



## EMPLOYMENT TRIBUNALS

**Claimant:** Ms N Hayes  
**Respondent:** Coventry City Council  
**Heard at:** Birmingham  
**On:** 9, 10, 11, 13, 16, 17, 18, 19, 20, 23 & 24 November 2020 (by CVP) and 20 & 21 April & 20 May 2021 (in chambers)  
**Before:** Employment Judge Flood  
Mrs Hill  
Mr Sharma

### Representation

**Claimant:** Mrs Lawrence-Russell (trade union representative)  
**Respondent:** Mrs Carter (Solicitor)

## RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's unfair dismissal complaint succeeds.
2. The claimant's complaints for direct disability discrimination, disability related harassment and victimisation are not well founded and are dismissed.

## REASONS

### The Complaints and preliminary matters

1. This was a remote hearing which was consented to by the parties. The form of remote hearing was V – video hearing. A face to face hearing was not held because it was not reasonably practicable, no-one requested the same and all issues could be determined in a remote hearing.

2. The claimant was employed by the respondent, from 15 June 2015 until 1 March 2018 when she was summarily dismissed. By a claim form presented on 19 April 2018 following an unsuccessful period of early conciliation from 4 to 19 March 2018 she brought complaints of unfair dismissal, direct disability discrimination, race and disability related harassment and victimisation. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5 December 2017 is potentially out of time and the Tribunal may not have jurisdiction to hear it. It may need to consider whether there was conduct extending over a period or whether time should be extended on a just and equitable basis.
3. The claimant's claim in respect of race discrimination was dismissed upon withdrawal on 15 March 2019.
4. The respondent submitted its response denying discrimination and stating that the dismissal was fair. Preliminary hearings were held on 14 December 2018 and 28 February 2019 for the purposes of case management. The issues in dispute were discussed and recorded at the second preliminary hearing although there were areas where this was incomplete. A further preliminary hearing was held on 24 June 2019 and 7 October 2019 before Employment Judge Dean to determine various preliminary issues including whether the claimant was a disabled person (which was conceded by the respondent) so a determination on that point was not necessary. The respondent's strike out application was dismissed although a deposit order was issued in relation to the claimant's direct discrimination and victimisation complaints. A previous application to amend was not considered as the respondent conceded that the matters were dealt with in the claim form and so amendment was not required. Employment Judge Dean set out at paragraphs 37 to 60 of her judgment issued following that hearing (pages 253-280) a list of the discrimination complaints being made by the claimant. There was also an agreed document at pages 245-247 which set out the discrimination complaints made by the claimant.
5. At the outset of the hearing we considered that there was still a lack of clarity as to the issues to be determined. Whilst the Tribunal conducted its pre reading, the parties were asked to work together to produce a definitive list of issues to be determined. There was some further discussion on this and both parties produced additional documents. On the evening of the 6<sup>th</sup> day of the hearing, a definitive list of issues based on the documents referred to at paragraph 2 above and those sent by the parties during the course of the hearing was e mailed to the parties. The parties were content with this and we set it out below. This was referred to throughout the hearing.
6. We had before us an agreed bundle of documents running to 1274 pages and where page numbers are referenced in this judgment they are to page numbers in that bundle. The respondent had prepared a document headed Issues and Reading List and a Chronology. The claimant also prepared a

reading list.

7. Although the hearing had been listed to include deliberation time, the evidence and submissions were completed late on the final day of the hearing. The case was adjourned for a reserved decision and the parties were notified that the Tribunal would be meeting in chambers for two further days to deliberate and reach its decision. Due to administrative issues, there was a long delay until it was possible to list time for the Tribunal to deliberate. The Tribunal met in chambers on 20 and 21 April 2021. It was not possible for those deliberations to be completed within the time originally allocated so a further day of deliberations took place by CVP on 21 May 2021 (which was the first available time the Tribunal could meet). The Tribunal sends its apologies to the parties for the length of time it has taken for this decision to have been made and sent to the parties.

### **The Issues**

#### **1. Unfair dismissal**

- 1.1 The claimant was dismissed on 1 March 2018.
- 1.2 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
- 1.3 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
  - 1.3.1 there were reasonable grounds for that belief;
  - 1.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation. On this issue the claimant complains in particular that:
    - 1.3.2.1 there was a finding that the claimant was intoxicated at work which was found against the C despite the evidence;
    - 1.3.2.2 the respondent undertook a biased investigation which ignored or minimised mitigating facts.
  - 1.3.3 the respondent otherwise acted in a procedurally fair manner. On this issue the claimant complains that:
    - 1.3.3.1 R failed to investigate (what so ever) C grievance submitted 9 November 2017;
    - 1.3.3.2 R took regard to matters which were over 12 months old;
    - 1.3.3.3 R failed to give C a right of response to a Social Worker complaint against her during the disciplinary process;

- 1.3.3.4 Prior to formal action, there was no informal process on some matters or managerial action;
  - 1.3.3.5 No reference was made to the R Harassment and bullying policy;
  - 1.3.3.6 The investigation was not carried out in reasonable time;
  - 1.3.3.7 R failed to follow the Grievance procedure;
  - 1.3.3.8 R failed to adhere to the Disciplinary procedure;
  - 1.3.3.9 R failed to adhere to the Addiction and Substance Abuse policy;
  - 1.3.3.10 Fail to allow the claimant's appeal which the claimant alleges was a perverse outcome
- 1.3.4 dismissal was within the range of reasonable responses. On this issue the claimant complains that:
- 1.3.4.1 some of the allegations of gross misconduct and misconduct found against the claimant were common practice in the team C used to work in

## 2. Remedy for unfair dismissal

- 2.1 Does the claimant wish to be reinstated to their previous employment?
- 2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- 2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.5 What should the terms of the re-engagement order be?
- 2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
  - 2.6.1 What financial losses has the dismissal caused the claimant?
  - 2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
  - 2.6.3 If not, for what period of loss should the claimant be compensated?

- 2.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 2.6.5 If so, should the claimant's compensation be reduced? By how much?
- 2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 2.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
- 2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 2.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 2.6.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

2.7 What basic award is payable to the claimant, if any?

2.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

### 3. **Disability**

3.1 The claimant has a disability as defined in section 6 of the Equality Act as a result of low mood, anxiety and depression.

### 4. **Direct disability discrimination (Equality Act 2010 section 13)**

4.1 Did the respondent do the following things:

4.1.1 On 8<sup>th</sup> November 2016 failed to successfully execute the Claimant's transition back to work and failed to assist her in remaining in work (by in particular modifying its reporting requirements to accommodate texting and failing to support following OH reports (Allegation 1)).

4.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The Claimant says she was treated worse than the rest of the team in respect of failure to modify reporting requirements and in respect of a hypothetical comparator in failing to support following OH reports.

If so, was it because of disability?

**5. Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Did the respondent treat the claimant unfavourably by:

5.1.1 On 8<sup>th</sup> November 2016 failed to successfully execute the Claimant's transition back to work and failed to assist her in remaining in work (by in particular modifying its reporting requirements to accommodate texting and failing to support following OH reports) (Allegation 1).

5.1.2 On 22<sup>nd</sup> June 2017 treating her behaviour in work as being the result of intoxication and suspending the claimant thereafter (Allegation 8)

5.1.3 Including in the reasons for dismissal the outcome of the Social Worker complaint (Allegation 9)

5.1.4 On 1<sup>st</sup> March 2018 dismissing the claimant from its employment by unreasonably upholding allegations of gross misconduct and failing to interview her as part of the disciplinary process (Allegation 7)

5.1.5 Upholding the claimant's dismissal on her appeal (Allegation 10)

5.2 Did the following things arise in consequence of the claimant's disability:

5.2.1 Her being unable to attend grievance interviews about the Social Worker complaint (Allegation 9);

5.2.2 Her being or appearing to be intoxicated at work on 22<sup>nd</sup> June 2017 (Allegation 8)

5.2.3 Her being unable to take up offers to attend disciplinary investigation interviews (Allegation 9)

5.2.4 Her behaving in a way that led the allegations of gross misconduct to be upheld (Allegation 8)

5.3 Was the unfavourable treatment because of any of those things?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

5.4.1 To ensure the efficient and effective management of Child Protection Conferences in order to reduce the risk to children in danger of significant harm

- 5.4.2 To ensure the best outcomes for children subject to child protection plans
- 5.5 The Tribunal will decide in particular:
  - 5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
  - 5.5.2 could something less discriminatory have been done instead;
  - 5.5.3 how should the needs of the claimant and the respondent be balanced?
- 5.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?
- 5.7 In considering this complaint, the claimant asks the Tribunal to consider as background only and not as a separate complaint her allegation that
  - 5.7.1 the that respondent stated in the return to work meeting that there were differences between mental and physical ill-health negatively, and the impact this was having on colleagues (Allegation 2 said to be background);
  - 5.7.2 on the claimant's return to work on 30 January 2017 she was immediately told she would be transferred from her substantive role to undertake duties as an Auditor (a role with less status an less flexibility with an expectation that her hours and days of work would increase from 4 to 5 days a week with little consideration for the adjustments and agreement made previously) (Allegation 3 said to be background).

**6. Harassment related to disability (Equality Act 2010 section 26)**

- 6.1 Did the respondent do the following things:
  - 6.1.1 On 30<sup>th</sup> January 2017 move the claimant from her substantive role to an alternative position as an alternative to a disciplinary suspension
  - 6.1.2 Disclosure by JW of sensitive information about the claimant to managers during the disciplinary investigation (Allegation 5)
  - 6.1.3 On 9<sup>th</sup> November 2017 fail to investigate a grievance about JH disclosing information supplied to it by the police about the claimant (Allegation 5)

- 6.2 If so, was that unwanted conduct?
- 6.3 Did it relate to disability?
- 6.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 6.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
- 6.6 In considering this complaint, the claimant asks the Tribunal to consider as background only and not as a separate complaint her allegation that
  - 6.6.1 the that respondent stated in the return to work meeting that there were differences between mental and physical ill-health negatively, and the impact this was having on colleagues (Allegation 2 said to be background);
  - 6.6.2 on the claimant's return to work on 30 January 2017 she was immediately told she would be transferred from her substantive role to undertake duties as an Auditor (a role with less status an less flexibility with an expectation that her hours and days of work would increase from 4 to 5 days a week with little consideration for the adjustments and agreement made previously) (Allegation 3 said to be background).

**7. Victimisation (Equality Act 2010 section 27)**

- 7.1 Did the claimant do a protected act as follows:
  - 7.1.1 Verbally allege discrimination by [SS] at a meeting on 8<sup>th</sup> November 2016
  - 7.1.2 Complain of discrimination and victimisation in an e mail to [JG] on 10 March 2017;
  - 7.1.3 Raise a grievance for Bullying & Harassment, Victimisation and Discrimination on 6<sup>th</sup> September 2017;
  - 7.1.4 Raise a second grievance on 9 November 2017 based on breach of confidentiality, harassment and victimisation
- 7.2 Did the respondent do the following things:
  - 7.2.1 On 30<sup>th</sup> January 2017 commence a disciplinary investigation against the claimant (Allegation 6)



- 7.2.2 On 30<sup>th</sup> January 2017 move the claimant from her substantive role to an alternative position as an alternative to a disciplinary suspension (Allegation 1A)
- 7.2.3 Following her removal from her substantive role on 30<sup>th</sup> January 2017 refuse to accommodate her four day working week and working from home (Allegation 1A);
- 7.2.4 Suspend the claimant after the incident on 22<sup>nd</sup> June 2017(Allegation 8)
- 7.2.5 On 6<sup>th</sup> September 2017 not adequately investigate a grievance raised by the claimant (Allegation 4)
- 7.2.6 Disclosure by JW of sensitive information about the claimant to managers during the disciplinary investigation (Allegation 5)
- 7.2.7 Dismiss the claimant (Allegations 6 & 8)
- 7.3 By doing so, did it subject the claimant to detriment?
- 7.4 If so, was it because the claimant did a protected act?
- 7.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

## 8. Time limits

- 8.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5 December 2017 may not have been brought in time.
- 8.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
  - 8.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
  - 8.2.2 If not, was there conduct extending over a period?
  - 8.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
  - 8.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
    - 8.2.4.1 Why were the complaints not made to the Tribunal in time?

8.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

**9. Remedy for discrimination or victimisation**

- 9.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 9.2 What financial losses has the discrimination caused the claimant?
- 9.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 9.4 If not, for what period of loss should the claimant be compensated?
- 9.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 9.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
- 9.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 9.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 9.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?
- 9.10 If so is it just and equitable to increase or decrease any award payable to the claimant?
- 9.11 By what proportion, up to 25%?
- 9.12 Should interest be awarded? How much?

**Findings of Fact**

8. The claimant attended to give evidence and Mrs Lawrence Russell also gave evidence on her behalf. Mr S Sharkey ("SS"), Ms G Kell ("GK"), Mr P Smith ("PS"), Ms K Eales ("KE") all employed by the respondent at the relevant time and Councillor F Abbot ("FE") an elected councillor of the respondent gave evidence on behalf of the respondent. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered

the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle.

9. We have made findings not only on allegations made as specific discrimination complaints but on other relevant matters raised as background as there may have been relevance to drawing inferences and conclusions.
10. The Tribunal resolved conflicts of evidence as arose on the balance of probabilities and assessed the credibility of the witnesses and the consistency of their evidence with surrounding facts.
11. We made the following findings of fact:
  - 11.1. The claimant was at all relevant times a disabled person as defined by section 6 of the Equality Act 2010. The claimant had suffered from anxiety and depression in 2009/10 but had completely recovered from that until 2016. She was diagnosed with Post Traumatic Stress Disorder ("PTSD") in 2016 and since that time suffered from depression, low mood, panic attacks and anxiety which has been ongoing. At pages 140-145 we saw an impact statement prepared by the claimant. The claimant's medical certificates and GP records for the period in question were shown at pages 150-177. We also saw supporting documents relating to the claimant's successful application for a Personal Independence Payment ("PIP") with effect from 7 March 2018 at pages 191 to 224. The claimant has been on medication (including citalopram) for her disability at various times. The claimant told us she is no longer on medication and feels much recovered although understands that she has a lifelong mental health condition to manage.

Allegations of alcohol misuse/intoxication and possible effects of medication

- 11.2. A number of the factual allegations and incidents that were referred to us in the claim related to the claimant's alleged use of alcohol. The claimant has consistently denied having an alcohol addiction or any problem with her use of alcohol. She drinks alcohol on occasion but does not accept that she was ever intoxicated on any occasion this was alleged to have been the case by the respondent. It had been suggested that some of the claimant's apparent behaviour which may have been mistakenly identified by the respondent as intoxication may have been caused by medication she was taking for her disability. At the preliminary hearing before Employment Judge Dean, counsel for the claimant, Miss Warren indicated that at this final hearing the claimant would produce "*a substantial amount of evidence that the claimant's medication had an effect on her and that caused her to behave in the way she did which in error was perceived by the respondent to be intoxication.*" No such evidence was produced before this Tribunal. The claimant did not mention this at all in her witness statement and we have not seen nor were we referred to anything in the bundle of documents to support this. Mrs Lawrence Russell did attempt to ask the claimant some questions about this during her evidence which

was objected to by Mrs Carter as entirely new evidence which we agreed with so such evidence was not provided.

- 11.3. The respondent council operates the Children's Services team within which the claimant worked as an Independent Reviewing Officer ("IRO"). The job description for the IRO role was at page 819 and states that the roles is to be responsible for providing a comprehensive review service for looked after children and those subject to child protection plans. The IRO had to be a qualified social worker and was responsible for chairing reviews that took place into the care of vulnerable children to provide independent oversight. It is accepted that part of this role involved "*constructively challenge the judgements and assessments of staff at all levels*".
- 11.4. The claimant started to work for the respondent on 15 June 2015. She moved from Northern Ireland where she had been working as a social worker and senior social worker and most recently in the role of guardian ad litem in the High Court. She told us that she moved to the area because she was looking for an independent role with autonomy and that her daughter was considering taking a course in the Warwickshire area which prompted the move. She retained her home in Northern Ireland but also had a rented property in Coventry where she lived whilst employed.
- 11.5. The claimant's contract of employment was at pages 296 to 312. She was employed full time to work 37 hours per week and her employment was subject to the completion of a satisfactory probation period of 6 months. She was based at the respondent's offices at Broadgate House in Coventry. We saw a number of policies that applied to the claimant's employment including the Managers Code of Practice for Application of the Anti-Bullying & Dignity at Work Policy (pages 313-321); the Promoting Health at Work policy (pages 322-335); the Disciplinary Policy and Procedure (pages 828-841); the Code of Conduct for Employees (pages 842-859); the Grievance Procedure (pages 860-870); the Anti Bullying and Dignity at Work Policy (pages 871-8) and the Addiction and Substance Abuse Policy (pages 879-884). We have not set out in detail all sections referred to as the policies were extremely, but in particular the following sections were referred to as being relevant:

*Disciplinary Policy and Procedure*

*2.1 Every effort will be made by managers/supervisors to resolve general concerns about an employee's conduct, behaviour and performance through informal discussion, counselling and target setting without recourse to the formal disciplinary procedure.*

....

*3.4 Investigation*

*3.4.1 No disciplinary action will be taken until the allegations have been*

*fully investigated. Investigations will be carried out promptly before memories fade and normally completed within 20 working days*

*3.4.2 The employee will be notified of any investigation in writing and of the allegations being investigated and provided with a copy of the disciplinary procedure.*

#### *Grievance Procedure*

*2.5 Any complaints of bullying, harassment, discrimination or victimisation made by any employee will be dealt with through the Grievance Procedure. However in such cases, reference should be made to the Anti-Bullying & Dignity and Work Policy, together with the Manager's Code of Practice for Application of the Anti-Bullying and Dignity at Work Policy*

*..*

#### *8. Grievances raised during disciplinary investigations*

*8.1 Any grievance registered during a disciplinary investigation that relates directly to the subject of that investigation will be dealt with through the disciplinary process. The Officer dealing with the disciplinary investigation will meet with the employee, listen to their grievance and decide whether a separate grievance hearing is necessary or whether the issues raised can be dealt with as part of the disciplinary process.*

#### *Addiction and Substance Abuse Policy*

##### *4. Highlighting the Problem*

*The potential existence of an addiction related problem may materialise in one of the following ways:*

- a. The employee may voluntarily discuss having an addiction with his/her manager, Human Resources or a trade union representative*
- b. The employee is, for example, found to be under the influence of alcohol whilst at work.*
- c. There is a reduction in the quality of work performance that indicates, for example, that misuse of alcohol or other addiction may be the cause.*
- d. There are work related behavioural or conduct issues which indicate, for example, that misuse of alcohol or other addiction may be the cause.*

##### *5. Roles and Responsibilities*

###### *Managers*

*..*

*5.1 Managers should be aware that , under the Health and Safety at Work Act 1974, if they knowingly allow an employee under the influence of*

*excess alcohol or drugs to continue working and this places the employee or others at risk, they themselves could be prosecuted*

*5.2 Directorate managers should seek advice from Human Resources in dealing with cases of addiction or suspected addition where it impacts upon the employee's work performance or conduct, Specialist advice may also be sought from the Council's Occupational Health & Counselling Services and/or other external specialist agencies...*

#### *Employees*

*5.5 Individual employees have a responsibility under the Health and Safety at Work Act to seek to ensure the health and safety of themselves, their colleagues and the public.*

*5.6 Where employees consistently refuse to seek help or guidance or do not acknowledge that there is a problem and work performance is adversely affected, the disciplinary procedure or capability procedure may be implemented.*

...

#### *9. Process*

*9.1 Advice should be sought from Human Resources at the earliest opportunity. Each case should be assessed individually, and the balance between support and the potential application of Council procedures assessed.*

*9.2 If gross misconduct does not apply, but the manager has a concern about work performance or conduct, the manager should meet with the employee informally as soon as possible to explain their concerns and enable the employee to explain what has happened...*

*9.3 If the employee is under the influence of alcohol or other substance misuse they should be instructed to leave the workplace until they are able to discuss the situation. Care should be taken to ensure that the individual does not drive and the employee may need to be escorted home.*

*9.4 In some cases it will be necessary to refer the matter to the Occupational Health Service for advice. Referrals for health assessments should be undertaken as soon as possible. However, viewing the matter as a health problem does not necessarily preclude other managerial action, and the matter may need to be considered in the context of the disciplinary or capability procedures and the Code of Conduct. All reasonable efforts will be made by the City Council to provide employees with support but where work performance, conduct or behaviour continue to be adversely affected, it may be necessary to implement the appropriate procedure.*

*9.5 If a referral is made to Occupational Health, it is possible that a*

*decision about disciplinary or capability action may be deferred until a report has been received and considered. This will not be the case in instances considered to be gross misconduct....*

*9.6 Factors that should be taken into account when making a decision about how to proceed include:*

- Whether the employee is in charge of machinery, vehicles etc*
- Whether the employee is responsible for service users, children, or vulnerable people or has contact with members of the public.*
- The impact of alcohol or substance misuse on work performance, colleagues or Council property.*
- Should the employee confide to a manager that they have a problem, then the Council will view this as a positive step. Seeking help at an early stage may avoid the need for disciplinary or capability action. However if work performance or conduct is an issue and continues to be so, then disciplinary or other action may need to be considered*

11.6. We heard about an issue that arose shortly after the claimant started work. As a result of the Disclosure and Barring Service (DBS) check carried out before the claimant's employment was confirmed, the respondent became aware of a caution received by the claimant in June 2011 relating to an incident in September 2010 where the claimant believed her drink had been spiked. We were shown a note of a supervision meeting which took place between the claimant and SS (her line manager) on 17 July 2015 where this was discussed (page 937). This confirmed that the Assistant Director of the respondent had authorised employing the claimant despite this coming to light.

11.7. We also heard about a further matter in November 2015 where a complaint had been received about the claimant's behaviour towards an Information and Communications Technology ("ICT") member of staff where the claimant was said to have shouted down the phone to that staff, made strange comments and sounded drunk. The matter was discussed by the claimant and SS, on 24 November 2015 (see notes of supervision meeting at page 938). The claimant reassured SS that she did not have a drink problem and she could not understand why the complaint had been made. SS confirmed that as far as he was concerned that was the end of this matter and it had been resolved informally.

11.8. The claimant's six month probationary period was extended by a month in December 2015. It was noted in a supervision meeting on 1 December 2015 that she was not keeping on top of paperwork, although that was not seen as a matter of particular concern. The claimant also raised the possibility at this time of working a condensed week to enable her to travel

to Northern Ireland every other weekend. The claimant was on annual leave over the Christmas and new year period and was off sick from 3 January 2016 with a serious eye infection.



House fire incident – January 2016

- 11.9. The claimant was involved in a serious house fire on 12 January 2016. This was a tragic and life changing event for the claimant and she suffered smoke inhalation and shock for which she was hospitalised and in intensive care for 7 days. After this incident the claimant was diagnosed with PTSD. The claimant's husband notified SS that this had taken place on 13 January 2016 and provided initial updates to the claimant but there was very little contact between the claimant and the respondent until March 2016.
- 11.10. The claimant remained off sick until 20 March 2016. The respondent arranged an occupational health ("OH") assessment and a report was produced on 15 March 2016 (page 942-5). On 21 March 2016 the claimant attended a return to work interview with SS. It was agreed that the claimant would work compressed hours working her full 37 hours over 4 days (see request at page 417-8). This enabled the claimant to return to Northern Ireland every weekend to see her family. During this period of time whilst she was returning to work and had periods of absence, SS told us he was also flexible with the claimant in terms of communication as he understood that she did not always feel well enough to speak to him so he permitted her to communicate by text message and by e mail. We accepted SS's evidence that this was not a formal adjustment to normal practices, it was an understanding between him and the claimant to alleviate her worries about speaking to people on the phone. We were referred to many text messages between the claimant and SS about work matters during the hearing, in particular messages on pages 363-389. It is clear that there was a substantial amount of communication by this method. Around 31 May 2016 we saw text message between SS and the claimant about absences from work. It is also clear that around this time the claimant mistakenly sent text messages to SS that were meant for someone else. The claimant asked for annual leave on 1 June 2016 to deal with a sick family member which was agreed by SS by text message (page 368).
- 11.11. The claimant was off sick at the end of June 2016 with stress and anxiety and a chest infection. Around this time the claimant spoke to SS and told him that she was feeling lonely and had discovered a lump. SS advised her to see her GP and also arranged that a colleague could support her if needed and suggested her fellow IRO, Ms F Brody ("FB"). A visit by FB to the claimant was arranged but the claimant cancelled this (SS's note of these discussions was at page 336-7). This was not a formal allocation of a buddy or similar by SS, but an offer of the help of a female colleague to the claimant to talk to and offer support on this particular occasion.
- 11.12. On 15 July 2016 the claimant agreed following a general request from her line manager to cover two case conferences that were due to

take place in October. The claimant attended an OH appointment and an OH report was prepared dated 11 August 2016 (939-940). This report confirmed that the claimant reported symptoms of panic attacks and feeling lonely and low and that the claimant was received counselling privately. The report also noted that the claimant "*loves her work*" and that management and her team were "*very supportive*" work being seen by her as a "*safe haven*". It noted that "*as her personal circumstance is likely to take some time to resolve, she may have moments where she can still experience a dip and may result in sickness absence from work*" but that the claimant could attend meetings and be contacted in writing, by e mail and by telephone. No adjustments were recommended and it was acknowledged that she should continue to receive support from her manager.

#### Complaints about claimant re child protection conference

11.13. On 25 August 2016 the claimant attended a child protection conference as part of her role. Some issues arose during that conference (relating to a mistake that had been made by the social worker involved in the case and how the claimant addressed this mistake). SS received a complaint in early September 2016 from the line manager of one of the social workers attending, T Dennis ("TD") about the claimant's behaviour towards her during and after the conference. SS spoke to the claimant about this complaint around this time and suggested that if the claimant apologised to TD, that the matter may be able to be resolved informally. The claimant told us that she did not feel that she had done anything to apologise for and was simply performing her role by appropriately and robustly challenging the professionals on what had been done during the meeting. She told SS so case at the time and said she would not apologise stating that they could "*bring it on, they don't know me*".

11.14. The claimant emailed SS on 27 September complaining about her caseload and was then off sick on 28 September 2016 for stress. She informed SS that she was struggling to keep up with the workload and the backlog was causing her stress. SS asked the claimant to come in to work and the claimant e mailed on 29 September to say she would not be coming in. That same day the claimant e mailed SS to say she would no longer be covering the two case conferences she had agreed to do back in July (see paragraph 11.12 above) as she did not have the capacity to cover any more conferences. The e mail she sent was at page 781 and also made the following comment "*Why would one ever had the audacity to ask someone else to cover a conference whilst they work from home. Unbelievable.*" The claimant told us that she was upset because she thought the colleagues she had agreed to cover for were in fact on the days of the conferences in question just working at home on other matters so did not feel this was a valid request for cover. She admitted to us that in hindsight that this was not the correct way to communicate this

message to SS. SS said that he felt that she had been incorrect about the reasons for cover and that her e mail was disrespectful and rude and it meant that another IRO had to cover at short notice. He confirmed he did not consider this to be a misconduct matter. SS did not discuss this e mail with the claimant at the time or inform her that he thought her e mail was inappropriate.

11.15. The claimant had a further two days off for stress in early October 2016. On 10 October 2016 TD made a formal complaint against the claimant (page 390-391). This was a very strongly worded grievance where TD alleged that she felt bullied and antagonised in front of parents and TD indicates that she required an apology and an assurance that this should not happen to anyone else. Following that complaint being submitted there were some discussions between SS and other managers at the respondent about how to handle the complaint and copies of e mails were shown at pages 395-397. There was an initial suggestion that the claimant be spoken to informally addressing the concerns about her behaviour and asking her to apologise to avoid the need for a full investigation and grievance process. SS expressed reservations about this approach as he had already attempted to deal with the matter informally and that as the claimant did not feel she had done wrong at the meeting, this would be unlikely to be successful. The respondent shortly after this started a formal investigation into the complaints to be carried out by Ms K Robinson ("KR") the respondent's Fostering Services Manager.

11.16. A supervision was held on 18 October 2016 where the claimant and SS discussed issues around workload and SS noted that personal issues were still evident and the claimant's counselling was ongoing. SS also reminded the claimant that she needed to renew her Health and Care Professions Council ("HCPC") registration and that this was urgent. On 24 October 2016 SS agreed with the claimant to reallocate a case conference as one of the issues under discussion involved a house fire. There appear to have been further issues with the claimant's attendance at week during the weeks after this and we see from SS's notes of discussions at page 338 he noted e mails sent by the claimant about problems with her car, doctor's appointments and then a further period of absence which started on 31 October 2016. The claimant had difficulties at home around this time because one of the neighbours in her shared house was experiencing domestic violence which she had reported to the police resulting in threats being made to her. The claimant discussed this with SS but also mistakenly sent text messages to SS referring to this on 2 November 2016 which clearly caused SS some concern. The claimant told SS that this brought back memories of the police being in her home after her house fire.

#### Meeting with SS on 8 November 2016

11.17. The claimant came back to work on 8 November 2016 and

attended a return to work meeting with SS. No return to work form was completed and the meeting ended early. The account of the claimant and SS differ about what was discussed but both agree that there was a discussion about the reason for the claimant's absence. The claimant gave us her account in the meeting but also gave an account to GK during the investigation carried out by GK (at page 751-2). She told us that SS made a derogatory remark about people with mental health stating "*it was very difficult to manage you*" and that "*mental health is very different to physical health as it was unpredictable*". The claimant then told us that she stated to SS that this was discrimination and SS said to the claimant that although physical health was also unpredictable, that managing a mental health condition was worse which the claimant found upsetting. The claimant said she left the meeting at this point in tears. SS gave his account of that meeting in evidence but also during the investigation referred to below at carried out by GK (notes at page 694-5). SS stated that the conversations that were taking place between SS and the claimant had led him to be concerned about her wellbeing. He said he raised the issue of the claimant's behaviour and asked her whether she was fit to be in work with the claimant telling him she did not know, but had come back in as she did not want to let her colleagues down. He said they discussed the conversation that had already happened about the domestic violence incident the claimant had reported to the police and the claimant said she still felt fragile about it. SS said he then told the claimant he needed to be sure she was able to do her job and the nature of her illness and what she had said to him in conversations were concerning him. SS said that the claimant then said that she was being treated differently because of her mental health and that SS was threatening her and she was therefore leaving and going home. SS said he then asked her not to leave but she said she was sorry and then left the room.

- 11.18. There is some common ground in the accounts above. We accept that SS made a comment about the unpredictability of the claimant's illness (which was a mental health illness) and his concern about this and the claimant's behaviour. This was an insensitive comment perhaps and the claimant took exception to it. We also accept that the claimant said she was being treated differently because of her mental health (albeit the word discrimination may not have been used). We do not accept however that SS said that the claimant was difficult to manage nor that he made an express reference to mental health being very different to physical health. He denies saying this and we note that his account of the meeting given in the investigation meeting held with GK at page 694-695 does not mention such comments. The comments are not referred to in the account the claimant gave to GK during investigation on 14 June 2017 (page 751) and does not appear in her written grievance of August 2017 (page 441). It only appears for the first time in her statement prepared for the Tribunal. On balance we find that these particular comments were not made as

described.

- 11.19. The claimant left the meeting and made a comment to FB (who was sitting outside SS's office) on her way out that she did not think SS was handling her sickness absence well. The claimant was referred to OH by SS again at this time. The claimant was off sick for a further period after this and contacted SS on 17 November 2016 to confirm she would be returning to work. SS then suggested that the return to work interview be carried out by a different manager as the last meeting had not ended well. The claimant objected to this and said that she would not be returning to work, mentioning the fact that an OH referral had been made by SS so he still had concerns and she would not return until after she had seen OH (see SS notes of e mail exchanges at pages 339-340).
- 11.20. The claimant attended an OH appointment on 7 December 2016 (report at page 946-9). This noted that the claimant had been described anti depressants due to low mood. It acknowledged that there was no medical reason why the claimant could not return to work within a short period and that the claimant could attend meetings and be contacted in writing, by e mail and by telephone. It went on to note that the claimant said that there had been some issues at work which had contributed to her sickness absence and mentioned the return to work meeting on 8 November and that the claimant felt she was being treated differently and discriminated against. The OH adviser recommended a discussion/meeting take place to resolve this. A phased return to work was recommended.
- 11.21. On 13 December 2016 (whilst the claimant was on sick leave) the claimant was sent a letter (page 797-799) which informed her that a grievance had been raised by TD which implicated her and contained an invitation to a meeting to be held on 10 January 2017 to "*consider the issues raised in the grievance letter and to hear your response to these issues. You will be given a full opportunity to respond to the complaints which implicate you. Please be assured that the meeting is not a disciplinary meeting.*" The claimant requested and was granted annual leave from 23 December until 16 January 2017.

#### HCPC registration issue

- 11.22. On 15 December 2016, SS checked the HCPC register and found that the claimant was not registered. On telephoning the HCPC he was informed that the claimant's name had been removed from the register as she had not renewed her registration. He was also informed that the claimant had not informed the HCPC that she had been working for the respondent since June 2015 (which was why the respondent had not been informed of the lapse in registration). SS telephoned the claimant that day to inform her of the problem. SS received a text message from the claimant the following day (16 December 2016) (page 789) informing him

that the claimant had telephoned the HCPC who informed her that all the forms had been sent to a previous address in Northern Ireland, and that they would send out new forms for her to complete. The claimant also informed SS in this message that it was unlikely she would be back to work before Christmas. The claimant's HCPC registration was resolved during this time and on 30 December 2016 when the respondent checked, her name was on the HCPC register. There were no further discussions about this matter at this time.

11.23. On 23 December 2016 the claimant started annual leave and travelled abroad to attend a missionary orphanage in Kenya to carry out volunteer work. Whilst the claimant was away, a further letter was sent to her on 11 January 2017 rearranging the grievance investigation meeting referred to above (which had been due to take place on 10 January) to now take place on 25 January 2017 (page 800-802). The claimant asked to extend her annual leave for a further week until 23 January 2017 which was agreed by SS. SS was in touch with the claimant on 17 January 2017 by e mail and by telephone to arrange the return to work meeting. This was initially to be carried out by SS which the claimant agreed to saying that she trusted SS. Copies of these e mails between SS and the claimant did not appear to be in the bundle, although the content of the e mails was cut and pasted into the notes SS made of his discussions with the claimant at pages 340-343. We had no reason to doubt that these were the emails passing between the claimant and SS and the claimant did not challenge that this was the case. The claimant then sent an email to SS about the proposed grievance hearing which was taking place on 25 January 2017 asking for representation at that hearing and asking SS to provide documentation and asking for his support. She also indicated that she would not be attending the investigation meeting (page 340). SS replied to the claimant on 17 January 2017 informing her that witnesses could not be called and that it was not appropriate for her to ask him or JW to attend. He also said that the claimant should not contact him about the grievance but should liaise with KR or those involved (including about whether the meeting should be postponed again). The claimant asked for further information from SS who then told her it would be sent to her. SS also informed the claimant that he did not think it was appropriate for him to conduct the return to work meeting (as the claimant had indicated during earlier conversations with him that he had breached her confidentiality). Therefore because of this and "*taking into account the outcome last time*" the meeting would be conducted by JW and would take place on 23 January 2017 at 10.00am (page 342).

#### Absences on 23 and 25 January 2017 and related matters

11.24. On 23 January 2017 (when the claimant was due to return to work and attend the return to work meeting with JW) the claimant sent a text message to SS at 8.10am stating "*Sam if it's okay with you I need to take*

*a days leave today and can hopefully meet with [JW] tomorrow* . SS replied stating *"Please can you contact [JW] to plan this"* (text message shown at page 785). The claimant did not respond further to SS and did not attend for work that day. The claimant sent a text message to JW that same day at 16.04 to ask her what time suits for a return to work interview. JW responds simply to say 9am please to which the claimant agrees and JW responds with a thumbs up emoji (messages shown at pages 790-791). There was much discussion at the Tribunal about this exchange of messages and whether this meant that the claimant had the agreement of the respondent to take annual leave on 23 January 2017. We find that no express consent had been given to the claimant to take annual leave on 23 January 2017. However we accept that the claimant understood that this request for leave had been agreed to from the combination of texts from SS and JW referred to above.

- 11.25. The claimant attended for work on 24 January and we saw a text message she sent to JW at 9.05 am confirming that she was on her way but she had been driving around looking for a parking space for 40 minutes (page 791). We note that the claimant was working compressed hours at the time and said she normally would have been in work at 7.30 a.m. She was due to attend the return to work meeting with JW at 9 a.m. but arrived in work at 9.45. The meeting took place with JW and the notes of that are page 408. This appears to have been a difficult meeting as the claimant refers to JW as having been aggressive during that meeting and SS told us that JW expressed her opinion to him that the claimant had been dismissive of her and suggestions made during that meeting and did not want to enter into a reasonable conversation. During the meeting the reason for the claimant's absence was discussed and the claimant raised the fact that she did not feel supported by SS following the last return to work meeting on 8 November 2016. JW discussed with the claimant whether her recent experiences with a domestic violence incident might impact her ability to deal with child protection conferences and the claimant said this would not be an issue for her. The forthcoming grievance hearing that the claimant was due to attend the next day was discussed and JW suggested that the claimant consider taking some of her annual leave after that meeting to manage any unresolved emotions from that meeting. The claimant said at that time she did not want to do this. There was then a discussion about the claimant's current compressed hours working arrangement and JW asked whether it was still needed and suggested that *"long days when she is only just returning was not a good idea"*. The claimant said she preferred to work long days and had no problem with this. There was a brief discussion about how the claimant might manage future absence and the impact on colleagues and was offered support from JW or SS if this was difficult to manage. The claimant was offered a phased return to work but refused it and said no other adjustments were required.

- 11.26. JW went on to discuss the claimant's annual leave and any future sickness absence. She informed the claimant that she had 8 days annual leave outstanding which needed to be taken and went on to say that *"all annual leave should only be taken in a planned way and not ringing up on the day to take that day off."* She went on to confirm that for future sickness absence the claimant *"must telephone and speak to either SS, JW or S Uppal [(another manager in the team) ("SU")]* and speak to one of the managers in safeguarding and discuss the sickness absence on the morning". It was also confirmed that the claimant would book all her annual leave into the calendar by the end of the day. These discussions reset the standards for absence reporting with the claimant.
- 11.27. The next day, 25 January 2017 the claimant was due to attend the grievance meeting at 12.30am. The claimant texted JW at 7.24 am that morning to inform her that she was working on preparation for the grievance meeting from home and that she was now requesting a phased return from work. She then thanked JW (text messages shown at pages 791-792). The claimant did not attend the grievance meeting as planned and told us she phoned the person who had invited her to attend the meeting, R Homer, and left a message to inform her she would not be attending the grievance meeting. Later that day (at 4.55 pm on 25 January 2017) the claimant sent a text message to JW stating *"I will take annual leave as you suggested until phased work is agreed"*. JW replied quickly stating *"we will meet tomorrow and work this out"*. There was then a further exchange of text messages between the claimant and JW (page 793). The claimant informed JW that she would not be *"back till all sorted I still have seven days leave"* with JW then stating that she would *"sort the phased return to work with you. You need to meet tomorrow or advise me you are sick"*. The claimant responded to say *"No I am requesting annual leave as u advised to take it.N"*. Once again there was much discussion about whether this exchange meant that the claimant had the express agreement of JW to take annual leave on 26 January 2017. We conclude that no express consent had been provided by JW for the taking of annual leave that day. However we also accept that the claimant appears to have understood again from the text messages sent and received and in light of the discussion at the meeting on 24 January 2017 about taking annual leave, that it was acceptable for her to take this leave.
- 11.28. On 25 January 2017, JW sent an e mail to an internal absence monitoring e mail address at the respondent (and copied a HR representative) summarising her discussions and concerns (page 691). This confirmed that JW had agreed that the claimant could take today (25 January 2017 as annual leave) and that she must return to work on 26 January 2017 to formalised her phased return and if she was not fit that a sick note would need to be provided. It was also noted that JW had arranged an OH referral regarding compressed hours.



Meetings on 27 January 2017

11.29. It was during this week commencing 23 January 2017 that SS became concerned about the claimant's erratic behaviour. He explained that the claimant had been absent from work on 2 occasions, she had been late and JW had told him that the claimant had shown an dismissive attitude during her meeting with JW and interactions with her that week. He told us that he had been observing these types of behaviour with the claimant since September 2016 and that there had been no improvement in her attitude and this came to a head during that week. SS became concerned about her ability to attend work and do her job. He did not see this as a health issue at this time although although (and it is noted in the notes of the disciplinary investigatory interview he attended later at page 1106) he felt that the claimant was not fit to chair a conference. There were a series of meetings that day when the claimant when to speak to his manager, Mr I Ghag ("IG") and Mr P Mc Donald ("PM") who was at that time transitioning into IG's role. They also met with L Hunter from HR ("LH"). There were no minutes produced of any of these discussions. SS told us that there was a discussion about how to deal with the claimant's behaviour and absences from work. It was decided by IG and PM that the respondent would remove her from the IRO role temporarily and commence an investigation because SS had concerns about the claimant chairing child protection conferences. He told us that he needed to "protect the service" but at this stage he had not considered what was causing the claimant to behave as she did, but acted because he did not feel she was able to chair child protection conferences. He told us his main concern at this stage was not moving to a disciplinary process but ensuring that the service was safe.

First disciplinary allegations

11.30. A letter was prepared by IG to the claimant of this decision (page 674-675) stating that "*allegations of gross misconduct*" had been made against her relating to "*serious insubordination*" namely:

*"Your ongoing disrespectful, disruptive, and negative behaviour towards your role; the service and your line managers and your continuing failure to follow the instructions provided by management.*

*Failing to follow the absence reporting procedures resulting in you being absent without permission on Monday 23 January 2017 and Thursday 26 January 2017"*

The letter went on to state that the allegations if proven could result in summary dismissal and

*"Very careful consideration has been given to whether or not to suspend you from your duties but as an alternative to suspension, it has been decided to move you to work within the Strategy & Commissioning*

*Services carrying out a designated range of duties”*

It went on to inform her that an investigation would be carried out and she may be required to attend an investigation meeting and offered her support from the Counselling and Support Unit.

11.31. The claimant attended for work on 30 January 2017. On arrival she was unable to log on to the IT systems and when she asked SS and JW why this was they said they did not know. She was informed later that day by the IT department that she had been blocked out of the systems and e mails. She was called to a meeting with IG that afternoon who informed her that she was being transferred to another role in Strategy & Commissioning reporting to Ms P Kay (“PK”) in another building and handed her the letter referred to above. The claimant started to work in that team the next day and we accepted her evidence that did not receive any information about the role and what she was required to do and found it very difficult. She worked the remainder of that week (excepting Friday her non-working day). She went off sick again the following Monday (6 February 2017).

11.32. The claimant was sent a further letter (page 804-6) inviting her to a rescheduled grievance hearing on 7 February 2017 to consider the complaint from TD (the claimant having failed to attend on 25 January 2017). This letter notified the claimant that if she did not attend the meeting, it would proceed in her absence. This meeting was subsequently postponed at the request of TD and rescheduled for 16 February 2017 (see letter at page 808-810). The claimant was off sick during this time from 6 February-26 February 2017 with stress, depression and anxiety (page 166). The grievance hearing took place on 16 February 2017, was chaired KR with a HR representative also in attendance. The claimant did not attend and the meeting took place in her absence (see notes at pages 811-816). During that hearing, TD outlined her complaint against the claimant. She acknowledged that she had made some mistakes in the report she had prepared for the child protection conference in question which she apologised for, but felt that the claimant has belittled and bullied her by the way those matters were raised in front of the family, probation officers, police and the health visitor. She said she had tried to deal with informally and wanted some acknowledgement and apology from the claimant. KR questioned TD about her allegations during the meeting. The outcome of the grievance was sent to the claimant on 27 February 2017 which informed her that TD’s complaint was upheld and she concluded that the claimant had been “*unprofessional*” and had “*undermined*” TD and her actions had constituted “*bullying*”(page 794-795). KR made a recommendation that the issue be dealt with through the disciplinary procedure.

Absence from work on 6 March 2017

11.33. At one minute after midnight on the morning of 6 March, the claimant sent PK an e mail to say "*if its ok with you I will work from home tomorrow*" (page 769). PK replied to this e mail at 8.45am that morning stating "*I would prefer you to come into the office as I've not seen you for a few days so we can catch up with how you are doing and how the audits are progressing*" (page 770). PK then rang the claimant several times during the morning to which she had no answer so PK sent a further e mail at 9.55 a.m (page 771) asking the claimant to ring her urgently and that she needed her to come into the office as soon as possible. The claimant told us she had not seen these messages as she had been offline working on paperwork during the morning. It appeared that on receiving these messages the claimant tried to contact her but did not speak and so PK sent a further e mail instructing the claimant to call her on her office line and to come in to the office and not work from home that day and that a catch up meeting had been booked for 1pm (page 772). The claimant did not respond to these e mails and did not attend for work. She told us she was in panic mode as she was behind on her work and she was not able to inform PK as she had hoped that the work she was doing was on track. She said that she had started to feel unwell that day. The next day she rang in sick and was off until for a period of 3-4 weeks.

Investigation into misconduct allegations by GK

11.34. By this time the respondent had started to investigate the disciplinary allegations that had been made against the claimant which had been notified to the claimant on 30 January 2017. It appointed GK, the Service Manager in the Youth Offending Service to carry out those investigations. Having collated all the documents, GK commenced her investigations by starting to interview various individuals she had identified as being involved. The process was that an interview was held and then a statement was provided which consisted of the notes of the interview. This was then sent to the individual who had been interviewed and the individual was asked to sign and return this. The individual interviewed had the opportunity to amend the notes if they did not reflect what was discussed or add to these. GK commenced the process by holding an interview with SS on 22 February 2017 (notes page 693-8). During this investigatory interview, SS told GK about various matters involving the claimant whilst he had been managing her having been asked to provide any examples of "*disrespectful, disruptive and negative behaviour*". He referred to the return to work meeting on 8 November 2016 as an example of the claimant's erratic behaviour. He went on to discuss the grievance that had been raised against the claimant and her response regarding the suggestion of an informal resolution. He also mentioned the issue of the claimant changing her mind about covering conferences in September 2016. He also raised the issue of the HCPC registration.

11.35. When asked about whether the claimant had failed to follow management instructions, he made reference to the difficulties with sickness reporting during the week of 23 January 2017.

11.36. On 7 March 2017, GK conducted an investigatory interview with JW (the notes of this meeting were shown at page 683-90). JW was firstly asked about her experience of managing the claimant and she confirmed that she was not her direct line manager but was one of three managers within Safeguarding who occasionally covered for each other. She explained she had become involved after the issue arose with the return to work interview in November 2016. JW told GK about the issues arising about absence in and around during the return to work meeting on 24 January 2017 and provided GK with copies of the relevant text messages (paragraph 11.27 above). JW described the meeting that took place on 24 January in fairly graphic terms telling JW that the claimant was disruptive and negative during this meeting. At one point she comments that the claimant had "*spat out*" a response about dealing with her colleagues when they asked about absence from work and that she "*sneered*" when responding to a question. She also described the claimant as being disrespectful of her colleagues and she was tearful, angry and unsettled during the meeting. It is clear that following this interview on JW added to her statement substantially to deal with incidents that took place after 7 March 2017 when the meeting was held. She made reference to text messages sent later in March and also an incident where JW had carried out a safe and well check on the claimant following staff reports of concern made on 22 March 2017 (see below). JW also added a section at the end of her statement making reference to an incident that took place on 23 April 2017 that she became aware of. JW described police officers having attended the claimant's property and informing her that the claimant had been under the influence of alcohol following reports she had made about a missing person which resulted in the claimant being supported by the Crisis team. It is not clear when these additions to this statement were made or when this completed statement was submitted to GK. None of these additional matters appear to have been followed up with JW by GK, nor were further steps taken to investigate such matters by GK.

#### Second disciplinary allegation

11.37. The claimant was sent a further letter by IG on 8 March 2017 (page 678) informing her that further allegations had been made against her namely that the outcome of a grievance against her was that she had behaved in an unprofessional and disrespectful manner in a child protection conference and that she had failed to follow a management instruction which led to her being absent without leave on 6 March 2017. She was informed that she would be contacted by GK. The claimant e mailed SS on 10 March 2017 asking him for an update on the investigation

and to let her know timescales and policy stating that this was “*seriously affecting my emotional wellbeing and you do have a duty of care*”. SS asked LH the same day to reply to the claimant and informed the claimant that he had referred her query to HR. The claimant then asked SS for the email address of Mr J Gregg (“JG”), the Director of Children’s Services as she had not heard from HR, and SS provided this. Shortly after that same day, she sent an e mail to JG (copying in SS) stating that she wished to “*put in a formal complaint re discrimination and victimisation*” (e mails shown at pages 413-5). It is not clear if this e mail was responded to.

11.38. On 15 March 2017 GK interviewed PK (notes at page 699-702) and KR (notes at pages 703-705) as part of her investigation. Both gave a similar account of the incidents they were involved in as set out at paragraphs 11.33 and 11.32 above.

11.39. On 22 March 2017 the claimant got in touch with FB sending her a message along the lines of “*they are trying to drive me to kill myself*” in reference to the way she felt she was being treated by the respondent. The claimant told us that she was feeling very low at that point in time. FB became concerned and reported this to SS and JW. On 23 March JW and SU visited the claimant at home for a welfare check. JW gives her account of this visit during the notes she provided to GK during the investigation (page 688-9). She described the claimant as being in a very poor state and was visibly shaking and not regulating her emotions. JW said she asked the claimant if she had any addiction habits (as JW said she felt she was presenting with someone with difficulties in this area) and the claimant said she did not. Following that visit JW made a referral to OH due to her concerns and observations during that visit. The form completed by JW was shown at page 611-4. This referral noted that the claimant was sending texts to people who were not the intended recipient and engaging in long calls with colleagues repeatedly (where her speech appeared to be slurred as if she was drinking alcohol). It made reference to the visit on 23 March and noted that JW had observed one empty bottle of wine and had seen many boxes of chocolate around (the claimant told us that this was correct as she had been gathering boxes of chocolate to be able to send to the mission she had previously attended in Kenya).

11.40. The claimant attended her OH assessment on 4 April 2017 and the report prepared after this assessment was shown at page 952-4. This report noted that the claimant was taking anti-depressant and ant-anxiety medication the dose having been increased in the last 2 weeks. It confirmed that the claimant was not emotionally stable to attend work but the claimant told the OH adviser that she could attend meetings. The report also noted that the claimant refuted the information that had been provided in the OH referral made by JW before the appointment. She informed the adviser that “*she has not got a drink problem and no addiction problem.*” She also denied that she was spending long periods

in conversations with colleagues nor that she sent text messages to the wrong recipients. She also denied that her speech was slurred and she was shaking during the visit from JW because she was upset and tearful.

- 11.41. On 23 April 2017 the incident involving the police attending the claimant's home took place. JW set out her understanding of what had occurred in the statement she provided following her investigatory meeting at page 689. The claimant strongly objected to the inclusion of this information in JW's statement as she did not believe what took place was relevant to her job. She admits that she had been drinking on this occasion and the crisis team had been called as there were concerns about the claimant's mental health. However the claimant maintained that this incident did not negatively impact her role as the professionals involved in any such incident would be obliged to maintain confidentiality.
- 11.42. On 4 May 2017 the claimant attended an investigatory interview with GK and on this occasion was supported by MLR (notes of meeting at pages 963-8). There was some brief discussion of the disciplinary allegations. The claimant and MLR raised concerns that the claimant was subject to disciplinary allegations relating to the TD complaint even though she was unable to participate in the grievance due to her sickness absence. MLR also indicated that it was the claimant's view that the complaints about absence reporting had been magnified by the respondent and that managers were colluding together to raise in some cases historical issues in order to "get rid" of the claimant. The meeting was cut short as MLR indicated that the claimant needed to see the questions in advance in order to provide her response. GK provided a copy of the questions she wanted to ask to the claimant and MLR (pages 639-643).
- 11.43. The claimant was then off sick from 19 May 2017 until 9 June 2017, then taking annual leave on 12 & 13 June 2017. During that period of absence the claimant was invited to a meeting as part of the absence management procedure of the respondent on 19 May 2017 (letter at page 423-4). She attended this meeting on 26 May 2017 which was conducted by S Giles ("SG"), the respondent's Head of Children's Strategy and Commissioning, and was accompanied by MLR. Following that meeting a letter summarising what was discussed was sent to the claimant on 7 June 2017 (page 425-30). The claimant's absence record was discussed during the meeting as was the latest medical information and the support the claimant had been accessing. The claimant raised a number of concerns during this meeting including visits made to her home and also the information that had been provided during the previous OH referral being inaccurate. It was agreed that the claimant would try to return to work on 12 June 2017 and would then try to maintain her attendance at work with a 3 week phased return. A review meeting was arranged for 12 July 2017.

- 11.44. The claimant returned to work on 14 June 2017 (after 2 day's leave) and had a return to work meeting with another manager within Commissioning, P Tomlinson ("PT") (page 773-4) (this having been agreed by the respondent the claimant having raised the fact was unhappy with PK managing her, having since raised an issue with her about unauthorised absence – see e mails 431-434). During that meeting a phased return to work was agreed with the claimant and the schedule for that is shown at page 774. Although the claimant did not usually work Fridays (as she worked compressed hours Monday to Friday each week), this schedule did show that the claimant would attend work on Friday 31 June between 8.30 a.m and 5p.m.
- 11.45. A further investigatory interview was held on that same afternoon (14 June 2017) by GK with MLR again accompanying the claimant (pages 745-762). During this meeting the claimant was asked if she needed any adjustments and replied no. She was asked about the child protection conference and the complaint from TD. GK asked the claimant to explain what happened in the child protection conference and the claimant gave her full version of events denying that she had behaved inappropriately. This was recorded in detail in the notes of the meeting. She admitted that she did raise the issue of the error made by TD in the report in the meeting stating that it was part of her role to challenge professionals. The claimant also complained that the grievance was upheld against her even though she was unable to attend due to sickness. She also said that she was offered the opportunity to apologise to TD but said she did not want to apologise for doing her job and admitted making the comment "*Bring it on, they don't know me*". She also stated that she had 2-3 supervision meetings with SS after this incident and nothing had been raised with her. GK confirmed during cross examination that she did not investigate any further the complaint that had been made by TD or what happened in the case conference herself as this had already been investigated at the grievance hearing.
- 11.46. The claimant was asked about her return to work meeting on 8 November where she alleges SS made a discriminatory comment to her. The claimant told GK she became upset during the meeting when SS discussed the recent incident involving domestic violence at her flat and made reference to the fire and that this upset her. She told GK that SS made some reference to her absence being different to someone being off with a cold and there was then a discussion about whether she was fit to be in work. It was at this point she left the meeting. The claimant was asked whether anything was said to her colleague FB as she left . The claimant said she told FB that she was concerned because SS had made a distinction between mental illness and physical illness and FB agreed this was wrong. The claimant acknowledged she may have said to FB that SS was not managing her sickness well but did so because SS had previously suggested she should use her as support.

11.47. The claimant was asked about the offer to cover case conferences which was withdrawn and also the HCPC registration and explained her position on these matters. The discussion then moved on to the sickness reporting procedure and the messages sent between JW and the claimant to which the claimant gave her understanding of what had happened. It finished with a discussion of the claimant's absence on 6 March 2017. Finally the claimant was asked about and gave her version of events of the visit of JW and SU to her home on 23 March 2017.

#### Incident at Broadgate House on 22 June 2017

11.48. On Thursday 22 June the claimant attended for work in the Commissioning team. The claimant said at this point she felt "*completely lost for hope*" and had made a "*mental decision to return to Northern Ireland*" She left that office at some time between 1.30 and 2.50 and then went to the Broadgate office which was where the Safeguarding team she had previously been working in were based. The claimant says she went there to collect her belongings having made the decision to leave. She said she was feeling very anxious and nervous and whilst there she stayed for a period of between 10 and 30 minutes and she spoke to various colleagues and remembers hugging FB and ZA. She denies having drunk alcohol at any time during the day but acknowledges that she was extremely unwell that day and has difficulty remembering all the events of the day saying she had flashbacks about things happening but the day was a "*blur*". She said she could have been behaving unusually due to a combination of the medication she was taking and its side effects (Citalopram) and because of her anxiety and panic attacks. The claimant drove home after attending the office in the respondent's vehicle it provided to her and later that day she took a flight to Northern Ireland.

11.49. The respondent has a very different account of events on that day involving the claimant. The respondent says that the claimant left the Commissioning office at around 1.30 pm and when she arrived at Broadgate House later than afternoon a number of employees observed unusual behaviour in the claimant which led the respondent to believe that she was intoxicated. It also alleged that the claimant had engaged in abusive language and conduct on that day.

11.50. On 23 June 2017, the claimant was due to attend work as part of her phased return plan even though she did not usually work on a Friday. She did not attend for work. The claimant's explanation for that is that she made a mistake as she did not usually work that day.

#### Third disciplinary allegation

11.51. When the claimant went to work on 26 June 2017 she was asked to attend a meeting with SG during which SG informed the claimant that she would be suspended from duty with immediate effect, following allegations relating to the incident on 22 June 2017 and due to unauthorised absence



on 23 June 2017. The claimant was issued with a letter confirming the allegations which were potential matters of gross misconduct (page 680-2) which confirmed that the allegations of gross misconduct were:

*“That you attended the workplace being incapable of safely performing normal duties due to the influence of alcohol, drugs and other substances*

*You took unauthorised absence from work on Friday 23 June 2017*

*Using abusive language and demonstrating abusive language in the workplace*

*Breach of trust and confidence and bringing the organisation into disrepute”*

#### Investigations into the 22 June 2017 incident

11.52. As a result of these additional allegations, further investigations were carried out by LH on behalf of GK the main investigator. LH conducted a series of investigatory interviews with the witnesses to the Broadgate house incident and others involved on that day. LH met with PT first on 10 July 2017 (notes of meeting at pages 706-711). PT confirmed that he understanding was that the claimant left the Commissioning office around 1.30pm and she did not have permission to do that. He confirmed he had no concerns about the presentation or behaviour of the claimant at that time. LH also discussed the events of 23 June 2017 with PT, and he confirmed that the claimant did not have permission for annual leave on that day and when this was raised, the claimant told him she got her working days mixed up. LH then interviewed a colleague who was there on 22 July, L Unsworth (“LU”) on 13 July 2017 (notes of investigatory meeting at pages 726-9). LU said the claimant was “possibly slurring” her speech but also mentioned her Northern Irish accent being strong. LU noted that a colleague, Robert had mentioned to her that the claimant’s “speech seemed slurred”. LU said the claimant looked flustered and awkward, didn’t look well and looked drawn, but reported nothing else unusual and confirmed she did not challenge the claimant on her behaviour.

11.53. LH then interviewed Z Ashton (“ZA”)(a colleague of the claimant present on 22 June) on 13 July 2017 (notes of meeting at pages 712-717). ZA told LH that she felt the claimant was intoxicated, although she did not know as she could not smell alcohol noting that the claimant smelt strongly of perfume. She said that the claimant was “slurring her words, pulling faces and acting bizarrely”. She said having seen people having drunk alcohol on a scale of 1-10, she estimated that the claimant was an 8 and felt the only other explanation was that she was on strong medication. She saw the claimant stick her fingers up at SS and when LU left the room. ZA said that she was concerned about the claimant’s presentation, looked dishevelled and ZA was worried about her. ZA told LH that she e mailed

SS and JW about the situation but they were interviewing and that she also e mailed SU who was in a meeting. She said she did not challenge the claimant because others were present and she did not know what to do and that she was fearful of how the claimant would react, but if they had been alone she would have done so. ZA described the claimant hugging her roughly ZA also mentioned in the meeting having conversations with claimant by phone previously and receiving slurred voicemails.

- 11.54. Another colleague who was also present that day N Chand (“NC”) was not interviewed but sent an e mail with her observations on the incident to LH on 13 July (page 741-2). She confirmed that she had hugged the claimant when she came in that day and that she did not smell alcohol, that the claimant’s speech was not affected, nor was her balance. She mentioned that the claimant smelt of perfume. She mentioned that the claimant seemed excited and was pleased to see her colleagues and was perhaps nervous having not seen them for a long time. On 17 July 2017 LH spoke to another colleague who had attended that day, I Pullen (“IP”). The notes of that interview were shown at pages 731-732. IP had not met the claimant before and did not know her. IP described the claimant as being drunk and being incoherent and repeating things. She said she asked IP “*Who the feck are you?*”. She also described the claimant sticking two fingers up behind her hand when SS entered and then left the room. IP described the claimant as “*really, really drunk, not tipsy she was staggering*”. IP said she did not challenge the claimant as she did not know who she was at first and she decided to be polite as IP was using the desk the claimant used to sit at.
- 11.55. A further colleague present that day, K Oddy (“KO”) was interviewed on 20 July 2017 (notes of that meeting at pages 718-721). KO said that the claimant was “*very intoxicated, dishevelled*” and was “*staggering*” and “*nearly fell over*” when she came to kiss KO. KO said she could smell something “*acrid like vinegar or alcohol with a sharp undertone*” but could also smell heavy perfume and mints. When asked why she did not challenge the claimant that day, KO said that by the time she had realised how drunk the claimant was, she had left and she did not know why anyone there did not ask her why she was drunk. KO told SH that she had sent an e mail to SS on the day in question setting out in detail her concerns about the claimant and this e mail was at pages 722-725. The e mail referenced several previous conversations with the claimant about drinking alcohol and observations she had made previously about this. She set out her account of the incident of 22 June which was broadly consistent with what she told LH in the investigation meeting. It also made reference to the claimant telling her she was writing a book about the respondent and corruption. KO ended her e mail by stating that her motivation in sending it was that she felt that the claimant “*really needs help. My best hope would be that she gets offered support to get better*”

*and return to our team.”*

- 11.56. A further colleague, J Smith (“JS”) was then interviewed the same day by LH (notes at pages 734-736). JS told LH that the claimant was excited gesticulating and laughing and that others present had raised concerns that they saw her stagger and that she smelt of alcohol but she did not hug her. O Gale, a further colleague present was not interviewed but sent a completed interview template (page 739-40) stating that the claimant was “*quite animated*” and said she had “*no need to challenge her behaviour*”. R Russell (“RR”), who was also present was interviewed on 28 July 2017 (notes pages 737-8) said the claimant appeared to be “*slurring her words*” and asked LU if she noticed that the claimant “*was presenting as though she was under the influence of alcohol*” and said that LU agreed. He said he did not challenge the claimant as he was unsure if it was normal for the claimant to present like this.
- 11.57. A further investigatory interview took place with claimant on 18 August 2017 (notes at 763-768) which was held by telephone by GK with MLR accompanying the claimant. The claimant raised concerns about the reference to taking drugs in the letter setting out the allegations and told GK she had had a test which confirmed she had never taken drugs (a copy of the test results obtained which was provided at the time was shown at pages 1023-8.) The claimant was asked and gave her account of the events of 22 June. GK then put the various allegations made to the claimant in general terms and makes reference to extracts of the 7 statements taken during the investigation. She did not go through each statement but in particular put to the claimant, the comments suggesting drunken behaviour. The claimant denied that these were true. The claimant admitted she stuck her fingers up, although this was not directed at anyone in particular and the claimant said she was joking and that she should not have done it. The claimant was then asked about a previous incident involving her breaking her laptop whilst drunk which she denied vehemently and said that the incident when she broke her laptop happened 18 months ago. The claimant had issues with technology and dropped of the call and the call finished shortly after.
- 11.58. The outstanding questions were then e mailed to MLR who provided her responses which were shown at pages 767-768. These responses confirmed the claimant’s denial that she had drunk any alcohol on 22 June 2017 and raised the issue that if she was drunk, why did her colleagues allow her to leave the office. The response went on to state that the claimant felt that the council’s manager were trying to exit her from the respondent. It also stated that the claimant had submitted a grievance which had not yet been formally responded to. GK acknowledged in her evidence that she did not ask the claimant specifically about whether her mental health had impacted on her behaviour in any way. GK explained that at no point during the investigation did the claimant or MLR suggest

that the claimant's mental health had caused any of her behaviour or offered that as an explanation. She said she had asked the claimant to share what had caused such behaviours and the claimant's mental health was not raised although a specific question was not asked. She said she did not feel that she was required to get any medical information about the issues being investigated as the claimant had not at any point raised an explanation that any of the matters may have been health related.

11.59. Following the conclusion of all interviews, GK compiled and completed an investigatory report which was completed in October 2017 (report shown at pages 644-673). GK concluded that there was a case to answer on all the allegations made against the claimant and recommended that these be taken to a disciplinary hearing. GK listed six allegations that had been made against the claimant and set out her findings on each of them. Allegation 1 related to being disrespectful, disruptive and negative. GK cited examples of this being the return to work meeting held with SS on 8 November 2016; the claimant's "*rude behaviour, gestures and language*" on 22 June 2017; the statement she made when withdrawing her cover for two case conferences on 29 September 2016 and her failure to renew her HCPC registration on time in December 2016. GK was asked in cross examination whether she felt that some of these matters were concerns that had been resolved already informally or had taken place some considerable time previously but she said she did not consider this was a particularly salient issue. Allegation 2 related to failure to follow absence reporting procedures and being absent without permission on 23 and 26 January 2017 with GK stating she found evidence of the claimant requesting leave but that neither manager agreed to it. She confirmed her investigation was about whether the claimant had secured consent to take the leave before taking it. Allegation 3 related to the finding of KR of the claimant being unprofessional and disrespectful during a child protection conference (as per the TD grievance). Allegation 4 related to a failure to follow a management instruction to attend the office on 6 March 2017. Allegations 5, 7 & 8 related to the allegation that the claimant attended the workplace being under the influence of alcohol or other substances, using abusive behaviour and language which GK told us was a "*breach of trust and confidence and brought the organisation into disrepute*". Allegation 6 related to the allegation of unauthorised absence on 23 July 2017 and noted that the claimant said this had been a mistake as she did not usually work a Friday. The investigatory report appended numerous documents including witness statements taken, copies of e mails and text messages, supervision notes and letters sent.

#### Decision to commence disciplinary proceedings

11.60. GK's investigatory report was passed to PM and he took the decision to progress the matter to a disciplinary hearing. He appointed PS to carry out that disciplinary hearing and he wrote to the claimant on 17

October 2017 inviting her to a disciplinary hearing to be held on 8 November 2017. This made reference to the 8 allegations investigated by GK and summarised in her report and noted that *“this alleged conduct breaches the City Council’s Code of Conduct in a number of ways”*. It informed the claimant that GK would be attending the hearing and would be *“calling a number of witnesses, namely SS, JW, PK, ZA, KO and IP”*. It informed the claimant that she was entitled to be accompanied by her trade union representative. It also attached the full investigation report of GK and the attachments referred to above.

#### Claimant’s grievances

11.61. The claimant appears to have first written a grievance on 18 August 2017 (shown at pages 441-451) although it is not clear when this was submitted (if at all). This referred to a complaint against SS, JW, PK and SU and set out lengthy complaints about the claimant’s managers making allegations against her which she says were magnified and taken out of context and which amounted to bullying and harassment. It also complained about her being unable to participate in the TD grievance hearing due to her illness. It went on to raise concerns about breaches of confidentiality. The claimant appears to have actually raised a grievance for the first time on 6 September 2017 (Pages 470-482). This grievance followed a similar format to the first written document seen but added a number of additional allegations relating to the allegations made against her about the 22 June 2017 incident stating that the respondent had failed to comply with its Drug and Alcohol Abuse Policy and that her suspension for these allegations was harassment and victimisation. A hearing was set up for 7 November 2017 and this was notified to the claimant in a letter dated 17 October 2017 (page 453-4).

11.62. On 6 November 2017 MLR sent an e mail to NM copying LH, GK, PS and KE stating that she wished to *“formally notify my most serious concerns about the actions of JW”* and complained about the signed statement submitted by JW as part of the investigation into the claimant’s conduct. This referenced the incident on 23 April 2017 which JW referred to in her statement and alleged that this was a breach of confidentiality. She suggested that the respondent should conduct an investigation into JW’s conduct but noted (in a somewhat surprising statement) that *“the situation is so blatant by her admittance with a signed statement, that it is sufficient to warrant a belief to [JW’s] guilt, therefore no further investigation would be necessary”*. NM replied to this e mail on 8 November 2017 and suggested that this was appropriate to be considered by PS the chair at the disciplinary hearing (page 525).

#### Grievance hearing 7 November 2017

11.63. The first grievance hearing took place on 7 November 2017 and was chaired by PS with KE in attendance. The claimant attended with

MLR and other attendees were SS, SU, PK, JW and A Groves (“AG”) (a trade union representative accompanying SS). KR was also in attendance as a witness. MLR first stated that the claimant felt she had been bullied or harassed by the managers coming up with issues to be used against her in a disciplinary action. KE questioned whether this needed to be dealt with as part of the disciplinary process and MLR initially said no. She then raised the issue of JW and breach of confidentiality and was told by KE that the hearing could not deal with this allegation as this was not in first grievance. JW was called as the first witness and MLR stated what the claimant’s complaint against JW was. Some questions were raised but it was unclear what allegations were related to JW and which to other managers. MLR was instructed by KE to refer to the matters already in the grievance document and then MLR raised that the hearing today was of process and should be dealt with as part of disciplinary hearing (page 976). After an adjournment, PS offered MLR the choice to continue with the grievance but only refer to matters already in the grievance submitted (as this was all the attendees at the meeting had seen) or to deal with all matters in the disciplinary hearing as mitigating circumstances. After a further adjournment MLR stated that she felt that neither choice was acceptable but ultimately she agreed that the claimant’s grievance would be dealt with as part of the disciplinary process and that she would waive the need for a meeting with the investigating officer as to whether the two should be combined. The meeting was then adjourned. On 29 November 2017 a letter regarding what was agreed about the grievance was sent to the claimant (page 537-8) and this letter stated that any questions that related to grievance issues were part of the claimant’s defence and would be considered at the disciplinary hearing.

- 11.64. On 9 November 2017 MLR sent a further e mail to NM copying PS, KE, LH and JG within which she submitted a second complaint (page 528-531). This letter challenged the respondent on why it had not suspended JW for potential misconduct. MLR also stated that the complaint should be processed as a “*service user complaint*” and should be read in conjunction with her earlier complaint submitted on 6 November 2017. NM responded on 8 November (e mail at page 1004) acknowledging this and suggested that this would be appropriate to be considered by the chair of the disciplinary hearing, PS. The claimant later sent two e mails raising personal matters relating to JW to PM and PS (copying MLR) (shown at pages 533 and 534). MLR later apologised for the e mails stating that they had been mistakenly copied into e mails from the claimant directed to her. NM sent an e mail to the claimant on 10 November stating that the claimant’s e mails were inappropriate and were not the correct way to raise issues. It further stated that issues relevant to the disciplinary hearing should be raised with PS and KE (page 534).

Disciplinary hearing

- 11.65. The disciplinary hearing originally scheduled for 8 November, finally took place on 18 December 2017. The claimant was informed of this change in an invitation letter at page 1087 which also confirmed that the hearing would provide the claimant with “*an opportunity to address your points of grievance that are related to the Disciplinary Investigation*”. The minutes of the hearing were shown at pages 1090-99. It was attended by PS with KE in support and the claimant attended with MLR in support. GK and LH attended as Investigating Office and HR support and SS attended as a witness with AG supporting him as a trade union representative. The meeting started with MLR complaining that there was some confusion about whether the claimant had been accused of being under the influence of alcohol or drugs. She then raised the grievance that had been submitted and said that if this was upheld there would be no need to continue with the disciplinary proceedings and asked about her request for JW to be suspended. PS informed MLR that this would not be something she would be informed about as it related to another employee. She also made reference to the complaint made against JW. There was clearly a concern towards the start of this meeting about the claimant’s ability to participate which was raised by KE but the claimant indicated that she wanted to carry on. The claimant indicated that she suffered from panic attacks and may have to leave the room quickly and PS confirmed that was fine and an adjournment could be called at any time. PS gave evidence that the claimant had a glass bottle in front of her during the meeting which she was drinking from during the meeting.
- 11.66. The hearing continued with GK reading through her findings on the investigation. MLR raised a concern about the impact this was having on the claimant but the claimant indicated again that she wished to continue. SS joined the meeting as the first witness and when informed by PS that the disciplinary and grievance process regarding the claimant would be held together, AG objected to this stating that the grievance allegations had not been formally put to SS nor had he been provided with the relevant paperwork. Following a discussion around this between AG and MLR, GK began asking questions to SS about the claimant’s behaviour. Before the questioning was complete AG requested an adjournment as he had concerns about the claimant. PS also told us that he had noticed that the claimant’s appearance and behaviour had “*rapidly deteriorated*” during the morning. MLR stated that she did not feel that the claimant was fit and should see OH but that the claimant wanted to continue with it. A lunch break was suggested by PS which MLR agreed to stating that the claimant could have some food which might help.
- 11.67. Following the lunch break, PS noted that the claimant entered the room unsteady on her feet and slurring her words. He said that there was a smell of alcohol and the claimant’s conversation was incoherent. This

was also observed by GK and KE. PS told the claimant that he believed she had been drinking alcohol and MLR told him that she had been with the claimant and that she had not had any alcoholic drinks. It was agreed that the hearing would be adjourned to enable the claimant to go to see OH. KE accompanied the claimant to the OH department together with MLR and said she observed the claimant acting in a way that led her to believe she was intoxicated. The OH advice received was that the claimant was unfit to attend a meeting that day and this was confirmed in a report which was at page 1022. This described the claimant's behaviour as erratic and that she became distressed and irritable and was raising her voice. The OH adviser noted in her report that due to her behaviour during the assessment that she asked the claimant whether she had been drinking alcohol but the claimant said no insisting she had not and began to empty out her bag and suitcase asking the OH adviser to check. The claimant then left and travelled home by plane to Northern Ireland that evening.

- 11.68. The claimant was invited to a further disciplinary hearing by a letter dated 17 January 2018 inviting her to two half day hearings on 29 and 30 January 2018 (which was the timing that had been discussed at during the first disciplinary hearing). That letter confirmed that the hearing was also to provide the claimant with the "*opportunity to address the two Bullying and Harassment grievances which you have submitted during the disciplinary investigation process and provide you with an opportunity to appeal any decision made regarding the findings*". PS was informed by MLR on 25 January 2018 that the claimant was unfit to attend the hearing but had requested that MLR attend on her behalf. PS agreed that this could take place.

#### Second disciplinary hearing

- 11.69. The hearing reconvened on 29 January 2018 with the same attendees as before except for the claimant (notes of hearing at pages 1100-1117). GK carried on with her questioning of SS that was where the previous meeting had stopped. SS went through the history of the claimant's employment and what he saw were the problems arising. He mentioned the ICT incident in October 2015 and then discussed the issues with HCPC registration at the end of 2016 (stating that as the claimant had been unregistered for a period, it would have been a serious issue if she had attended a conference during that period, although this did not take place as the claimant was off sick). He went on to discuss the claimant's absence from work in January 2017 and also the TD complaint and his attempts to resolve this informally and the claimant's comment about this. He was asked whether he had concerns about alcohol or drug use and said he had not witnessed anything causing him concern of this nature. MLR then went on to ask SS questions about the structure of his team and JW's role in managing the claimant. A number of the questions asked



were objected to by AG and MLR and he appeared to be in dispute about what could and could not be asked about. There was once again a discussion about the correct process for the claimant's grievance to be resolved. SS was then asked about his conversations with IG prior to the decision to start an investigation back in January 2017. SS said in the hearing that it was clear to him at this point that the claimant was not fit to chair a conference due to the issues that had arisen during the week and this is why he raised the matter with IG. He confirmed that he was there when the decision was made by OG and NM to move the claimant to a different team and that he supported it as he was "*worried for the service.*"

11.70. During the course of the meeting MLR produced and submitted additional documents which were notes of supervisions with SS. PS accepted these but noted that this was out of process and SS was asked questions about these by MLR. She challenged SS as to the fairness of including matters from 2015 in the investigation and he said it was if it was relevant to the investigation. Later in the meeting GK suggested that as the claimant was not in attendance that the case presented by management "*was at a disadvantage*". She suggested that all other witness statements that were in the pack were therefore accepted as a true representation and that those witnesses were also not called. MLR did not agree to this. The meeting carried on the following day (minutes at 1118-1132) and it was agreed that 2 further days would be needed to complete the hearing given the number of witnesses. Further issues were raised by MLR regarding additional documents and KE objected to this (and MLR then said that KE was bullying her). It was clear at this stage that the hearing was become side-tracked with issues being raised about process by both the respondent and MLR. There was also some conflict between MLR and AG, SS trade union representative. None of this was helpful or conducive to the smooth running of the hearing.

11.71. During further questioning from MLR SS confirmed that he had reported the incident on 22 June 2017 to NM who had then made the decision to suspend the claimant. He also confirmed that during these discussions he could not recall any mention being made of the respondent's substance abuse policy. At the end of the questions put to SS, MLR confirmed that the complaint raised against SS was withdrawn. The meeting was then adjourned again and a further invitation was sent to the claimant inviting her to two further days of hearing on 13 and 14 February 2018. The letter inviting the claimant was shown at page 1080-83. This letter confirmed that all the witnesses requested by MLR to attend had been asked but that as they would be attending as witnesses for the claimant, it was their choice as to whether to attend or not and that the management would not be calling any further witnesses. PS also e mailed the claimant on 5 February 2018 (which was forwarded to MLR the next day) asking her to clarify the grievance against JW and if this related to a data breach and asking her to confirm if she also had a complaint to

the respondent as a service user (e mails at pages 1009-10). MLR responded to this e mail on 6 February 2018 (page 1012) stated that she was puzzled by this request and referring back to her e mails of 6 and 9 November 2017 and attaching the complaints again.

11.72. The disciplinary hearing was reconvened for a third time on 13 February 2018 (minutes at page 1134-69) with the same attendees as the previous hearing. MLR carried on with questions to SS in particular with regard to the TD complaint. GK stated at one point that she felt that the process had not been fair as she had not been able to question the claimant other than at the investigation stage. MLR asked a large number of questions about the sharing of confidential information between managers which were answered by SS. This included about the events of 23 April and SS's knowledge of this. After MLR had finished asking SS questions, GK went on to ask SS further questions in particular in relation to incidents involving the claimant and alcohol which was objected to by MLR. GK made reference to the relevance of the questions as incidents "*forming a pattern*". PK then attended the hearing as a witness and was questioned by MLR and she provided information about the issue she had raised a concern about which was the allegation about the claimant being absent without permission on 6 March 2017 and confirmed that when she put in her e mail "I prefer you to come in" that she regarded this as an instruction in the context of the other e mails and calls that day. PK then left as the union representative had to leave and MLR once again complained that she found he was being aggressive.

11.73. After lunch, MLR commenced her questioning of GK. She asked GK whether she had considered whether the incidents were because the claimant could not cope and GK answered that she was not there to determine that. It was put to GK by MLR that she was conducting a fishing exercise because she asked open ended questions asking witnesses for examples of behaviours that fit the allegations made which was not accepted by GK. MLR suggested that GK had conducted a biased investigation. She was asked why she had included information in her report which predated the allegations made against the claimant and GK said she had done this as it showed a "*pattern of behaviour*" and that before starting the investigation the respondent did not have a clear pattern of issues with alcohol but she believed there was one now. MLR asked about the inclusion in JW's statement of the incident on 23 April 2017 and why this had been included and GK responded "*it relates to an incident which involved alcohol, which then relates to 1 of the allegations. As I have mentioned it appears there is a pattern of alcohol consumption.*"

11.74. MLR raised at this point that the claimant had not agreed that the second matter raised as a grievance by the claimant (relating to JW's alleged breach of confidence) to be addressed as part of the disciplinary hearing. PS then referred MLR to the letters sent to the claimant

confirming that this would be the case and MLR said that was an error on her part with PS suggesting she *“did not read the letter properly”*. GK was repeatedly asked by MLR what her opinion was on various matters in the investigation report with GK responding that it was not her view to have an opinion but just to present information. JS then attended and was questioned by MLR in particular about the 22 June incident. MLR resumed her questioning of GK and asked her about including incidents in the investigation that were resolved, specifically the issue of the HCPC registration and GK stated that although the registration had been resolved, *“the concerns around registering later and the potential issues that may cause if it were not picked up”* were not. MLR asked GK whether she had considered the respondent’s Addiction and Substance Abuse Policy during her investigation and GK referred to sections 5.5 and 5.6 of the policy (see above) and stated that the policy states that the *“employee needs to highlight having a problem which [the claimant] did not highlight. It goes on to suggest that if it is not reported/accepted then it can lead to disciplinary action.”* MLR asked GK whether she could identify where the claimant had constantly denied help or did not seek it and GK responded *“I think that is documented in the bundle clearly”* and confirmed that she did not consider section 9 of the Addiction and Substance Abuse Policy when writing her report or asking questions because the claimant *“has always stated she does not have a problem with Alcohol. Therefore management would not have had the prompt to trigger a need to follow this”*. The meeting concluded shortly after and PS informed MLR that there was one remaining day to conclude the case and for *“both sides to complete their summing up”*. MLR said she felt that this was unreasonable and she felt that the second grievance raised against JW was unresolved.

11.75. The hearing was reconvened with the same attendees again on 14 February 2018 and at the outset, PS confirmed that as the second grievance raised by JW was specific to matters in her statement prepared for the investigation, he considered that the grievance was linked to the disciplinary hearing. When asked during the Tribunal hearing about whether the respondent had followed its grievance policy in making this decision (as MLR suggested it should have been GK who made the decision as Investigating Officer) he said that the decision was made jointly as a group of professionals, that GK was part of the discussions and that the claimant and MLR had both provided their agreement. He also stated that if the claimant wished to make a service user complaint, this would need to be raised with the Crisis team and not Children’s Services as the claimant was not a service user of this area. MLR appeared to be unsatisfied with this but then did carry on her questioning of GK and subsequently went on to start presenting the claimant’s case. During this she asked for four further documents to be considered which was the e mail correspondence with NM and the claimant’s handwritten notes on the

back of her letter from IG given to her during the meeting on 30 January 2017. As MLR had not finished her summing up of case when the meeting concluded at 5pm, PS agreed that final statements should be e mailed to him by 9am on 16 February. This was subsequently extended and the document (pages 1213-1222) was submitted by MLR on 19 February 2018.

Decision to dismiss the claimant

11.76. PS gave his account of how he reached his decision to dismiss the claimant at paragraphs 27-38 of his statement. His conclusions are also set out in the dismissal letter which was sent to the claimant on 1 March 2018 (page 1066-78). He considered each of the allegations in turn and found that all 8 allegations made had been proven and each one amounted to gross misconduct. In respect of the first allegation he concluded that the claimant's behaviour during the return to work meeting on 8 November 2016 was not justified. He also concluded that her failure to register with the HCPC until 23 December 2016 left a period when she was unregistered. He said he also took into account the claimant's failure to attend work on 23 January 2017; to cover pre-arranged case conferences in September 2016 (in particular how this had been portrayed to her manager by the claimant) and the incident of 22 June 2017 where the claimant stuck her fingers up at colleagues and swore in an open office. His conclusion was that this demonstrated disrespectful, disruptive and negative behaviour towards her role. The second allegation of failure to follow absence reporting procedures resulting in absence without permission on 23 and 26 January 2017 he also round proven, citing in particular the absence of any written evidence of a request for annual leave and evidence that she had been asked to attend.

11.77. The third allegation regarding the claimant being unprofessional and disrespectful in a child protection conference on 26 August 2016 he found proven and that the claimant had not satisfactorily explained it. He confirmed that he concluded that the claimant's behaviour had been inappropriate as even though it was correct to point out failings of social workers, he would expect this to have been raised outside the case conference itself. He explained that he had considered that the claimant had the opportunity to attend the grievance hearing conducted at the time and had the opportunity to answer this allegation during the investigation and hearing. He also concluded the claimant had not followed the instruction of PK to attend work on 6 March 2017 and not followed the correct procedure so the fourth allegation was also proven. He accepted during cross examination that the claimant may well have been suffering with her mental health at this time and he did take this into account overall but not specifically as this was not given as an explanation as to why she had not followed the correct procedure that day.

11.78. He then concluded that the claimant had attended work incapable

of safely performing duties due to alcohol, drugs or other substances on 22 June 2017. He explained that he had reached this conclusion taking into account statements of witnesses and their detailed description of her behaviour. He said in particular he considered the claimant's lack of explanation for her behaviour that day and that her behaviour and the smell of alcohol described had mirrored what he had witnessed himself during the disciplinary hearing on 18 December 2017. He said he specifically considered the denial of the claimant of having an alcohol problem and that MLR had also stated that the claimant did not have an alcohol misuse issue. He said he had concluded that there had been a "*pattern of behaviour linked to alcohol misuse*" by the claimant in particular citing her original DBS check, the ICT incident and the claimant discussing this with a colleague. He therefore concluded that this allegation had been proven.

11.79. During cross examination PS explained that he did have the information provided by JW about the incident on 23 April 2017 when he considered this allegation, although he did not consider this to be a major piece of evidence and was not important in making his decision making. He told us he considered general issues regarding the emotional wellbeing of the claimant at the time but it had never been put to him that the claimant's behaviour on 22 June 2017 was due to an acute mental health episode (rather than the witnesses to the event had been mistaken about how the claimant was behaving) nor had it been put to him that the claimant was behaving in the way she had been because of medication. He was asked whether he made any reference to the respondent's Addiction and Substance Abuse policy when considering this allegation and confirmed that to the best of his knowledge this was only applicable if the alcohol user had admitted that they had a problem so was not relevant to the claimant, who had not. PS said he did not consider seeking a medical report as there had been so many referrals to OH already and he had the information from those reports to hand.

11.80. Regarding allegation 6, taking unauthorised absence on 23 June 2017, he concluded this was proven as the claimant did not dispute this and although the day in question as a Friday had not been part of the claimant's normal pattern of work, she had agreed to work this day as part of the phased return she had agreed to. Allegation 7 related to abusive language and behaviour he found to be proven on the basis of the claimant's admitted behaviour on 22 June 2017 and statements given by witnesses on that day. He then concluded that as a result of all other allegations being proven that the claimant had committed a breach of trust and confidence, finding the eighth allegation proved. This allegation did include a suggestion that the claimant was "*bringing the organisation into disrepute*". PS did not include this allegation or his conclusions on this in his dismissal letter (page 1076) and we did not hear evidence as to whether any findings were made on this particular point. It would appear

to us that this particular part of the allegation was not proved, just the first element of it.

- 11.81. PS also set out his brief findings in relation the grievances raised by the claimant setting out 16 “overriding issues” that MLR had submitted on the claimant’s behalf which he had *“taken to be a summary of the grievances that [the claimant] had submitted to the Council on 6 September and 6 & 9 November 2017.”* In particular on the issue raised of whether managers and human resources had taken action on an alcohol problem he concluded that the claimant had *“repeatedly denied having an issue with alcohol which made it impossible for managers or HR to take any action with regard to this.”* He concluded that he saw no evidence of discrimination on the basis of the claimant’s nationality or because she had depression. He also concluded that the *“investigation report presented was comprehensive and fair and I did not find that the allegations had been magnified”*. He went to separately address the issue raised as a grievance against JW regarding the additional information JW had supplied about the incident on 23 April 2017. He said that the inclusion of this information was relevant as it *“further cited concerns raised by external parties to the Council in regard to alcohol”* and that the claimant was aware of its inclusion before the disciplinary hearing and so was able to submit a response.
- 11.82. PS confirmed during cross examination that he was aware of the OH reports and considered the OH evidence when making his decision but that there was no specific reference to the claimant’s mental health being put forward as an explanation for her behaviour. He said it was apparent to him that the claimant had mental health issues but that no evidence had been offered that any behaviour or incident was a result of any acute mental health episode. PS was specifically asked about the date of the incidents and their proximity to the claimant’s absence for mental health reasons during cross examination and said that he could not remember whether this was considered specifically but that he did consider all evidence he had been presented with.
- 11.83. PS went on to consider the appropriate sanction and in particular the nature of the claimant’s role as IRO which involved safeguarding vulnerable children and young people. He concluded that the claimant’s integrity and honesty had been brought into question during the disciplinary process. He stated that the claimant had been unable to explain her decisions of behaviour and that the service had been left vulnerable and cases had not been covered. He went on to stated that staff members had felt intimidated and managers undermined by the claimant’s actions. He concluded that the claimant’s actions *“fell significantly short of the standards I would expect from an employee within the service”* and amounted to a *“significant breach of the trust and confidence that the Council could hold in you as an employee”*. He

therefore concluded that the claimant should be summarily dismissed. During cross examination PS explained that each of the allegations could in some cases be explained away but it was the totality of the number of incidents which constituted the misconduct. He confirmed that he made a finding of misconduct in respect of each allegation individually but his biggest concern was the consolidation of these events and his conclusions came from combination of all the events.

#### Appeal against dismissal

- 11.84. The claimant submitted an appeal against her dismissal on 21 March 2018 (pages 1059-1065). This contained various grounds for appeal firstly in relation to the grievances raised by the claimant against JW and then other matters contained in the dismissal letter and complaints about the process and the way it was carried out. She went on to complain that the allegations had been misconstrued, magnified and taken out of context and there had been no informal process before disciplinary action was taken. She also challenged the evidence presented on a number of allegations stating that these were unproven.
- 11.85. An appeal hearing was held on 29 June and 17 August 2018 before a panel of respondent councillors (notes of appeal hearing shown at pages 1226-71). In advance of the appeal hearing, PS prepared a detailed report to be submitted to the appeal panel which was shown at pages 1031-1056. This set out the background, summarising the allegations made and the disciplinary process that took place, appending a large number of the documents relevant to this. It went on to set out a "Management Statement of Case" summarising the conclusions reached by PS on all the allegations in a similar manner as was set out in the dismissal letter. It then went on to set out the response of PS to each of the grounds of appeal raised.
- 11.86. The claimant was still unwell and unable to attend any of the appeal hearings so MLR attended on her behalf. The appeal hearing was chaired by FA with two further councillors also on the panel. PS attended to present the respondent management case and KE and a further HR representative Ms K Mihajlovic also attended. At the outset of the appeal, FA explained that the appeal would not be rehearing of the case but an opportunity for the claimant to present grounds of appeal and that no witnesses would attend. FA outlined the 5 grounds of appeal that the claimant relied upon, namely that firstly the disciplinary, grievance, harassment and bullying procedures had not been followed; secondly that all the evidence was not considered or was ignored; thirdly that the chair of the disciplinary hearing had shown unfair bias or prejudice (including following questionable HR advice); fourthly that the severity of the action was too great for the offence and fifthly that there had been race and disability discrimination, victimisation and harassment.

- 11.87. PS then presented the management cases and answered questions from MLR and then from the appeal panel members. The panel asked whether the claimant had attended an occupational health appointment at any time after the disciplinary hearing on 18 December 2017 and it was confirmed she had not. The process of working from home was also discussed. MLR went on to make detailed submissions to the panel raising various points about the various allegations including that it was the role of the IRO to challenge professionals in case conferences and that the respondent had not fully considered the claimant's reasons for walking out of her return to work meeting with SS. MLR complained about not being able to cross examine JW during the process and went on to explain that the claimant still maintained that the claimant's behaviour at the disciplinary hearing was not alcohol related but was related to the fact that the claimant was having a nervous breakdown. She made points about the process and in particular the grievance being considered as part of the disciplinary hearing. MLR went on to go through the various documents in some amount of detail pointing out what she saw as errors in the findings and conclusions reached by PS on the evidence. It was pointed out to MLR by FA that the appeal hearing was not a rehearing of the evidence but a chance for MLR to present the grounds of appeal. MLR then accused the panel of behaving in a racist manner towards her in the way it was conducting the appeal hearing.
- 11.88. The appeal hearing concluded at 4.30 in the afternoon and as MLR indicated she had not finished presenting the claimant's case, it was then reconvened on 17 August 2018. MLR continued to present the claimant's case and again referred to documents at this point focussing on what she said were breaches of its processes and procedures. She raised that the claimant had been suffering from depression and stated that the respondent had not acknowledged this or attempted to support her. She spent some time going through the respondent's Addiction and Substance Abuse policy and highlighting her concerns that this had not been applied. In particular she raised the fact that the respondent to date and indicated that as the claimant had not acknowledged an alcohol problem with them, that this meant they no longer had to follow the Addiction and Substance Abuse policy. She also suggested that the only potential issue that could constitute gross misconduct was the incident on 22 June 2017 and had the Addiction and Substance Abuse policy been followed it would not have resulted in dismissal. She also complained about the respondent raising matters that took place some considerable time before the investigation into the claimant commenced and had not been addressed as potential misconduct at the time.
- 11.89. PS and the appeal panel then asked questions of MLR which included questions about the offer of counselling by the respondent and also the issue of the application of the Addiction and Substance Abuse Policy. Following a summing up by PS and then MLR, the panel



adjourned to make a decision. The appeal panel decided not to uphold the claimant's appeal and all grounds for her appeal were dismissed. The outcome letter which summarises the decision of the appeal panel was sent to the claimant on 7 September 2018 and is shown at pages 1272-4. It concluded that "*the allegations did constitute gross misconduct and were therefore considered appropriately*" FA was asked whether the appeal panel gave any consideration to obtaining a medical report to obtain information to consider the appeal. FA said that this was not done and in general if an appellant wanted to provide any evidence it would be considered but this was not raised in this case. She confirmed that no evidence was raised in mitigation to suggest that health had played a part in any of the incidents in question.

- 11.90. We heard evidence that following the claimant's dismissal, the claimant was suspended from the HCPC register on an interim basis with effect on 18 September 2018. The suspension order was subsequently revoked on 26 November 2019 (shown at pages 573-5)

### **The Law**

12. The Claimant complains of unfair dismissal contrary to **Section 94 of the ERA**. The Respondent alleges that the dismissal was on the grounds of gross misconduct. The employer must (a) show the reason for the dismissal and that it is one of the potentially fair reasons set out in **section 98(1) and (2)** and; (b) if the employer has done this, then the Tribunal must then determine whether dismissal was fair or unfair under **section 98(3A) and (4)** depending on the circumstances including the size of the administrative resources of the Respondent.
13. Conduct is one of the six potentially fair reasons for dismissal set out in **section 98**. If a dismissal is asserted to be on the grounds of conduct, then the test laid down in **British Home Stores –v- Burchell [1978] IRLR 379** requires an employer to show that:-
- 13.1. it believed the employee was guilty of misconduct;
  - 13.2. had reasonable grounds to hold that belief;
  - 13.3. it formed that belief having carried out a reasonable investigation, given the circumstances.
14. In determining the question of reasonableness it was not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether "*the dismissal lay within the range of conduct which a reasonable employer could have adopted*" as set out in the case of **Iceland Frozen Foods v Jones [1982] IRLR 439**.
15. The "range of reasonable responses" test applies not only to the actual decision to dismiss, but also to the procedure adopted by the employer in

putting the dismissal into effect - Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.

16. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: A v B [2003] IRLR 405.
17. A fair investigation requires the employer to follow a reasonably fair procedure. Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and the appeal is to be treated as part and parcel of the dismissal process: Taylor v OCS Group Ltd [2006] IRLR 613.
18. Tribunals must not put themselves in the position of the employer and consider what they themselves would have done in the circumstances. It must not decide what it would have done if it had been management, but whether the employer acted reasonably. A decision must not be reached by a process of substituting themselves for the employer and forming an opinion of what they would have done had they been the employer. — Grundy (Teddington) Ltd v Willis 1976 ICR 323, QBD; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA, .
19. The relevant sections of the Equality Act 2010 applicable to this claim are as follows:

#### **4 The protected characteristics**

*The following characteristics are protected characteristics: ... disability”*

#### **6 Disability**

*(1) A person (P) has a disability if -*

*(a) P has a physical or mental impairment, and*

*(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

#### **13 Direct discrimination**

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”.*

#### **15 Discrimination arising from disability**

*(1) a person (A) discriminates against a disabled person (B) if –*

*(a) A treats B unfavourably because of something arising in consequence of B's disability, and*

*(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

*(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability”.*

**23 Comparison by reference to circumstances**

*(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case.”*

**26 Harassment**

*(1)A person (A) harasses another (B) if—*

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

*(b)the conduct has the purpose or effect of—*

*(i)violating B's dignity, or*

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

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

*(a)the perception of B;*

*(b)the other circumstances of the case;*

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

**136 Burden of proof**

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

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

20. In relation to the section 13 claim, the following authorities were relevant:

Anya v University of Oxford & Another [2001] IRLR 377 - it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.

The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if

the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Nagarajan v London Regional Transport [1999] IRLR 572, HL, -The crucial question in every case was, *'why the complainant received less favourable treatment ... Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'*

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for ...'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'*

Bahl v Law Society [2003] IRLR 640 – *“where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.”*

21. In relation to section 15 EqA, the case of Pnaiser v NHS England and Coventry City Council EAT /0137/15 confirmed as follows:

(a) *A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

(b) *The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial)*

*influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*

*(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant .....*

*(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links ...[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

*(e) ..... However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

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

*(g) .....*

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

22. City of York Council v Grosset [2018] WLR(D) 296 also confirmed that section 15 (1) (a):

*"requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability".* This case also established that there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test

23. The case of *South Warwickshire NHS Foundation Trust v Mrs S Lee and Others: UKEAT/0287/17/DA* was also referred to illustrate how the question of causation is approached in terms of the decision in Pnaiser above and the application of the burden of proof provisions in s 36 EqA.

24. In relation to harassment the following authorities were relevant:

Richmond Pharmacology V Miss A Dhaliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

Pemberton v Inwood [2018] EWCA Civ 564. Underhill J "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).

25. In addition to the above both parties referred the panel to a number of additional authorities which are not all listed. These were reviewed and considered by the Tribunal in making its decision but it was not necessary to include each one above.

## **Conclusion - Hayes v Coventry CC**

### **Unfair dismissal complaint**

26. We firstly conclude that the respondent has discharged the burden of proof in establishing that conduct was the reason for dismissal. We were satisfied that the dismissing officer, PS genuinely believed that the claimant had committed the seven allegations of misconduct that she had been accused of and that accordingly, as per allegation 8, that she had committed a breach of trust and confidence and brought the council into disrepute (paras 11.76-11.80 above). The appeal hearing chaired by FA also considered the matter, and we were also satisfied by the genuineness of the belief that the claimant was guilty of misconduct as alleged (para 11.89 above). Both PS and FA gave clear and convincing evidence at the hearing as to what they had concluded at the time of dismissal (and appeal as applicable) and there is no evidence which casts any doubt as to the genuineness of this belief. There was some suggestion from the claimant that the respondent had been engaged in a "witch hunt" to remove her from her role and that allegations has

somehow been trumped up by the respondent to support her dismissal. However there was no evidence that either PS or FA was not genuine in the belief they both held that the claimant had committed the acts of misconduct complained of.

27. We have then gone on to consider whether the respondent acted reasonably in all the circumstances in treating the misconduct as a sufficient reason to dismiss the claimant. The first question we considered was whether the respondent had reasonable grounds for that belief that the claimant had committed misconduct. There were 7 separate allegations of misconduct levelled against the claimant and a further allegation that the 7 previous matters meant that there had been a cumulative breach of trust and confidence and that the respondent had been brought into disrepute. Ms Carter noted that the respondent found 5 instances of gross misconduct and 2 of misconduct but for the purposes of considering whether there were reasonable grounds for the respondent's belief that the claimant had committed misconduct (which is the test we are concerned with in an unfair dismissal claim) the distinction is not important. Ms Carter submits that there were clearly reasonable grounds for findings of misconduct in all the individual allegations having carefully considered each one. She makes reference to the lengthy investigation report and additional documents submitted which amounted to considerable evidence on which PS could find misconduct. Mrs Lawrence Russell submitted that in particular when considering allegations 2, 4 and 6 relating to absence from work/failure to follow absence procedures, the respondent had no evidence that any of this amounted to a deliberate act on the claimant's part and each of the instances could be explained as a misunderstanding/error and because of the claimant's ill health.
28. We have considered whether the respondent had reasonable grounds for finding misconduct on each of the allegations as follows:

Allegation 1 – disrespectful, disruptive and negative behaviour and failure to follow instructions

29. This allegation was made up of a number of incidents which the respondent relied upon to support its conclusion. Our findings of fact at para 11.76 set out the incidents relied upon and what PS found on each matter. The facts behind each incident are not in dispute but rather the interpretation of what such facts show. It is clear that the claimant did walk out of a return to work meeting on 8 November, fail to register with the HCPC on time leaving a gap in registration; not attend work on 23 January 2017; pull out of covering pre-arranged case conferences using perhaps unhelpful and unprofessional language and swear and stick her fingers up at colleagues in the office on 22 June 2017. We did have concerns about the inclusion of matters which appeared to have been resolved within this allegation (see our conclusions on the fairness of the process below) but on balance find that the respondent had

reasonable grounds for finding misconduct in particular in relation to the claimant's behaviour on 22 June 2017.

Allegation 2 – Failure to follow absence procedures resulting in absence without leave on 23 & 26 January 2017

30. It is clear that the claimant did not attend work on the days in question and that PS having considered the evidence contained in the investigation report prepared by GK (see para 11.59) including the exchange of text messages which we deal with at paras 11.24 and 11.25 reasonably came to the conclusion that there had been an absence of consent, failure to follow procedures and unauthorised absence. A different dismissing officer may have reached a different conclusion, in particular with respect to the absence on 23 January 2017, but we are not in any way able to say that the respondent did not have reasonable grounds for reaching the conclusion it did. This was clearly a conclusion not outside the range of reasonable conclusions to have reached and there were sufficient grounds for coming to it.

Allegation 3 – behaviour at a child protection conference on 25 August 2016

31. PS reached his conclusion that the claimant had behaved in an unprofessional and disrespectful manner having taken into account the notes of an outcome to the grievance raised by TD against the claimant about this matters (see our findings of fact on this at para 11.32). This is strong and persuasive evidence and we are also satisfied that PS considered the claimant's explanation as to what happened in the conference which she provided at the investigation hearing held on 14 June 2017 when making his decision (see para 11.45). There is no doubt here that the respondent did have reasonable grounds for reaching its conclusions on this matter, even if the claimant (or indeed a different manager) would or could have reached a different one.

Allegation 4 – Failure to follow a management instruction and being absent without permission on 6 March 2017

32. We are satisfied that the respondent had reasonable grounds for concluding that this allegation had been made out. The facts behind it were essentially not disputed by the claimant and PS relied on the e mails sent by PK during the day in question (see para 11.33) together with the evidence given by PK in person at the disciplinary hearing on 13 February 2018 (para 11.72) all of which supported the conclusions reached.

Allegation 5 – Attending the workplace being under the influence of alcohol, drugs and other substances

33. There was a significant amount of evidence concerning the events of 22 June 2017 which was largely gathered by LH in the period after the incident. Our findings of fact about this investigation are set out at paras 11.52-11.58 above. In total 8 witnesses were interviewed and it is fair to say that there



were differing accounts of the claimant's behaviour. MLR pointed out the inconsistencies in these accounts at various points both during the disciplinary process and indeed at the Tribunal hearing itself. Nonetheless there were several witnesses who gave accounts of the claimant's behaviour in very strong and clear terms stating that they observed what they believed was the claimant being intoxicated. The statements from ZA, IP, KO and RR all made reference to this in fairly graphic terms in some cases. Other statements were less clear and did not necessarily support the conclusion reached by PS. However we take note also of the factors PS took into account in reaching his conclusion in particular the claimant's inability to explain why her behaviour might have been observed as described in the statements. We also note that PS said he observed similar behaviour himself of the claimant on 18 December 2017 at the disciplinary hearing (and that he had seen evidence of the claimant having a pattern of behaviour around alcohol use). We do have reservations about how including some of the historic information in the investigation impacted procedural fairness (see below) but it is clear that PS did have grounds for reaching the conclusion that the allegation was proved. Again a different decision maker may have placed more weight on the accounts that did not observe or note intoxication, but it was certainly not outside the range of reasonable responses for PS and the respondent to have reached this conclusion on the evidence found.

Allegation 6 – unauthorised absence from work on 23 June 2017

34. The facts around this are not disputed nor is in fact the reason or explanation for the absence, namely that the claimant had mistakenly thought she was not due to work on the day in question, as Friday was not usually her working day (paras 11.50 and 11.52). There were clearly reasonable grounds to find that the claimant had not attended work on a day she had agreed to do so we conclude that the conclusion that this amounted to an act of misconduct was just about formed on reasonable grounds. Another decision maker may have placed more weight on the fact that there appears to have been a misunderstanding here (as a result to changes to normal working arrangements as part of a phased return) and concluded that this was not an act of misconduct. Nonetheless we cannot conclude that the conclusion reached by PS was one which was outside the range of reasonable conclusions he could have reached on the evidence available.

Allegation 7 - using abusive language and demonstrating abusive behaviour in the workplace

35. The particular conduct that this allegation relates to was in part at least admitted by the claimant who agrees that she stuck her fingers up at colleagues when she was in Broadgate House on 22 June 2017 (para 11.57). The claimant denies using the language she was accused of. However given the accounts of the witnesses and the claimant's admitted behaviour, it was clear to us that the belief that the claimant had committed this act of misconduct was based on reasonable grounds.

Allegation 8 - Breach of trust and confidence and bringing the organisation into disrepute

36. There are in effect two separate but linked allegations here. The first relates to a breach of trust and confidence. The second relates to disreputable conduct. We refer to our findings of fact at 11.80 above. PS effectively determined that as a result of all the other allegations put together that there had been a loss of trust and confidence in the claimant, so this allegation was proven. This is a cumulative matter, and as we have found that the respondent had reasonable grounds for concluding that all the other allegations had been proven, we also conclude that it cumulatively had reasonable grounds for reaching the conclusion that these had amounted to a breach of trust and confidence. The allegation of disreputable conduct does not appear to have been proven as it is not referred to further in the dismissal letter or in the evidence we heard from PS. We would have had doubts as to whether the respondent did have reasonable grounds for a finding that the claimant had brought the organisation into disrepute. This is a very high bar to show and there was really very little evidence as far as we heard about this particular point. However as this was not relied upon or referenced further as a ground for dismissal we do not need to consider this further.
37. The next question is whether at the time the belief was formed the respondent had carried out a reasonable investigation. It is clear to us that the respondent expended a considerable amount of time and resources on its investigation process which was led by GK. Other employers may well have carried out the investigation differently and taken different steps but what we must consider is whether the investigation conducted by the respondent outside the band of reasonable responses that an employer may take. The main criticisms of MLR and our conclusions as to whether these apply and put the investigation outside the range of reasonable responses are as follows:
- 37.1. There was a finding that the claimant was intoxicated at work which was found against the claimant despite the evidence
- This is dealt with above when we considered whether the respondent had reasonable grounds for concluding that the claimant had committed misconduct on the 22 June 2017. Whether or not a different decision maker would have examined the evidence and decided that it was not sufficient to show the claimant was intoxicated at work, or indeed what the Tribunal itself would have decided, is not the relevant test. What we had to determine was whether in making the finding that the claimant was intoxicated at work, the respondent had made a finding that was outside the range of reasonable responses of findings that an employer could have made when faced with the evidence in front of it. That is not a conclusion we are able to reach.
- 37.2. The respondent undertook a biased investigation which ignored or minimised mitigating facts.

Firstly we did not in any way conclude that any of the individuals involved in the investigation were biased against the claimant in the sense that they were deliberately acting in a partial or unfair way in order to cause the claimant to be dismissed. GK approached her investigation in a methodical manner looking at each allegation that was raised and gathering evidence about that allegation. However we were concerned around certain aspects of that investigation in terms of how it investigated possible mitigating facts and we set out our concerns below:

- a. The investigation into many aspects of the conduct alleged did not examine or look for evidence as to how the claimant's ill health could have played a role or be a mitigating factor in any of the incidents that took place. We have heard much about this since the dismissal (albeit that any actual medical evidence is still not forthcoming). However this was an issue in play at the relevant time too. The claimant had at this stage been diagnosed with PTSD (para 11.9). Having returned to work in March 2016 the respondent was aware that the claimant was experiencing difficulties and SS had been supportive allowing her flexibility around communication (para 11.10); offering her the support of a female colleague (para 11.11) and acknowledging an increased level of absence. The claimant had a considerable amount of sick leave following her return to work after the fire in March, some of which was stress and anxiety related (para 11.11, 11.14 & 11.15). SS discussed issues that were of concern to the claimant during October 2016 including the incident involving domestic violence and the attendance of police at the claimant's neighbours house at the end of October 2016. The claimant had attended an OH appointment in July 2016 where it had been noted that there were ongoing issues which could lead to further absence from work (which did in fact happen). The events that led to a disciplinary investigation being commenced came to a head in the week of 23 January 2017 when SS became concerned about the claimant's erratic behaviour (see para 11.29) and that although he did not see this as a health issue, he did think that the claimant was "*not fit to chair a conference*".

During the investigatory interview of SS by GK on 22 February 2017 some of these matters were raised again although no specific questions were put to SS about the claimant's health (see para 11.34 above). GK did not seek OH or medical advice during the investigations as to whether the claimant's ill health may have played any part in her erratic behaviour, stating that this was because no issues were raised by the claimant (para 11.58). The claimant did attend an OH appointment during the time that the disciplinary issues were being investigated. This was a result of the safe and well visit conducted by JW on 23 March 2017. This did not address any of the issues that had arisen regarding the claimant's conduct to date or ask for an OH opinion about this. It was entirely separate to the

investigation process. It is correct that the claimant herself did not raise matters of her health having been or impacted her behaviour during the investigatory interviews she attended, but she was never asked about this by GK (see para 11.58). The claimant's health seems only to have been explored in the context of whether she was fit to participate in the process or whether adjustments were required (see paras 11.45, 11.65-11.68) which was something the respondent correctly considered. However it seems to have been almost disregarded in terms of how it might have explained or mitigated some of the conduct the claimant was accused of. The respondent relies on the fact that this was never raised specifically by the claimant as an explanation for any of the behaviour she was accused of. It also says that it had various OH reports to hand during the investigation and disciplinary process which were taken into account. However neither the investigating or dismissing officer seems to have applied their mind to the impact of the claimant's ongoing mental health issues and any possible relationship with the conduct alleged (or even asked any questions of the claimant about this), nor sought any OH advice on this particular point. This seemed to us a significant procedural omission and may have elicited further relevant evidence that the dismissing officer might have been able to consider as either mitigation or explanation. This may not ultimately have changed the final outcome for the claimant (given what we say below and this will be explored further in the event of a remedy hearing) but we conclude that to have failed to investigate such matters was outside the range of reasonable responses, given the particular circumstances in this case.

- b. Individuals interviewed as part of the investigatory process were permitted to add to their statements providing significant additional information which was then not further examined or investigated. In particular we had concerns about the detailed statement provided by JW following the interview that took place on 7 March 2017 (see para 11.36). In dealing with the questions posed by GK, JW did not only set out the events she was involved in factually, but included her own opinion about what this meant and used very emotive language to describe the claimant's behaviour. It is clear to us that JW was in her statement presenting a picture of the claimant in a detrimental way, rather than simply setting out the factual incidents she was involved in. JW went on to describe incidents that had taken place after the events under investigation including the safe and well visit conducted on 23 March and the reports emanating from the police following the incident on 23 April 2017. This was highly prejudicial information to the claimant and it does not appear that further investigation was undertaken by GK with either JW or anyone else involved in these incidents to give a more balanced view or to explore the validity of this information. This in our view was something that any reasonable

employer would have done having been faced with the significant amount of new information it was provided with. We consider that the failure to conduct further investigations into such matters but to have included the information without further examination was something that was outside the range of reasonable responses as to what an employer should do when faced with this information.

38. When looking at whether the dismissal was reasonable in all the circumstances, we must then consider whether respondent otherwise acted in a procedurally fair manner. In the first instance we conclude as submitted by Miss Carter that the respondent broadly complied with the ACAS Code of Practice in that it investigated the issues, informed the employee in writing of the allegations, conducted a disciplinary hearing and informed the employee of the decision in writing and informed the employee of his right to, and held, an appeal. However further on this issue the claimant complains of a number of other matters that are said to be procedural flaws upon which we set out our analysis and conclusions below:

38.1. The respondent failed to investigate (what so ever) the claimant's grievance submitted 9 November 2017

We do not accept that the respondent did not investigate the grievances raised by the claimant. See our findings of fact at 11.63 (MLR agreed that the grievance would be dealt with as part of the disciplinary process); 11.65 (the claimant was informed in writing that the points of grievance could be raised at the disciplinary hearing); 11.68 (the claimant was informed in writing that the two grievances could be raised at the disciplinary hearings to be held in January 2018); 11.69 (the grievance was discussed at the hearing on 29 January 2018); 11.71 (e mails were exchanged between PS and MLR about the claimant's grievances in February 2018); 11.73 (MLR was able to ask questions of the respondent witness relating to issues raised in the grievance); 11.75 (issues raised in the grievance were discussed again); and significantly 11.81 (PS set out his findings and conclusions on the matters raised in the grievances). The respondent did investigate and respond to the claimant's grievance raised on 9 November 2017. It appears to us that what the claimant is really complaining about here is the perceived lack of any action being taken against JW by the respondent about the matters complained of. MLR made several references to her view that JW should have been investigated and suspended as a result of the claimant's complaints against her (see para 11.62). However ultimately action it takes against other employees is a matter for the respondent and does not impact directly on the claimant's dismissal and its fairness .

38.2. The respondent took regard to matters which were over 12 months old

It is clear that at the time PS was involved in the disciplinary hearings and

certainly at the time he made the decision to dismiss the claimant on 1 March 2018 that some of the matters related to incidents that had occurred well over 12 months ago. The first of the allegations including something that took place on 28 September 2016 and the third allegation related to a child protection conference that took place on 25 August 2016. It is far from satisfactory that it took so long for such matters to be dealt with. However we do note that investigations commenced into such matters on 30 January 2017 and 8 March 2017. There were very many reasons why such matters took so long to be addressed. The claimant was off sick on many occasions during this time. The disciplinary allegation in relation to the complaint from TD only crystallised once the grievance had been investigated and heard.

We were more concerned that some of the allegations that were eventually included as allegations of gross misconduct against the claimant appeared to relate to matters that had already been addressed informally or resolved. In particular, we refer to the claimant informing SS on 29 September that she would no longer cover case conferences. As we noted above, at the time, SS did not consider that this was an act of misconduct although it was disrespectful and rude (para 11.14). In addition the events of the return to work meeting on 8 November 2016 were not raised at the time and indeed the claimant and SS had been in regular communication after that meeting discussing various matters (see paras 11.19, 11.22 and 11.23). The HCPC registration had also been resolved by the time the disciplinary allegations were being investigated (see para 11.22). Including these particular incidents as allegations of gross misconduct offences when they appear to have been already dealt with was not appropriate or fair and we conclude that the respondent's action in doing so was outside the range of reasonable responses.

38.3. The respondent failed to give the claimant a right of response to a Social Worker complaint against her during the disciplinary process.

We do not accept that the claimant did not have a right of response to the complaint made by TD against her during the disciplinary process. First of all we note that following receipt of the grievance from TD by the respondent on 10 October 2016 (see para 11.15), the claimant was informed on 13 December 2016 that an investigation would take place and we would be invited to a meeting where her response to the complaint would be considered (para 11.21). The meeting was rearranged twice at the claimant's request although ultimately the claimant did not attend. She clearly had the chance during this period to either attend in person to provide her response or to submit something in writing to KR who was hearing the grievance. Moreover even after the grievance outcome was confirmed, and disciplinary action was instigated, the claimant was given a further opportunity to explain what had happened. This was discussed in detail during the investigatory meeting with GK on 14 June 2017 (para

11.45) and again during the disciplinary meetings held 29 January 2018 (para 11.69) and 13 February 2018 (para 11.72).

38.4. Prior to formal action, there was no informal process on some matters or managerial action

It is correct to say that some of the matters relied upon as gross misconduct had not been raised by the respondent as matters of concern before formal a formal disciplinary investigation took place. However in general the respondent did try to deal with some of the more significant matters that were appropriate for formal action informally first. It attempted to resolve the issue that arose with TD informally (see paragraphs 11.13 and 11.15). The claimant was informed on 23 January 2017 of the absence reporting processes she must follow (see para 11.26). However some of the matters were deemed by the respondent not to be appropriate to be addressed with informal or managerial action e.g abusive language and behaviour and alleged intoxication at work. We conclude that the decision to move straight to disciplinary investigation and action for such matters was within the range of reasonable responses, given the seriousness of the alleged conduct involved.

38.5. No reference was made to the Harassment and bullying policy;

It is not entirely clear what elements of the harassment and bullying policy that the claimant believes should have been referred to by the respondent and at what point. This appears to relate to the complaints made by the claimant during the disciplinary process that she was being subjected to bullying and harassing behaviour by the respondent's managers, SS, JW and PK and SU. The allegations were investigated as part of disciplinary process with the claimant's agreement to this (see paras 11.63, 11.65 and our conclusions at para 38.1 above). Having read and reviewed the respondent's harassment and bullying policy ourselves as part of our deliberations and in the absence of any particular sections being identified as relevant, we were not able to conclude that the failure to refer to it specifically was outside the range of reasonable responses in this case.

38.6. The investigation was not carried out in reasonable time;

The investigation into the various allegations of misconduct did take a long time to be concluded. The investigation by GK was commenced in February 2017 (para 11.34) and was not completed until the investigation report was presented to PS in October 2017 (para 11.59). On any analysis for a disciplinary investigation to be ongoing for 9 months is far from ideal. The investigation into the first disciplinary allegation made against the claimant on 30 January 2017 (para 11.30) proceeded relatively quickly with all the main witnesses being interviewed during February and March 2017. However a second disciplinary allegation was made against the claimant on 8 March 2017 in relation to the TD complaint and being absent without leave on 6 March 2017 (para 11.37). The claimant was off

sick during this period and it is clear from all our findings of fact from around this time that she was very unwell (see paras 11.39-11.41). She was not interviewed until 4 May 2017 for the first time shortly after which she had a further period of sickness absence for almost a returning on 13 June 2017 and was then interviewed again on 14 June 2017 (see para 11.44). There then followed the incident on 22 June 2017 and the third disciplinary allegation being notified to the claimant on 26 June 2017 (para 11.51). This necessitated a further detailed investigation which was carried out by LH and took from early July until 18 August 2017 when the claimant was interviewed (paras 11.52-11.57). A substantial amount of information had been gathered by this point and in the particular circumstances of this case, with the claimant absent for much of the period, we do not believe that the respondent acted outside the range of reasonable responses in the length of time it took to investigate the matter.

38.7. The respondent failed to follow the Grievance procedure;

We understand that this allegation largely relates to the respondent's decision to deal with the claimant's grievances raised as part of the disciplinary process. MLR referred us to the submissions made at the claimant's disciplinary hearing (at page 899) where it is alleged that the respondent is in breach of clauses 2.5, 8.1 and 8.2 of the Grievance Procedure (set out at para 11.5 above). It appears to be suggested that GK as the "officer dealing with the disciplinary investigation" should have met with the claimant and listened to her grievance to decide "*whether a separate grievance hearing is necessary or whether the issues raised can be dealt with as part of the disciplinary process*". We refer to our findings of fact at paras 11.61, 11.62, 11.63, 11.65, 11.68 and 11.75. We entirely accept the explanation of PS that the decision as to whether to include the grievance in the disciplinary considerations was made by him and GK jointly and moreover that this had been agreed to by the claimant via her representative. We do not conclude that there was a failure to follow the Grievance procedure in this regard and the respondent's actions regarding how it addressed the complaints made were well within the range of reasonable responses.

38.8. The respondent failed to adhere to the Disciplinary procedure;

MLR referred us to the submissions made at the claimant's disciplinary hearing (at page 899) where it is alleged that the respondent is in breach of clauses 1.3, 1.4, 2.1, 2.3, 2.12, 3.3.1 and 3.3.2 of the disciplinary procedure (referenced at para 11.5). We have read and considered all of these sections as part of our deliberations and cross referenced our findings of fact above and could not conclude that there had been a breach of these particular provisions. Nothing done by the respondent in this regard would fall outside the range of reasonable responses in the way it applied its own Disciplinary Procedure.



38.9. The respondent failed to adhere to the Addiction and Substance Abuse policy;

In her submissions made at the claimant's disciplinary hearing (page 899) MLR alleged that the respondent was in breach of clauses 3, 2b, 2c, 5.1, 5.2, 5.4, 7.1, 9.1-9.6 of its Addiction and Substance Abuse policy. The use and potential abuse of alcohol was a feature throughout this case and it despite this, we were not satisfied the respondent did not have regular and consistent recourse to its own policy in this regard. After having suspicions of possible alcohol misuse during the welfare check carried out by JW on 23 March 2017, an OH referral is made which was entirely appropriate (see para 11.39) and during this it is correct that the claimant denied having a problem with alcohol. The claimant had also denied that she had an alcohol problem during an earlier informal conversation about this with SS on 24 November 2015 (see para 11.7). However during and after the incident on 22 June 2017 where the respondent alleges the claimant was intoxicated at work, very little regard appears to have been taken of the recommendations of the respondent's own policy. Firstly clause 9.3 deals with the situation of an employee being under the influence of alcohol at work and what should be done including instructing the claimant to leave the workplace and ensuring he or she does not drive and escorting her home. None of this took place on this day (see paras 11.48 and 11.49). Secondly we did not hear of any reference to or consideration of the Addiction and Substance Misuse policy in determining what action should then be taken with regard to the claimant (para 11.51). There is no mention of considering the policy in the letter informing the claimant of these allegations on 26 June 2017 (see page 681). None of the respondent's managers provided any positive evidence about whether it was considered at this point at all (see paras 11.71, 11.74 and 11.79). There is no reference to the policy in any of the evidence we heard about the investigations carried out into the 22 June 2017 incident and there is no reference to consideration of this policy in the investigation report completed by GK (para 11.59). The respondent does not appear to have considered whether an OH referral as suggested by the policy might be appropriate at that time at all. We note at para 11.74 that GK said this had not been done because the claimant had consistently denied having an alcohol problem and so clause 5.6 of the policy applied and the matter was not considered further. We suspect that this is a conclusion reached in hindsight. We were concerned that no specific consideration was given to the Addiction and Substance Misuse policy at the time the allegations first arose and decisions were being taken about how to proceed. This was an allegation focussed almost entirely on the claimant displaying behaviour as if she was intoxicated, it would seem to us to have been entirely appropriate (and within the range of reasonable responses) for the respondent to have made explicit reference to its own policy on this and to set out why particular steps were or were not being taken. Its failure to do

so in our view was outside the range of reasonable responses and is procedurally unfair.

Following concerns about alcohol misuse at the disciplinary hearing on 18 December 2017, the claimant was referred to OH for a brief consultation and again the claimant denied that she had been drinking alcohol (para 11.67). No further follow up to this was carried out. The claimant continued to deny that there was an alcohol problem during the disciplinary hearing and we accepted that this was specifically considered by PS during the disciplinary hearing when reaching his conclusion on this matter concluding that as by this stage there was no admittance of a problem, the policy did not apply (paras 11.78 and 11.79)

38.10. Fail to allow the claimant's appeal which the claimant alleges was a perverse outcome

We refer to our findings of fact at paragraph 11.85-11.89. The appeal hearing was thorough and detailed running over two full days. The claimant had every opportunity to present all the grounds of appeal that she wished to via the representations of MLR. We could find no basis for determining that the decision made by the appeal panel was "perverse" or at all outside the range of reasonable responses.

39. The next issue to determine is therefore whether dismissal was within the range of reasonable responses. On this issue the claimant complains that some of the allegations of gross misconduct and misconduct found against the claimant were common practice in the team the claimant used to work in. In particular here the claimant makes reference to the use of text messages to arrange annual leave and inform managers of sickness absence. We note that this particular matter was in our view a relatively minor part of the decision to dismiss.

40. The decision to summarily dismiss was a harsh decision with serious implications on the claimant, in particular because the regulated nature of the claimant's role meant that this impacted her HCPC registration and ability to work in social work generally. However, whether the Tribunal believes the decision was harsh or not is not the test we had to apply. We were mindful not to substitute the Tribunal's decision for that of the employer. Although harsh, it cannot be said that this decision is outside the range of reasonable responses given in particular some of the findings made by the respondent during the disciplinary hearing. We were in particular convinced that the allegations made against the claimant firstly concerning her behaviour during the child protection conference in August 2016. Once a formal complaint had been received by TD, the respondent was under an obligation to investigate and conclude it and the outcome recommending disciplinary action be pursued was reasonable and proportionate given the findings of the grievance panel (see para 11.32). That outcome was that the claimant had behaved unprofessionally and had undermined and bullied fellow professionals. This

had knock on effects not only on the social worker concerned but also on the ongoing care provided to the family on question. The claimant was given an opportunity to set out her side of what happened during the investigatory and disciplinary process (see our conclusions at para 38.3). We were satisfied that the claimant's explanation was fully considered by PS when considering this particular allegation, but ultimately he found that it was proven (para 11.77). This is a very serious matter that had implications on the respondent's ability to deliver vital services to vulnerable people. Having reached the conclusions it did about what took place, the decision to dismiss for this allegation was not one which was outside the range of reasonable responses.

41. In addition, the conclusions reached by the respondent that the claimant had been intoxicated at work and had used abusive language and exhibited abusive behaviour on 22 June 2017 was also a highly significant and serious matter. In a role as important and sensitive as the one carried out by the claimant it was difficult to see that the respondent deciding that employment could not continue was outside the range of reasonable responses. We accepted that PS considered whether there were any alternatives to dismissal but that given the nature of the claimant's role and the overall loss of trust and confidence, there was no alternative. A different decision maker may have come to a different conclusion but the conclusion reached by PS was plainly within the range of reasonable responses.
42. Therefore in conclusion, whilst we determined that the respondent dismissed the claimant for misconduct and that dismissal itself was in the range of reasonable responses, we conclude that the dismissal was unfair because the investigation carried out by the respondent was incomplete and unfair to the claimant in the aspects we set out above. It was unfair also because the respondent acted in a procedurally unfair manner in the way that it included as allegations of gross misconduct against the claimant matters already been addressed informally or resolved and because it failed to have full and due regard to its own Addiction and Substance Misuse policy during the investigation process. Those matters we considered to be beyond the range of reasonable responses and so the dismissal we find to be procedurally unfair.
43. The Tribunal was not specifically addressed at the liability hearing on whether there was a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or whether the claimant caused or contribute to dismissal by blameworthy conduct. This will be clearly be a highly relevant factor when determining any awards of compensation to be made and will need to be specifically dealt with by both parties should a hearing on remedy be required.

**Disability discrimination complaints**

44. It is conceded by the respondent that at all material times, the claimant was a disabled person under section 6 of the Equality Act 2010 as a result of low mood, anxiety and depression.

**Equality Act 2010, section 13: direct discrimination because of disability**

45. For us to reach the conclusion that the claimant has been subjected to direct disability discrimination, there must be evidence, although it is of course possible for that evidence to be by way of inferences drawn from the relevant circumstances. A belief, that there has been unlawful discrimination, however strongly held is not enough.

46. In order to decide the one complaint of direct discrimination, we had to determine whether the respondent subjected the claimant to the treatment complained of and would then go on to decide whether any of this was “less favourable treatment”, (i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances). We would then go on to decide whether this was because of the claimant’s disability or because of disability more generally, deciding whether the respondent did or would have acted differently if the matter had concerned an employee who was not disabled in circumstances that were not materially different.

47. In considering this we would apply the provisions of the two stage burden of proof test referred to above, first asking whether the claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of disability. This would shift the burden of proof over to the respondent. The next stage would be to consider whether the respondent had proved that the treatment was in no sense whatsoever because of disability. Our conclusion on the one complaint of direct disability discrimination is set out below

On 8th November 2016 failed to successfully execute the Claimant’s transition back to work and failed to assist her in remaining in work (by in particular modifying its reporting requirements to accommodate texting and failing to support following OH reports (Allegation 1)).

48. This allegation appears to relate to the events of the return to work meeting on 8 November 2016 and what took place after that. It was not entirely clear what was meant by the phrase “*failed to successfully execute the claimant’s transition back to work*”. We refer to our findings of fact at paras 11.17-11.9 above about the return to work meeting itself. It is clear that the claimant did not return to work on that day as planned as she left after the meeting and was then on sick leave until mid December (para 11.21). After this time, she was on annual leave from 23 December until 23 January 2017 (para 11.23). On 23 January 2017 the claimant was due to return but did not return until 24 January 2017 and our findings of fact about the events of those days are set out in full at paras 11.24-11.26. Shortly after this the claimant was informed of

the disciplinary investigation and subsequently transferred to a different role. Clearly the claimant's return to work at this time did not go well. However we are not able to conclude that this was caused by any specific failings of the respondent in the way the transition back to work was managed. The respondent held (or attempted to hold) two return to work meetings with the claimant. It arranged for an OH appointment to take place on 7 December 2016 (para 11.20) where a phased return was recommended and indeed subsequently implemented. These appear to be sensible steps to take to try and assist an employee who is returning after a period of long term sickness to return.

49. The claimant complains the respondent "*failed to assist her in remaining in work*" and again it is not entirely clear what this relates to, save that the claimant complains of the respondent not "*modifying its reporting requirements to accommodate texting and failing to support following OH reports*". The respondent did allow the claimant to communicate with her line managers by text throughout this period of absence and transition back to work (see findings of fact at para 11.10 above). This continued during December and into January 2017 (see paras 11.22, 11.24, 11.25 and 11.27). It appeared to us that this complaint may have related to the fact that some of the matters that led to the claimant being disciplined and ultimately dismissed related to her failure to follow absence reporting procedures and resulting absences on 23 and 26 January 2017. However the nub of the issue here really appeared to be the absence of consent to from the respondent to the days being taken as leave at all (see paras 11.24, 11.59 and 11.76). It is not clear what the generalised allegation of "failing to support following OH reports" relates to and what it is the claimant says that the respondent failed to do that was suggested in any OH reports. There were various OH reports produced in relation to the claimant (see paras 11.12, 11.20, 11.40, 11.67) but the claimant does not say what steps in any of these the respondent did not take. Therefore we do not find that the facts behind this allegation are made out. The treatment complained of is not made out by the claimant and so it is not necessary for us to further consider whether that was less favourable treatment or whether it was because of the claimant's disability. The complaint of direct discrimination is dismissed.

**Discrimination arising from disability (Equality Act 2010 section 15)**

50. We then considered the claim of discrimination arising from disability. We started by identifying what was the something arising from disability that the claimant relied upon as being the reason for unfavourable treatment. The claimant contended that the following things arose in consequence of her disability and we set out our conclusions on each below:

- 50.1. Her being unable to attend grievance interviews about the Social Worker complaint (Allegation 9)

We refer to our findings of fact at paras 11.21, 11.23, 11.27 and 11.32. The first grievance interview the claimant was invited to attend to discuss TD's grievance was to be held on 10 January 2017. The claimant was on

annual leave at this point (and away in Kenya). That grievance interview was rescheduled for 25 January 2017. The claimant was working from home that day and did not attend the grievance interview. It was rescheduled again for 16 February 2017 and took place in the claimant's absence. At this time the claimant was off sick with stress, anxiety and depression. We conclude therefore that the claimant being unable to attend this final grievance interview on 16 February 2017 was something arising from her disability but the first two occasions she was unable to attend were not.

50.2. Her being or appearing to be intoxicated at work on 22nd June 2017(Allegation 8)

We refer in particular to our findings of fact at para 11.2 above. The alleged use of alcohol has been a feature of this complaint. In the first instance the claimant has consistently denied that she was actually intoxicated at work on 22 June 2017 (see paras 11.48, 11.58). She has not suggested that in fact that she was intoxicated on 22 June 2017 and that was because of arising from her disability. No evidence has been adduced by the claimant to support this and we cannot make this finding or conclusion on any of our findings of fact above. In addition, the claimant has still not produced any evidence to support her contention that the way she presented on 22 June 2017 made her appear to be intoxicated and this was caused or arising from her disability (or medication she was taking at the time). The claimant merely suggests that her medication and the effects of her condition may have caused her to behave unusually and that she was unwell on that day but she cannot really explain why she was presenting in a way that led some of those who saw her to conclude that she was intoxicated. It is simply too much of a leap for this Tribunal to conclude that her intoxication (or apparent intoxication) or any of her behaviour on 22 June 2017 was something arising from her disability as we have no clear evidence at all upon which we can make this conclusion. Despite an indication at an earlier preliminary hearing that such evidence would be adduced, this has not been done. Therefore this element of this claim is simply not made out as the claimant has not satisfied the burden of proof on this matter.

50.3. Her being unable to take up offers to attend disciplinary investigation interviews (Allegation 9)

This allegation is phrased as the claimant being unable to attend "disciplinary investigation interviews". We have assumed this relates to the disciplinary hearing itself rather than the investigatory interviews the claimant was invited to, purely because the claimant did attend both investigatory interviews on 4 May and 14 June 2017 (see findings of fact at paras 11.42 and 11.45). The claimant attended the first day of her disciplinary hearing on 18 December 2017 (para 11.65). However she was unable to attend the remaining days of the hearing on 29 & 30

January 2018 (para 11.69, 11.70) and 13 & 14 February (paras 11.72 and 11.75). The reason she was unable to attend was that she was off sick during this time suffering from anxiety and depression, so we conclude that her inability to attend the disciplinary hearing on these dates was something arising in consequence of her disability.

50.4. Her behaving in a way that led the allegations of gross misconduct to be upheld (Allegation 8)

Our first observation is that this is a very wide ranging and vague allegation. The claimant appears to be saying that the way she was behaving led to allegations of gross misconduct being upheld and this behaviour was something arising in consequence of her disability. She does not specify what behaviour in particular she says arises from her disability. This has made it very difficult for this Tribunal to understand the basis of this contention. However on the basis that the claimant was found to have committed gross misconduct, we have considered each of the matters found by the respondent to be an act of gross misconduct and considered in each whether the claimant has shown that what led to this finding was because of behaviour arising in consequence of her disability:

- a. The first finding of gross misconduct relates to the claimant failing to follow absence reporting procedures and being absent without permission on 23 & 26 January 2017. Our findings of fact on these matters are set out at paras 11.24 and 11.27. The claimant has not adduced evidence and we have not been able to make any findings that any of the issues relating to absence on these two days were matters arising from her disability. The claimant was under the impression she was taking annual leave on both these days (although the respondent's concern with it was that she had not secured consent to take such leave on these days). The claimant has never suggested or adduced evidence to suggest that anything that took place regarding communications between herself, SS and JW on these occasions were caused by or arising from her disability. We are not able to conclude that it was so arising.
- b. The second finding of gross misconduct relates to the child protection conference on 25 August 2016 and the complaint from TD. Our findings around this incident and what the claimant said about it are at para 11.13 above. The claimant has never suggested that anything that took place this day was something arising from her disability, but rather that her behaviour was entirely appropriate and justified (paras 11.13, 11.15 and 11.45). We are unable to make a conclusion therefore that anything that took place on this day which led to a gross misconduct finding was something arising in consequence of disability.
- c. The third finding of gross misconduct relates to the failure to follow a management instruction resulting in the claimant being absent without

permission on 6 March 2017. Our findings of fact on this incident are set out at 11.33. The claimant told us she had started to feel unwell on this day in the afternoon and that she was then off work for a period of 3-4 weeks. However we conclude that it was in fact the events of the morning that led to the respondent considering this to be a matter of gross misconduct and in particular the failure of the claimant to follow PK's instruction to attend for work that day (see para 11.77). Therefore we are unable to conclude that this was behaviour arising in consequence of the claimant's disability.

- d. The fourth finding of gross misconduct relates to the incident on 22 June 2017 and we have already concluded at para 50.2 above that the claimant has not shown that being or appearing to be intoxicated at work was something arising in consequence of her disability.
- e. The fifth finding of gross misconduct relates to the claimant having unauthorised absence on Friday 23 June 2017 and our findings of fact on this are at para 11.50. The claimant explains her absence on this day as being in error – she did not usually work Fridays (due to her condensed hours working pattern) and had forgotten that she had agreed with PT to work this day as part of her phased return. We heard no evidence that the claimant's disability played any part in this at all. This contention is not made out.

We were therefore not able to conclude that any of the behaviour involved in the allegations of gross misconduct that were upheld by the respondent arose in consequence of the claimant's disability

51. Having found that two of the matters arising the claimant relies upon (being unable to attend grievance interviews about the Social Worker complaint (Allegation 9) and being unable to take up offers to attend disciplinary investigation interviews (Allegation 9) were things arising from the claimant's disability, the next stage was to consider whether any of the unfavourable treatment was caused by these matters. We have applied the case of Pnaiser above and note the provisions on the burden of proof at section 136 EqA. The claimant has pleaded 5 acts of unfavourable treatment which we set out below with our conclusions on whether (a) such treatment happened and (b) whether any such unfavourable treatment was because of any of the two matters arising.

51.1. On 8th November 2016 failed to successfully execute the Claimant's transition back to work and failed to assist her in remaining in work (by in particular modifying its reporting requirements to accommodate texting and failing to support following OH reports) (Allegation 1).

This is the same allegation that was made and addressed at paras 48 and 49 above as an allegation of direct disability discrimination. For the same reasons set out above, we conclude that this allegation has not been



made out by the claimant on the facts. This unfavourable treatment did not take place as alleged and so this complaint is dismissed.

51.2. On 22nd June 2017 treating her behaviour in work as being the result of intoxication and suspending treating the claimant thereafter (Allegation 8)

At the first instance, we are able to conclude that treating the claimant's behaviour on 22 June 2017 as being as the result of intoxication and suspending the claimant from work is unfavourable treatment. This is self-evidently the case. The question for us to determine is whether this treatment was because of the things we have found to be arising in consequence of disability. The things we found as arising were the claimant being unable to attend grievance interviews about the Social Worker complaint (Allegation 9) and being unable to take up offers to attend disciplinary investigation interviews (Allegation 9). The complaint by TD and the grievance interviews resulting from this are not connected to the events of 22 June 2017 nor the decision to suspend the claimant (see our findings of fact at para 11.51). The claimant was suspended following the incident on 22 June 2017 and her failure to attend work on the 23 June 2017. All the grievance interviews on the social work took place and were concluded by 16 February 2017. There is no connection between the two matters at all and so we do not conclude that the claimant being suspended was because of her being unable to attend the grievance interviews. Similarly, the fact that the claimant was unable to attend her disciplinary hearings on 29 & 30 January 2018 and 13 & 14 February cannot possibly have had any bearing on the decision to suspend the claimant (which took place on 26 June 2017 (over six months earlier)). The burden of proof to explain the reason for the unfavourable treatment had not passed to the respondent. We conclude that as both allegations of unfavourable treatment were not caused by these two things arising from disability, this allegation is also dismissed.

51.3. Including in the reasons for dismissal the outcome of the Social Worker complaint (Allegation 9)

This complaint we have taken as in fact being an allegation that the outcome of TD's grievance playing a part in the claimant's dismissal was unfavourable treatment. Although not entirely clear, we can conclude that this allegation being used as one of the reasons for dismissal was unfavourable treatment. We then had to consider whether this unfavourable treatment was caused by either of the matters we have found to be arising from disability, namely the claimant being unable to attend grievance interviews about the Social Worker complaint (Allegation 9) and being unable to take up offers to attend disciplinary investigation interviews (Allegation 9). The claimant did not attend the hearings she was invited to into the TD grievance and the grievance went ahead without her participation on 16 February 2019. The grievance was upheld in her

absence, and the claimant had not provided an account of events/submissions about this in writing. Clearly the decision as to whether to uphold the grievance was made without the claimant's input, which was partly a result of her ill health. However the grievance outcome simply upheld TD's complaint and recommended that the matter be dealt with through the disciplinary procedure (see para 11.32). The grievance hearing did not (and rightly so) make any conclusion about whether the claimant should be dismissed or disciplined as a result of the complaint being upheld. This was considered further and the claimant was given an opportunity to set out her version of events during an investigatory interview on 14 June 2017 (see para 11.45) and this was again discussed in detail during the disciplinary hearing on 19 January 2018 which MLR attended on the claimant's behalf (paras 11.69, 11.72). The claimant's explanation was considered by PS in determining whether the claimant had committed gross misconduct with him concluding that her behaviour was inappropriate (see para 11.77). Therefore we were unable to conclude that the claimant's non attendance at the grievance hearing was in fact a contributing factor in this forming part of the dismissal decision. As for the claimant not attending the disciplinary hearings, for similar reasons we do not conclude that this was the cause of the unfavourable treatment, largely because the claimant was represented by MLR throughout the disciplinary hearing process (who attended on her behalf) and had attended the investigatory interview where her account of this matter had been taken. The claimant has not been able to show that her non attendance had a significant influence on the decision to dismiss (as is required by Pnaiser above) or that it event had just a trivial influence on any unfavourable treatment. This complaint is therefore dismissed.

51.4. On 1st March 2018 dismissing the claimant from its employment by unreasonably upholding allegations of gross misconduct and failing to interview her as part of the disciplinary process (Allegation 7)

Dismissal is clearly unfavourable treatment and so we must consider whether the claimant's dismissal was because of her being unable to attend grievance interviews about the Social Worker complaint (Allegation 9) and being unable to take up offers to attend disciplinary investigation interviews (Allegation 9). For the same reasons as above, we do not conclude that these were factors that caused the claimant's dismissal. The claimant had every opportunity during the investigatory interviews she attended on 4 May and 14 June 2017 (see findings of fact at paras 11.42 and 11.45) and during the disciplinary hearing on 29 & 30 January 2018 (para 11.69, 11.70) and 13 & 14 February (paras 11.72 and 11.75) where she was represented by MLR. This was an extensive and lengthy disciplinary hearing at which MLR had every opportunity to make the points she wished to on the claimant's behalf. The claimant's absence did not we conclude contribute to the decision to dismiss. Moreover we have already concluded as part of the unfair dismissal complaint that the

claimants dismissal was because of her conduct and we were satisfied that the respondent had discharged the burden of proof in this regard. The claimant has not established that the unfavourable treatment was caused (either in a significant way (as required) or even in a minor or trivial way) by the something arising from her disability here so this complaint is dismissed.

51.5. Upholding the claimant's dismissal on her appeal (Allegation 10)

The decision not to uphold the appeal is unfavourable treatment but we are not able to conclude that the decision not to allow the claimant's appeal against her dismissal was in any way whatsoever connected with her non-attendance at the TD complaint grievance interviews, nor the disciplinary hearing. Once again the claimant had a full and lengthy opportunity to present her appeal over a period of two days in June and August 2018 when MLR appeared on her behalf (see findings of fact at paras 11.84-11.89). The fact that she did not attend the grievance interview (at all) nor the disciplinary hearing (in person, albeit she was represented there) had no bearing on the appeal panel's decision to uphold the dismissal. This complaint is therefore dismissed.

52. As the claimant has not been able to show that any of the unfavourable treatment relied upon was because of anything arising from her disability, we do not need to consider the issue of whether the respondent knew of the claimant's disability when the unfavourable treatment took place, nor whether the respondent has established justification defence under section 15 (1) (b) Equality Act 2010. This complaint is dismissed.

**Harassment related to disability (Equality Act 2010 section 26)**

53. The claimant also makes three complaints of harassment on the grounds of disability contrary to section 26 of the Equality Act 2010 which are set out in the list of issues above. In order to determine these complaints, we needed to decide whether the claimant was subject to unwanted conduct of the type described; then determine whether the conduct was related to disability. We would only then be required to consider whether the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. Our conclusions on each of the acts of unwanted conduct relied upon are set out below:

53.1. On 30<sup>th</sup> January 2017 move the claimant from her substantive role to an alternative position as an alternative to a disciplinary suspension

We can conclude that the decision to move the claimant away from the IRO role on 20 January 2017 was conduct that was unwanted by her. See our findings of fact at para 11.31 above. The key question to be determined was therefore whether that decision was related to the

claimant's disability. We refer to our findings of fact on this decision at paragraph 11.29. We accepted the evidence of SS that he had become increasingly concerned about the claimant's erratic behaviour during the week of 23 January 2017 which had included the claimant being late, being absent from work without authorisation on 2 occasions and that she had behaved in a dismissive manner towards JW in a meeting. He had observed similar behaviour since around September and was concerned as to whether the claimant was fit to attend work and chair a conference. He spoke about wanting to "protect the service" whilst an investigation into the various allegations that had been levelled against the claimant were investigated. We conclude therefore that this conduct was not related to disability. This was an operational decision and was designed to allow investigations to continue into potential allegations of misconduct. The claimant was performing a highly sensitive and crucial role and if there were any concerns as to whether behaviour observed and having an ongoing investigation would impact her ability to carry out this role, then it is entirely correct that the respondent took steps to address this. The claimant has not been able to adduce evidence that this decision was about her disability and so this complaint of harassment must fail.

53.2. Disclosure by JW of sensitive information about the claimant to managers during the disciplinary investigation (Allegation 5)

We accept that this disclosure of information by JW in her statement provided as part of the disciplinary investigation (see para 11.36) was unwanted conduct. The next question was whether the conduct of JW in including this information in her statement provided to GK was related to the claimant's disability. We did not hear from JW during the Tribunal hearing. The subject matter referred to in this account did make reference to alcohol use and the claimant also states it relates to her mental health, as it involved the Crisis team being called. However the claimant has not adduced any evidence that JW deciding to include this information in her statement to GK was related to the claimant's disability. It appears to us that JW included this information as she felt it was relevant to the allegations she had been asked about. We were concerned about the inclusion of this information more generally as it was highly prejudicial to the claimant and did not in fact directly relate to any of the matters being investigated at the time. Nonetheless we were not satisfied that the disclosure by JW was related to the claimant's disability. The claimant has not been able to show that this is the case and we are unable to make any inferences from the surrounding facts. Therefore this allegation of disability related harassment is dismissed.

53.3. On 9<sup>th</sup> November 2017 fail to investigate a grievance about JH disclosing information supplied to it by the police about the claimant (Allegation 5)

We refer to our findings of fact at 11.65; 11.68; 11.69; 11.71; 11.73; 11.75 and 11.81 and our conclusions on this matter at paragraph 38.1 above in

considering this issue as part of the unfair dismissal complaint. The respondent did investigate and respond to the claimant's grievance raised on 9 November 2017. Therefore the underlying facts behind this allegation of disability related harassment are not made out and we did not need to consider this matter further. The claim is dismissed.

54. In considering her complaints for discrimination arising from disability and disability related harassment the claimant asked the Tribunal to consider as background only and not as a separate complaint two particular matters, namely:

54.1. her allegation that the that respondent stated in the return to work meeting that there were differences between mental and physical ill-health negatively, and the impact this was having on colleagues (Allegation 2 said to be background); and

54.2. on the claimant's return to work on 30 January 2017 she was immediately told she would be transferred from her substantive role to undertake duties as an Auditor (a role with less status an less flexibility with an expectation that her hours and days of work would increase from 4 to 5 days a week with little consideration for the adjustments and agreement made previously) (Allegation 3 said to be background).

These matters were both considered and taken into account by the Tribunal and we refer to our findings of fact on these allegations at paras 11.17-11.19 and 11.29 above. Ultimately we did not conclude that our findings assisted us in determining the issues we had to decide on the complaints made under section 15 and 26 Equality Act 2010 and in determining whether the various tests we must apply for these particular complaints have been met.

**Victimisation (Equality Act 2010 section 27)**

55. The first issue to determine is whether the claimant do a protected act within the meaning of section 27 (1) (a) or (b) of the Equality Act 2010. The claimant relies on four protected acts namely that she did:

55.1. Verbally allege discrimination by Mr Sam Sharkey at a meeting on 8th November 2016

55.2. Complain of discrimination and victimisation in an e mail to John Gregg on 10 March 2017;

55.3. Raise a grievance for Bullying & Harassment, Victimisation and Discrimination on 6th September 2017;

55.4. Raise a second grievance on 9 November 2017 based on breach of confidentiality, harassment and victimisation.

56. The respondent accepts that all four matters were protected acts so this element of the complaint is made out. The remaining questions we needed to determine was whether the various acts of detrimental treatment took place as alleged, and whether any such treatment was because the claimant did one or more of the protected acts relied upon. The claimant pleads 7 acts of alleged detrimental treatment and we set out below our conclusions on each matter alleged

56.1. On 30<sup>th</sup> January 2017 commence a disciplinary investigation against the claimant (Allegation 6)

This did occur as alleged and it is clearly detrimental treatment so the remaining question is whether this was because the claimant did a protected act. The only protected act pleaded that took place before 30 January 2017 was the first one above, namely verbally alleging discrimination to SS during the return to work meeting on 8 November 2016 so we must determine whether the respondent commenced its disciplinary allegation because she alleged to SS that he was discriminating against her. We have applied the two stage burden of proof and we first considered whether the claimant has had proved facts from which, if unexplained, we could conclude that the treatment was because of the protected act. This would shift the burden of proof over to the respondent. The next stage would be to consider whether the respondent had proved that the treatment was in no sense whatsoever because of the protected act.

Our conclusion is that the claimant has not been able to prove facts sufficiently to shift the burden of proof. We refer to our findings of fact at paras 11.17- 11.11.29 above. Following the meeting on 8 November 2016, there were a series of events that took place that led the respondent to be concerned about the claimant's behaviour and its impact on her work. We accepted entirely the account of SS at para 11.29 about what led him to become particularly concerned and that was the behaviour of the claimant during the week of 23 January 2017. This led him to meet with various managers at the respondent on 27 January 2017 to determine the correct course of action. The decision to commence a disciplinary investigation was ultimately taken by IG and PM (albeit that SS and LH were involved in the discussions leading to that decision). There is no evidence whatsoever and we are not able to make any conclusions from drawing any inferences that any of these four individuals were influenced by the fact that the claimant had alleged discrimination during a meeting some two months earlier. Following that allegation being made, the claimant had several interactions with SS and the issue of an allegation of discrimination was not discussed. The claimant raised this during her OH appointment on 7 December 2016 and the recommendation there was to hold a discussion to resolve the issue. However there is no evidence at all that this was in the mind of any of the decision takers who made the decision on 27 January that the claimant would be subject to disciplinary action. As the claimant has not shown facts from which we could

conclude that the treatment was because of the protected act, the burden does not shift to explain that the protected act was in no sense whatsoever because of it. In any event, we conclude that had the burden so shifted, the respondent would have been able to satisfy it.

56.2. On 30<sup>th</sup> January 2017 move the claimant from her substantive role to an alternative position as an alternative to a disciplinary suspension (Allegation 1A)

For the same reasons we set out at 56.1 above, we do not conclude that the claimant has been able to show facts from which we could conclude that the decision to move her from her substantive role on 20 January 2017 was because of the earlier protected act. The same decision makers made this decision at the same time as deciding to instigate a disciplinary investigation against the claimant. There is simply no evidence that the fact that an allegation of discrimination was made against SS on 8 November 2017 played any part whatsoever in the decision to move the claimant. We accepted the evidence of SS that the main concern of the respondent at this stage was to ensure that the service being delivered was safe. This allegation of victimisation fails.

56.3. Following her removal from her substantive role on 30<sup>th</sup> January 2017 refuse to accommodate her four day working week and working from home (Allegation 1A);

We have concluded that the conduct alleged by the claimant did not in fact take place as alleged. After the claimant was removed from her substantive role and transferred to Commissioning to work in PK's team, it does not appear that any changes were made to the claimant's hours of work or indeed any arrangements that she could work from home. There were some discussions before the claimant was removed from her role between her and JW about whether the claimant working compressed hours was correct given she was just returning from sickness absence (see para 11.25) and a referral was made to OH to consider this (see para 11.28). However this arrangement was not removed or not accommodated moving forward. The next time that working hours and days to be worked was discussed was during the return to work meeting on 14 June 2017 (see para 11.44) but again the claimant's working arrangements were not removed at this time, an adjustment was made to the days she worked on to accommodate a phased return.

Similarly we can find no evidence that any current arrangements for home working were changed following the claimant being removed from her substantive role. An issue did arise as to her working from home on 6 March 2017 (see para 11.33). However this was a specific request from management to attend for work rather than work from home. It is clear that the claimant had worked from home during her time working on PK's team in the same way she had done previously i.e upon request and with the agreement of her line manager. On this occasion, agreement was not

given and the claimant was instructed to attend for work. However we do not conclude that this amounted to a refusal to accommodate home working per se. In any event there is simply no evidence that in respect of this particular occasion PK was even aware that the claimant had done a protected act on 8 November 2016, let alone that this in any way influenced her decision to ask the claimant to attend for work that day. This allegation is not made out and is dismissed.

56.4. Suspend the claimant after the incident on 22<sup>nd</sup> June 2017(Allegation 8)

The claimant was suspended from duty on 26 June 2017 which was her first day back at work after the incident at Broadgate House on 22 June 2017. The claimant was suspended by SG and our findings of fact on this matter are set out at para 11.51. It is abundantly clear that the decision to suspend the claimant was a direct result of the events of 22 June 2017 and the respondent making an allegation that the claimant was at work and was incapable of safely performing her duties. This is a very serious allegation and clearly required investigation and examination and in the meantime, the respondent had concerns about the claimant's ability to be safely in work at all. There is no evidence that the claimant having complained to SS verbally about discrimination on 8 November 2016 (over 6 months earlier) or having complained in an e mail to JG on 10 March 2017 played any part in the decision of SG to suspend the claimant. It is simply not plausible that this was the reason for the decision to suspend considering all our findings of fact above. We do not find that the claimant has proved facts which would lead us to conclude that any protected act was the reason for suspension and so the allegation fails at this first hurdle and is dismissed.

56.5. On 6<sup>th</sup> September 2017 not adequately investigate a grievance raised by the claimant (Allegation 4)

The claimant appears to be alleging that because of two earlier protected acts on 8 November 2016 and 10 March 2017, the respondent then failed to investigate a grievance containing a further protected act which she raised on 6 September 2017. There is a degree of circularity in that argument but in any event we have already concluded above that the respondent did not fail to adequately investigate the grievance raised by the claimant at paragraph 38.1 above. As the factual allegation behind the alleged detriment is not made out this complaint is therefore dismissed.

56.6. Disclosure by JW of sensitive information about the claimant to managers during the disciplinary investigation (Allegation 5)

Our findings of fact on the information provided by JW during her investigatory interview are set out at para 11.36 above. It is not clear when JW added to her statement to include the information about the



incident on 23 April 2017 but it must have been after 23 April 2017 (self evidently) and before 17 October 2017 (when PS wrote to the claimant including the investigatory report containing reference to the statement made by JW (see para 11.60). This was clearly detrimental treatment as it referred to very sensitive issues around the claimant and it is clear that the claimant was very concerned about this appearing in the investigation report. The question to be determined is therefore whether this was because the claimant had previously done a protected act. In this regard we do not find that the claimant has shown that the actions of JW in including this information were in any way connected to the various complaints made by the claimant. We refer to our conclusions at para 53.2 above on this allegation as made as part of the claimant's disability related harassment claim. Although this is a different question, we have reached the conclusion that JW included this information as she felt it was relevant to the allegations she had been asked about during the investigation. The claimant has not been able to show that the previous complaints she made played any part in this and we are unable to make any inferences from the surrounding facts. Therefore this allegation of victimisation is dismissed.

56.7. Dismiss the claimant (Allegations 6 & 8)

We refer to our conclusions at paragraphs 26 and 27 above on the reasons for the claimant's dismissal. We were entirely satisfied that the claimant was dismissed for misconduct. The claimant had adduced no evidence and we are unable to make any findings based on inference that any of the protected acts were the reason for the claimant's dismissal. PS, the dismissing officer, was charged with hearing the claimant's grievances which raised discrimination as part of the disciplinary process and he went on to do so. We can find no basis in fact or inference which would suggest that he was motivated in any way by such complaints being made when he dismissed the claimant. This allegation is dismissed.

57.As none of the allegations forming the victimisation complaint have succeeded, that complaint is dismissed.

**Time limits**

58.Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5 December 2017 may not have been presented within the time limits set out in 123 (1)(a) & (b) of the Equality Act 2010. Given that none of the complaints for discrimination or victimisation have succeeded, we do not need to go on to consider whether there was conduct extending over a period and if not, whether the claims made within a further period that the Tribunal thinks is just and equitable.

59.The remedy for the successful claims will be determined at a further hearing, if necessary. The parties will apply to the Tribunal within 56 days of receiving

this judgment and written reasons if they are unable to reach agreement and require a remedy hearing to be listed.

**Employment Judge Flood**

Date: 14 July 2021