage of the List of Issues. We have kept the numbering in accordance with the List of Issues agreed at the outset of the hearing to avoid confusion.

Issue 6a: Did R apply a provision, criterion, or practice ("PCP") to C?

C relies on:

i. An alleged requirement to carry out a "full" workload as a mental health case manager, by which C means working 7.5 hours per day and having a case load of, on average, 340 patients. C will also say she picked up queries or matters arising on colleagues' caseloads when they were on annual leave or sick leave.

ii. A requirement to work in the Mental Health case worker team.

98. We find that at various points the claimant was required to carry out a full caseload. We find that little turns on the differentiation between the numbers of 340 and 230 given that it was agreed that a caseload such as this did not in any event represent the active cases and volume of work that a caseworker actually dealt with in their To Do List. We accept that being required to carry out a full caseload amounts to a PCP.

99. We do not find that the requirement to work in the mental health case worker team is capable of being a PCP. This was her job. We do not think that it can be that the requirement for the claimant to do her job was a PCP in these circumstances particularly where no disadvantage is properly established either in the pleadings nor the evidence presented to us. We have had regard to the respondent's written submissions and the reliance on the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, EAT in reaching this conclusion.

100. At no point has a case been advanced that the claimant ought to have been transferred to a different job and when Mr Davison asked her in her appeal hearing whether she would consider demotion she said she would not. In cross examination the claimant accepted that she may have been wrong in suggesting in her claim that she should have been considered for another job and she stated that this was not something she considered or thought the respondent ought to have considered. We conclude that the change in job she sought was in fact a change to her team. This is not what her claim is. She has

cited being moved teams as a reasonable adjustment, not that the requirement to work in a certain team amounted to a PCP.

101. *Did either of these PCPs put C to a substantial disadvantage in relation to a relevant matter in comparison with non-disabled persons? C will say these PCPs put her at a disadvantage in that she was unable to (i) concentrate long enough to carry out risk assessments on cases; (ii) work at a normal pace as compared with non-disabled workers (C accordingly worked at a slower pace); and (iii) made a significant number of spelling mistakes. She will allege she suffered from these disadvantages from the start of her employment until the termination of her employment (in relation to Sjogren's Syndrome this arose along with associated impairments from 10 January 2018).*

102. The Claimant stated that she was put to 3 particular substantial disadvantages by the PCPs.

(i) That she could not concentrate long enough to carry out risk assessments

(ii) She could not work at a normal pace when compared to non-disabled workers

(iii) She made a significant number of grammar/spelling mistakes

103. We have found as fact that the claimant's concentration was impaired by the disabilities relied upon for this part of her claim namely, Lupus, Sjogrens and Hughes**.** However we were given very little evidence to suggest that she could not concentrate long enough to carry out risk assessments nor that this had been the case since her employment commenced. The claimant defended her performance as not including significant enough numbers of mistakes and she stated to us that her performance was not that bad as she had a number of greens and amber greens regarding her work. Therefore whilst her concentration was impaired, we were not provided with evidence in order to conclude that it specifically impaired her ability to carry out risk assessments and the claimant's evidence was that she was broadly capable of doing her job.

104. We accept the respondent's submissions that there was no evidence provided to the tribunal that she was unable to concentrate long enough to carry out risk

assessments. She produced several pieces of work that were Green or Amber Green and they included risk assessments. In fact the claimant both before us and during the process has repeatedly pointed out that she did not make the mistakes that she is being accused of and that her work was of an acceptable standard and should not have been graded so badly. Whilst we undoubtedly have examples of work that she has done badly, and we have found that her concentration may well have been poor at times causing her to make mistakes; on her own evidence she has stated that she did not mistakenly prepare the reports as she did, and she made the majority of her work-related decisions on purpose not because of any 'mistakes'. Therefore any disadvantage of not being able to prepare accurate and correct risk assessments did not arise from the inability to concentrate.

105. We do not find that the claimant made a significant number of grammar or spelling mistakes. Whilst Ms Grover did criticise the tone and content of some emails; spelling and grammar are not prevalent in the mistakes or performance issues raised with the claimant and appear nowhere in Ms O'Prey's decision to dismiss. At most, the claimant's spelling and grammar mistakes were minor issues commented upon – they were not the cause of the dismissal and we accept Ms Grover's evidence that they were not issues that caused her particular concern regarding the claimant's overall performance.

106. We conclude that it is more likely than not that the claimant could not work at a normal pace when compared to non-disabled workers though again we were provided with very little medical evidence to substantiate this. The OH reports and medical evidence we have does not suggest any adjustments to this end though the claimant's workload was significantly reduced as discussed below.

107. However it is not clear that this disadvantage is caused by the respondent's requirement that she carry out a full case load. The claimant has not put to us that a full caseload disrupted her ability to concentrate. Nonetheless we have considered whether it has put at a disadvantage compared to the comparators.

108. We have no evidence as to how the PCPs relied upon affected the comparators nor any substantive information as to whether the comparators are appropriate. The respondent states that two of the comparators were disabled, and all three had reduced workloads at one time or another and that they were therefore not appropriate at all.

109. We considered carefully whether we could substitute a hypothetical comparator for the named comparators relied upon by the claimant. We specifically asked both representatives what flexibility the tribunal had with regard to re-drawing the comparator in such a case but neither was able to specifically comment.

110. We have had regard to the cases of Archibald v Fife Council *[2004] ICR 954,* Fareham College Corporation v Walters [2009] IRLR 991 and Smith V Churchill's Stairlifts plc [2006] IRLR 41 to establish that an appropriate comparator in such cases is not a 'like for like comparison. In the case of Smith the court stated that the proper comparator for the purposes of assessing substantial disadvantage in the context of a reasonable adjustments claim was to be "readily identified by reference to the disadvantage caused by the relevant arrangements."

111. An appropriate comparator ought to be a person in materially the same circumstances who does not have a disability. In this case that would be an underperforming MHCW who was being put through a performance improvement process but who did not have any difficulties working at a normal pace. We have therefore compared the claimant to such a comparator when considering this case.

112. We accept that the claimant would have had more difficulty working at a normal pace during a performance improvement plan than an underperforming MHCW being put through the same process.

Issue 6d: Did R know, or could it reasonably be expected to know, that C was likely to be placed at the substantial disadvantage relied upon?

113. We have concluded that two of the disadvantages relied upon by the claimant did not exist and therefore we do not accept that the respondent could have reasonably been expected to know that the claimant was placed at these substantial disadvantages.

114. However, with regard to working at a slower pace, we conclude that they could reasonably be expected to know that the claimant was likely to work at a slower pace than a MHCW being put through a disciplinary process, who did not have these disabilities.

Issue 6e: Did R take such steps as were reasonable to have to take to avoid the disadvantage relied upon?

115. *Reducing C's workload;*

We have found that the claimant's workload was significantly reduced by the respondent in several different ways. The primary way was that she was only required to carry out 12 QAable pieces of work per week when compared to 20. She was also taken off prison transfers and was frequently placed on 'neither' during the performance management process and in the build up to it.

116. The claimant did not state what further reductions the respondent ought to have reasonably made in the circumstances. We did hear evidence that she continued to receive work allocations on her weekly day of annual leave (as was the practice for all MHCWs who took single days off). However the claimant made no submissions to us about this practice nor suggested that it placed her at a disadvantage.

117. We accept that the respondent's managers wanted to keep the claimant on as full a range of casework as possible (though with expected output significantly reduced) in order to assess whether she was capable of carrying out her role. They had to be able to ensure that she made safe and timely

decisions across her range of tasks. She has not stated in evidence or accepted at any stage that there was any particular aspect of her role that she found challenging; simply that she found the volume challenging or the systems/protocols kept changing etc. We conclude that significant reductions were made to her workload and therefore there was no failure to make this adjustment. We accept the respondent's evidence that it would not have been reasonable, given the sensitivity and the importance of the decisions being made by the MHCW team to reduce the volume of work any further for the purposes of assessing whether the claimant was competent to carry out her role.

118. *Transferring C to another team where she would have been given a lighter workload;*

The claimant did not establish how being transferred to another team would have offset any of the disadvantages she relied upon and certainly not her inability to work at a normal pace. We do not accept that she would have had a lighter caseload in a different team – the only change would have been that she had a different manager. This would not offset any inability to concentrate or work in a timely fashion. It would simply have changed the personalities involved and, the claimant hoped, change the expectations against which she was being managed. We do not consider that this would have been the case in any event but we also conclude that this change would not have offset the disadvantage relied upon and was not a reasonable adjustment.

119. *Extending the performance management period by a further six months;*

We have found that the respondent followed its process. The claimant had had substantially the same concerns regarding her work raised with her at least from 2016. Subsequently, the formal performance improvement lasted from 4 May 2018 to the dismissal letter dated 3 September 2018. We found that the procedural concerns raised by the claimant are not well founded and this includes the time frame allowed for improvement. During the MPP period, the

claimant made little or no improvement. It is not in dispute that she produced some good pieces of work as she had always done – but the respondent concluded that it was not sufficiently consistent and she continued to make a high level of mistakes and have a low output in terms of volume.

120. We accept that it is possible that a longer period to demonstrate improvement could amount to a reasonable adjustment in some circumstances where an individual is not able to work at a normal pace. Nevertheless, the claimant in evidence said that she just wanted the performance improvement plan to be over. She said that she found it very difficult and stressful. She said that this was because she was in effect being set up to fail by her managers. However we have found no evidence of that and do not accept that this was the case.

121. We therefore conclude that any extension of the poor performance plan would not have ameliorated the disadvantages relied upon e.g. her ability to concentrate, any spelling/grammar mistakes and/or working at a slower pace than her non-disabled colleagues. It would simply have extended the period over which she continued to underperform as it does not directly influence any of the disadvantages she relies upon and not the one that we have found she actually suffered (inability to work at a normal pace). Mr Brown submitted that if all the other adjustments were implemented and she was given 6 months in those working conditions (in particular being managed by someone different and working exclusively from home), then this would have assisted her. We accept in principle that reasonable adjustments may need to work together in order to achieve the amelioration sought, however, we have been provided with no evidence to suggest that the other adjustments either had not already been made to the extent necessary to ameliorate the disadvantage, and/or were reasonable. We therefore do not conclude that this was a reasonable adjustment in all the circumstances of the case.

122. *Allowing C to work from home on a sustained basis.*

The claimant was allowed to work from home for the duration of any Lupus flare up. This is what had been recommended by the OH adviser. This was

in place throughout the claimant's Poor Performance Improvement plan (and before). Although the time frame was initially limited, it could be repeatedly extended were the Lupus flare up to last longer and were the claimant to obtain medical evidence that this was the case. The starting point therefore for our consideration is that the respondent had made an adjustment in this regard to the extent recommended by the OH adviser.

123. Nonetheless, this adjustment would have seen a permanent shift to entire home working without the need for the situation to be reviewed or medically supported. We accept that this takes the home working adjustment further than that which was in place.

124. There was no evidence before us that the claimant made fewer mistakes whilst working from home, in fact the only evidence on this point was that she missed more deadlines whilst working from home (pg 434) and in Ms Grover's witness statement where she said that there was no discernible improvement in either quality or quantity. We also accept the respondent's contention that it removed her from easy access to advice from her managers which she was encouraged to take but seemingly failed to do. Further we also find that it would not have offset the claimant's refusal to take on board any of the management suggestions as to how she could improve her work, particularly with regard to any efficiencies she could make with the To Do List and/or what questions should or should not be asked. We therefore do not conclude that this adjustment would have ameliorated the disadvantages the claimant relies upon. Home working did not appear to improve her concentration or her working pace and the claimant could not provide us with any evidence that this would occur had the working from home been 'unlimited'. To the extent necessary to ameliorate the symptoms of Lupus flare ups the respondent made adjustments and this remained in place throughout.

125. *<u>Providing a mentor or buddy.</u>*

This was an area focussed on in considerable detail by the claimant's representative though it was not in her pleaded case nor was it covered in any great detail in her witness statement. The definition of what providing a

mentor or buddy was, was vague. It appeared to include anything up to and including someone who would check every piece of work that the claimant did before it being 'sent out'. The claimant's representative argued that this would be a resource saving because it would have saved all the management time and meetings involved in performance managing the claimant. However all the respondent witnesses stated that it would instead require the resources of another Band 4 to effectively reduce their work output in order to vet the claimant's work. Band 4s were in short supply following an office relocation.

126. However resourcing the adjustment was not the respondent's main objection to the idea of a buddy or a mentor. Their concern was that this would not facilitate the claimant to be able to perform her role. The claimant was a senior member of staff performing an important role with important questions about risk and people's individual freedoms. We have found that she received a reasonable amount of training, and had been in post for a considerable period of time. She also had access to support in terms of answering ad hoc questions because all her managers agreed to provide this support should she require it – something she appears not to have used. She has not accepted (either before us or at the time) that her mistakes were serious. She has also repeatedly demonstrated that she did not want to change the way in which she worked either from an efficiency point of view or from a substantive point of view (e.g. disputing that she asked unnecessary questions when doing a prison transfer). It is not clear to us, if she was not willing to listen to managers provide this feedback, how a peer would have persuaded her to work differently. Providing a buddy or mentor with the aim of ensuring that the claimant improved her work output might have been something that could have been considered in the short term – however the vague proposal advanced by Mr Brown seemed to be an indefinite arrangement whereby a colleague would double check all of the claimant's work thus relieving her of the necessity of doing her job to the level required by the respondent.

127. Mr Brown stated that the purpose of the disability discrimination legislation was to ensure that employers took the extra steps necessary to

ensure people with disabilities remain in the workplace. We accept that this is what was envisaged by the legislation. Nonetheless, the adjustment of providing a 'buddy/mentor' in these circumstances was not a reasonable adjustment either from a resources point of view or with a view to ameliorating the disadvantages relied upon by the claimant in this case.

128. We therefore do not find that the claimant's claims under s20-21 Equality Act 2010 are well founded and dismiss all her claims in this regard.

S15 Equality Act 2010 – Discrimination arising out of disability

129. Mr Brown clarified that the only detriment being relied upon under s15 Equality Act 2010 was the dismissal. It is not contested that as at this date, the respondent was aware of all the claimant's conditions.

130. The something arising relied upon by the claimant was her lack of concentration and ability to contemplate all relevant issues in her mind to make robust risk assessments. The Tribunal has found that as fact that the claimant's inability to concentrate did arise from her tiredness which in turn arose, at least in part, from her Lupus, Sjogrens and Hughes syndrome. However we have been provided with no evidence to suggest that this extended to the point that she could not contemplate all relevant issues in her mind to make robust risk assessments. The claimant did make robust risk assessments from time to time. She made mistakes, but she also produced good pieces of work. She has not provided us anywhere with any medical evidence to support that assertion nor was it something flagged to the respondent or the OH advisers at the time. In fact, the claimant has maintained that she generally did make good assessments and the mistakes which have been raised with the claimant either as part of her Poor Performance management process or before us the Tribunal have not been accepted.

131. Nevertheless, given that we accept that poor concentration arose from her disability we have gone on to consider whether there is a causal link between the dismissal and the claimant's inability to concentrate. We consider

that the lack of concentration must have, in part, contributed to some of her mistakes and the mistakes were part of the reason that the claimant was dismissed. The respondent submitted that it was no more than a trivial reason because there were other reasons;

"for example, Natalya O'Prey's mention of C's *"lack of insight or acceptance of performance issues"* at **[p.151]** and *"refusing to accept constructive feedback and failing to engage with attempts to help you improve your performance"* at **[p.154]**, neither of which can be attributed directly or indirectly to C's inability, if any, to sustain concentration for any significant period of time or to C's struggle, if any, to contemplate all relevant issues in her mind to make robust risk assessments).."

it (i.e. Natalya O'Prey's decision to dismiss) was caused by the impairment of C's ability to concentrate arising in consequence of C's depression and anxiety and/or anaemia due to B12 deficiency and/or anaemia due to iron deficiency (none of which are relied upon by C as disabilities for this claim) and it was not caused (or, in the alternative, caused only in trivial part) by the impairment of C's ability to concentrate arising in consequence of C's lupus, Hughes Syndrome and Sjogren's Syndrome.

132. We agree that the respondent relied upon other significant issues contributing to the claimant's performance as well as her mistakes. Nevertheless we consider that her mistakes were an important component of the reason for her dismissal. Without the mistakes, presumably the way the claimant worked would have been tolerated.

133. We are not persuaded by the respondent's submissions that we can split the lack of concentration caused by the Hughes/Lupus/Sjogrens syndrome from the lack of concentration caused by the claimant's depression and stress and somehow find that it was the lack of concentration arising from her mental health that caused the inability to concentrate and to contemplate all relevant

issues in her mind to make robust risk assessments. We do not have any medical evidence that would enable us to carry out that exercise.

134. We have therefore considered whether the dismissal was a proportionate means of achieving a legitimate aim. The claimant was making serious important decisions on behalf of the state regarding the freedom and treatment of detained people. Despite a detailed performance improvement plan which included various adjustments, the claimant failed to improve and her work continued to fall below the respondent's reasonably required standards.

135. In submissions, the respondent relied upon Ms O'Prey's evidence which we reproduce below:

27. In respect of the Respondent's legitimate aim: Band 4 Mental Health Case Managers are required to make decisions on restricted patients (mentally disordered offenders) on behalf of the SOSJ. The work is demand-led, fast paced and complex. Band 4 Case Managers are provided with training and ongoing development to ensure they have the appropriate skills to make good quality assessments of risk, when making decisions such as allowing a restricted patient leave in the community, or to be moved from one level of security to another. Errors in this work can lead to serious consequences, such as loss of life or serious harm, together with a risk to the reputation of the SOSJ and the public's confidence in the system. MHCS closely measures performance in terms of timeliness of decisions, and implements a Quality Assurance process. This enables MHCS to assure the SOSJ of the quality of these critical decisions and ensures the public is protected from serious harm, while respecting the Human Rights of mentally disordered offenders to appropriate and necessary treatment.

28. I consider that my decision to dismiss Ylaine was proportionate as there was no lesser sanction that would allow the MHCS to complete its work to the standard required to deliver its services. The relevant

circumstances were that Ylaine had been underperforming for many years, reasonable adjustments were made to support her and her work did not improve, during the formal poor performance management process she refused to engage in a constructive way, her work did not improve and therefore there was no other reasonable option but to dismiss her. I considered whether downgrading would be appropriate, but agreed with Lyndel that Ylaine's performance fell so short she was unlikely to be able to perform to the required standard in a Band 3 role [151].

123. We accept that evidence and justification in full. The claimant provided us with no evidence on which we could rely that showed that her performance would have improved significantly enough to carry out her role without continued errors which placed the public, detained people and the SSJ's reputation at risk. We therefore conclude that the decision to dismiss the claimant was a proportionate means of achieving a legitimate aim and do not uphold the claimant's claim for discrimination arising out of her disability and dismiss this claim.

Unfair Dismissal

124. We accept that the respondent's reason for dismissing the claimant was her capability. The claimant has asserted that the respondent's evidence suggests that her attitude was part of the reason for dismissing and therefore the real reason was her conduct not her capability. We have found that the claimant did fail to engage constructively in the process in that she would not accept criticisms of her work or try to work in the way suggested by the respondent managers to ensure she was working more efficiently.

125. Nevertheless, we find that the primary reason for the dismissal was the consequence of that behaviour, namely the underperformance. We also find that Ms O'Prey believed that any decisions by the claimant regarding how she worked and how she took feedback fed into her capability as a MHCW as opposed to being perceived as a disciplinary matter.

126. In reaching this conclusion we have considered the case of Hart v Sussex Group Training Association EAT 239/78 which establishes that where there is an overlap between capability and conduct as the reason for dismissal, the employer needs to identify in their own mind what the principal reason for dismissal was. We find that Ms O'Prey considered that the principal reason for dismissal was the claimant's performance.

127. We have then gone on to consider whether the decision to dismiss the claimant fell within the band of reasonable responses based on a reasonable investigation. In poor performance dismissals, an employer must show that it had a reasonable belief in the employee's inability to do the job when it took the decision to dismiss. This is summarised by the Court of Appeal in *Alidair Ltd v Taylor [1978] IRLR 82*:

"Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent".

128. We do not consider that the decision to move the claimant onto the MPP process was unreasonable or based on incorrect information. The claimant had had consistent negative feedback (along with some positive feedback) about the same issues since her employment began. It is correct that both the feedback and the level of underperformance were not as serious at the outset of her employment, but from 2016 onwards, she was told that she needed to improve her performance. Even allowing for her sickness absences, this covered around 18 months of her knowing that she was working below what was expected of her.

129. Once moved onto the Managing poor performance policy we have found that a fair process was followed. The claimant alleges that she was being set up to fail because she was bombarded by emails from several managers and because she met with several managers at each weekly catch up. We have not found that she was 'bombarded' as described and that the respondent managers, and in particular Ms Grover, was approaching the situation with the aim to ensure that the claimant had support and information to improve. The

claimant was given a written warning and a final written warning and her appeals against the decisions were considered in a timely fashion.

130. The claimant challenged Ms O'Prey making the decision to dismiss because of her previous involvement with the claimant's performance. We do not accept that Ms O'Prey's previous involvement meant that she was not the appropriate manager to make the decision. The process complied with the respondent's internal processes and Ms O'Prey was the overall manager of the MHCW department. Her previous knowledge of the claimant and an error she had made did not detract from her ability to consider the situation as a whole when making her decision.

131. We find that the claimant was given a proper opportunity to improve with adequate training, the assessment being over a reasonable period of time, access to management support in the form of weekly meetings and on the spot feedback for her work. She was fully aware of what improvements were sought and by when. She was provided with all the information she needed regarding how her performance was being measured both during the performance management process and during the dismissal process.

132. Despite this she showed no sign of significant and sustainable improvements across all types of work and continued to amass a significant backlog of work and produce inadequate and risky pieces of work that caused significant public safety issues and placed the service at risk. We accept that the respondent could not afford to continue missing deadlines or reduce the quality of work expected as there would be significant repercussions not only for the service's reputation but also public and prisoner safety – all of which the claimant accepted during evidence before the tribunal.

133. We have found that there was no failure to make reasonable adjustments nor that there was discrimination during the poor performance management process or within the decision to dismiss.

134. We as a tribunal have reminded ourselves that we must not substitute our opinion of what we would have done were we the respondent. We simply

have to find whether it was a reasonable decision in all the circumstances. At the end of the MPP process, Ms Grover compiled a report which encompassed the evidence she had of the claimant's errors, her output levels including work that 'passed' as well as did not come up to standard, the steps that had been taken to offer support and training to the claimant throughout her employment and in particular during the MPP process, any steps that had been taken regarding the claimant's health, the OH reports, the notes of the meetings that managers had had with the claimant and the claimant's appeals against the written warning and final written warning the preceded the decision to recommend dismissal. We find that this amounts to a reasonable investigation or process before the decision to dismiss was made.

135. Ms O'Prey took all of this information into account when reaching her decision to dismiss. She also took into account the claimant's refusal to accept responsibility for the majority of those errors and the need to change the way in which she worked when deciding to dismiss the claimant.

136. The claimant was given the opportunity to appeal. Mr Davison carried out a reasonable appeal in that a fair process was followed and we accept that he considered Ms O'Prey's decision to dismiss carefully and carried out such reasonable additional information gathering as he felt was needed.

137. Overall, we find that a fair process was followed and that it was within the range of reasonable responses for the respondent to conclude that the claimant was not capable of doing the job based on the evidence they had, and was unlikely to improve to any significant extent to suggest that an alternative to dismissal was appropriate.

138. We therefore do not uphold the claimant's claim for unfair dismissal and the claimant's claim is dismissed.

Employment Judge Webster

Date: 12 April 2021