EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102730/2020

Preliminary Hearing Held at Glasgow on 16 to 20 August 2021

Employment Judge A Jones

Members: Mr J Burnett

Mr Ashraf

Ms Kathleen Graham	**Claimant** **In Person**
Rape Crisis Scotland	**Respondent** **Represented by** **Mr G McQueen,** **Solicitor**

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The claimant was unfairly dismissed by the respondent;

2. The respondent is ordered to pay to the claimant a basic award in respect of her unfair dismissal £7087.50

3. The respondent is ordered to pay to the claimant compensation for unfair dismissal of £28,124.00. The recoupment period is from 11 February for 26 weeks to 11 August 2020 and the amount of compensation subject to recoupment is £14,924.

4. The respondent knew or ought to have known that the claimant was a disabled person for the purposes of the Equality Act 2010 from November 2018;

5. The respondent discriminated against the claimant for a reason arising from her disability;

6. The respondent failed in its duty to make reasonable adjustments in relation to the claimant;

7. The respondent is order to make a payment to the claimant in respect of injury to feelings arising from the respondent's failure to make reasonable adjustments and having discriminated against the claimant for a reason arising from her disability of £15,000 together with interest of £1612.10;

8. The claimant was not directly discriminated against by the respondent on the basis of her disability;

9. The claimant was not victimised by the respondent for having committed a protected act.

REASONS

Introduction

1. The claimant raised claims of unfair dismissal and disability discrimination against the respondent. A preliminary hearing took place on 18 August 2020 to discuss case management. Following that hearing the claimant made an application to amend her claim to include claims of harassment, direct discrimination, discrimination arising from a disability, failure to make reasonable adjustments and victimisation all arising from the protected characteristic of disability. The amendment application was opposed in its entirety. In addition, the respondent did not accept that the claimant was a disabled person for the purposed of the Equality Act 2010.

2. A further preliminary hearing took place on 30 April 2021. While the issue of the claimant's disability was not discussed at that hearing, the Tribunal granted the claimant's application to amend her claim other than in relation to

allegations of harassment. Arrangements were made for a final hearing in this case to take place. The question of the claimant's disability was to be considered on the first day of the final hearing.

3. The respondent conceded that the claimant was a disabled person on the last working day before the final hearing was due to commence. The respondent's position however was that it was not aware of the claimant's disability during the claimant's employment.

4. Parties agreed a list of dates and a list of issues in advance of the final hearing. A joint bundle of productions was provided for use at the final hearing. Four witnesses gave evidence on behalf of the respondent. A reasonable adjustment was made to allow one of those witnesses to give evidence in chief by way of written witness statement and this statement was lodged with the productions. The claimant gave evidence on her own behalf and did not call any further witnesses. The claimant lodged an updated schedule of loss prior to giving her evidence.

Findings in fact

5. Having considered the evidence, documents to which reference was made and the submissions of the parties, the Tribunal made the following findings in fact.

6. The respondent is a charity which provides support to those who have been impacted by sexual violence. The respondent receives funding from a number of sources and for specific projects.

7. The claimant was initially employed by the respondent from 7th July 2007 to work part time on a national helpline which had been set up.

8. From 2016, the respondent obtained additional funding for a helpline for a new project called the Scottish Women's Resource Centre ('SWRC'). The claimant was appointed to an additional role carrying out work on the helpline operated by SWRC as a result of this funding. The purpose of this project was

to signpost women who were seeking advice on issues such as domestic violence or custody.

9. The respondent has various employment policies, including a stress management policy, a bullying and harassment policy; Health and safety policy, sickness absence policy; a disciplinary policy and a grievance policy. All of these policies are said to be related to each other.

10. Further funding was obtained by the respondent in relation to the SWRC project on which the claimant was working and the claimant applied for and was appointed to a newly created full-time role of Advocacy worker with SWRC from 30 January 2017. She was paid £30,186 per annum.

11. In addition to her full-time role, the claimant continued to work on the Rape Crisis Scotland ('RCS') helpline and was paid latterly at an hourly rate of £15.39 for 8 hours per week. This was a separate contract of employment from her full-time role with SWRC.

12. The respondent employs around 15 people in total. In addition, the respondent uses the services of volunteers and a Board of Directors, who also provided their service on a voluntary basis and are not remunerated.

13. Around February 2019, another advocacy worker was recruited by the respondent for SWRC.

14. A third advocacy worker began to share an office with the claimant and her colleague from around October 2019

15. The claimant reported to Katy Mathieson ('KM') in her role at SWRC and had support and supervision meetings with her. Separate meetings were carried out in relation to the claimant's RCS helpline role. These were initially with a Sarah Gurney and then Sandi Barton, Director of Operations.

16. The claimant was referred to a 'Coping with Anxiety' course by her GP, which she attended in the early part of 2017 on a weekly basis. The claimant made arrangements with KM to leave work early in order to attend this course. The

respondent was aware that the claimant was undergoing treatment for anxiety at this time.

17. At a support and supervision meeting between the claimant and KM regarding her role in SWRC in October 2017, the claimant was noted as 'feels terrible and quite stressed' and 'mentally exhausted'. It also noted 'KM also concerned that there is a pre-existing anxiety problem for KG that is being made worse by stresses at work.'

18. The claimant was prescribed anti-depressant medication from November 2017, which she continues to take at present. The claimant advised KM around this time of the medication she had been prescribed.

19. At a support and supervision meeting with KM in May 2018, the minutes record 'Kate is on medication and feels it works for her, giving her a handle of things and that her mental health feels ok.' The respondent was aware from that point at the latest that the claimant was taking medication for depression and anxiety.

20. The claimant was off work suffering from work related stress in October/November 2018.

21. The respondent was or ought reasonably to have been aware that the claimant was likely to be a disabled person for the purposes of the Equality Act 2010 ('EqA') by November 2018.

22. The notes of a support and supervision meeting between the claimant and her line manager for the RCS helpline on 21 February 2019 record 'Impact of the work- vicarious trauma – has become apparent'.

23. The claimant's relationship with KM began to break down from the beginning of 2019. The claimant began to feel isolated and excluded in her full-time role.

24. KM carried out a risk assessment of the SWRC project for the period April – June 2019, which was dated 31 May 2019. Under a heading of staffing, it referred to a medium to low risk being 'Potential HR risk as the AW (advocacy worker) who raised this can be challenging and has previously been signed

off with work related stress'. While at this point there were two advocacy workers, it would have been clear to anyone familiar with the staffing of the project that this referred to the claimant. The claimant was not consulted in relation to the risk assessment nor made aware of the content.

25. The risk assessment document was provided to the Board of Directors of the respondent together with other board papers. The document itself was saved to a shared drive to which all members of staff both in the SWRC project and RCS more generally had access. The claimant became aware of the document in August 2019 by accident.

26. The claimant sent an email to Sandy Brindley the respondent's Chief Executive on 7 August 2019. The claimant complained that the risk assessment which had confidential information about her health could be accessed by any member of staff and said 'In terms of being described in this way I would like to know who this has been communicated to but would also like an opportunity to discuss the reasons for this and how this can be resolved as I find this unacceptable.'

27. The claimant met with Sandy Brindley on 9th August 2019 to discuss the matter. The claimant was offered mediation to address the matter. The claimant indicated she would consider the position. The claimant was asked to put her concerns in writing.

28. KM's line management responsibilities for the claimant were removed from 9 August 2019.

29. In a support and supervision meeting between the claimant and Sandi Barton, Operations Director on 20 September 2019 in relation to her helpline role, it was agreed that Sandi Barton would also take on the support and supervision responsibility in relation to the claimant's SWRC role. At that meeting the claimant said that she felt unsafe and lacked trust in the organisation. No further support and supervision meetings in relation to either role took place.

30. The claimant set out her concerns in writing in relation to the risk assessment document by letter dated 15th October 2019, which referred to 'nature of

grievance' and set out the basis on which she did not believe that mediation was appropriate. The grievance stated 'I would submit that the fact I have been risk assessed is inappropriate and discriminatory'. The claimant made clear in this letter that she wished the matter dealt with as a grievance.

31. Ms Brindley then responded by email dated 23 October 2019 again raising the possibility of an informal resolution to the claimant's concerns, indicating that if the claimant wished to proceed with a formal grievance she should confirm this by 31 October and the respondent's Chair would investigate matters.

32. The claimant confirmed in an email dated 31 October 2019 that she wanted to follow the grievance procedure.

33. Ms Brindley then emailed the claimant on 8 November 2019 to indicate that a meeting would take place on 13 November to discuss the grievance. In the event, that meeting was postponed and did not take place until 2 December. The grievance was chaired by the respondent's then Chair and Ms Brindley was present throughout the grievance hearing, ostensibly in a note taking capacity.

34. Ms Brindley, who had worked with the claimant throughout her employment noticed a change in behaviour of the claimant in the months leading up to November 2019.

35. On 26 November the other advocacy workers asked to speak to Sandie Barton in private. They raised concerns regarding the conduct of the claimant towards them. Ms Barton contacted Ms Brindley to discuss this. Following that discussion an email was sent between Ms Barton and Ms Brindley which stated 'they had been undergoing a very difficult time with Kate Graham and that things had reached a climax yesterday when they had become unbearable. They both described behaviour which made their working environment very difficult and increasingly tense.' It went on to say that 'Clair stated that the difficult behaviour had been going on for months and Natalia

noted this, having only recently moved into a shared space, as having become extreme in the last weeks. Relationships were irreparably damaged'.

36. Ms Brindley then responded and asked, at the request of the respondent's chair, whether Ms Barton was of the view that suspension should be considered.

37. A recommendation was subsequently made to the Board by Ms Brindley to suspend the claimant and each board member was asked to agree whether suspension was appropriate by email. All board members agreed.

38. Ms Brindley then telephoned the claimant on 27th November and advised her that she was being suspended immediately. Ms Brindley followed this up with an email that day which stated 'I am writing to advise you that you are being suspended on full pay on a no prejudice basis to enable an investigation to take place into complaints that have been raised……The complaints have been made by two other staff members from SWRC and concern aggressive and bullying behaviour.' The email went on to say 'The current grievance process will continue in tandem with the disciplinary investigation'.

39. Ms Barton was appointed by Ms Brindley to investigate the allegations. Ms Barton did not think it was in her remit to consider whether there was any background cause for the conduct of the claimant, to investigate the claimant's mental health issues or to consider whether the grievance and disciplinary processes should be combined.

40. Ms Barton asked both employees who had complained about the claimant's conduct to put their concerns in writing which they did. In the document from one colleague, under a heading 'Other incidents', reference was made to a 'racially-motivated 'joke'' which was said to have occurred 'On one occasion in October 2019'.

41. Ms Barton then emailed the claimant on 3rd December saying she would be in touch 'on Friday to arrange a time to meet up with that suits next week'.

42. An outcome letter dated 9 December 2019 was sent to the claimant in relation to the grievance she had raised, upholding her allegation of breach of confidentiality and making recommendations in relation to the claimant's relationship with her line manager. No action was taken against her line manager or anyone else as a result of the grievance. The letter made no reference to any right of appeal the claimant may have against the outcome. No steps were taken to implement the recommendations which had been made.

43. Ms Barton met with the two complainers (CJ and NE) separately on 9th December. These meetings were said to be an 'informal meeting to discuss concerns about bullying and harassment'. During the meeting with CJ, Ms Barton is recorded as saying in the context of the allegations against the claimant 'SB (being Ms Barton) said she could feel the impact, and that this links to how we talk about stalking and a course of conduct. She recognises CJ's (being one of the complainers) strategies for resilience but also the impact including taking on more work, being in the office whist feeling she can't trust people – being subject to that is not acceptable'.

44. In the meeting with NE (the other complainer), NE is noted as saying 'apart from the racist incident NE herself didn't really feel bullied, but wondered if was going to be the start of something that might increase the more time she and KG spent together.' Ms Barton asked NE if there was anyone else she ought to speak to and NE suggested two other individuals should be interviewed as it was alleged that the claimant had shouted at one of them. Towards the end of the meeting Ms Barton is noted as saying 'she was sorry this had been her (NE's) experience, its not what RCS wants for anyone. She hopes that over time trust can be built with other members of staff, and we can look at ways of making the SWRC space feel better'.

45. Ms Barton accepted CJ and NE's version of events as fact before having spoken to the claimant about the allegations.

46. Ms Barton also met with LJ on 9 December, who had been mentioned by NE. This was also said to be an 'informal meeting to discuss concerns about

bullying and harassment'. Ms Barton opened the meeting by saying that the its purpose was 'to discuss KG's behaviour'. LJ was asked to speak about her experience with the claimant. At the end of the meeting LJ expressed discomfort around being in a formal process. The minutes then noted 'SB (Sandi Barton) reflected it was difficult, and that we have an assumption here about how we work together. It was not a reflection on LJ. No one should be speaking about colleagues in that way [referring to the claimant] in this organisational culture, its not acceptable.'

47. The other individual mentioned by NE was not interviewed by Ms Barton. However, the claimant subsequently asked that Ms Barton interview her. Ms Barton did not conduct a meeting with her, but spoke to her and did not take notes of the conversation. The individual, PN, said that while it had been suggested she had previously described the claimant's behaviour as aggressive on an occasion in September 2018, she would better describe the behaviour as 'overbearing'.

48. Ms Barton emailed the claimant on 9 December inviting her to a meeting as 'part of the investigation into reports of bullying, intimidation and disruptive work practice by members of staff at the Scottish Women's rights Centre and Rape Crisis Scotland'. The email said 'at this stage this is an informal process'.

49. On 10 December, Ms Barton met with KM as part of the investigation. She opened the meeting by inviting KM to 'speak about her experiences of being KG's manager'. During the meeting KM is noted as saying 'As an organisation the culture is to try to deal with things informally, with encouragement and support, but KM doesn't know that that approach has been helpful here. She has raised this in her own support and supervision during the period – she thinks we all have a reticence about being in a formal process, but she wonders if we'd formalised this sooner whether we'd be here now.' Ms Barton also informed KM that CJ and NE were 'fearful about safety'.

50. None of these meetings were conducted with an open mind on the part of Ms Barton, who expressed sympathy with the complainers throughout the

meetings. The meetings were not fact finding in nature. Ms Barton formed the view that the allegations made were established before speaking to the claimant. Ms Barton categorised the claimant's conduct as bullying and harassment even where NE had said she did not feel bullied or harassed other than in relation to one incident.

51. Ms Barton met with the claimant on 16 December. The claimant was accompanied by her trade union representative. At the beginning of the meeting the claimant and her trade union representative expressed concern about the investigation process and the claimant's suspension. The claimant also asked for clarity as to how many members of staff the concerns related to. The notes of the meeting state 'SB explained that initially she had been made aware of concerns by two members of staff, but in the course of her investigation had clarified other members of staff who had been affected. The claimant raised her concerns that the investigation had been widened and that there 'may have been a trawl to identify additional information.'

52. During the investigation meeting the claimant is noted as indicating that her defence will be that she's 'suffering from work related stress.' She is also noted as saying 'she is not a bully. For 12 years she's worked in the organisation and not been accused of bullying. She experienced stress and trauma, and surely there's more than one way to express trauma, you can't pigeon hole this. KG said it doesn't amount to what is being made out to be.' The claimant also stated that she suffered workplace, stress, anxiety and depression. The claimant's trade union representative said during the meeting 'You (the claimant) raised issues with stress, medication you were on, so I am trying to work out if any reasonable adjustments were needed.' She also asked whether the claimant had been referred to occupational health to which Ms Barton replied 'I don't think so'.

53. The claimant emailed Ms Barton and Ms Brindley on 19 December to indicate that she had been signed off work for four weeks due to work related stress. The claimant went on to say 'She (the GP) advised that a request to occupational health should be made by me to the organisation directly and

they have no role in this. Sandie, as you recall I made this request via email two days ago. Given that my defence to allegations of bulling is essential work-related stress could you please honour my request and make the referral to occupational health.'

54. Ms Barton replied to the claimant's email within 20 minutes indicating that 'the external occupational health service is to assess fitness for work but 'given you will be off sick for the next 4 weeks this would not be appropriate at this stage.'

55. Ms Barton emailed the claimant later that day with a copy of the minutes of the meeting which had taken place. She indicated that she wouldn't be able to conclude the investigation until she interviewed those highlighted by the claimant and that would be the new year when she returned to work on 6th January.

56. No system of support was put in place for the claimant over the Christmas and New Year holiday period.

57. On 6 January, Ms Barton emailed NK, whom the claimant had asked should be interviewed in relation to the allegations against her. The email asked that NK provide details of how she experienced the claimant's presentation and upset. The email stated 'As discussed if this would be easier in an interview let me know, otherwise a summary in writing is fine.'

58. NK sent an email to Ms Barton later on 6 January which made reference to her concerns regarding the claimant 'especially around episodes of witnessing Kate distressed; low mood, tearful, very pale, anxious and I sensed vulnerable. I did note this with Pauline who also saw Kate's levels of distress.'

59. Ms Barton then produced an investigation report on 6 January. The terms of reference of the investigation were said to be 'To investigate the conduct of Kate Graham, following reports of bullying and intimidation by SWRC colleagues.' Prior to submitting the report, Ms Barton had not read all of the support and supervision meetings notes in relation to the claimant. In

particular she did not read any of the notes relating to the claimant's RCS helpline role. The report notes that 'Where relevant I also reviewed minutes of Support and Supervision' and that the claimant has stated 'that she has a diagnosis of depression and anxiety'.

60. Ms Brindley wrote to the claimant in a letter dated 16th January, inviting her to a disciplinary hearing and attaching the investigation report with appendices. The letter stated 'I am writing to tell you that Rape Crisis Scotland is considering dismissing you. This action is being considered following the investigation into complaints about your conduct from other members of RCS staff.'

61. In response to an email which was not produced to the Tribunal from the claimant where she requested a delay to the process while she was off sick, the respondent emailed the claimant on 20 January indicating that they did not wish to delay the process further and suggested that the claimant could bring a family member to the disciplinary hearing and/or that the hearing could be conducted a neutral venue.

62. On 22 January, Ms Brindley emailed KM, and asked whether the claimant had ever 'indicated that she suffers from or has a formal diagnosis of anxiety and depression?'. KM responded almost immediately by email saying 'No she has never indicated this to me either in the helpline or SWRC.' Around 30 minutes later, KM emailed further stating 'Kate did once indicate to me she was temporarily taking medication but didn't say what for or that she has a diagnosis for any health condition.' In fact, the claimant had informed KM on 18 May 2018 that she was on medication for her mental health, which had been noted in her support and supervision notes and made no mention of that being a temporary state of affairs.

63. Following a further request by the claimant that the disciplinary hearing be postponed, Ms Brindley wrote to the claimant by email dated 24th January indicating that the hearing would be postponed. It went on to say that 'If your union representative is unable to or unwilling to attend on your behalf, your written responses to the questions will be considered.' The respondent

attached to that email a list of questions which were vague in their terms and did not specify in any meaningful manner the allegations against the claimant. The respondent suggested that if the claimant could not attend the disciplinary hearing, she could provide written answers to these questions which would be considered.

64. By letter dated 29 January, the claimant's trade union representative wrote to Ms Brindley to indicate that the process should be paused and that the claimant was not well enough to undertake such a hearing. The letter also requested a referral to occupational health be made in respect of the claimant before any hearing was rescheduled.

65. Ms Brindley responded by email on 30 January indicating that the hearing would have to take place by 5 February.

66. The claimant's trade union representative then wrote by letter dated 3 February, restating their view that an occupational health assessment ought to be carried out and that the claimant was not fit to attend the hearing. The letter went on to state that as the respondent had indicated that the hearing would take place in any event, the claimant felt compelled to attend.

67. A hearing then took place on 5 February. The hearing was chaired by a member of the Board of Directors, Lindsey Millen ('LM'). LM had no training in chairing disciplinary or grievance hearings, and although she had represented members in her former employment at some hearings, had never conducted a disciplinary or grievance hearing before.

68. Ms Brindley also attended the disciplinary hearing, ostensibly in a note taking capacity. Ms Brindley had no training in conducting such proceedings and had never conducted such proceedings before. The claimant's trade union objected to Ms Brindley's role indicating concern that it could compromise the process and potentially affect the impartiality of the hearing. Those concerns were dismissed by the respondent.

69. The claimant was represented by her trade union representative at the disciplinary hearing who opened the meeting by saying that the union had

twice raised concerns about the meeting going ahead when the claimant was signed off work with stress and that an occupational health referral ought to have taken place.

70. LM conducted the hearing by referring to five points which she said were the summary of the allegations. Three of these points (failure to carry out reasonable requests of managers, comments that could be seen as bringing RCS into disrepute e.g. with external providers and comments about other members of staff) were not mentioned in the terms of reference of the investigation report, there was no specification of the allegations and no investigation had been conducted into them. During the meeting the claimant indicated that she had been diagnosed as having anxiety and depression in December 2017.

71. LM was not aware of the recommendations made in relation to the claimant's grievance prior to the disciplinary hearing and although she knew that a grievance had been raised by the claimant regarding LM, she made no enquiries in that regard. LM did not consider the relevance of policies (other than the disciplinary policy) of the respondent, in particular the Stress at Work policy in her deliberations. LM incorrectly understood that the claimant had requested a referral to occupational health only in relation to the postponement of the disciplinary hearing and not in relation to a potential defence to the allegations against her.

72. Prior to the claimant being dismissed, the chair of the respondent contacted the claimant's trade union and indicated to them that if the claimant resigned before she was dismissed, then the respondent would provide the claimant with a positive reference.

73. The claimant was dismissed by letter dated 11 February on grounds of gross misconduct. The letter stated that the allegedly racist comment made by the claimant in October 2019 alone amounted to gross misconduct. The letter also indicated that LM took into account that the complainers may resign if the claimant returned to work. This was in fact LM's own view as the complainers had not indicated that they may resign, but had raised issues about their ability

to continue to work with the claimant. The letter indicated that the claimant had not suggested that her behaviour was in any way caused by any anxiety or depression. This was inaccurate as the claimant had raised on a number of occasions during the process that this was the cause of any unacceptable behaviour. The claimant was dismissed from both her roles with the respondent. LM did not give consideration to whether the claimant could have continued in her RCS helpline role and instead treated the claimant's two employment contracts as one.

74. The claimant appealed against her dismissal by letter dated 22 February.

75. By letter dated 28 February, the claimant was invited to a hearing on 6 March to consider her appeal. The appeal was to be heard by two Board members, Ms Ritch (who is sadly now deceased) and Ms Wilson-Scott. Ms Brindley was to be in attendance again, ostensibly as a note taker. The claimant indicated at that meeting that the external counsellor to whom she had been referred had sought to persuade her to resign and that she believed that the counsellor had been in communication with the respondent in relation to the matter. The respondent told the Tribunal that it had contacted the counsellor but no email correspondence with the counsellor was produced to the Tribunal.

76. The claimant's appeal was dismissed by letter dated 12 March.

77. The Tribunal was satisfied that the claimant's disability contributed to her conduct in the period between October and November 2019 which led to her dismissal.

78. The claimant received Income Based Job seekers allowance for 26 weeks after the termination of her employment.

79. The claimant commenced employment with Glasgow City Council on 3 December 2020 and earns £467.66 per week net and has an ongoing weekly loss of £80 per week net.

Observations on the evidence

80. The Tribunal heard evidence from Ms Barton, Ms Brindley, Ms Mullen and Ms Wilson-Scott for the respondent. The claimant did not call any supporting witnesses. The Tribunal found Ms Wilson-Scott to be a credible and reliable witness. She was honest and open in her evidence and was willing to be clear when she could not remember particular matters. She was a straightforward witness.

81. The Tribunal did not find Ms Mullen to be so open and honest. Ms Mullen was confident in her evidence and confident that she had followed a fair procedure and conducted the proceedings in a fair manner. The Tribunal found that confidence to be misplaced. Ms Mullen appeared to be of the view that because she had been a workplace representative for a trade union for a number of years in her role in a bank, that she was qualified to chair a disciplinary hearing in which dismissal was being contemplated. She was also robust in her view that she did not require any medical evidence in order to consider the allegations against the claimant as she was qualified to form the view that the claimant's conduct could not have been caused by any medical condition. The Tribunal was extremely surprised at the position adopted by Ms Mullen in this regard who did not have any medical or occupational health qualifications.

82. Ms Mullen also indicated that she considered both roles in which the claimant was employed separately when she considered whether dismissal was an appropriate sanction. The Tribunal did not accept that evidence. There was nothing in the letter of dismissal or indeed the ET3 to suggest that the respondent had given any consideration whatsoever to the fact that the claimant had two contracts of employment and that her role in the RCS helpline had been performed by her for 12 years, without any question regarding her conduct being raised or any complaint being made in relation to her performance in that role. Rather the Tribunal was of the view that the respondent in general and Ms Mullen in particular had formed the view at an

early stage that the claimant would be dismissed and the failure to consider the separate roles performed by the claimant was indicative of this approach.

83. The Tribunal was very concerned at the role Ms Brindley played in the proceedings concerning the claimant. While the Tribunal was mindful that the respondent was a small mainly vorganisation, it seemed extraordinary that the Chief Executive of the organisation would make a recommendation that an employee be suspended, take part in a grievance hearing concerning that employee and then be present at the disciplinary and appeal hearings concerning that same employee where the employee was suggesting that the grievance and disciplinary proceedings ought to have been combined. The Tribunal did not accept Ms Brindley's evidence that her presence was to ensure as few people as possible were aware of the allegations against the claimant. Rather, the Tribunal formed the view that consciously or otherwise, the whole process involving the claimant was influenced by Ms Brindley and her view of the claimant. The Tribunal was also concerned in particular that a number of witnesses when asked why one of the complainers would contact the claimant out of work hours for advice after the claimant was said to have been racist towards her was 'that it was a sign of that the complainer's character'. When questioned further, it transpired that neither Ms Mullen nor Ms Wilson-Scott knew the complainer and the Tribunal formed the view that this was likely to be language to have been used by Ms Brindley which was then picked up by the other individuals during the process.

84. The Tribunal was also concerned at Ms Brindley's evidence that she had advised the claimant's line manager during support and supervision meetings that formal action ought to have been taken against the claimant. Despite this evidence, it did not seem that Ms Brindley accepted any responsibility for the failure to take any formal action and appeared to be of the view that this was the responsibility of the line manager herself. While the respondent had no individual responsible for HR matters, it seemed to the Tribunal that a Chief Executive ought to have intervened if she had thought that disciplinary action, whether in relation to conduct or performance ought to have been taken against an individual. It must have been obvious to Ms Brindley that the clear

breakdown in relationship between the claimant and her line manager was likely to have an impact on the rest of the organisation. Her failure to intervene allowed the circumstances in which the claimant was then dismissed to develop. It was a clear failure of management on the part of the respondent which allowed the situation to develop.

85. Ms Brindley appeared unable or unwilling to understand that her presence throughout both the grievance and disciplinary processes could have a bearing on the extent to which these were conducted in an impartial manner. It was clear to the Tribunal that Ms Brindley operated an invisible hand throughout both processes and her presence was not neutral.

86. The Tribunal did not accept as credible or reliable Ms Barton's evidence that she had conducted a thorough investigation. It was clear to the Tribunal that the starting point of Ms Barton's investigation was that she believed what she was told by the complainers without question. She appeared to think that it was her role to provide support to the complainers rather than investigate allegations and seek to establish facts. There was no attempt on the part of Ms Barton to establish any facts which might have been in favour of the claimant. She did not think it was her responsibility to determine whether there was any cause for the claimant's behaviour, which had been recognised had changed in recent months. She did not think it was her responsibility to investigate what the claimant was saying about her mental health. The only focus throughout the process was whether or not the claimant had a formal diagnosis of depression and anxiety, without any consideration being given to investigating the claimant's mental health by obtaining a professional view. It was notable that it was Ms Brindley and not Ms Barton who asked the question of KM regarding the claimant's possible diagnosis.

87. It was clear to the Tribunal that the investigation was conducted with a view to dismissing the claimant and sought to find as much evidence of unacceptable conduct on the part of the claimant as possible. Ms Barton was unwilling to establish any facts which might have been in support of the claimant. At no stage did Ms Barton set out with any specificity the allegations

against the claimant. This had a material impact on the fairness of the procedure but was also to the claimant's actual detriment. For instance LM indicated that she questioned the claimant's credibility as in the notes of the investigatory meeting, the claimant had responded to the allegation she had made a racist joke by saying she didn't know what that was about, when she had not yet been told what she was alleged to have said (and which clearly was not a joke at all). She therefore believed the claimant was not credible in her position on that matter, when in reality the allegation had not been put to her in such a way as she could recognise what was being alleged.

88. The Tribunal found the claimant to be generally credible and reliable and it found that her evidence was to be preferred to that of the respondent's witnesses where there was any dispute in particular in relation to the information she provided to the respondent regarding her mental health. While the Tribunal did not hear from the claimant's line manager KM, the Tribunal accepted the claimant's evidence that she discussed the medication she was taking and treatment she was undergoing for her mental health with her on a number of occasions, both in relation to anxiety management sessions and in relation to her anti-depressant medication, initially because it was causing her gastric issues as a result of which she had to take time off and again in support and supervision meetings.

89. While the Tribunal accepted that the claimant's conduct at times may well have been challenging, in that she was clearly an intelligent woman with strong opinions who was willing to challenge operational matters with which she did not agree, it concluded that the way in which she had been treated by the respondent had clearly had a long lasting effect on her in that she felt betrayed and undermined by the respondent, which had simply cast her adrift rather than address the organisational management issues which were clearly impacting on the claimant and others in the organisation.

Issues to determine

90. A list of issues had been agreed between the parties. These can be summarised as follows:

Disability discrimination

91.

a) Did the respondent have actual and/or constructive knowledge of the claimant's disability?

b) Did the respondent directly discriminate against the claimant in relation to the risk assessment carried out on 31 May 2019 because of the claimant's disability in terms of s.13 EqA?

c) In subjecting the claimant to a disciplinary process, did the respondent treat the claimant unfavourably in terms of section 15 EqA?

d) Was the claimant dismissed for something arising in consequence of her disability in terms of s. 15 EqA and if so, was such treatment justified?

e) Did the respondent's process for gathering information about an employee's health status when making decisions about employment including referral to an Occupational Health provider, amount to a PCP?

f) If so, did it apply this PCP to the claimant and did it put the claimant at a disadvantage?

g) Would it have been reasonable for the respondent to acquire evidence where the employee was claiming to be covered by the EqA in the context of a disciplinary/grievance process and would such steps have removed the substantial disadvantage to the claimant?

h) Did the grievance raised by the claimant against her manager in August 2019 amount to a protected act for the purposes of s.27 EqA?

i) If so, did the respondent subject the claimant to a detriment, being a disciplinary process because of that protected act?

j) What compensation if any should be awarded to the claimant in terms of injury to feelings or compensation for loss of earnings?

Unfair dismissal

92 In relation to the dismissal of the claimant from each of her contracts of employment with the respondent

92.1 Was the reason or principal reason for the claimant's dismissal conduct in terms of s98(2) Employment Rights Act 1996 ('ERA')?

92.2 If so, did the respondent act reasonably in dismissing the claimant in terms of s.98(4) ERA and in particular:

92.3 Did the respondent have a genuine belief that the claimant had committed the conduct alleged, in particular bullying colleagues and making a racist remark?

92.4 Did the respondent have reasonable grounds for such a belief?

92.5 Was the investigation which was carried out reasonable in all the circumstance?

92.6 Was the decision to dismiss within the band of reasonable responses?

92.7 Were any procedural defects which might have rendered the dismissal unfair remedied by the appeal hearing?

92.8 If the claimant's dismissal was procedurally unfair, would the claimant have been dismissed in any event had a fair procedure been followed?

92.9 Did the respondent follow the ACAS code of practice on disciplinary and grievance procedures?

92.10 What remedy if any should be awarded to the claimant, and did the claimant contribute to her dismissal such that any compensation should be reduced?

Relevant law

Unfair dismissal

93. Section 98 of ERA sets out that

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

Disability discrimination

94. s.6 EqA provides that a person will have the protected characteristic of disability if she has a physical or mental impairment which has a substantial and long-term adverse effect on her ability to carry out normal day to activities.

95. s.13 EqA provides that a person will discriminate against another person if, because of a protected characteristic, that person is treated less favourably than the person treats or would treat others.

96. s.15 EqA provides that a person will discriminate against a disabled person if he or she treats the disabled person unfavourably because of something arising in consequence of their disability and they cannot show the treatment is a proportionate means of achieving a legitimate end. No discrimination will have occurred if the employer did not know, and could not reasonably have been expected to know, that the person had a disability.

97. s.20 EqA deals with an employer's duty to make reasonable adjustments. S.21 provides that a failure to comply with a duty to make reasonable adjustments will amount to discriminatory treatment.

Submissions

98. The respondent provided written outline submissions and summarised those submissions in oral argument.

99. The respondent denied all claims against them. It was said that the claimant was not a credible witness for a number of reasons and that the procedure which had been followed in relation to the claimant's dismissal was fair and dismissal was a reasonable sanction. The Tribunal was reminded not to substitute its view in either regard. It was said that the claimant was dismissed for having bullied and harassment her colleagues and made a racist remark.

100. The evidence of LM was very important and she took into account all evidence which was presented and found the allegations to be corroborated.

101. It was said that the investigation was reasonable. The respondent is a small charity with no HR team and it was reasonable for Ms Barton to be identified as being appropriate to carry out the investigation. She conducted five interviews in total and the claimant was given a full chance to respond at the investigatory hearing.

102. It was said that given the size of the respondent's organisation an occupational health referral was not appropriate as the claimant had already been signed off work sick.

103. The decision to dismiss was within the band of reasonable responses given the serious nature of the allegations against the claimant and any defects in the procedure were remedied at the appeal hearing.

104. It was also said that even if it could be said that the claimant's dismissal was procedurally unfair, she would have been dismissed in any event. It was said that the claimant did not specifically allege that the stress she was suffering was the cause of her making a racist remark and that medical evidence would have made no difference to the decision to dismiss.

105. The respondent was said to have followed the ACAS code of practice, there was no delay in the proceedings, different staff took the different roles and the

procedure was completed as soon as possible given the number of staff available.

106. It was said that it was clear that the suspension of the claimant was without prejudice. She was told of the case to answer and the allegations were set out in full in the investigation report. The disciplinary hearing took place without unreasonable delay and the claimant exercised her right of appeal.

107. Turning to the facts in dispute, it was said that there was no evidence for the claimant's allegation that the timing of the decision to suspend her was suspect.

108. It was said that the claimant's evidence became increasingly extravagant, whereby she made allegations of collusion and that there was no evidence to substantiate this and in fact the evidence runs contrary to the evidence of the respondent's witnesses.

109. In particular, it was submitted that there was no evidence to substantiate the claimant's allegation of collusion between Ms Barton and Ms Brindley and the external counsellor in relation to attempts to persuade the claimant to resign.

110. The minutes of the investigatory meeting with the claimant were accurate and reflected that the claimant was given notice of the allegation of a racist comment.

111. In terms of the claimant's claims of discrimination arising from a disability, it was said that the respondent did not know that the claimant was disabled and had no constructive knowledge of this either. In the alternative, the Tribunal was invited to find that if the respondent did have knowledge of the claimant's disability, the behaviour of the claimant did not arise from her disability. It was said that the claimant on multiple occasions isolated colleagues, made negative comments and failed to take personal responsibility for her actions.

112. It was also submitted that the claimant hadn't suggested that the racist remark made by her was caused by her disability until the Tribunal hearing and that she was simply seeking to contextualise the comment rather than accept

responsibility for it. Therefore the respondent's position is that the claimant's treatment was because of her behaviour and not her anxiety and depression

113. It was also said that if the Tribunal did find that there had been discriminatory treatment arising from the claimant's disability, then the claimant's dismissal was objectively justified because of her conduct and the standards of conduct expected within the organisation.

114. In terms of the allegation that the risk assessment amounted to direct discrimination, it was said that there had been no reference to a comparator and that in any event, there was no less favourable treatment of the claimant by being subject to a risk assessment. The Tribunal was invited to accept the evidence of Ms Brindley that the risk assessment was organisation wide and that there was no singling out of the claimant. In any event, the risk assessment was not related to the claimant's disability. At the time of the risk assessment, it was said that the respondent was not aware of the claimant's disability and that there was nothing to suggest that it was in any way related to the claimant's disability.

115. The Tribunal was also invited to accept LM's evidence which corroborated Ms Brindley's evidence regarding the purpose of the risk assessment and that as the claimant's evidence was that she had no experience of risk assessment being conducted and that as she accepted that it was a reasonable interpretation that the risk assessment covered all staff, there was no discrimination.

116. Turning to the question of victimisation, it was said that the claim was without merit. LM who took the decision to dismiss the claimant, had no awareness of the grievance. In any event, it was said that the grievance was not a protected act as it did not refer specifically to disability.

117. In terms of reasonable adjustments, it was said that the claimant had failed to articulate the PCP. If the Tribunal found that there was a PCP which was applied, it was said that it did not put the claimant at a substantial disadvantage in comparison to a non-disabled person.

118. It was also said that the question of fitness to work was ongoing and that the claimant's GP's evidence was accepted by the respondent.

119. In terms of the occupational health referral, this might not have been conclusive and that other steps were taken to facilitate the claimant's attendance at the disciplinary hearing such as holding it at a neutral venue and allowing additional support for the claimant.

120. In terms of remedy, it was said that any award for injury to feelings should be in the lower band of Vento. In terms of unfair dismissal it was said that if it were found to be unfair for procedural reasons, then in accordance with Polkey, compensation should be reduced to zero. Further the claimant had contributed to her dismiss and therefore any award should be reduced to zero on that basis.

121. Although initially the respondent sought to argue that the claimant had failed to mitigate her losses, it was accepted that the claimant had not been cross examined on this point and that therefore no argument on mitigation could be made.

Claimant's submission

122. The claimant said that she had been subjected to the risk assessment because of her disability and the negativity arising out of that. It was said to be directed at her and not other workers, and she was included as an action to mitigate a risk. This was seen as a negative matter but wider actions to mitigate were referred to positively. Therefore when she is compared to other advocacy workers she was less favourably treated. No one else was referred to as a risk. The reference to her absence due to work related stress demonstrated the difference. The reference to her being 'challenging' was said to be a reference to her anxiety and an aspect of her behaviour and the way in which she challenged matters.

123. Reference was made by the claimant to an employment Tribunal judgment *MG Taplin v Freeths LLP 2602284/2018* and in particular from paragraph 683

regarding the drawing inferences from primary facts and the burden of proof in discrimination cases. It was said that the respondent has not discharged the burden.

124. Reference was also made to the EHRC guidance on disability and paragraph 5.9 which deals with the necessity of focussing on the consequences of the disability. The claimant said that she was suspended because of her behaviour towards colleagues which arose from the stress she was suffering as a result of her grievance and the risk assessment. It was also said that the repeated refusal to send the claimant to occupational health in October and November was relevant.

125. The claimant said that the suspension exacerbated her disability and that there were 5 weeks where there was no contact from anyone at the organisation despite her having indicated that she was disabled. It was not clear who had decided on the suspension or that less serious action had been considered. Reference was made again to the *Taplin* case where there was clear reasoning regarding the lack of consideration of mitigation put forward. As Ms Barton had been present at all hearings she could have noted that the claimant was disabled. Further the grievance outcome letter at p208 makes reference to the claimant being part of a protected group. The claimant said that all of this ought to have been communicated to occupational health. Further one of the outcomes of her grievance was that a mentor should have been appointed and that is referred to as a reasonable adjustment at paragraph 6.33 of the EHRC guide.

126. Reference was further made to *Taplin* and from paragraph 673 and 872 which related to the causal connection between the conduct of the claimant in that case and his disability. Further, paragraph 3.11 of the EHRC code says that a disability does not need to be the only cause of unfavourable treatment, but simply a cause. In *Taplin* at paragraph 875, the Tribunal had said that the disability had been the underlying reason rather than the cause of the conduct. It was also said that the reasoning from paragraph 931 onwards

supported the claimant's position in relation to behaviour being linked to a medical condition and the need for an employer to make enquiries.

127. The claimant said that there was no genuine basis for the respondent to think that the claimant would make another racist comment and that it was the effect of her condition which had impacted on her ability to communicate properly. It was not a slip of a mask of a racist.

128. It was said that the respondent ought to have considered capability rather than conduct as a way forward and that this would have been a less discriminatory way of dealing with matters. Despite the respondent's position, suspension is not always neutral, particular where there is an underlying mental health condition.

129. Reference was also made to another Tribunal case of *Sadeghi v THE 2200211/2017* and from paragraph 70 where there was a failure to make enquiries about mental health.

130. The claimant said that she was not prepared for the allegation of racism at the investigatory hearing and once she realised what was being referred to she offered her position as an explanation.

131. Reference was also made to *Taplin* in the context of knowledge of the claimant's disability and in particular from paragraph 1014. It was said that if the claimant's support and supervision notes had been read thoroughly and her grievance considered it was have been clear that she was disabled.

132. Reference was also made to a Tribunal case of *Evans v GE Capital Funding* 1600139/2019 and paragraphs 37-40 therein where the circumstances were similar to that of the claimant being overwhelmed with work and bound up in a disability claim.

133. In addressing her claim of a failure to make reasonable adjustments, the claimant again made reference to *Taplin*. She also said that the grievance she submitted could be seen as a request for reasonable adjustments. She said that this was all very similar to the *Taplin* case and particularly paragraph 1041

where the outcome of the grievance ought to have been her back to work plan.

134. The claimant said that the grievance was a protected act and was a cry for help and way to try and get access to the Board of directors to obtain a comfortable working plan and alleviate the work-related stress and anxiety she was suffering. However, she said that some of the motivations and concerns leading to the grievance were then said to part of the conduct issues against her.

135. Reference was made to the EHRC code recommending the avoidance of conflict and that while the claimant disagreed with Ms Barton and Ms Brindley that formal action should have been taken against the claimant previously, they should have intervened earlier to avoid the escalation of conflict.

136. Reference was made to *Sadeghi* at paragraph 85 and 86 where the PCP was similar in that medical information was not obtained. Further in *Evans* at paragraph 24 – 28 if was found that the claimant worked long hours and a performance improvement plan to which she was subject was found to be bullying.

137. Reference was made to *Taplin* where a failure to intervene was an issue, and that there the respondent had been willing to stand back from matters. It was said that while this had happened in the claimant's case, it shouldn't preclude an understanding of disability.

138. The claimant said that it was clear from the correspondence that Ms Barton was sharing information and reporting to the board at each stage and that there was a predetermined outcome. Key information the claimant highlighted was isolated and as both Sandi Barton and Ms Brindley had said the claimant ought to have been subject to a disciplinary or performance improvement plan before proceedings, they must have been discussing the matter.

139. In terms of unfair dismissal, the claimant referred to the *Burchell* test. She highlighted that Sandi Barton had not read the support and supervision notes

which she had directed her to and only made selective reference to them in her investigation report.

140. Further Ms Mathieson's summary of her interactions with the claimant does make reference to anxiety at pp432 and 437 of the productions. The claimant criticised Ms Barton for failing to read or pass on information which was relevant to LM or those determining the appeal. Neither decision maker had all relevant evidence and was not aware that Ms Barton had not read all the support and supervision notes.

141. It was said that Ms Barton had no experience of investigations, or interviewing and asked leading questions, she apologised to the complainers and introduced assumptions and concepts such as course of conduct all of which were negative towards the claimant. It was said she had established the allegations as fact without considering an alternative explanation. Therefore the investigation was fundamentally flawed.

142. Further the scope of the investigation was so vague with no timescale for the allegations, that the claimant was not prepared at the disciplinary hearing when this was extended to five heads of complaint. Although there had been questions produced to the claimant in writing (at p214) they were not sufficient to foreshadow the allegations against her.

143. The claimant said there was no attempt to engage with her mitigation or alternative explanation regarding the alleged racist comment at the disciplinary hearing. There was no attempt to consider the breach of confidentiality highlighted in her grievance and the impact of that on her, together with the larger response regarding the other matters in her grievance.

144. It was said that there was explicit reference in the grievance outcome latter to disability at paragraph 3.

145. It was said that the decision to dismiss was not within the band of reasonable responses. LM didn't take any other disposal into consideration and couldn't say how the alleged conduct had impacted on the claimant's role at the helpline.

146. Reference was made to paragraph 1023 in *Taplin* and that there was an agenda to remove the claimant. It was said that the recommendations at p205 could have been an alternative to dismissal. It was clear the respondent was willing to adapt policies where relevant, for instance in relation to the systems failure identified in her grievance which should have been a disciplinary matter at page 175 of the productions.

147. In relation to the appeal, it was said that procedural defects had not been remedied. Ms Wilson-Scott had not had any training or experience in handling such matters and hadn't seen the support and supervision matters and didn't know that Ms Barton had not read them all. She was not aware of the stress at work policy or the issues around occupational health and had been unable to recollect a lot of information in relation to what documents were considered and whether an alternative disposal had been considered.

148. Reference was made to *City of Edinburgh Council v Dixon* 105843/2011 where it was said that dismissal was unfair if there was a refusal to engage with the defence.

149. The claimant said that she should have been moved to sick leave from suspension and a referral to occupational health made. Her line manager had been aware of the medication the claimant took. Reference was also made to paragraph 5.15 of the EHRC code where an employer was advised to do all it could to establish if there was a disability.

150. The respondent responded briefly to the claimant's submission to highlight that LM had considered alternatives to dismissal and that she had read all the support and supervision notes.

Discussion and decision

The respondent's knowledge of the claimant's disability

151. The respondent maintained throughout the proceedings and in submissions that it was not aware of the claimant's disability at the material times. The

Tribunal had no hesitation in finding this position to be untenable. Throughout the internal process and in evidence before the Tribunal, the respondent appeared only to be concerned with whether or not the claimant had communicated to anyone in the respondent's organisation that she had formally been diagnosed with depression and anxiety. The respondent appeared to be of the view that in the absence of a formal diagnosis, then they were not obliged to consider whether there were any steps they ought to take in terms of the claimant's condition. While such a position is of course wrong in law, the Tribunal was extremely surprised that an organisation such as the respondent, whose services were focussed on supporting women who had experienced trauma would adopt such a position. It seemed to the Tribunal that the respondent was simply putting its hands over its eyes and ears in an effort to avoid formally finding out what it must already have known to avoid taking action to support the claimant. The Tribunal was of the view that this was why it did not wish to refer the claimant to occupational health and made no effort to obtain any medical information in relation to the claimant.

152. Rather the respondent had decided at an early stage that the claimant would be dismissed and did not want to invite any complications which might arise, such as being required to address issues arising from the claimant's disability. The Tribunal came to this conclusion based on the following:

- The respondent was aware that the claimant was referred by her GP to an anxiety management group in January 2017. Her attendance at these groups required her to leave work early which was something she discussed with her line manager.

- The respondent was aware that the claimant had been prescribed anti-depressant medication in November 2017. There was no suggestion made to the respondent that this had been on a temporary basis.

- The claimant raised the issue of her anti-depressant medication and mental health at a support and supervision meeting on 9 May 2018

- The claimant was signed off work with work related stress from 12 October 2018- 6 November 2018.

- The impact her work was having on her was identified by Ms Gurney (the claimant's line manager for the RCS helpline) at an annual review of her work on the RCS helpline on 21 February 2019 where the notes state that vicarious trauma had become apparent in the claimant.

- The claimant's grievance refers to her inclusion in the organisation's risk assessment as being 'discriminatory' and the response makes reference to the claimant being in a protected group.

- The claimant raised in the investigatory interview with her on 16 December that her defence to the allegations would be work related stress and stated 'at the end of the day, I suffered workplace stress anxiety and depression.'

- The claimant said in an email on 19th December 2019 that her defence to allegations of bullying is essentially work-related stress.

- The claimant and her trade union representative continued to raise the claimant's health throughout the process.

153. For all of these reasons, the respondent either did or ought to have known that the claimant was a disabled person for the purposes of the EqA. The respondent appears not to have considered that a formal diagnosis was not necessary for it to have obligations under the EqA. Moreover, it made no effort to find out if there was any formal diagnosis by seeking medical advice. By November 2017, the respondent through the interactions between the claimant and her line manager, must have been aware that there was a real possibility that the claimant was a disabled person for the purposes of EqA. However, no steps were taken to investigate this and it appears that the respondent was of the view that the onus was on the claimant to confirm a diagnosis and raise the issue herself before any action would be taken. While the respondent said that various measures were put in place for the claimant

in relation to support and supervision, it did not seem to the Tribunal that these were any more than routine steps which were taken for all employees, given the challenging nature of the work they were carrying out. The respondent failed to distinguish between its obligations in relation to employees generally given the stressful nature of the work they carried out and duties which would be owed to employees who were disabled by virtue of their mental health. The Tribunal found the respondent's failure to acknowledge that the claimant was a disabled person until the day before the Tribunal hearing and continuing refusal to acknowledge that it either knew or ought to have known about the claimant's disability in the face of clear evidence to the contrary, very concerning.

Did the respondent directly discriminate against the claimant in relation to the risk assessment carried out in May 2019.

Was there less favourable treatment?

154. It is trite to say that there will not be less favourable treatment simply because a claimant believes that they have been treated less favourably (see for instance *Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT*,). Further simply because a claimant has been treated differently to others will not without more amount to less favourable treatment.

155. In the present case, the claimant was not specifically named in the risk assessment document. However, the Tribunal accepted that it would have been obvious to anyone with a knowledge of the staffing complement that it was the claimant to whom reference was being made. Ms Brindley for instance accepted in evidence that she knew that it was the claimant.

156. The document did not discuss any other individual employees. It was clear that the reference to the claimant was negative, she was seen as a risk to the project in which she was employed. That risk was both in relation to her being 'challenging' and that she had been absent with 'work related stress'. It was not clear to the Tribunal why it was necessary to make reference to the reason for the claimant's absence from work, unless the nature of that absence was

likely to impact on the delivery of the project. Anyone reading the document would reasonably form the view that the claimant was a risk.

157. On this basis the Tribunal concluded that the claimant had suffered a detriment.

158. Was the treatment because of the protected characteristic of disability?

The Tribunal found this a difficult aspect of the case to determine. It was clear to the Tribunal that the claimant's disability was relevant to the reference to her in the risk assessment, but the Tribunal could not conclude that it was the reason why she was referred to in the risk assessment. The relationship between the claimant and her line manager was breaking down by this point for reasons wider than the claimant's disability in that the claimant was willing to challenge decisions which were being made if she did not agree with them. The Tribunal concluded that the reason why the claimant was referred to in the document was that her relationship with her line manager was breaking down and her line manager saw her as a risk more generally (whether rightly or wrongly) to the delivery of the project. Therefore the Tribunal found that this did not amount to direct discrimination because of the claimant's disability.

159. In subjecting the claimant to a disciplinary process, did the respondent treat the claimant unfavourably in terms of section 15 EqA?

160. In *Secretary of State for Justice and anor v Dunn EAT 0234/16* the EAT identified the following four elements that must be made out in order for the claimant to succeed in a s.15 claim:

- there must be *unfavourable treatment*
- there must be *something* that arises in consequence of the claimant's disability
- the unfavourable treatment must be *because of* (i.e. caused by) the something that arises in consequence of the disability, and

- the alleged discriminator cannot show that the unfavourable treatment is *a proportionate means of achieving a legitimate aim*.

162. In this respect, the Tribunal thought it important to draw a distinction between subjecting the claimant to a disciplinary process at all, and the outcome of the disciplinary process, which was dismissal.

163. While subjecting the claimant to a disciplinary process would almost inevitably amount to unfavourable treatment, and the claimant was disabled, the Tribunal was not satisfied that the treatment arose in consequence of the claimant's disability. The Tribunal accepted that allegations of what could amount to bullying treatment had been made against the claimant. While as is explained below, the Tribunal was of the view that the disciplinary procedure which was followed was not fair, it was not satisfied that this was because of the claimant's disability. The Tribunal was of the view that the respondent was likely to have commenced some kind of disciplinary proceedings against an employee who had been accused of bullying behaviour whether or not that person was disabled. The Tribunal was of the view that underlying reason for the behaviour, arising as it did from the claimant's disability was more relevant to the action taken by the respondent in the disciplinary process rather than subjecting her to a disciplinary process at all.

164. In any event, had the Tribunal found that subjecting the claimant to a disciplinary process was because of the fact that her conduct was caused by her disability, commencing proceedings against an employee who had been accused of bullying behaviour at all would have been justified in order to maintain employee relations.

<u>Discrimination arising from disabiilty</u>

165. Was the claimant dismissed for something arising in consequence of her disability in terms of s. 15 EqA and if so was such treatment justified?

166. In this regard, in addition to the authorities to which it was referred, the Tribunal considered the case of *City of York Council v Grossett* 2018 ICR 1492. In that case a teacher was dismissed on the grounds of gross misconduct for having shown an inappropriate film to a class. The teacher said that his behaviour had been caused by his disability, or more specifically stress arising from coping with his workload together with managing his condition, cystic fibrosis. The teacher said that the error in judgment was caused by his disability, but this was not accepted by his employer. On appeal to the Court of Appeal, the employer sought to argue that while the dismissal of the claimant had been unfavourable treatment in terms of s.15 (1)(a), and that the 'something', which was the showing of an inappropriate film arose from the claimant's disability, because the respondent was not aware of the causal link between the two, the provisions of s.15(1)(a) had not been satisfied. That argument was rejected by the Court of Appeal. In rejecting the argument the Court stated:

i. On its proper construction, 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.

ii. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something". In this case, it is clear that the respondent dismissed the claimant because he showed the film. That is the relevant "something" for the purposes of analysis. This is to be contrasted with a case like *Charlesworth v Dransfields Engineering Services Ltd* , EAT (Simler J), UKEAT/0197/16/JOJ, unrep., judgment of 12 January 2017, in which the reason the claimant was dismissed was redundancy, so that no liability arose under section 15 EqA , even though the redundancy of the claimant's job happened to be brought into focus by the ability of the defendant employer to carry on its business in periods when he was absent from work due to a disability. In that case, therefore, the relevant

"something" relied upon by the claimant was the claimant's absence from work due to sickness, but he was not dismissed because of that but because his post was redundant.

iii. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something". In this case, on the findings of the ET there was such a causal link. The claimant showed the film as a result of the exceptionally high stress he was subject to, which arose from the effect of his disability when new and increased demands were made of him at work in the autumn term of 2013.

iv. In my view, contrary to Mr Bowers' argument, it is not possible to spell out of section 15(1)(a) a further requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (i.e. that A should himself be aware of the objective causation referred to in issue (ii) above).

167. In the present case, the Tribunal has found that the respondent ought to have been aware of the claimant's disability. The claimant was dismissed for alleged inappropriate conduct towards colleagues. The claimant made clear throughout the process that her behaviour had been impacted upon by her mental health. She was under a significant degree of stress because of her workload, the difficulties with her line manager and the grievance she had raised against her. The Tribunal accepted the claimant's evidence in this regard. The respondent did not accept this argument and in fact refused to investigate whether there was any merit in what the claimant was saying. Had it done so, the Tribunal was satisfied that it would have been confirmed that the claimant was disabled and that her disability could have affected her behaviour.

168. It was astonishing to the Tribunal that the respondent's witnesses, and LM in particular could not accept that suffering from depression and anxiety could impact on the claimant's behaviour. It had been recognised that there had

been a change in the claimant's behaviour in the months leading up to the disciplinary issues by Ms Brindley at least, but the respondent deliberately chose not to investigate what cause there might be for this change and refused to countenance the claimant's explanation, even in circumstances where the claimant had taken out a grievance against her line manager. The Tribunal was therefore satisfied that the claimant's dismissal was unfavourable treatment, that the something arising from the claimant's disability was her conduct towards her colleagues in the period before her suspension and that there was a causal link between the two. As such, the claimant's dismissal amounted to discrimination arising from a disability in terms of s.15. The Tribunal did not accept that such treatment was justified. There was no evidence as to how the claimant's discriminatory dismissal could be justified.

Reasonable adjustments

169. Did the respondent's process for gathering information about an employee's health status when making decision about employment including referral to an Occupational Health provider amount to a PCP?

The Tribunal was of the view that this did amount to a provision, criterion or practice. The respondent's position was that it would only refer an employee to occupational health in order to facilitate their return to work and in these circumstances it was not appropriate to refer the claimant to occupational health. It was notable that the respondent's own policy on Stress at Work did not suggest that these were the only circumstances in which an employee might be referred to occupational health. However, the Tribunal was satisfied that this was the practice which was adopted in relation to the claimant. It therefore amounted to a PCP for the purposes of the legislation.

170. If so, did it apply this PCP to the claimant and did it put the claimant at a disadvantage?

The respondent clearly applied this PCP to the claimant and it put her at a disadvantage. The Tribunal accepted the claimant's evidence that her GP had

said she could not be referred to Occupational health through their offices and had to be referred by her employer. A disabled person will often wish to be referred to occupational health when not actually off sick (although the claimant was in fact off sick), and the Tribunal were of the view that one reason for not referring her to occupational health was that there was no intention on the part of the respondent to allow the claimant back to work at all. A disabled employee will also often wish to be referred to occupational health while off sick with no clear date for a return to work so that reasonable adjustments can be considered which might facilitate a return to work. The practice adopted by the respondent in the present case, where it refused to refer a disabled employee to occupational health, in circumstances where the employee was seeking a referral both in relation to their fitness to attend a disciplinary hearing and to provide evidence on which they could rely in those proceedings, was clearly a disadvantage.

171. Would it have been reasonable for the respondent to acquire evidence where the employee was claiming to be covered by the EqA in the context of a disciplinary/grievance process and would such steps have removed the substantial disadvantage to the claimant?

The Tribunal had no hesitation in concluding that it would have be reasonable of the respondent to obtain medical evidence in relation to the claimant. Any reasonable employer in the circumstances would have made a referral to occupational health. The Tribunal did not accept the respondent's submission that there was no referral because the respondent was a small organisation. The Tribunal did not hear any evidence regarding what the cost of such a referral would have been, or that advice was taken from the occupation health provider about cost or the practicalities of a referral. Rather, the Tribunal formed the view that the question of referral was repeatedly dismissed out of hand without any consideration being given to its appropriateness. Had a referral been made, the substantial disadvantage to the claimant which was that she was not able to advance a professional view on her condition and its relevance to the proceedings would have been removed. While the Tribunal took into account that it was not inevitable that information which was provided

in relation to the claimant's health would have been entirely in her favour, the failure to give the claimant the opportunity of a professional view on her condition was of itself a substantial disadvantage to the claimant.

Therefore the respondent failed in its duty to make reasonable adjustments in relation to the claimant.

172. Did the grievance raised by the claimant against her manager in August 2019 amount to a protected act for the purposes of s.27 EqA?

The Tribunal formed the view that the grievance raised by the claimant was a protected act in terms of s.27 EqA. The grievance did not specifically refer to disability discrimination. However, it made clear when read in its entirety, that the claimant was of the view that her inclusion in the risk assessment was because of her medical condition and that this amounted to discrimination on the basis of a disability.

173. If so, did the respondent subject the claimant to a detriment, being a disciplinary process because of that protected act?

While it was clear to the Tribunal that being subject to a disciplinary process was a detriment, the Tribunal did not accept that the principal cause of being subject to the process was that the claimant had made an allegation of discrimination. In the Tribunal's view, the grievance was part of a wider picture of the breakdown in relationships between the claimant and her line manager, the increase in stress she was suffering from as a result, together with her workload and the breakdown in her relations with her colleagues. While this was part of the wider picture and no doubt contributed to the breakdown in relations which led to the disciplinary proceedings, it was not the main cause of the disciplinary proceedings themselves being raised. On that basis the Tribunal did not accept that the claimant had been subject to victimisation.

Unfair dismissal

What was the reason for the claimant's dismissal ?

174. The Tribunal was satisfied that the respondent had established that the claimant was dismissed for conduct in terms of s.98(2) of ERA.

175. The Tribunal then went on to consider whether the dismissal was fair. The starting point in such a consideration should always be the words of the legislation itself.

176. S.98(4) ERA states that 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

177. It is of course crucial that a Tribunal does not substitute its own view either in relation to the fairness of the procedure which was followed in relation to a dismissal or the decision to dismiss itself. Rather the Tribunal should consider whether these matters are within a band of reasonable responses of a reasonable employer. The size and resources of the particular employer should be taken into account. The Tribunal was particularly mindful of the fact that the respondent was a small charity.

178. The Tribunal also considered the well-known test set out in *Burchell v BHS.*

179. The Tribunal therefore considered whether a fair investigation had been carried out. It had no hesitation in finding that the investigation was not fair for the following reasons:

180. Ms Barton prejudged the allegations against the claimant. She apologised twice in her investigatory interview with one complainer and confirmed in evidence that she accepted the version of events of both complainers before speaking to the claimant. She also suggested in the interviews that the claimant had been engaged in a 'course of conduct' towards the complainers and that the conduct was similar to 'stalking'.

181. Ms Barton did not carry out a balanced investigation, it was notable that she did not interview either of the individuals put forward by the claimant, but suggested to them that they could confirm what they wanted to say in writing 'if this would be easier in an interview let me know, otherwise a summary in writing is fine'. She did not send this email until 6 January 2020, some weeks after the claimant had asked for them to be contacted. While the Tribunal appreciated that Ms Barton was on leave over Christmas and new Year, it still seemed surprising that she would not action this immediately. The questions Ms Barton had asked those she interviewed had been wide ranging, such as to Katy Mathieson ('SB asked if KM could speak about her experience of being KG's manager'). In contrast, the question asked of Ms Kelly was 'Kate has asked that I speak to you about her conduct and specifically how you experienced her presentation and upset.'

182. It appeared to the Tribunal that the approach was very different in relation to the interviews where information was gathered to support the allegations against the claimant than where the claimant sought evidence of mitigation. No independent efforts were made by Ms Barton to investigate whether there was evidence to disprove the allegations against the claimant. For instance, the Tribunal concluded that when interviewing KM, Ms Barton did not mention or take into account that the claimant had successfully raised a grievance against KM, that KM's line management duties of the claimant had been removed from her and that their relationship had clearly deteriorated.

183. Further the limited exchange with one of the people put forward by the claimant was the same day Ms Barton produced her report. While there was no time recorded on her report, the email from Ms Kelly was sent to Ms Barton

at 14.55. This raised in the Tribunal's mind a question of the extent to which Ms Barton actually considered the evidence. Further there was no statement at all from Ms Neilly, who was simply spoken to by Ms Barton and no record was made of the conversation. It seemed to the Tribunal that the witnesses put forward by the claimant were not treated in the same way as the complainers or the others interviewed by Ms Barton and this was to the disadvantage of the claimant and rendered the investigation unfair.

184. Ms Barton approached the investigation with a closed mind and, in the Tribunal's view, was more concerned with establishing the allegations against the claimant and finding any further information against her than investigating the allegations.

185. Ms Barton did not read all the support and supervision meeting notes with the claimant despite suggesting that she had done so in her report (or at least those she considered relevant). Had she done so she would have realised that the claimant had discussed her disability with her line manager and better understood the issues behind the claimant's condition. She did not disclose these notes to the disciplinary hearing or the appeal hearing but left those conducting both hearings with the impression she had read them. While her report indicates that she read the notes which she considered relevant, Ms Barton accepted that she could not determine what was relevant without reading all of the notes in the first place. Her report was therefore misleading.

186. The investigation was vague in its terms of reference. It was said to be 'to investigate the conduct of Kate Graham, following reports of bullying and intimidation by SWRC colleagues.' It did not make reference to which colleagues, or give a timescale in which the claimant's conduct was being investigated. It did not specify what the allegations against the claimant were. While there was a 'summary of evidence' section, this did not give specifics about what the claimant was said to have said or done either in terms of dates or specific allegations. Rather it made sweeping allegations such as 'Kate's behaviour impacted on productivity, team communication and team morale, both internally and with external partners', without providing any specifics or

indeed having been in touch with external partners. The Tribunal concluded that the investigation amounted to a trawl to identify any matters which could be held against the claimant rather than an investigation into specific allegations. Ms Barton said in evidence that her investigation wasn't a trawl, but she was 'looking to see whether others had been impacted by the claimant's behaviour.' In the view of the Tribunal, in the particular circumstances of this case, this did indeed amount to a trawl.

187. The Tribunal accepted that allegations of bullying and harassment can often be vague in their terms. However, where that is the case, it is all the more important that an even handed investigation should be conducted. Ms Barton conducted a one-sided investigation. The investigation was conducted in such a manner as to support a decision to dismiss the claimant.

188. Ms Barton interviewed Ms Mathieson the claimant's line manager in her investigation. While she was aware that the claimant had raised a grievance against Ms Mathieson, there is no evidence that this was taken into account when interviewing Ms Mathieson. Indeed it was not at all clear to the Tribunal why Ms Mathieson was being interviewed in the first place other than to establish evidence which might be damaging for the claimant.

189. Ms Barton conceded in evidence that she was not investigating what might have caused the claimant's behaviour and was only trying to identify what had happened. Again, the Tribunal concluded that given the nature of the vague allegations, such an approach was unfair. The allegations were about a breakdown in relationships in a team. The claimant was saying that she was not well and the pressure of work-related stress and the grievance she had raised against her line manager had contributed to her conduct. It would have been reasonable for Ms Barton to investigate the work environment as a whole in order to obtain a full picture as to what had happened and why. The Tribunal accepted that the issue of mitigation may not always be within the scope of an investigation. However, in the present circumstances, it was firmly of the view that the respondent's failure to engage at all with the claimant's mitigation during the investigation process, other than to state in the

investigation report 'Kate has also stated that she has a diagnosis of depression and anxiety' under the heading 'other information' was unfair.

190. It was notable that Ms Barton indicated in evidence that she thought that the claimant ought to have been disciplined at an earlier stage. It was clear that she did not go into the investigation with an open mind, and that the investigation was not fair or balanced. The investigation was fundamentally flawed. On that basis the claimant's dismissal was unfair.

191. The Tribunal was also mindful of the different approach taken to the grievance raised by the claimant and the issues raised by CJ and NE. Although the issues raised by the claimant in relation to the risk assessment were clearly serious, considerable efforts were made to persuade the claimant to address the issues in an informal manner. Although the claimant initially raised her concerns in August, the grievance hearing did not take place until December and the Tribunal was not informed of any investigation which was conducted into the matter. Efforts were made to persuade the claimant to deal with the matter informally. This was in marked contrast to the allegations brought by the claimant's colleagues and reinforced the Tribunal's view that the respondent saw the allegations against the claimant as an opportunity to resolve the ongoing management issue which had been created by the respondent's own failings to deal with clear conflicts amongst its staff.

192. However the Tribunal went on to consider whether if it was wrong that the investigation which had been conducted rendered the dismissal unfair, whether the decision to dismiss itself fell within the band of reasonable responses.

193. The Tribunal was of the view that the dismissal was not within the band of reasonable responses. LM approach the disciplinary hearing with a closed mind. She could not countenance that the claimant's behaviour could have been contributed to by her illness, without investigating whether that might be the case. She did not appear to take into account the claimant's 12 years' service.

194. Further, LM raised in the disciplinary hearing various matters which had not been the subject of the investigation or the allegations against the claimant, although these were said to have been disregarded in the decision making process. The Tribunal was of the view that this was indicative of the respondent's entire approach to the claimant, in that there was a predetermined decision that the claimant would not be coming back to work and that at every opportunity it sought to raise matters which would support that outcome.

195. LM exaggerated the complainers' position by saying that they may resign if the claimant returned, when she admitted in evidence that this was her own interpretation of what they were saying and they had not said that they would resign.

196. LM did not consider the claimant's contracts of employment separately and seemed to be unaware that there were two contracts of employment at all. This was not dealt with in the disciplinary hearing or the decision letter and the Tribunal concluded that this was again indicative of a predetermined decision that the claimant would not be coming back to work at the organisation at all.

197. In relation to the decision on the complaint by NE, the decision letter recorded that while she had noted that she did not feel bullied, apart from the comment described as racist, 'nonetheless the pattern of behaviour described in her complaint can still be characterised as bullying and harassment.' Again this was indicative of the respondent's pre-determined decision. The complainer was not alleging that particular conduct was bullying or harassment, but nonetheless, the respondent sought to frame it in that manner.

198. There was nothing in the letter of dismissal to specify what the claimant was said to have done other than in relation to the alleged racist comment. LM said that the racist comment alone was sufficient to amount to gross misconduct. The Tribunal did not accept this and was of the view that this was also indicative of the respondent's approach.

199. LM said that the claimant's credibility in relation to this comment was damaged as in the investigation meeting she said she did not know what was being referred to. However in that meeting, the claimant was told she had made a racist joke. The Tribunal accepted that she did not know what this was referring to until it was subsequently explained to her. It was entirely unfair of LM to question the claimant's credibility for not knowing what an allegation was when it hadn't been put to her in terms.

200. LM also referred to the claimant letting a 'racist comment slip', and that she could not be satisfied that the claimant might not make a similar comment in the future. The Tribunal did not accept that evidence as either credible or reliable. The claimant had worked for the respondent for over 12 years and no question of racist behaviour had ever been raised in relation to her. The Tribunal did not believe that LM genuinely thought that the claimant might make a racist comment in the future and that her evidence in this regard was simply intended to give support to her decision to dismiss the claimant. When considered in context, the comment made by the claimant, that a white person could cover themselves in dirt to attend a women of colour only book group, while clearly using inappropriate and potentially racist language, was not intended to be racist by the claimant. The claimant immediately apologised for her use of the inappropriate phraseology. She explained in the investigation that she had been trying to support NE in her view that it had been inappropriate for a white woman to attend a women of colour only book group, but had not expressed herself in the way she normally would because of the stress she was under.

201. The Tribunal concluded that the respondent blew this comment out of all proportion in order to find something to justify the dismissal of the claimant. It did not consider the claimant's explanation at all or, despite the evidence of LM, the fact that the claimant had immediately apologised once she made the remark. Neither did it consider that NE had continued to contact the claimant out of work hours for advice when deliberating whether this could amount to gross misconduct. No consideration was given to putting the claimant's explanation to NE to determine whether she could accept that explanation.

202. While the Tribunal accepted that simply because someone makes a comment which they did not intend to be racist would not render that comment inappropriate if it was perceived as racist, a balance had to be struck in considering the seriousness of such a comment and the context in which it was made. The Tribunal was of the view no such balancing exercise was considered by the respondent. Rather they concluded that because something which might be considered racist was said, that immediately amounted to gross misconduct. This was wholly disproportionate in the circumstances and was not within the band of reasonable responses.

203. In addition, LM was not aware of the content of the grievance which had been raised by the claimant against her line manager. It would have been reasonable of her to consider this and the findings of the grievance in determining whether the claimant ought to have been dismissed. Her failure to do so rendered the dismissal unfair.

204. In addition, LM did not give consideration to obtaining medical advice at the hearing itself. That amounted to a failure to follow its own procedures and in particular the Stress at Work policy which stated that 'decisions about a member of staff's employment are better made with the benefit of medical opinion'.

205. For all these reasons the disciplinary hearing was not fair. Further, the presence of Ms Brindley at every stage of the proceedings reinforced the Tribunal's view that the dismissal of the claimant was predetermined. Ms Brindley was aware of the grievance raised by the claimant and the outcome and recommendations which had been made. However, she did not raise this with the disciplinary hearing as an alternative potential outcome, which the Tribunal found very surprising.

206. In addition, the Tribunal accepted that the respondent offered to give the claimant a positive reference if she resigned before being dismissed. The Tribunal was of the view that if the respondent had genuinely believed that the claimant was a bully and had made a racist comment, it would not have been willing to give the claimant a reference at all. Rather, this was an effort

to force the claimant's hand to resign so that the respondent would not have to take the step of dismissing her. It demonstrated again that there was a predetermined outcome to the whole process.

207. Turning to the question of whether dismissal was within the band of reasonable responses, the Tribunal had regard to the recommendations which had been made in the context of the claimant's grievance. Had LM read this document and/or the support and supervision notes thoroughly, she could have seen an alternative approach, which would have been to implement the recommendations with a view to addressing the management failings which had led to the claimant's grievance and disciplinary action against her in the first place. The Tribunal did not accept LM's evidence that she considered options other than dismissal.

208. Therefore the Tribunal found that the claimant's dismissal was not just procedurally unfair, but was substantively unfair in terms of s.98(4).

209. The Tribunal did go on to consider whether the appeal hearing remedied any procedural defect but concluded that it did not. The appeal hearing was not a rehearing, the appeal panel were not given sight of relevant documentation, in particular support and supervision notes, were not aware that Ms Barton had not read all the support and supervision notes and Ms Wilson-Scott was not aware of the content of the grievance.

210. In these circumstances the claimant was unfairly dismissed. The Tribunal went on to consider whether if a fair procedure had been followed, the claimant would have been dismissed in any event. It concluded that the failures were too fundamental to allow it to conclude that the claimant may have been dismissed in any event. As the Tribunal formed the view that the claimant's dismissal was predetermined, any reduction in compensation on the basis of *Polkey* was not appropriate.

211. The Tribunal also considered whether the claimant had contributed to her dismissal. It concluded that she had not. Rather the management failings of the organisation had allowed a situation to develop where relationships had

broken to down to such an extent that the respondent formed the view that the claimant could not continue working for it and it saw allegations which were made against the claimant as an opportunity to solve what had become a difficult management issue.

Remedy

212. The claimant was employed for 12 years and was 44 years old at the date of her dismissal. Her net pay was £547 per week. She is therefore entitled to a basic award of 13.5 weeks at a capped weekly pay of £525 being a total of £7087.50.

213. The claimant obtained alternative employment from 3rd December 2020, having received benefits for a period of 26 weeks. The claimant was therefore unemployed for a period of 42 weeks, which at a weekly net pay of £547 amounts to loss of earnings of £22, 974. The recoupment period is from 11 February for 26 weeks to 11 August 2020 and the amount of compensation subject to recoupment is £14,924.

214. The claimant has an ongoing weekly net loss of £80 per week from 3 December 2020, which to 2 September 2021 is a period of 39 weeks, which is a loss of £3120. The Tribunal accepted that the claimant would take some time to reach the level of income she received when employment by the respondent and therefore was of the view that it was just and equitable to award the claimant a period of 6 months future losses, which is a total amount of £2030.

Injury to feelings

215. The Tribunal was of the view that an award for injury to feelings should be in the middle Vento band. In that regard, it particularly bore in mind that the claimant had undertaken additional study in the area of violence against women while she worked for the respondent and was clearly dedicated to a career in this field. She is now working for a local authority in a project which is not directly related to violence against women.

216. The claimant said that her medication had to be increased over the lockdown period and her medical records report that her dosage of anti-depressants was increased on 2nd June to 40 mg. The Tribunal accepted that the claimant's evidence that she was devastated by the allegations against her and that the respondent did not take steps to provide her with support over the Christmas and New Year period in particular. The Tribunal also took into account the respondent's intransigence in refusing to recognise the claimant's health issues or take advice on them, which the Tribunal accepted would exacerbate the claimant's condition. In addition, the Tribunal noted the claimant's evidence that due to her suspension and then dismissal, she did not know, and the respondent did not take any steps to determine whether she could be told, what had happened to one particularly vulnerable women with whom she had been working for some time. This all caused the claimant additional stress.

217. Further the Tribunal was mindful that the process went on for almost two months and while a delay due to the festive period could be expected, the ongoing uncertainty, together with the respondent's repeated refusal to obtain medical information to determine whether the claimant was fit to attend the disciplinary hearing, all caused the claimant a high degree of stress. In these circumstances, the Tribunal concluded that an award of £15,000 was appropriate. Interest on injury to feelings compensation should run from the date on which the refused to refer the claimant to occupational health which was 19 December 2019 until the calculation date of 16 September 2021 which is a period of 490 days at a daily rate of £3.29 which is a total of £1612.10.

218. Therefore the respondent is ordered to pay to the claimant:

Basic award	£7,087.50
Compensation for unfair dismissal	£28,124.00

(subject to recoupment provisions as set out above)

Injury to feelings £15,000.00

interest at a daily rate of £3.29 on the award for injury to feelings for a period of 490 days which is a total of £1,6012.10

The Tribunal wishes to record that while it has awarded the compensatory award on the basis that the claimant was unfairly dismissed. However, if the Tribunal had not awarded that compensation in relation to the claimant's dismissal, it would have made the same award in respect of the respondent's breaches of the Equality Act 2010 outlined above, to which it may have been appropriate to apply interest.

Employment Judge: **A Jones**
Date of Judgment: **16 September 2021**
Entered in register: **22 September 2021**
and copied to parties