EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms W Bourne **v** **NHS Herts Valleys Clinical Commissioning Group**

Heard at: Watford **On**: 16-19 August 2021

Before: Employment Judge R Lewis
Members: Ms A Brosnan
Mr A Scott

Appearances
For the Claimant: In person – assisted by a friend, Ms Smith
For the Respondent: Ms R Owusu-Agyei, Counsel

JUDGMENT

1. The respondent dismissed the claimant fairly and her claim of unfair dismissal fails.

2. The respondent did not discriminate against the claimant and her claim of disability discrimination fails.

3. The claimant's claim for wrongful dismissal (breach of contract/notice pay) fails and is dismissed.

4. The claimant's request that her name be anonymised in this Judgment is refused.

REASONS

Introduction

1. Both sides asked for written reasons after judgment had been given. This was the hearing of a claim presented by the claimant on 14 September 2018. The claim had been the subject of case management on 14 October 2019 (Employment Judge Skehan, orders sent 26 October 2019, 26). The initial listing for four days in October 2020 could not be maintained.

2. At this hearing, there was an agreed bundle in excess of 700 pages, of which we were referred to a modest selection. The parties had exchanged witness statements. The claimant's witnesses were herself and Ms L Haslam, who had supported her during some of the meetings with which we were concerned. The respondent's witnesses in order of giving evidence were Mr H Scheffer, who was the claimant's "grandparent" line manager, and direct line manager during vacancy of the intervening post; Ms L Thomas, who had been the claimant's line manager for a brief relevant period; and Ms T Stober, a board member who had heard and rejected the claimant's appeal against her dismissal. The respondent served a statement by the dismissing officer, Mr R While, signed and dated 29 October 2020. Ms Owusu-Agyei asked us to rely on the written statement in the absence of the witness. In reply to the tribunal's request, Mr Scheffer gave a detailed explanation for Mr While's absence.

3. In case management at the start of the hearing, it was confirmed that s.6 disability was no longer in dispute. The claimant confirmed that in accordance with Judge Skehan's order, the claim of disability discrimination proceeded as a s.15 claim only, not as a claim of direct or indirect discrimination or a failure to make reasonable adjustments. In the course of the same discussion, the claimant was advised, apparently for the first time, that Mr While would not be available as a live witness.

4. All parties, witnesses and representatives attended the hearing in person with the exception only of Ms Stober, who observed the proceedings throughout and gave evidence via CVP. On the fourth day of hearing, when judgment was given, the proceedings were conducted entirely by CVP. We apologise to the parties for the technical difficulties which arose during the hearing.

5. It was agreed during case management that this stage of hearing would deal with liability, including the principles of any contribution or Polkey reduction; while all calculations would be undertaken at a separate remedy hearing if required. There was a substantial and potentially complex schedule of loss.

6. Before the start of the hearing, the claimant advised the tribunal clerk that she had brought a letter from her GP. The clerk reported that the claimant had said that the letter simply asked that Ms Smith be allowed to participate in the proceedings on the claimant's behalf. When all parties were in the room, it was explained to the claimant that the tribunal would read the GP's letter if asked to do so, but that the respondent must be able to read it if the tribunal were to do so. It was also explained that the claimant had the right to be assisted or represented by Ms Smith or any other person, provided only that when the claimant gave evidence, the evidence must be her sole and unassisted evidence. The tribunal was not asked to see the GP's letter.

7. Ms Smith sat next to the claimant throughout the hearing except when the claimant was giving evidence. She addressed the tribunal on the claimant's behalf, and questioned the respondent's witnesses, putting to them the

questions which had been prepared by the claimant. We were grateful to her for her constructive support of the claimant.

8. We took a number of breaks, greater in number and longer in duration than might otherwise have been the case, in order to assist the claimant. After Ms Owusu-Agyei had concluded submissions, the tribunal took a long break to allow the claimant to finalise her reply.

9. Before we give our findings, we make two general observations. In this case, as in most others, evidence touched on a wide range of issues. Where we make no finding about a point raised by a party, or where we do so, but not to the detail to which the parties went, that is not a matter of oversight or omission, but reflects the extent to which the point was truly of assistance to us.

10. The tribunal is familiar with the difficulties experienced by members of the public who represent themselves. We understand that the law and procedure of the tribunal are unfamiliar, and that the stress and emotion of reflecting on distressing past events may be exacerbated by delay. We know that a contest between a professional representative such as counsel and a lay member of the public is bound to have an element of inequality. All of those were features at this hearing, the claimant's HR experience notwithstanding.

Setting the scene

11. The claimant, who was born in 1966, is educated to Masters degree level, and holds CIPD qualifications (40). Her experience in HR within the NHS goes back to 2000 at least (45). When the events in this case arose, she was regarded as having some twenty years of unblemished service. She was seen as an experienced, competent and respected colleague.

12. At the time of the events with which we were concerned, essentially April 2017 to February 2018, she was employed as HR Business Partner. She reported to the Assistant Director of HR, a post held by Ms Thomas from 1 January 2017; Ms Thomas and her predecessors reported to Mr Scheffer.

13. Mr Scheffer summarised the work of the respondent:

> "It hosts an HR shared service, providing an HR employee relation service, a payroll service, a workforce information service and a learning and organisation development service to clinical commissioning groups in Hertfordshire and adjacent counties".

14. The respondent had a system known as ESR (Electronic Service Record). This was a database of employment related information about its own employees, as well as about employees of the other CCGs to whom it provided employment services. It included personal information, such as address and next of kin, as well as information about banding, pay, pensions and the like. ESR information was generally confidential, but as a member of the HR function, the claimant had access to the ESR as and when operationally necessary.

15. In the course of 2017 the staff of the respondent, including those who operated ESR, were preparing for the implementation of GDPR in early 2018. Preparation involved learning for those whose work would be affected, training of others, and management of any system changes which might be required. We accept that the preparation was regarded as a serious major task.

16. We accept that within the respondent there was a high level of awareness of issues of confidentiality, relating to its own employees and operations, to those of other CCGs to whom it provided a shared service, and, if the situation were to arise, to third parties such as patients. That understanding would, we find, also follow from the ethos of public service.

17. The bundle contained a few pages of the claimant's medical records (635-641, in reverse chronological order). They are plainly incomplete as to the claimant's mental health: we accept that the claimant was entitled to redact from disclosure medical records or information related to any other condition. Our initial finding is however that she appears not to have given full disclosure relating to mental health, nor does the respondent appear to have pursued the point.

18. The documents which we have show that the claimant was prescribed Fluoxetine (Prozac) since at least April 2014, but possibly longer; and that her dosage varied between 40 and 60mg per day. We understand 60 mg per day to be the maximum permitted daily dose. The prescription was for depression. There appear to have been regular review meetings with her GP. This case was particularly concerned with late 2016 and the calendar year 2017. However, pages 639 to 640 appear to show no medical engagement with the claimant's GP between 12 July 2016 and 9 March 2018, except perhaps for one entry, not dated in the printout, but with a handwritten date added (1 June 2017) which states:

> "Under a lot of stress at work.. feels maybe needs to increase fluoxetine.. has had counselling but never CBT – Wellbeing service info given, she will also check at work as thinks has access to Psychological TX."

19. It was common ground that the claimant's history of depression was not known to colleagues at work, and that she had not, at any material time, indicated to the respondent that she considered herself to have a disability.

20. It may be useful therefore to take a snapshot of where matters stood when Ms Thomas came into post at the beginning of 2017. The claimant was a long-serving respected HR Business Partner. She had a history of depression and fluoxetine prescription which was unknown to the respondent. In the course of her work, she had access to ESR, and therefore to confidential data about every employee of the respondent and of any other CCG for whom it provided a shared service. The introduction of GDPR was on the horizon, a matter for which the respondent as an organisation needed to prepare.

Findings of fact

21. Our material findings of fact are limited.

22. The claimant remained prescribed Fluoxetine throughout 2017.

23. There were concerns in the course of that year about aspects of her performance. We accept Ms Thomas' evidence that in about March Ms Thomas and the Chief Executive, Ms Flowers, were concerned that the claimant was not participating proactively in meetings, and not completing work. Ms Thomas discussed performance issues with the claimant and was told by the claimant in about June 2017 that she was depressed and taking antidepressants. Ms Thomas' evidence was that she thought that that was a new diagnosis, although plainly it was not. Ms Thomas then had a period of sick leave. The claimant's line manager in the absence of Ms Thomas was Mr Scheffer, who held the claimant in high regard.

24. Performance concerns rose again in November 2017. Although they were raised by Ms Thomas and Mr Scheffer, the claimant appeared not to disagree (179). We noted emails in which Mr Scheffer recorded the claimant speaking about the possibilities of a career break or leaving the service. We accept that Mr Scheffer regarded the claimant as a valued member of his team, with much to contribute, and that he wished to offer her support, to avoid either of these options.

25. In late 2017 preparation for GDPR was in train. We were shown notes of a Senior Team meeting on 22 November, when the claimant gave a briefing on GDPR (189).

26. An Occupational Health report of 16/17 November (191) advised that the claimant was fit for work but that "she appears to be experiencing symptoms associated with pressure and work-related stress." The claimant asked for "time to address strategic issues," which she found difficult in an open plan environment and the suggestion of one day per week working at home arose.

27. It is evident from correspondence in December 2017 and January 2018 that concerns about the claimant's well being and performance appeared to management to be under control. After coming back from sick leave, Ms Thomas resumed her line management role.

Events from 8 February 2018

28. The immediate sequence of events before us was triggered on 8 February 2018. On that day Ms Thomas was advised that preparatory work for implementation of GDPR revealed that since April 2017 (a cut-off date, before which data were not available) the claimant had looked up the details of colleagues on ESR over 200 times; there were 139 occasions on which those looked up were colleagues within the HR team; access was recorded as having taken place on 35 different dates between 3 April 2017 and 1 February 2018; and on one date (22 December 2017) access had taken

place 27 times. There appeared to be no legitimate operational reason for access on this scale.

29. Ms Thomas' email (209) of that day records that when first asked about this, the claimant's first response was that she was updating a birthdays list. Ms Thomas sent the claimant the first of a number of tables.

30. The claimant at no point disputed the accuracy of the information summarised above. She agreed that it could not be shown that any proportion of this access was operationally required for her work. Although the tribunal asked, it was not possible at any stage to establish the full extent of the claimant's ESR access for the following reasons. Data could not be traced for access before April 2017; and (as we understood it) data was not necessarily available for access to data on employees of other CCGs for which the respondent provided a shared service. In the course of this hearing, the Judge asked the respondent if it could state the number of individuals whose information had been accessed, and counsel later replied that it was believed to be over 300, not all of them employees of the respondent.

31. The information identified as accessed included personal information such as addresses, earnings, contact details and the like.

32. The claimant met Ms Thomas and Mr/Ms Shah on 9 February. The note of the meeting records the claimant as having stated, "The reason [for access] was pure nosiness or curiosity" (220); the claimant's evidence to us was that that was what she said, and that was the word that came into her head. The claimant was suspended and remained on suspension until the end of her employment. The suspension was confirmed in writing (223).

33. On 13 February the claimant submitted a statement (228) in which she accepted that she had accessed ESR without consent, "but I do not know why I did this. I can't remember when I first accessed the ESR information. I did not do anything with the information but did read the information." The claimant expressed regret. In the same statement, the claimant for the first time attributed her actions to "underlying anxiety I was experiencing at the time;" and wrote about her mental health history, stating that there had been a "crisis point in November 2017." (228)

34. On 20 February Mr While wrote to all those employees whose ESR records the claimant was found to have accessed to inform each of them of a breach of data confidentiality (we saw one sample letter, 232). We were not advised of the replies. The respondent also reported itself to the ICO as responsible for a data breach. Correspondence suggested that having received the report, the ICO did not require any further report or action from the respondent.

35. Ms Thomas made a further Occupational Health referral. The report of 26/27 February (240) said that the claimant "has a long-term on-going condition of depression and anxiety" and confirmed that the claimant was fit to attend any meetings. The claimant asked to be accompanied at

meetings by a person not within the usual framework of either a fellow employee or a trade union official.

36. Ms Mount was appointed investigating officer for a potential disciplinary case, and the claimant was interviewed on 1 March (242). At that interview the claimant asserted that she had been looking up records on ESR since ESR was introduced in 2016 (the note says 2006, which we take to be a typo). At her disciplinary, the claimant commented that the noted date (2006) must be mistaken, as she had not joined the CCG until October 2014. The claimant made the point that she had legitimate operational need of access to ESR on occasion, while accepting that the access in question in this case was not operational and was excessive.

37. Ms Mount completed her report on 9 March (247). It was supported by appendices in excess of 50 pages. It set out a timeline, methodology, summarised that the claimant did not deny the allegations, and concluded that there was a case to answer.

38. On 28 March Mr Evans, Director of Commissioning, notified the claimant that there was to be a disciplinary hearing. She was invited to attend a hearing on 10 April. He confirmed continuation of her suspension. The claimant was sent a copy of the investigatory report and appendices the same day.

39. On 29 March Mr While, who was then Head of Governance, wrote to the claimant to confirm that he was to be Chair of the Disciplinary Panel, and that the claimant would be allowed the exceptional facility of being accompanied by an external person. The claimant was invited to submit statements if need be. The hard copy of the investigation report and appendices was then sent.

40. On 6 April Mr Scheffer write to inform the claimant of a matter which was briefly dealt with at this hearing. It appeared that monthly practice at that time was that a box containing a large number of payslips for staff was left in an open area for staff to search through and find their own payslip. The envelope containing the claimant's payslip for March 2018 was found opened, plainly not by the claimant as she was not permitted to come to the workplace. Mr Scheffer notified the claimant of this, with apologies. He gave evidence that as the box in question was in an open area and accessible to a large number of staff, it had not been possible to establish who had opened the payslip, or why. It seems likely that this was an accident, and there was no evidence that it was in any way related to the events before us.

41. The first disciplinary meeting took place for several hours on 10 April. The claimant was accompanied by Ms Haslam (also present throughout the tribunal hearing). Ms Haslam was a former colleague and long term friend, and also an experienced HR professional. Mr While was supported by Ms Price of HR. Ms Mount was present as investigator presenting the management case, receiving HR support from Ms Thomas. The meeting was recorded, and the bundle contained a full transcript (329). We were

told that recording was not the usual disciplinary process of the respondent; the usual would be that a member of the HR team took notes. However the claimant was in the HR team, and recording was arranged because of the wish to keep to a minimum the number of HR staff who knew about the case. The claimant was an established and respected member of the HR team, and we accept that the respondent had a concern to minimise the number of colleagues who knew of the case, with a view to not prejudicing her return to work if that was what happened.

42. Mr While adjourned at the end of the hearing and explained the position to the claimant by letter of the following day. That is an important letter, to be read in full, and the thoughtfulness and drafting stand entirely to the credit of Mr While and Ms Price. Mr While summarised the content of the meeting concisely and recorded that he had adjourned the meeting to obtain further information:

> "I explained that as you have suggested your behaviour and actions were mitigated by your health condition, it was appropriate that further advice be sought from Occupational Health.

43. Mr While then wrote that:

> "I advised that a management referral would be submitted to Occupational Health which asked specific questions about your health condition and the influence this has had regarding the allegations. I shared the questions with you and confirmed that you would shortly be invited to an appointment with an Occupational Health physician where you will be asked to consent to release of a specialist report from your consultant reporting on your mental health condition.
>
> After the appointment and receipt of specialist report, the disciplinary hearing will be reconvened and the medical evidence considered in conjunction with the information already presented."

44. Mr While confirmed continuation of suspension.

45. We also note that the second paragraph of the same letter contained the following, which we record as an exceptionally helpful, concise summary of the allegations and issues at the heart of the matter:

> "That you accessed information in the ESR for staff members that you did not need to do so for your day to day job. This includes information that employees would expect to be treated with a duty of confidence. These actions have taken place over a considerable period of time and without the consent of the employees concerned."

46. That formulation, which the claimant did not factually challenge, captured a number of key points: that the ESR access was not operationally necessary; that it touched on confidentiality; that it was spread over a period of time; and that it happened without the consent of any employee.

47. The Occupational Health referral was also carefully drafted (421-422). It explained the issue which had arisen at the disciplinary and asked a number of questions, including:

> "Could her health condition (anxiety and depression) have caused or contributed to the act of accessing personal records via the ESR?"

48. The referral also stated:

> "Given the nature of the questions above, I would like to request that [she] is seen by a physician and request that a specialist medical report is requested from her treating consultant to answer the above questions – this may involve requesting a psychological assessment."

49. The resulting report from Dr Aldegather wrote that the claimant

> "has mild to moderate anxiety/depression symptoms which though present did not preclude her being able to return to work as soon as practically possible."

50. The report confirmed the claimant's history as given by the claimant, ie that her treatment for depression went back many years and she had been prescribed Fluoxetine for many years.

51. The answer to the question quoted above was the following:

> "There is no doubt that significant anxiety and depression symptoms can interfere with any individual's judgment. There are some doctors that would suggest that the severity of her anxiety/depression symptoms could cause the claimant to carry out actions that are harmful without understanding their actions. There will be other doctors who feel that these actions could only occur in individuals who were severely mentally impaired or have merely had without being ill….As explained above, significant anxiety can lead to actions that are deemed harmful to society. This link could have occurred in the claimant's case."

52. There was no guidance or suggestion or advice given for a further medical report.

53. The disciplinary hearing resumed on 21 May. Ms Mount was unable to attend; it was explained to us that this was due to a family health issue. The respondent suggested that Ms Thomas take over Ms Mount's role as presenting/investigating officer, so as to avoid an adjournment. The claimant did not disagree. It seemed to us that we could not fault Mr While for electing to continue, with the claimant's consent, in those circumstances. We likewise do not fault Ms Thomas for stepping into Ms Mount's shoes.

54. The claimant was dismissed by letter dated 25 May (450). Mr While set out a summary of reasons, and at pages 452 to 454 set out the considerations which led him to conclude that the claimant had committed gross misconduct and that the appropriate sanction was dismissal.

55. In particular, Mr While wrote that the claimant had failed to give a satisfactory explanation, and that OH had not confirmed that any health condition was a significant contributory factor. He referred to the extent of the contravention, and the inconsistent responses given by the claimant. He found that the claimant had not shown remorse and therefore indicated a lack of insight, such as to leave a concern about a recurrence of the conduct.

56. By letter of 5 June the claimant appealed (458). A summary of her appeal points was manifestly poorly made. Mr While replied at length to the appeal in writing, and the appeal was then heard by Ms Stober, supported by Ms Bevan on 12 July. Mr While presented the management case supported by Ms Price. The claimant was supported again by Ms Haslam.

57. We accept that even by the 12 July appeal the respondent had not prepared a transcript of either of the April or May meetings but had provided the claimant with a CD of the recordings, which the claimant had part transcribed. Ms Stober's outcome letter (562-570) set out at length the procedure which had been followed and the points raised in appeal and set out Mr While's reply.

58. On page 569 Ms Stober set out her detailed reasons for rejecting the appeal. She noted that the misconduct was admitted and referred to the importance of the HR team maintaining the trust of colleagues in the confidentiality of the information and records which it had. She rejected a number of the detailed points of procedure which the claimant raised, some of which are dealt with in these reasons below.

The legal framework

59. The claimant complained of unfair dismissal. The respondent asserted that this was a fair dismissal for gross misconduct. In such circumstances, the first task of the tribunal is to establish what, as a matter of fact, was the operative reason which caused dismissal. The tribunal must then ask whether that factual reason was one of the potentially fair reasons set out in s.98(2) Employment Rights Act 1996; those reasons include conduct. The tribunal must then go on to consider s.98(4) of the Act which provides as follows:

> "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in then circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

60. The tribunal must consider that question through the spectrum of well known decided case law, including British Home Stores v Burchell 1978 IRLR 379 (bearing in mind that that case was not decided under the burden of proof which now prevails) and Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23.

61. The tribunal must take care not to substitute its own view for that of the employer, and to respect that on each occasion when an employer exercises discretion, it will have a range of options open to it, more than one of which may be a reasonable choice. In a conduct case, it must ask whether the dismissing officer genuinely believed that the claimant had committed the misconduct; did so on reasonable evidence after reasonable

enquiry, and whether the sanction of dismissal fell within the range of reasonable responses.

62. If it finds the dismissal unfair, the tribunal may nevertheless reduce a basic award in accordance with s.122(2) if it considers:

> "that any conduct of the complainant before the dismissal… was such that it would be just and equitable to reduce the amount"

and reduce any compensatory award in accordance with s.123(6), which provides:

> "where the tribunal finds that the dismissal was to any extent caused or contributed to by an action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

63. The claimant's claim was also one of breach of contract. It was agreed that she was dismissed summarily, and therefore not paid the three months' notice pay to which she was contractually (and by statute) entitled. The tribunal must ask whether it has been shown by the respondent, on evidence to the tribunal, that the claimant on the balance of probabilities committed an act or acts of gross misconduct such as to forfeit her entitlement to notice.

64. The claim was also brought under the Equality Act 2010 s.15 which provides as follows:

> "A person discriminates against a disabled person if A treats B unfavourably because of something arising in consequence of B's disability and .. cannot show that the treatment is a proportionate means of achieving a legitimate aim."

65. We were referred to authority, notably Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305.

66. We accept Ms Owusu-Agyei's submission, that to make good the s.15 claim, two separate causative links are to be shown by the claimant. It was not in dispute in this case that the unfavourable treatment was dismissal and that the disability was depression. That was not the end of the matter. It remained to be shown in these proceedings, in two separate steps, first that the dismissal was because of something; and secondly that the something arose in consequence of the claimant's depression.

67. In October 2019 Judge Skehan had defined the "something" (28) as the claimant's alleged sense of isolation that prompted her to act out of character; and her perception of increased demands by the respondent leading to an increase in stress levels.

68. Although that was Judge Skehan's formulation, sent to the claimant two weeks after the preliminary hearing in which the claimant had represented herself, and therefore available to the claimant on paper for some 20 months before the start of this hearing, it was not the case which the

claimant set out in her witness statement, or which she advanced to us. The claimant did not apply to amend, and the tribunal required both parties to adhere to the structure identified by Judge Skehan.

Discussion: unfair dismissal

69. The first question for the tribunal is what was the reason for dismissal. We find that Mr While's dismissal letter of 25 May 2018 (450) truthfully and accurately sets out the material factual reasons for dismissal. We accept that that adopts the unchallenged factual evidence of the extent of wrongdoing set out at the start of this process (8 February 2018, 209); and the cogent concise summary in Mr While's letter of 11 April.

70. We accept that that is a factual reason which relates to the conduct of the claimant and therefore a potentially fair reason within the framework of s.98(2).

71. We accept that Mr While genuinely believed that the claimant had committed the acts in question, not least because they were never disputed.

72. When we come to the question of whether his belief was based on reasonable evidence after a reasonable enquiry, we remind ourselves that the test is an overview of the actions of the reasonable employer, having regard to the size and administrative resources of the respondent, and on each occasion when discretion is to be exercised, reaching a conclusion within the range of reasonable enquiries.

73. Our overview is that that was the case. The allegation against the claimant was put to her, first informally and then through a formal investigation. The results of the investigation were formally analysed. The claimant was notified of the case against her and had the opportunity to participate in disciplinary proceedings and defend herself. The respondent was generous in allowing the extension of a right of accompaniment to Ms Haslam. Mr While's actions in adjourning, and seeking focussed medical evidence, show the application to a difficult case of a high standard of fair analysis.

74. In light of all of the above, we do not need to find, as the claimant had at times implied, a standard of perfection. We comment below on specific points raised by the claimant. Our overarching view is that the test of s.98(4) is met.

75. In that context we accept that dismissal was within the range of reasonable responses, the claimant's long and commendable record notwithstanding. In so saying we note in particular the centrality to the claimant's role in HR of employee confidentiality and the integrity of records. That she delivered training on GDPR at the same time as these events was a striking point. We accept that Mr While had an evidential base upon which to find that the claimant's response to the claims lacked insight, by which we understand the understanding of underlying or larger reasons for what she had done wrong, leading to some degree of self analysis, and reassurance that there would be no recurrence.

76. In reaching the decision to dismiss, the respondent was entitled to have regard to inconsistency in the claimant's attempts to explain her reasons for her misconduct. Her first explanation, on 8 February, was birthdays; it then became nosiness; it then became thoughtlessness or force of habit; and later became depression. After her dismissal, and in the tribunal process the claimant put forward the points noted by Judge Skehan; and then, to us, her counsellor's instances in relation to hierarchy and self-confidence. We accept that the claimant must at times have been bewildered by her own actions. However, understanding of one's own wrongdoings, and addressing any underlying or generic issues, are the fundamentals of assuring an employer that a recurrence is not likely. We accept that inconsistency of response was a legitimate element in the respondent's management of these events.

77. The claimant appeared at times to raise a consistency point in relation to the payslip incident. The payslip incident was not remotely comparable. It was a one off, which in all likelihood was accidental. The perpetrator could not be identified. It could not be compared with the claimant's deliberate actions on over one hundred occasions over a period of at least 10 months.

78. As we have found the dismissal was fair we need not make remedy findings. However, we have heard evidence and submission on the principles of contribution and Polkey and it is in the interests of justice that we state what our conclusions would have been.

79. When we consider the compensatory award, we would set the level of contribution at 100%. But for these events, the claimant would have continued in her role as a respected HR colleague. The contribution which these events made to her dismissal was a complete one. When we consider the basic award however, we consider it right to give the claimant credit for the fact that the basic award represents compensation for many years of good service, and we set the basic award reduction at 66%, reflecting that the balance of responsibility should be two to one against the claimant.

80. We have however declined to make a finding on the Polkey issue. We do not need to. At the time of dismissal, the claimant expressed concern about the difficulty of returning to work, and indeed stated that she did not want to do so (443 and 558). At this hearing however she said that she thought that it would have been possible for her to return to work after a final written warning. It did not seem to us in the circumstances necessary to resolve this difficult hypothetical question.

The claimant's points

81. In the course of this hearing the claimant identified a number of procedural points. In closing Ms Owusu-Agyei described them as "nit picking." That was a slightly harsh word, but it had at its heart the legitimate observation that these points were largely comments of perfection, not all of them relevant. We might say that some were well founded comments or criticisms, but our overarching finding is that neither individually nor

cumulatively do they lead to the conclusion that the dismissal was unfair. The selection of the points which we here answer is that of the tribunal. We accept that the selection is not exhaustive to address all the points raised by the claimant. We do not set them out here in order of priority.

82. The claimant commented on the absence from evidence of Mr While and Ms Mount, respectively the decision maker and the investigator. As stated, we accept Mr Scheffer's evidence about Mr While's absence. We do not find that at this hearing the claimant was prejudiced by his absence. Mr While's reasoning was set out at length in a number of documents and letters, and the claimant had every opportunity to question Ms Stober or the other witnesses about them. Ms Mount's role was to investigate, and her conclusions were set out in the investigation report. It was open to the claimant to question Ms Mount's contribution at the first disciplinary hearing through questioning of the witnesses who were available. We set out below one matter on which we accept that the claimant's criticism of Ms Mount was well founded, noting that Ms Mount has not been questioned about this in the tribunal, so we have not heard her explanation.

83. The claimant submitted that Mr While was not independent and therefore not an appropriate person to conduct the disciplinary because he was Head of Governance and therefore head of the department reponsible for data security. She suggested that Ms Thomas was not an appropriate person to advise or take part in the May disciplinary because she was the claimant's line manager and therefore involved in her performance management; and because she was a "victim" of ESR access. She suggested that Mr Scheffer was the real controlling mind in these matters, and that he was involved in what purported to be the drafting and decision making of Mr While.

84. We remind ourselves that the standard of fairness is that of a reasonable employer of the size and administrative resources of the respondent in each case. It is not a judicial standard. It is a realistic standard of workplace justice.

85. We do not agree that Mr Scheffer in some way controlled the process. He denied it, and there was no evidence that he did so. We do not agree that Mr Scheffer intermeddled with or crafted drafts of Mr While's letters, and we do not accept that the appearance of the initials HS on a file name are evidence that he did so. That was a matter on which the claimant relied heavily.

86. It seems to us that Mr While's role as Head of Governance qualifies rather than disqualifies him from conducting the disciplinary. We accept that he was a figure of appropriate seniority who had in fact not been a victim of ESR access. There was no evidence that he was influenced by extrinsic factors or was under any other person's direction.

87. Ms Thomas' role was that which was typical in the model of disciplinary cases which we see, namely that she was an advisor about HR process, practice and template drafting, but not an executive decision maker. We

accept that although she stepped into the role in May 2018 of investigating and presenting officer, she had no role in executive decision making. We do not agree that either as a line manager with knowledge of the claimant's performance issues, or as a victim of ESR access, she was disqualified from being involved in this disciplinary.

88. The claimant suggested that it would have been better practice for the respondent to remit the disciplinary to an external provider. We do not agree that that was required in order to achieve fairness. On the contrary, we accept that at the time in question the respondent had a legitimate concern to contain conflict, and that one legitimate consideration was that if the claimant were not dismissed, her return to work would be less difficult to manage if there were fewer people who knew the circumstances of the disciplinary.

89. The claimant complained that the ESR victims had not been interviewed and their opinions not sought. This point seems to us entirely misplaced. The respondent was under an obligation to notify the victims and it did so. It was under no obligation to interview each, which would have involved, we now know, potentially up to 300 interviews. The decision on the claimant's disciplinary outcome was that of Mr While, not of the rest of the workforce. Apart from the disproportionate burden of work, interviews would not have made the claimant's return to work any easier if she were not dismissed. We do not fault the respondent for asking the claimant how she might have felt if she had been a victim, and for attaching weight to the claimant's use of the word "violated" in reply.

90. The claimant complained of a failure to interview her colleague, Ms Barratt. It was never in dispute that ESR access was part of the claimant's legitimate operational work, and that she had exercised that right many times for legitimate operational reasons. One of them was to maintain a list of birthdays. We could see no benefit in interviewing Ms Barratt on this topic, as both sides proceeded through the disciplinary on the agreed understanding that there were occasions of legitimate operational access, which were not part of this case.

91. The claimant raised points about the disciplinary meeting papers. She complained that they included material about the performance issues which had arisen earlier in 2017, and there was a mistake about including the wrong Occupational Health report. We accept that a mistake was made. It was put right, by inclusion of the right report. We can see no evidence that the mistake was material to the outcome. We can see no evidence that inclusion of wider information about the claimant's employment history led to an unfair or improper hearing or outcome. On the contrary, it seems to us that Mr While focussed precisely on the issue which was before him.

92. We make no criticism of the decision to suspend the claimant, or of the management of the claimant's suspension, including her exclusion from the workplace. We accept that suspension is a stressful and difficult time, and that any employee feels isolated from their work contacts and from social contacts at work. We accept that the claimant had a perception that she

was particularly vulnerable to a sense of isolation , and that she may have found the experience of suspension more difficult than many. Allowing for that, it does not seem to us that the suspension issue adds weight to the claimant's case.

93. We agree with the claimant that it was puzzling that having decided to record the April and May meetings, the respondent did not then arrange for the recordings to be transcribed, so that for the purposes of her appeal hearing, the claimant had the CD of the first two meetings, which she part transcribed herself. We accept that the reason for recording was to reduce the number of HR staff who were involved in the disciplinary of a colleague, but even so, we accept that the logic of recording is that transcription is available. We can see no evidence that its absence prejudiced the claimant. Ms Haslam presented her case both in May and July. The lengthy letters which emerged from these procedures were not criticised for material inaccuracy, or for failure to cross refer to recorded material. We have seen no evidence that the absence of a transcript prejudiced the claimant, or hindered her ability to present her case or defend herself.

94. The claimant put forward a criticism of the May disciplinary, which was Ms Mount's absence. We accept that Ms Mount had a legitimate reason to be absent. We also accept that there was potential uncertainty about her availability on a postponed date. We find that Mr While was faced with a common kind of Hobson's choice: proceed at once on the understanding that there may be an unsatisfactory aspect of doing so; or postpone on the understanding that delay has caused stress and will continue to do so, and there cannot be absolute certainty that the reason for postponement will not recur. The claimant was accompanied in May and did not object to proceeding and we do not criticise the respondent for doing so.

95. We add for avoidance of doubt that we do not fault Ms Thomas for stepping in as investigating/presenting officer and we accept that she was not a decision maker.

96. The respondent reported the claimant's actions to the Information Commissioner. We do not accept that the respondent's relationship or interactions with the ICO are material to its management of the claimant's disciplinary and dismissal. The two sets of relationships arise in wholly different contexts. If the claimant's point was that the ICO's reaction indicates that the events did not have a level of gravity such as to warrant dismissal, our response is that the opinion of the ICO was not a material consideration to the management or employment rights of the claimant as an individual employee.

97. The claimant made the point on a number of occasions that it was open to the respondent to commission a medical report and that it failed to do so. The respondent's witnesses stated that the NHS employment practice was to refer an employee's health issues to Occupational Health, and that the choice of liaising with treating physicians or obtaining medical records lay with the Occupational Health Advisor.

98. Mr While's referral of 11 April 2018 seems to us a meticulous piece of drafting. It shows an open mind at that stage considering that what will happen next will also require an open mind. It seems to us very likely that if Dr Aldegather had advised further medical advice or records to be obtained, that action would have followed. The referral letter referred to engagement with a treating consultant; there was no evidence, including evidence from medical records, that the claimant ever had a treating consultant in the sense of a consultant psychiatrist.

99. However, the burden of the claimant's point was that the respondent should have made a direct request to her, the claimant, to obtain a report from her GP. We disagree. In our experience, the practice of going through Occupational Health is good practice and widespread. An employer who demands a medical report from an employee may be crossing issues of boundary and confidentiality and may place the treating physician in an invidious position. It has been open at all times to the claimant to obtain medical evidence and at no point since these matters first arose in February 2018, and concluding at this hearing, has she ever done so, save for producing a selection of her medical records. (As noted above, the claimant did not in fact ask the respondent and tribunal to see the letter from her GP which she said she had brought with her to the hearing).

100. The last of the claimant's points is one on which we are with the claimant. Ms Mount's note of her investigation meeting with the claimant on 1 March 2018 contains the following record of her own remarks (242):

> "The definition in the Data Protection Act is that you are right about personal data, sensitive data, there is a list of eight things that I learned recently were drawn up by the Nazi party that could identify you as a person of interest, eg sexual orientation, trade union membership. So what do you think the rules are regarding what you should do or not do?"

101. In the absence of Ms Mount's oral evidence at this hearing, we assume that she was asking whether the claimant understood that seemingly neutral data could be abused or misused, for which there was historical precedent. We record our surprise that in the context of employment rights in 2018 a member of management should have referenced the events of the 1930s and done so by analogy with the greatest evils in human history. The claimant was right to express a concern about Ms Mount's choice of words. It was however not a matter which in our view impacted on fairness.

Discussion: wrongful dismissal / breach of contract

102. When we come to consider the claimant's claim for wrongful dismissal, we find that the respondent has demonstrated on evidence to this tribunal that the claimant committed gross misconduct such as to warrant summary dismissal and disentitle her to payment in lieu of notice.

Discussion: disability discrimination

103. We have set out above the wording of s.15 Equality Act. It was agreed that the claimant's dismissal was unfavourable treatment for the purposes of the

section. It was agreed that the disability was anxiety and depression, in relation to which the claimant met the s.6 definition. The questions at this hearing were (a) what was the 'something arising' and (b) was the dismissal because of that something?

104. Ms Owusu-Agyei reminded us of the two separate elements of causation to be proved: that the disability had caused the something, and that the something had caused the dismissal. The claimant was not dismissed because she was depressed, or experienced the symptoms of depression. On the claimant's case, she was dismissed because of what her depression caused her to do. Ms Owusu-Agyei also cautioned the tribunal against the error of finding that there was some loose factual linkage between disability, conduct and dismissal, an error which she said would not meet the rigour of the statute.

105. In discussion, we referenced the cases of City of York Council v Grosset 2018 EWCA Civ 1105, and Risby v London Borough of Waltham Forest UK EAT/0318/15. In both of those cases it appeared that the claimants gave evidence that a physical disability (respectively cystic fibrosis and quadriplegia) led to stress symptoms, which in the former case the claimant tried to manage inappropriately, and in the latter case led to extremes of foul language. There was no evidence from or on behalf of the claimant in the present case which set out a step by step analysis.

106. We ask first, what was the 'something.' There were two potential sources of evidence available to form the answer: the claimant's own accounts, and those of professionals. In October 2019 Judge Skehan had recorded as the claimant's account her alleged sense of isolation that prompted the claimant to act out of character; and the claimant's perceived increased demands leading to an increase in work-related stress. In evidence, the claimant spoke of a lack of self confidence, and said that knowledge of colleagues' earnings gave her a sense of place in the work hierarchy, and of authority over those whom she line managed. But we note that NHS staff are appointed to a post which has an objective band of salary, and an employee at Band C for example does not need to research further to know that she is paid less than a colleague at Band B and more than a colleague at Band E. That knowledge would be particularly well understood within HR, where the claimant's speciality lay.

107. Ms Owusu-Ageyi probed the same point in cross examination, by asking why the claimant thought that she had done what she had done. The claimant's evidence in reply was vague, inconsistent and unsatisfactory. She said on a number of occasions that she could not explain her actions. She expressed this in a number of formulations, although she made the same point: she said that she had racked her brains, that she was still looking for the answer, that she could not explain and did not know. She said that she had been asking herself the same question since February 2018.

108. Medical evidence might have been one source of the answer. We have quoted above the medical referral of 11 April 2018, and Dr Aldegather's

reply later the same month. We accept Ms Owusu-Agyei's careful analysis of Dr Aldegather's report. He conspicuously does not give a definitive answer to the question asked, whether in terms of an unqualified yes or on a balance of probabilities. He advised (emphases added) that "significant anxiety and depression symptoms" could interfere with personal judgment; that advice comes two paragraphs after the advice that the claimant has "mild to moderate anxiety/depression symptoms." We accept that that language is not coincidental, and that Dr Aldegather does not advise that the claimant is within the group whose judgment is interfered with. He then refers to the two groups of doctors who might advise either way, without stating expressly that he falls into either group.

109. We interpret Dr Aldegather as having failed to answer positively to the question of whether the claimant's mental health condition caused or contributed to her conduct in accessing personal records. We note that he failed to advise that any further medical enquiry was necessary. We repeat that there has never been evidence of the claimant receiving specialist psychiatric treatment, or of the involvement of a treating consultant.

110. In evidence, the claimant repeated advice which she had received, apparently from a counsellor, setting out possible therapeutic explanations for the claimant's actions. It was not clear to us that the claimant adopted any of those explanations as her first hand evidence. She seemed, on the contrary, to present them as possible speculative explanations. We have found above that the tribunal did not have complete relevant disclosure about the claimant's mental health. There was nothing in writing before us from a counselling or therapeutic source, and so we have no verification that the advice was fairly quoted by the claimant, when it was given, and there was no evidence of the status or qualification of the person who gave it.

111. The tribunal considered an alternative approach of its own initiative. Despite the absence of medical or other professional evidence, could we find that viewed as a whole, the behaviour for which the claimant was dismissed was time consuming, pointless, plainly wrong, of no tangible benefit to the claimant, incompatible with her position of trust in HR, and at odds with systems training which she both received and delivered. It was, in one word, irrational. From that, could it be inferred that the behaviour was, on balance of probabilities, the result of impaired judgment and therefore of a mental health condition, which, at the relevant time, was depression and anxiety? Although common sense suggests that that was at least a possibility, we cannot adopt this approach. The tribunal cannot make itself the assessor of medical questions of which we have neither primary evidence nor expertise, and in the teeth of the professional medical advice which was available at the time.

112. Drawing the above together, we find that the claimant has not put to tribunal her own evidence to identify what was the 'something' or that it was in any way causative of the conduct which led to dismissal. There is no evidence from a professional source, including a medical source, to support her. We find that the claimant has not, on the balance of probabilities, shown that the conduct which led to dismissal was something arising from her disability.

We therefore find that she has failed to show a causal connection between disability and the conduct which led to the unfavourable treatment of dismissal. Her claim of disability discrimination therefore fails.

Justification

113. If we had found the causative link made out, we would have found the dismissal of the claimant justified in accordance with s.15(1)(b).

114. The respondent had set out a number of legitimate aims, which we accept were its aims, and were legitimate (23). They included the protection of confidential information in accordance with GDPR, and maintaining the trust and confidence of the workforce in the respondent's ability to keep personal information about them confidential. We accept that dismissal may be a means to achieving that aim. In considering the proportionality of dismissal (the most extreme sanction) we note the potential tension between the role of the tribunal in making its own assessment of proportionality and justification, as opposed, in the identical case, to not substituting our own view for that of the fairness of dismissal. In our judgment, the scope and breadth of the claimant's actions, spread over an unknown period of time (but of at least 10 months), applying to numbers of employees measured well into three figures, and extending to over 20 occasions on a single day, and the dismisser's finding that the claimant has failed to offer reassurance of there being no recurrence, taken together were such that dismissal was the proportionate response.

Anonymity

115. Of our own initiative, we drew the attention of the claimant to the Employment Tribunals Act s.12. It provides,

> "This section applies to proceedings on the complaint… in which evidence of a personal nature is likely to be heard… [that] means any evidence of a medical, or other intimate, nature which might reasonably be assumed to be likely to cause significant embarrassment to the claimant if reported."

116. No question about this had been raised before, and in light in particular of the practice of posting judgments on line, we invited submissions on anonymity. The claimant in reply invited anonymity because the matters in this case dealt with her health. In opposing any such application, Ms Owusu-Agyei reminded us of the precise wording of the statute.

117. We accept that the evidence in this case, as set out above, is evidence of a medical nature. We accept that the claimant may prefer to have it kept personal, and that that preference may not be one that she thought of when initiating proceedings which would lead to a public hearing. We also accept that the practice of posting judgments online is not necessarily fully understood in all its ramifications by all claimants.

118. Our primary duty is to deliver public justice, which includes promulgating public judgments. It seems to us that the provision quoted above requires us to be satisfied, in a particular case, of a balancing interest which would

outweigh the public interest in public justice. We do not consider that that has been shown in the circumstances of this case, and the application for an anonymity order is refused.

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Employment Judge R Lewis

Date: 2/9/2021

Sent to the parties on: 14/9/2021

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For the Tribunal Office