EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113698/2019 Hearing Held at Edinburgh on 3, 4, 7, 8 and 9 March, and 21 April 2022; Deliberation Days on 22 April and 9 June 2022

Employment Judge: M A Macleod
Tribunal Member: S Gray
Tribunal Member: C Russell

Patricia Rodger	**Claimant** **Represented by** **Mr G Bathgate** **Solicitor**
AdvoCard Ltd	**Respondent** **Represented by** **Mr A McCormack** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claimant's claims under section 20 of the Equality Act 2010 succeed; that the claimant's claims under section 13 of the Equality Act 2010 fail and are dismissed, and that the respondent is ordered to pay to the claimant the sum of Twenty Thousand Pounds (£20,000) as compensation for injury to her feelings; interest is payable upon that sum at the rate of 8% from 21 February 2019 until the date of promulgation of this Judgment.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 29 November 2019, in which she complained that the respondent had discriminated against her on the grounds of disability.

2. The respondent submitted an ET3 response in which they resisted the claimant's claims.

3. A Hearing on the Merits was listed to take place at the Employment Tribunal, Edinburgh, on 3, 4, 7, 8 and 9 March 2022. As it turned out, the first day of the Hearing was lost owing to the late presentation of the Joint Bundle of Productions, and a further 2 days were allocated to the Hearing, on 21 and 22 April 2022. The Hearing concluded on 21 April, and the Tribunal was able to make use of 22 April 2022 in order to commence its deliberations into the case. A further deliberation day was required, and was set down for 9 June 2022.

4. The claimant attended the Hearing, and was represented by her solicitor, Mr G Bathgate. The respondent was represented by their solicitor, Mr A McCormack.

5. A Joint Bundle of Documents was presented to the Tribunal on 3 March 2022, and owing to the fact that Mr Bathgate had not seen the full bundle until that point, the Tribunal granted an adjournment until 4 March 2022 to allow him both to read the additional documents and to seek instructions thereon from his client. No objection was taken to that decision by the respondent.

6. The claimant gave evidence on her own behalf, and called as witnesses the following:

    - Dr Robby Steel, Consultant Liaison Psychiatrist, Royal Infirmary of Edinburgh, and
    - Suzanne Michelle Crichton, Advanced Practice Occupational Therapist in Vocational Rehabilitation.

7. It is worth recording at this stage that when the Employment Judge saw the productions for the first time in this case, and noted the names of the witnesses to be called, Dr Steel's name was familiar to him. He advised the parties that he knew a Dr Robby Steel personally, as he has two sons who have attended the same school, and in the same years, as the Employment Judge's own two sons; and that his wife shared a flat with the Employment Judge's brother-in-law when they were at university some years ago. He confirmed that he had had no personal contact with Dr Steel for some years, and that he had no concern that any conflict of interest would arise. Both parties confirmed that they had no objection to the Employment Judge continuing to hear the case.

8. The respondent called as witnesses:

- Ian Broatch, Formerly Chair of the Board of the respondent, and
- Christopher George Mackie, Formerly Chief Executive of the respondent.

9. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

10. The claimant, whose date of birth is 25 March 1958, commenced employment with the respondent as a Community Collective Advocacy Development Worker on 29 July 2014. Her contract of employment (33ff) specified that she was contracted to work 18 hours aa week, providing independent advocacy services to people with mental health and other difficulties. She was paid £23,781 per annum pro rata The respondent is a registered charity providing advocacy services, managed by a Chief Executive and three team leaders, employing approximately 25 full- and part-time staff.

11. The respondent is governed by a volunteer Board of 5 people, of which over 50% must be eligible to use its services and have "lived experience" of suffering mental illness.

12. The claimant was based at the respondent's office in Leith Walk, Edinburgh, sharing a space with a colleague which amounted to a corridor through which other staff would require to pass. As a result, the claimant provided many of her services on site where those whom she worked with were based.

13. The claimant suffers, and has for some years suffered, from Post Traumatic Stress Disorder (PTSD) and Complex Post Traumatic Stress Disorder (C-PTSD). The respondent admits that the claimant is and was at the material time in this case a person disabled within the meaning of section 6 of the Equality Act 2010, and that they had actual knowledge of the claimant's disability.

14. Her condition arises from trauma experienced due to childhood abuse within her family, the suicide of her partner in 1990 and her involvement in a very serious road accident in Thailand in 1997 or 1998. She was diagnosed with PTSD in approximately 1998, and with C-PTSD, a condition not previously included in diagnostic manuals, in approximately 2018.

15. The claimant self-referred to the NHS Lothian Vocational Rehabilitation Service in 2017. The claimant had had a period of sickness absence following a meeting with Chris Mackie, the respondent's Chief Executive in early June 2017 and a co-worker. The claimant had previously established a "traffic light" system, whereby she would have on the desk in front of her, visible to Mr Mackie, a sheet bearing three coloured blocks, of green, amber and red. If she touched the green block, that would mean that she was okay; if amber, that would mean that she felt there was a need to re-set the discussion; and if red, that would indicate that the meeting should stop immediately as she needed to leave In that meeting, feeling that her voice was not being heard, she suffered a panic attack and left the office.

16. She was seen by Suzanne Crichton and on 23 June 2017, Ms Crichton provided to the claimant a series of bullet points to enable her to discuss with Mr Mackie, adjustments to assist her in carrying out her duties (93/4).

17. The bullet points suggested were:

- *"Move is towards formal, written, agreed adjustments which will be held in staff file and reviewed regularly potentially in support and supervision meetings*
- *Aim to remain in work, doing current role with current organisation with adjustments in place to support disclosed health conditions*
- *Responsibility (processes) – procedures in place for routine tasks, all staff have recognised roles and responsibilities eg buzzer, reception cover etc*
- *Responsibility (tasks) – things need done and no ones specific role to do, automatic/default to an individual – requires management overview and delegation, explicit notice and reference made to tasks would highlight awareness at a management level*
- *Responsibility (crisis) – management intervention will be required, potential triggers can be shared, appropriate actions and responses identified, actions should support manager and staff members, individuals not singled out*
- *Disclosure – appropriate level, how this is done, recognition for challenges for staff member and wider team*
- *Aim to maximise individuals flexibility and control over workplace and workload within recognised remit of business requirements*
- *Support – ongoing review and support to maintain agreed adjustments & alter as required, explore more tailored peer support longer term"*

18. It was agreed by Mr Mackie that he would meet with the claimant and Ms Crichton in order to consider how to address these points in the workplace. The respondent had access to the bullet points above in advance of that meeting as the claimant had forwarded them to Mr Mackie. On 13 June 2017, she emailed Mr Mackie to discuss next steps (91/2). In the course of that email, she said that the events following that meeting should serve as a reminder that she lived with PTSD and C-PTSD, which meant that she was vulnerable and needed support. She continued: *"Both conditions comprise conglomerate symptoms that, for me, include hypervigilance, high levels of general anxiety, high levels of social anxiety, disturbed sleep (nightmares, flashbacks, intrusive thoughts in relation to current stress/es), depression, panic, powerlessness, overwhelming emotional responses and associated limited ability to self regulate those responses, toxic shame and comparative worthlessness (ie in relation to other people)."*

19. The claimant and Ms Crichton met with Mr Mackie at the Astley Ainsley Hospital towards the end of June 2017, and all found that to be a constructive meeting. Following the meeting, Ms Crichton produced a report entitled "Summary of Suggested Workplace Adjustments" (95ff) dated 25 July 2017. The report was structured so as to divide the adjustments between different headings, namely Disclosure, Working Environment and Crisis Management, and then set out additional supporting information, taking into account what steps had been taken by the respondent to that point and what worked well in the workplace.

20. Mr Mackie received this report and met with the claimant in August 2017, in order to set out adjustments in a more tailored fashion for the claimant. In discussion with the claimant, and taking into account the terms of Ms Crichton's report, Mr Mackie drafted a "Tailored Adjustment Plan" (TAP)(101ff). He described this as a first iteration, and there were other iterations of the TAP (for example, in November 2017 (104ff)).

21. The TAP (101) stated its aims to be:

- *"To support Patricia to manage the symptoms of her disclosed health conditions and to remain in her role as part time Community Collective Advocacy Development Worker with AdvoCard.*

- *To provide a formal written record of agreed adjustments which will be held in Patricia's personnel file. These will be reviewed and amended as necessary and at least annually.*

- *To avoid the need to repeatedly explain Patricia's health conditions and their impacts to her line manager and work colleagues."*

22. The TAP went on to identify the existing arrangements which should continue:

- *"Patricia being able to remove herself from stressful situations/conversations with relative ease*

- *When there are clear expectations of what is expected of Patricia and of others in the team/office*

- *Having flexibility in your workload to allow Patricia to work evenings/weekends and outwith the office environment.*

- *Having a supportive line manager*

- *Having a recognition that Patricia brings the dimension of lived experience to her role and the team*

- *Having regular support and supervision meetings in place."*

23. A number of additional adjustments were also agreed, including an alert system (whereby a blue ribbon would be attached to her desktop computer to signal that she was vulnerable), and the traffic light system. Under "Recovery from crisis", the TAP stated that *"Patricia and her line manager will agree a response protocol (eg text messages to be sent,*

and approximate the timing of these) to be used during and/or following any workplace crisis incident."

24. The second version of the TAP, in November 2017, developed the additional adjustments and sought to put in place specific arrangements where a crisis had arisen or when the claimant was absent from or seeking to return to work.

25. Although the plan was not formally signed off, it was in the process of being implemented on an ongoing basis.

26. The claimant was heavily involved in a project at the Redhall Walled Community Garden, which was a supportive horticultural environment for the benefit of individuals suffering from mental illness in Edinburgh (known as "trainees"). The project involved trainees attending the walled garden and being encouraged to participate in horticultural activities for the purpose of rehabilitation, either to point them towards paid employment or simply to give them meaningful activity. The Scottish Association for Mental Health (SAMH) was the managing organisation for the project, for which funding was provided by the City of Edinburgh Council through the Health and Social Care Partnership.

27. The claimant's role at Redhall was to facilitate meetings, usually monthly, with the trainees and seek to advocate on their behalf in order to address common issues. These were largely low level issues until October 2017. At that time it was known that there were to be substantial changes to the way in which Redhall operated, including placing rigid time limits on the length of time for which trainees could be involved with the project. The announcement led to a degree of upset and concern on the part of the trainees, and therefore the claimant required to become involved in collective advocacy to speak on behalf of the trainees and ensure that their voices were heard. The claimant questioned how the decision had been made, and whether it could be challenged and reversed.

28. After the first meeting about this matter with the trainees, on 10 October 2017, the claimant fed back the concerns to Nicky Cole of SAMH. She

was subsequently advised that she was not permitted to meet the trainees at Redhall, and accordingly arranged to meet them at the Clock Café in Dalry. In the meetings at the Clock Café, trainees expressed themselves very strongly to the claimant about the degree of upset and anxiety which the decision of SAMH had caused them. The claimant advised SAMH of this, as well as Colin Beck at the Lothian Health and Social Care Partnership, and Linda Irvine at NHS Lothian.

29. In a meeting in December 2017, the trainees were informed by SAMH that the requirement for long-term trainees to leave the project was to be removed and further consultation would take place on the redesign of the service. The claimant spent time in the remainder of December and into the new year seeking to communicate with all the interested parties and engage with the trainees. This required her to work in excess of the hours which had been agreed with SAMH, and on 16 February 2018, Mr Mackie wrote to Sarah Blackmore of SAMH (114) to explain that to the end of January the claimant had spent a total of 185 hours on advocacy to the project. He went on to request that SAMH make a payment to the respondent in relation to the additional advocacy activity required of the claimant.

30. The claimant wrote to Mr Mackie on the same date (113) to express her thanks for his making this request. She went on to advise him that she had, within the previous days, been advised that both her godmothers had died within 24 hours of each other, one on 14 February and the other on 15 February. These relationships were particularly significant to the claimant given the compromised relationship she had had with her own mother.

31. She described herself as being “utterly overwhelmed” by the fact that there were a number of triggers from different sources, including SAMH, which she was unable to raise anywhere. She concluded the message by saying that she was “not at my best”.

32. She attended a meeting with 10 of the trainees on 16 February. One of the trainees, whom we shall refer to as PH in order to preserve anonymity, raised the issue that some trainees felt that they were not being represented at advocacy meetings. The claimant said that if trainees did not attend, she could not represent their views, but then sought to devise a means of communicating with trainees outwith the meetings so as to ensure that she knew their views.

33. At the end of the meeting, 3 female trainees continued to discuss matters with the claimant, and when she advised of her bereavements, showed her kindness, which caused the claimant to break down in tears. The claimant was moved by the compassion shown towards her at a time when she felt she was under considerable pressure. The claimant told Mr Mackie about this meeting and about her own reaction, expressing concerns about her mental health at that time. He agreed that they should meet in order to provide her with support, on 23 February, in the afternoon, and also to discuss the consultation meetings required with the trainees, which they were now under some pressure to arrange. He emailed the claimant on 20 February 2018 to confirm that they should meet, following an exchange of emails in which the claimant had pointed out the difficulties she was encountering with Ms Blackmore of SAMH (533). The meeting should take place either on the following day or on the Friday, and it was agreed that they should meet on the Friday, 23 February.

34. On 23 February 2018, Sarah Blackmore, Director of Delivery & Development at SAMH, sent an email to Mr Mackie at 9.36am. In that email, she said (351):

"Dear Chris,

I am emailing to apprise you of an urgent and confidential matter. I have been approached by a Trainee from Redhall who has expressed concerns on behalf of several of the group regarding Patricia's behaviour and how she is representing them. This Trainee has asked not to be

identified, or to have material that would identify them shared. The Trainee group, as expressed to me by this Trainee, feel that they are being misrepresented by Patricia, and rather than helping to move the situation at Redhall forward, that she is now doing the opposite. The Trainee has described to me behaviours of concern, including sending late night emails to Trainees with alarming statements (I cannot give the detail of this without identifying those concerned), and at a meeting held with the group in a public café last Friday, Patricia was described as becoming 'hysterical', crying and detailing the extra work she is doing and its impact on her, to the point where the Trainees present felt the need to try to comfort her. She was described to me as 'over involved', with emails to me and others from Patricia purported to be on behalf of the Trainees as 'out of order' and 'wrong' in their tone and content.

You will understand my extreme concern at this information. I need to ask you to take urgent action to address this, to ensure that an already highly vulnerable group of people are not further put at risk. This will by necessity meant a different approach to site and other meetings with Trainees, and the forthcoming facilitation meetings about the PSP offer, which Patricia had been intending to lead.

I have copied Linda, Colin, and Fiona into this email as I am aware that this is not the first occasion where there have been concerns about Patricia's behaviour and presentation.

I would be grateful for your urgent response outlining how this will be addressed.

Many thanks,

Sarah"

35. The claimant did not see this email at the time. It was, in time, forwarded to her as part of the investigation into her grievance, at a much later stage, but before us she maintained that she did not read it at that point

as there was so much information being sent to her that she was unable to bring herself to read everything.

36. Mr Mackie was of the view that this email raised serious issues, which required to be looked into carefully, and that since he was meeting with the claimant on the Friday it would be appropriate for him to raise it with her then. He felt that since she was coming to the REH anyway to meet with him, he should simply raise it with her in person at that meeting. He was aware that the claimant would not like what was in the email, but took the view that due to the fast pace of events at that time it could not be left until the following week. His evidence before us was that he "thought long and hard" about whether or not to have the conversation, and how to say what he wanted to.

37. She attended the Royal Edinburgh Hospital (REH) to meet with Mr Mackie, as arranged, at 2pm on Friday 23 February 2018. Mr Mackie did not put in place any adjustments for that meeting, on the basis that he did not consider it necessary to do so. His view was that the adjustments were to be put in place for meetings with third parties, and that while they had had their ups and downs, their conversations were usually constructive. They had, he felt, found ways to navigate around difficult areas when they arose. The traffic light system was not in place for 1:1 meetings with the claimant.

38. No minutes were taken of the meeting between the claimant and Mr Mackie on that day.

39. The meeting took place in a small meeting room, with Mr Mackie and the claimant the only persons in attendance. At the start, Mr Mackie confirmed that he may have access to additional funds to pay for the extra work being carried out by the claimant. Mr Mackie then advised that the respondent had received a complaint from the trainees at Redhall, via Ms Blackmore, about misrepresentation and crying in front of some of the trainees. The claimant was confused by this complaint, on the basis that she felt that she had dealt with the misrepresentation issue, and could not

understand why a trainee would have complained that she had been crying in their presence.

40. The claimant was also concerned that a complaint from SAMH had been accepted by the respondent, since she was of the view that SAMH had no right to make a complaint to her employer about her conduct. She felt confused, overwhelmed, distressed and betrayed, with conflicting thoughts. She was unhappy that Mr Mackie was not following the CUTS (Compassion, Understanding, Tea and Sympathy) approach with her, and that the traffic light card system was not available for her. In evidence she described herself as horrified and terrified. Her thoughts were going around her head “like a pinball machine”, and she was unable to articulate her thoughts to Mr Mackie. She was extremely distressed, and partly because she could not work out why no adjustments had been put in place for this meeting.

41. Mr Mackie then told her that he required to protect the reputation of the organisation, and that he had to carry out an investigation. At this point the claimant panicked. She stood up, and Mr Mackie went to put a hand on the door of the office. However, the claimant simply opened the door and left the room. She continued until she had left the building, and went to her car.

42. Mr Mackie told the claimant at the meeting that she was no longer to play any further part with the Redhall Trainees, and that she was to tell the Trainees that. She was not to have any further contact with them thereafter. The claimant’s evidence was that this may have been said to her during the meeting, but that after being told that the respondent had to protect their reputation she had no memory of what had been said to her.

43. Mr Mackie’s evidence as to the instructions given to the claimant was not entirely clear. He did say that he believed that he told her that she would play no further part with the Trainees, and that she was to tell them that, but not have further contact with them. He also suggested that he told

her, before she handed in her keys, that she should not have any contact with the Redhall Trainees. The claimant was unable to remember any such instruction at all, nor recall exactly what was said to her.

44. We have concluded that Mr Mackie did not go so far as to tell the claimant not to have any contact with the Trainees, but indeed told her that she could contact them to advise them that she would not be working with them any more. We accepted that the claimant's state of mind prevented her from taking in any instructions from Mr Mackie about contact.

45. Before leaving the meeting, the claimant raised her voice and displayed a very strong, angry reaction to what she had been told. Mr Mackie was familiar with the claimant's disability, and had seen her behave in such a manner before, which is why reasonable adjustments had been put in place to minimise the risks of recurrence. Colleagues in the adjacent corridor heard the claimant raising her voice and swearing before she left the meeting.

46. He had been concerned at the claimant's potential reaction to the meeting, but felt that he had play the role of manager in light of the complaint. He was concerned about the claimant's wellbeing following the meeting.

47. Having left the meeting, the claimant went home. She was very distressed, and contacted CL, one of the trainees, to tell her that she could no longer work with them as a group, but that she had not voluntarily abandoned them.

48. She then called her GP, and said that she was having a serious panic attack, worse that any since her partner had committed suicide. She told her that she needed to see her urgently, so she went to the Portobello surgery and was seen by Dr Millen that day.

49. The claimant then sent an email to Mr Mackie, which she copied to a number of recipients (123) at 3.42pm on 23 February 2018, including PH, CL and others:

"Dear Redhall Trainees,

It is with overwhelming regret and sadness that I have to let you know that I am no longer permitted to be your collective advocacy worker at Redhall.

I honestly cannot articulate how sorry I am to let you all down.

As I am no longer able to work at Redhall or represent Redhall Trainees in any way, Chris, the AdvoCard Director, aims to cover my work with you, including the three Trainee Participation events – please go and please design the most amazing service.

I don't know anything other than Chris received an email from Sarah Blackmore that detailed a complaint that has been made about me and my work that has been made by a Redhall Trainee that states that I have misrepresented Redhall Trainees.

Please do not reply to this email – any questions or comments you have should be sent to Chris: chris@advocard.org.uk or 0131 554 5307.

And please do not give up on the work we have done to date – please take what you have learned from all our discussions and fight for the service you should have.

You are all amazing, wonderful, thoughtful, kind compassionate people and you deserve to have the best support available. I am sorry that I am no longer able to spend time with you or to support you with your fight for the answers you so badly need.

Warmest regards always.

Patricia"

50. At some point shortly thereafter, the claimant sent a text message to Mr Mackie to advise that she did not think she was okay, and did not think that she was ever be okay again. She heard nothing in reply from Mr Mackie.

51. Mr Mackie found the meeting very stressful, and as a result was absent from work due to illness from the following Monday for a period of some weeks.

52. On 24 February 2018, at 9.51am, the claimant emailed Mr Mackie, copying LC, one of the Trainees, and Dr Robby Steel, Consultant Psychiatrist. She copied the message to Dr Steel since, although she was not a patient of his at that time, she knew him as the treating psychiatrist of a number of the Trainees, including LC, and felt, therefore, that this email would be treated confidentially. The email confirmed to LC that she could no longer deal with the Trainees, and that if she wished to have support she would require to email Mr Mackie direct. She set out, to Mr Mackie, a number of questions which she considered to be relevant to ask SAMH.

53. On the same date, at 12.48pm, the claimant emailed Mr Mackie (120). In that email, as well as a number of other comments, the claimant said:

"I appreciate that you did not have much time to prepare. However, you were aware that I was already very vulnerable and to just give me life-shattering/life-changing news that impacts on my entire self-perception and sense of place in the world (which, let's face it, given the conversations we have had and the information I have given you or given you sight of, you must have been aware). Did it not occur to you that before telling me (and given where you delivered the news) that you had done nothing to seek immediate support for me… apparently done nothing about the fact that I had no-one, bar you, a Manager/Director who has made it very clear that he is not my therapist and who was the person delivering that life-shattering, life-changing news, to talk to (you know my circumstances)… did it not occur to you that there were safe-guarding

issues about my driving in that state? You talked about 'duty of care' but had done nothing about that duty of care in advance…

At least the Trainees had each other. I have nothing and no-one.

I cannot see a way back for me and AdvoCard under these circumstances."

54. On 25 February 2018, the claimant emailed 3 Trainees (C, L and J)(126), starting *"I am pretty sure that I know who made the complaint – and why it was made.*

I certainly know it was <u>not</u> made by any of the three of you who witnessed by (sic) breakdown in tears in the Clock (the only three I have sent this email to).

I wanted to thank you from the bottom of my heart for being there for me at that time. I have explained to L and C that I had just found out that both of my godmothers had died and it was all very raw; the kindness I got from you at the Clock was hugely appreciated.

In regard to the complaint: I do not understand it to be valid because the person who I believe has made the complaint has not been at collective advocacy meetings for some time. I cannot include the views of people who have not attended collective advocacy meetings – that really would be misrepresentation – and it is my job to represent those who do attend. I cannot possibly guess at what other Trainees who are not present might want to say and it would be inappropriate to do so…

Unfortunately, that complaint means that I can no longer work with any Trainees now and most probably in the future.

And Chris won't fight that because AdvoCard has no time capacity to fight it, AdvoCard is already overstretched and there is no-one with the time or the will to fight on my behalf.

So the situation is that the complaint was made; and the way that I was told about the complaint was a horribly ironic reflection of the iatrogenic

trauma and psychiatric/psychological injury some Trainees experienced as a result of the awful news about the change to service but also as a result of the way in which you were told and the implications for your future sense of safety and security.

I was told that the complaint had been made – but the person telling me was in a position where they knew – or should have appreciated – that I had no access to any kind of support over the weekend (either professional or personal)… and I left the place where we had had the conversation in deep distress to drive home without the person who has a Duty of Care towards me checking that I was safe, checking that I was safe to drive a vehicle… or checking later to be sure that I was safe (so, just like Trainees, my questions are: where was the risk assessment? Where was the planning for duty of care?)

We had never discussed how having a complaint raised against me would be managed… and my distress (and my mental health condition) was minimised with the dismissive and diminishing attitude of 'it happens all the time at AdvoCard'.

Perhaps that is true – but I have never had a complaint raised against me by a service user in my entire working life of around 40 years.

All this loss of trust means that I cannot see a way for me to remain an AdvoCard employee under these circumstances.

It would take months of pretty intensive therapy to get me to the point of being able to trust AdvoCard management and co-workers again, never mind believe in myself as someone who should be doing this work…"

55. She then sent an email to Ms Blackmore on 25 February 2018 in response to the complaint (127). She denied that there had been any "misrepresentation" of the Trainees, and said:

"I believe this complaint has been made by a Trainee who has previously raised the issue of non-representation of his particular views with AdvoCard, in relation to the situation at Redhall. I spent time with this

person and listened and explained to that Trainee that I have an obligation to represent all views expressed at Collective Advocacy meetings; I assured him that his views have been acknowledged and included in any write-ups whenever he has attended meetings – but I cannot represent the views of Trainees who do not come to the meetings I facilitate. I have always added the caveat to both Trainees and to SAMH that I do not represent all Trainees and cannot guess at the views of those who do not attend. We can only offer all Trainees the opportunity to engage with collective advocacy – and if they do not attend, I can only acknowledge the number of Trainees who have attended and that I represent those Trainees. Any issue raised by three ore more people is understood to be a valid collective advocacy issue…"

56. She went on to explain the circumstances in which she broke down at the Clock Café, and concluded the email by saying that *"I fully appreciate that removing me from the situation at Redhall suits your agenda and that of SAMH."*

57. The following day, 26 February 2018, the claimant emailed Michelle Howieson (129), with whom she had arranged to meet, to advise that having been banned from working with the Redhall Trainees, in a manner she described as "unjustified", she had become extremely unwell and would not be able to meet with her.

58. On that day, Karen Barr, a Board member of the respondent, left a voicemail message in which she instructed the claimant not to contact anyone at Redhall. The claimant was very upset by this. She emailed Ms Barr, copying the email to Mr Mackie, at 4.26pm on 26 February 2018, to say that:

"I don't think it is in any way appropriate to call me on my personal mobile phone and issue instructions relating to my employment without making <u>any</u> enquiry about my personal wellbeing. How dare you do that without a single word about my vulnerability and wellbeing? How fit are any of you to be working in mental health charity when you cannot even meet the

most basic concepts of human compassion and discriminate against a vulnerable employee?"

59. She criticised the respondent for its failure to meet its obligations towards the duty of care owed to her as a vulnerable employee, and emailed further, at 6.34pm, to Ms Barr and Mr Mackie to say that they had not shown any care or compassion for her (132).

60. The claimant attended her GP on 26 February 2018, and was signed off as unfit for work due to stress at work, for a period of one month (885).

61. Ms Barr emailed Mr Mackie and Dianna Manson (late Chair of the respondent's Board) on 27 February 2018 (133) at 8.12am:

"FYI

In discussions with Dianna and Redhall/SAMH yesterday, SAMH asked Dianna to stop PR contacting Redhall trainees.

When Dianna and I talked we agreed that I should place a call to PT. I left what I believed to be a support message on her phone asking her not to be in touch with anyone from Redhall but no mention of any other AdvoCard work or that there was even any suggestion of wrongdoing. This has clearly only exacerbated the situation and resulted in two abusive voicemail messages to me from PT.

I'm not sure how we move forward but Dianna and I will discuss it."

62. "PT" is understood to be a reference to "PR", the claimant.

63. On 1 March 2018, the claimant emailed Mr Mackie again, having received no indication from the respondent that he was off work himself. In her email (timed at 11.56pm) (134), she asked a number of questions directed at trying to establish what he was doing to assist the Redhall Trainees.

64. She went on to address the distress, anxiety and confusion she was suffering on the grounds that the respondent had shown no concern for

her nor observed any duty of care towards her. In particular, she said, *"I do not understand why you did not adhere to the plan we worked out with Susanne Crichton – that after I experienced a panic attack, you would ensure that I was contacted to ensure that I was safe and that I was reassured."*

65. She went on to point out that Redhall Trainees were contacting her while distraught and begging her to help them, that barring her from meeting the Trainees would compromise her whole job as they attend all other meetings in which she is engaged and that by "ostracising" her, she might feel that she was being put on a disciplinary without being told so. She suggested that the outcome might have been very different had the adjustments agreed with Ms Crichton been put in place for the meeting.

66. Mr Mackie emailed the claimant on 5 March 2018 (138) to say that he had been off sick for a week. He noted that the claimant had sent a number of emails from her AdvoCard address, and requested that she did not use that email address until she was signed as fit to return to work.

67. The claimant sent 2 replies to Mr Mackie on 5 March 2018 (138), one of which informed him that in order to communicate with NHS professionals she required to use her work rather than personal email address; and the other of which said that he was not to contact her again until he made appropriate enquiries under his duty of care or heard from her Trade Union.

68. On 5 March 2018, the claimant composed and sent to Mr Mackie a longer letter (139), with which she attached a further Fit Note (886) signed by the doctor whom she normally consulted, Dr Miller, citing the reason for absence as an acute stress reaction. She said that when she Dr Miller, she was unable to take in what was being said to her and left the surgery under the impression that the doctor had refused to issue her with a medical certificate.

69. She went on to address the manner in which the meeting had been arranged and conducted on 23 February 2018:

"I also need to say that I remain hugely distressed and disappointed by the lack of Duty of Care from AdvoCard. I experienced the most significant mental health crisis I have had in almost a decade on Friday 23 February – in part because I understood that we had an outline for how to deal with potentially difficult situations from the work done with Susanne Crichton that mentioned, basically, tea and sympathy rather than cold hard facts and my needs being minimised in relation to AdvoCard – and I currently feel that I am being blamed, shamed, punished and stigmatised for being overwhelmed by my C-PTSD/PTSD in relation to known key triggers… treated as if I have behaved in a totally unacceptable way when the reality of what happened was that I had an acute stress reaction relating to the conditions of which you have been aware since I applied for the post. I found the email you sent late this afternoon very cold and entirely unsupportive and lacking in any concern for my wellbeing. That also has horrible echoes that trigger emotional distress for me – and the more you treat me as if I am abhorrent and repugnant, the more unwell and utterly mired in my mental health condition/s I become.

However, I appreciate that you may never have experienced someone in crisis the way I was on Friday 23 February. I appreciate that it must have been very difficult for you and I am appalled by the prospect that what happened may have led to your being on sick leave yourself. If I played any part in that I am truly sorry…"

70. She advised that following trade union advice she did not wish to pursue a more formal complaints procedure, but that before beginning a process of re-engagement, she needed to feel that there was genuine concern for and understanding of her situation as a vulnerable employee, currently experiencing a mental health crisis. She proposed that a meeting with Mr Mackie, Katie James and herself with someone supporting her should be set up.

71. The respondent did not reply to this letter.

72. The claimant was able to secure an appointment with Susanne Crichton on 13 March 2018. Ms Crichton produced a report (142ff) in which she set out recommendations. She cited the difficulty for the claimant of anxiety symptoms related to the allegations made against her and the sanctions applied (that is, being told not to contact certain clients), and stated that the claimant was willing and able to participate in a formal procedure about the complaints made about her; that she would have the capacity to fulfil some of her duties and that she should have no contact with the respondent's employees other than those necessary to progress formal procedures.

73. She also suggested that the claimant limit her work time to 3 hours a day to allow her to manage her health.

74. Ms Crichton summarised her comments: *"Patricia is finding the lack of contact from her employer is having a negative impact on her health and hopes that being able to participate in some work related tasks while formal procedures are followed will support her to remain in and return to her role in the near future. She has agreed to continue to work with relevant health care professionals to extend existing return to work plans to avoid similar situations arising in the future."*

75. The claimant then emailed Mr Mackie again, with a copy to Karen Barr, on 21 March 2018 (146), formally requesting answers to the questions and points set out within that email within 3 working days. She pointed out that the only contact from Mr Mackie had been an email sent on 5 March requiring her not to use her work email address. She criticised the respondent for failing to communicate with her, not providing any "Duty of Care" to her, and not providing support to her and as a vulnerable employee.

76. She requested that the respondent provide clarity to her about the situation, and set out a number of bullet points raising issues for her employer to address.

77. Karen Anderson, Advocacy Manager, responded to this email on 22 March 2018 (156) to confirm that Mr Mackie was absent from work, and that due to that absence the respondent was unable to provide their response to the points in the claimant's email.

78. In reply, the claimant confirmed (155) that she would wish to have Katie James or Ben Baldock as points of contact with whom she would be comfortable. She enclosed, to Karen Anderson and Karen Barr, copies of her fitness for work noted 22 March, Ms Crichton's report dated 26 March and the documents attached to that report.

79. It was agreed that Ms James would be the claimant's point of contact, but that she would have no managerial responsibility for the claimant nor any involvement in the management of her absence or the complaint procedure. She would be available to speak to the claimant and be a confidential listener for her.

80. Ms James met with the claimant on 29 March 2018 and provided a report on that meeting (158ff), albeit that it was not clear to the claimant if it had been shared with the respondent. She confirmed that the claimant was engaging in a phased return to work, carrying out work tasks such as writing and distributing the respondent's newsletter, and attending external meetings and consultations. She set out, at some length, a description of the claimant's emotional state and her lack of trust in the organisation, and Mr Mackie in particular.

81. Ms James contacted the claimant on 20 April 2018 (163) to advise that a meeting would be arranged with Ian Broatch, Board Chairman, and the claimant, accompanied by her trade union representative, in the near future. She asked the claimant some questions in order to prepare for the meeting, to which the claimant replied on 22 April (162). The claimant complained that she was in the dark as to the progress of the complaint, and suggested that the first thing to do would be to contact SAMH to determine a number of matters, including whether the complaint still stood and what SAMH expected the respondent to do about it.

82. The claimant met with Ian Broatch and her trade union representative, Graham Turnbull, at the Unite the Union offices in York Place, Edinburgh, in early May 2018. Mr Des Loughney and Katie James were also in attendance. Mr Turnbull raised his concern that the claimant was being given no information as to the process being followed. Mr Broatch confirmed that the claimant was not suspended, but that the complaint had to be investigated. The claimant had the impression that Mr Broatch did not know very much about the complaint or how it was being progressed. She was informed that the investigation could not proceed fully until Mr Mackie returned to work from sick leave. There was no suggestion at that meeting that the claimant was to be subject to disciplinary action.

83. Following the meeting, Ms James continued to act as a point of contact for the claimant. Mr Broatch wrote to Ms James on 9 May 2018 (171):

"Hi Katie

Just to give you a further update which you may wish to share with Patricia.

I'd tried to contact Sarah Blackmore on Tuesday, but it appears that she is no longer working at SAMH. I talked to Fiona Benton today. She was broadly aware of the background but had no specific information to hand regarding the initial complaint. She said they have robust information governance around logging and monitoring of complaints so she will investigate and talk to her director about this before getting back to me.

I'll update as soon as I hear back.

Ian"

84. Ms James forwarded that message to the claimant on 10 May, suggesting that *"It appears reassuring in some sense, but I will await Ian getting back to me with further detail, to regard my senses as fact!"*

85. Fiona Benton spoke with Ian Broatch shortly after that email exchange, and confirmed that SAMH no longer had any interest in pursuing their complaint. The evidence did not specify precisely when that conversation took place, but it was shortly after the email on 9 May 2018.

86. Mr Broatch gave evidence before us to the effect that he was "pretty certain" that SAMH's confirmation that they did not wish to pursue the complaint had been passed back to Ms James. The claimant's evidence, by contrast, was that at no stage was it communicated to her that SAMH did not wish to pursue the complaint.

87. It was our conclusion that the claimant's evidence on this point was to be preferred. We set out our views on the credibility and reliability of the different witnesses before us below, but it is appropriate to explain our conclusion as to why we preferred the claimant's evidence.

88. Firstly, Mr Broatch, who was a volunteer Chair of the respondent's Board for a relatively short period of time (just over a year), was notably vague in his evidence before us, and was unable to remember or answer precisely points which he was asked about. We do not criticise him for this, though we did detect the sense that he wished to distance himself from the issues arising from this case, having left the organisation some time ago.

89. Secondly, the claimant was quite clear in her evidence that she had not been told that SAMH no longer wished to pursue their complaint against her. She gave that evidence with clarity and conviction, and we found it entirely believable.

90. Thirdly, and of considerable importance, the claimant is a highly intelligent, articulate and forthright individual (as one might expect an advocate for service users to be). It is simply not credible to the Tribunal to suggest that this claimant, if told that the SAMH complaint was not to be pursued in May 2018, would have remained silent on the matter throughout the lengthy correspondence which followed and encompassed the grievance process and the disciplinary invitation. Had she been aware

that SAMH did not wish to pursue the very complaint which had caused her strong reaction in the first place, it is our judgment that the claimant would have raised this immediately with the respondent and pointed out that a large part of the case against her had been withdrawn.

91. Fourthly, and associated with that previous point, it was not put to the claimant in cross-examination that she was aware that the complaint had been withdrawn. In our judgment, that could imply that the respondent did not convey this information to their solicitor in advance of the hearing, on the basis that it was not true.

92. We should say, on this point, that we do not consider that Mr Broatch was deliberately dishonest about this. It is more likely, in our view, that he had simply overlooked the matter, and that when asked about it when giving evidence, suggested that he thought it was likely that it had been done.

93. We will return below to this issue.

94. Mr Turnbull wrote to the Board on 24 May 2018 to express his serious concerns about the allegations made against the claimant (173), and about the anonymised and vague nature of the complaint; together with the failure, as he saw it, of the respondent to follow a proper process. He proposed that the allegations against her should be dismissed as spurious, and that the respondent adopt policies and procedures to be put in place in order to investigate such matters.

95. Mr Broatch replied on 28 May 2018 (175) to repeat that the respondent had investigated as much as they were able to without being able to speak to Mr Mackie, who remained absent due to ill health.

96. The claimant continued to work during this period, but was concerned to ensure that her work did not have a negative impact upon her mental health.

97. On 29 May 2018, the claimant was seen again by Ms Crichton, who provided an Advisory Fitness for Work Report (178ff), to which was

attached a separate document setting out work-relevant difficulties, recommendations and goals (182).

98. On 25 June 2018, the claimant prepared a document to be passed to the respondent's Board (197ff), setting out the issues on which the claimant felt she needed clarity. She noted the facts, in 10 numbered paragraphs, about what she was told by Mr Mackie at the meeting of 23 February, following which she had an acute stress reaction/severe panic attack. She then advised the respondent of the reasons for the panic attack, including the failure by Mr Mackie to put in place reasonable adjustments for the meeting at which the complaint was raised with her.

99. No significant communications took place following this between the respondent and the claimant. Mr Mackie returned to work on a phased basis. However, the claimant felt it necessary, on 5 September 2018, to prepare a formal grievance to the respondent's Board (203). Her grievance repeated her concerns that the respondent had failed to follow due process in investigating the complaint. She proposed that an independent investigator should be appointed in order to speak to everyone concerned and carry out a full investigation. She set out, once more, her concerns about the meeting of 23 February 2018 and the respondent's failures in preparation and conduct of that meeting.

100. The grievance was sent to Mr Mackie by email on 7 September 2018 (221).

101. On 6 September 2018, John Murray, a member of the Board, provided a letter to the claimant (207), after proposing to meet with her when she was meeting with Ms James, a proposal which was rejected by the claimant.

102. In his letter, Mr Murray said:

"First, on behalf of the Board I wish to apologise for the delay in responding to your various correspondence. As you will appreciate there have been various extenuating circumstances for this such as staff

absences, including your absence, Chris's prolonged absence and the Chair's illness. Second, there are a number of issues that I would like to address: your concerns, the concerns highlighted by SAMH in February 2018 and your alleged actions following this."

103. Mr Murray then went on to address these three matters in turn. He advised that the Board had decided to instruct Stephanie Harper, of Navigator Law, to carry out an independent investigation. He suggested that prior to carrying out a full investigation into her concerns (and he had not seen the claimant's grievance letter before writing this letter), it would be necessary to refer the claimant to Occupational Health in order to assess her fitness to partake in the investigation, and to determine whether the restrictions on her duties should continue.

104. Mr Murray then set out the concerns which had been raised in the complaint by Ms Blackmore of SAMH, and confirmed that the Board wished those concerns to be investigated.

105. The Tribunal noted that no mention was made in this letter of the fact that SAMH had advised the respondent in May 2018 that they no longer wished to pursue the complaint.

106. Finally, he advised that the respondent wished to instruct Ms Harper to investigate a number of allegations against the claimant, including that she sent inappropriate texts to an SAMH Trainee after being instructed not to contact staff or trainees, and that she had had an "inappropriate reaction" to a Board member communicating such an instruction.

107. This last section of the letter represented the first time that the claimant had been told in writing that she was to be the subject of disciplinary action, and notified of the allegations to be investigated. The claimant was shocked and panicked by this. She took the letter by Mr Murray in digital form and annotated it, at significant length (210ff).

108. On 26 September 2018, the claimant attended an Occupational Health (OH) appointment with Dr Alan Williams, Consultant Occupational

Physician, following which he provided a report of the same date to Mr Mackie (232).

109. Having set out the background, Dr Williams expressed the following view:

"On examination today, there is no evidence of symptoms of stress, anxiety or depression. Patricia appears cognitively intact and insightful regarding her circumstances. Based on these findings, my view is that she is currently medically fit to continue in her current role, provided her work performance is deemed to be satisfactory. In addition, any behaviours or conduct would need to be considered as being acceptable, taking into account a reasonable level of adjustment around generally accepted professional standards and boundaries and the underlying medical history. In general, work activity is beneficial for Patricia's mental health and overall well-being.

I do not think that there is currently any medical reason for restriction on Patricia's work duties. An individual Stress Risk Assessment (ISRA) would enable residual stress risk to be identified and could facilitate a return to working within the office and participation in face-to-face meetings with colleagues and service users. On discussing this process with Patricia, she is aware that she would need to decide on whether residual stress risk was acceptable to her. I would be happy to forward a template for the ISRA if you wish and advise on residual stress risk when completed.

In addition to any actions that are identified through such a process that can reasonably practicably be put in place, I would support continuation of the adjustments documented within your management referral. It is likely that further discussion and clarification will be required around some of these…"

110. On 25 September 2018, the claimant was seen by Dr Robby Steel, Consultant Psychiatrist. He provided a report to the claimant's GP on 28 September 2018 (235).

111. In his report, Dr Steel described the two pressing issues for the claimant, namely the "challenging situation" at work following the complaint by SAMH, and her control of her Type II Diabetes.

112. After discussion, he said, the claimant and he had agreed, among a range of options, that he would write a letter to the respondent urging them to resolve the workplace dispute as soon as possible, and to identify a change of role or location/base at least until the dust had settled. He also proposed that the claimant, while not seeking regular psychiatric review, should meet with an understanding professional every three months, and that he would be happy to fulfil that role for her.

113. Stephanie Harper, of Navigator Employment Law Ltd, carried out an investigation into the matters raised by Mr Mackie and intimated to the claimant, and produced her report, with appendices, dated 14 December 2018 (256ff). The claimant was provided with a copy of the report on 21 December 2018.

114. A grievance hearing was fixed to take place on 17 January 2019, and the claimant was invited to attend that meeting by letter of 14 January 2019 (310) by Mr Mackie. The hearing took place on 17 January 2019. The panel comprised Ann Nolan, who acted as Chair, Paul Fitzpatrick and Robert Montgomery. The claimant attended and was accompanied by Katie James. Seanpaul McCahill attended in order to take notes (314ff).

115. Following the hearing, Ms Nolan wrote to the claimant on 19 February 2019 (600) to confirm the outcome of the hearing, attaching the respondent's decisions on the 8 points of grievance in a document with the letter (602). The claimant's grievances were not upheld.

116. The claimant was dissatisfied with the outcome, and decided to appeal against the decisions made by the panel. She submitted a letter dated 28 February 2019 setting out her wish to appeal (606), with detailed grounds of appeal in respect of each finding attached (609).

117. On 6 March 2019, Dr Alyson Falconer, Consultant Clinical Psychologist, produced a letter “To whom it may concern”, to offer details of her contact with the claimant and outline her concerns about her recent experiences. She confirmed that the claimant had initially attended to see her in early March 2018, following a brief assessment at the Rivers Centre by Heather Hillen, Senior Psychological Therapist. Dr Falconer went on:

“When we met, Patricia was clearly struggling with the fallout of losing key aspects of her role at her place of work, including a sense of belonging and value. This meant that she was trying to manage the emotional impact of the conflict with her employer while feeling a huge amount of uncertainty about her personal and professional future. It was agreed between Claire Fyvie and myself that she should be supported within the NHS system whilst the situation was ongoing and while she was struggling with the impact on her mental health. Unfortunately, the ongoing delays, lack of communication with Patricia by her employer and the resultant continued uncertainty about her future have further exacerbated her feelings of distress and vulnerability.”

118. Dr Falconer said, towards the end of this report:

“I would recommend, that for successful employment to continue, acknowledgment of the difficulties of the last year and appropriate consideration of Patricia’s mental health needs are taken into account both as this situation moves forward towards resolution and as long as she remains an employee of the organisation. She will no doubt need a period of recovery but during this time would benefit from continuing to engage in work. This should accommodate some flexibility in order for Patricia to have her needs met over the next year. It is important to recognise the impact of last year’s events on Patricia’s wellbeing. She describes both physical and psychological difficulties that will take a period to settle and for her to return to a healthier state of functioning. She also describes a loss of social support as a result of not being able to share information about her distress with friends, difficulty trusting others, and financial loss which will no doubt affect her ability to manage in the

coming months. All of this continues to create stress for Patricia and I hope will be understood and managed within her employment."

119. On 28 June 2019, the respondent wrote to the claimant (633) to invite her to a Disciplinary Hearing on 17 July 2019. It was confirmed that the hearing would be chaired by Angela McCusker, with Blyth Crawford and Michelle Ramsay on the panel. Mr McCahill would attend, again, as note-taker.

120. The allegations were set out as follows:

"The specific allegations made against you are:

1. *That during a meeting at the Clock Café on 16 February 2018, you complained to Redhall trainees about the amount of hours that you were working at that point.*

2. *That you sent an inappropriate email to SAMH on 25 February 2018, with various presumptions and inappropriate wording, specifically 'Finally, I appreciate that removing me from the situation at Redhall suits your agenda and that of SAMH'.*

3. *That you sent an inappropriate text message to a SAMH trainee based at Redhall, after being instructed not to contact staff or trainees.*

4. *That your reaction to a Board member contacting you was inappropriate, after receiving repeat instructions not to contact Redhall staff or trainees.*

5. *That you sent an inappropriate email to a Redhall trainee, under the name 'SK', after being instructed not to contact Redhall trainees or staff.*

6. *That you sent 89 text messages, with some containing inappropriate language, to a Redhall trainee."*

121. The claimant was advised that these were potentially serious matters and if upheld may result in disciplinary action being taken against her, which may include dismissal.

122. This letter was sent to the claimant's trade union representative, Mr Turnbull, rather than directly to her, so there was a delay before she received and read its terms.

123. On 4 July 2019, Dr Steel wrote directly to Mr Broatch, in his capacity as the claimant's Consultant Psychiatrist (637). He said *"I am aware that Patricia and AdvoCard are embroiled in a protected employment dispute. As Patricia's Psychiatrist, my primary concern is for her mental wellbeing. I have repeatedly and consistently made the point that Patricia's mental wellbeing would be best served by a prompt resolution of this dispute: each time I meet with Patricia I advise her to do everything she can to bring the dispute to an end; each time my view is sought by representatives of AdvoCard I urge them to do the same."*

124. He expressed frustration that nothing had happened since an exchange of correspondence between the claimant and the respondent on 11 and 14 May, and asked that Mr Broatch do everything in his power to ensure that the employment dispute was resolved as quickly as possible.

125. The Disciplinary Hearing fixed to take place on 17 July 2019 did not take place, owing to the fact that the invitation letter was not sent directly to the claimant but to her trade union representative. The invitation was therefore re-issued, for a hearing dated 13 August 2019 (651).

126. A further report was provided by Ms Crichton dated 22 July 2019 (647ff). She continued to recommend that a temporary alteration in hours (maximum 9 hours per week) would amount to a reasonable adjustment under the Equality Act 2010. She sent the report to Mr Mackie by email (653) and said that she had significant concerns about the claimant's health and subsequent ability to manage this while trying to process the recent communications, both volume and content, from the respondent. She said that the claimant presented on that date "overwhelmed with

anxiety and in distress". She had therefore decided to remove the report into the allegations against her from the claimant's possession, due to the anxiety they were causing her.

127. Mr Turnbull wrote to Mr Broatch on 24 July 2019 (654) to express concerns about the grievance appeal, which was, as he put it, "apparently held in the month of June 2018". He proposed that the appeal should be reheard by an independent person prior to the disciplinary hearing.

128. The claimant emailed Colin Beck, at the City of Edinburgh Council, on 28 July 2019 (656) to communicate how she was feeling at that time. She told him that *"It is just not sustainable for me to go on under this pressure – and my state of mind relates directly to the seemingly endless war of attrition that has lasted an appalling 75 weeks."* She considered that Mr Beck was sympathetic to her circumstances.

129. She also wrote to Mr Broatch, on 26 July 2019, to say that she did not think it was appropriate for the Disciplinary Hearing to proceed on 13 August 2019, given the outstanding issues relating to her grievance.

130. Mr Broatch responded by writing to Mr Turnbull on 29 July 2019 (660), in the course of which he sought to address the various criticisms made of the process followed, and denied that the grievance appeal was heard without the claimant being invited to attend. Notwithstanding that denial, however, he confirmed that the respondent would invite her to a formal meeting to address the grievance appeal.

131. The claimant emailed Mr Broatch on 5 August 2019 (662) at considerable length, setting out her medical history and her current medical condition. In light of that letter, Mr Broatch confirmed that the respondent would suspend the hearing on 13 August 2019 (671) by email of 9 August 2019. The respondent agreed that there should now be a further independent medical assessment of the claimant, and notified the claimant of this on 15 August 2019 (672).

132. On 23 August 2019, the respondent wrote to the claimant to advise that she was to be suspended on medical grounds. The letter was sent to her in a large brown envelope (693), inside a white envelope sealed and marked “From AdvoCard. Not to be opened without support.”

133. The letter (694) was sent in the name of the respondent’s Directors, though signed by Mr Mackie. It said:

“The purpose of this letter is to advise you formally of your medical suspension from duty, which will be on full pay, pending the outcome of your appointment with Occupational Health. The effective date of this suspension is today, 23 August 2019. We are suspending you in the interests of Health and Safety and exercising responsibilities in terms of our ‘duty of care’ to both yourself and your colleagues. If, following this medical referral to Occupational Health, it is found that you are fit to resume you duties and the medical suspension will be lifted.”

134. The claimant did not receive that letter on that date, but discovered, while away from work, that her access to her email account had been locked. She did not work for the respondent after 23 August 2019 until the date upon which she presented her claim to the Employment Tribunal (29 November 2019).

135. Two reports were provided for the claimant, which she passed to the respondent, from Dr Falconer and Dr Steel. Dr Falconer’s report (696) dated 13 September 2019 recommended that *“for successful resolution to occur at this stage, acknowledgement of the difficulties of the last year and appropriate consideration of Patricia’s mental health needs are taken into account in any communication with her. it is important to recognise the impact of the last year’s events on Patricia’s well being. She describes both physical and psychological difficulties that will take a period to settle and for her to return to a healthier state of functioning.”*

136. Dr Steel’s report (699) dated 17 September 2019, repeated his concerns about the length of time taken to resolve the employment dispute, and said that at each stage in the dispute the respondent had taken action

which directly contravened the advice of the Occupational Health Psychiatrist. He reported that *"As things currently stand Patricia feels betrayed, abandoned, belittled and terrified. She told me 'my employers have finally pushed me over the edge into a total emotional breakdown' and I can only concur with that assessment."*

137. Dr Steel encouraged the respondent to demonstrate a "trauma-informed approach", that is, an approach which took into consideration the traumatic background and illness which the claimant was known to suffer from, and applied the recommendations of the Occupational Health Psychiatrist.

138. Dr Falconer provided a further report on 8 October 2019 (703) recommending that since meaningful work assisted the claimant's psychological health the respondent should consider allowing her to return to work.

139. A further OH assessment was arranged, and the claimant was seen by Dr Williams. His report, dated 9 October 2019, sought to answer a number of questions placed before him by the respondent in their referral. He expressed the view that the claimant was not currently fit for work, but deferred to a psychiatrist to answer whether the condition posed any risk to others, or indeed whether the claimant was fit enough to participate in a disciplinary process.

140. On 2 October 2019, the claimant notified ACAS of her intention to make a claim to the Employment Tribunal about the events under consideration. An Early Conciliation Certificate was issued by ACAS on 2 November 2019 (29), and the claim was presented to the Tribunal on 29 November 2019.

141. Events which took place after the presentation of the Tribunal claim are relevant not to the merits of the claim but to the question of remedy, and must be seen in that light.

142. A letter provided by Dr Steel on 10 December 2019, sent to Julia Fitzpatrick of the respondent (713), attached a co-authored report by Dr Steel, Dr Claire Fyvie and Suzanne Crichton. The report was provided on soul and conscience (714ff).

143. The report, entitled "Supplementary information from mental health professionals", set out the clinicians' understanding that at the outset of her employment the claimant disclosed to her employer two significant health conditions, PTSD and C-PTSD. They summarised the impact of these conditions upon the claimant, the recognised triggers and the effects of such triggers on her.

144. The impact on the claimant was set out in a series of bullet points, including panic attacks, constant worry, sleep disturbance, unwanted intrusive thoughts and images, suicidal thoughts, expectation of abandonment, criticism and rejection by other people, misplaced feelings of being to blame and *"on a few occasions dissociation/dissociative fugue during the first minute or two of a mental health crisis being triggered".*

145. The known triggers were listed as:

- *"cognitive dissonance*
- *(perceived) betrayal of trust*
- *sudden changes in topic or plans"*

146. The clinicians also advised that there were transient changes in the claimant following a trigger, including raised voice, tearfulness, overwhelming shock or panic leading to a need to escape the distressing situation and actions which could be perceived by others as rudeness or aggression.

147. They confirmed that they considered that the claimant would be fit to attend a disciplinary meeting, so long as it was conducted in accordance with due process and transparency. They went on: *"Furthermore, it is our view that a non-discriminatory approach to these meetings is essential –*

recognising that Patricia is managing two significant mental health conditions. We acknowledge that it is impossible to guarantee that Patricia will not be triggered (triggers are unique to each individual and can be difficult to predict), but in our view any interaction with Patricia should be based on the principles of trauma-informed care, namely: choice, collaboration, empowerment, trust and safety. These principles are particularly important in the context of an inherently anxiety-provoking setting such as a disciplinary meeting."

148. The report, under the heading of "Other relevant information" concluded that:

"It is clear that Patricia finds purpose in her job and, despite the protracted and distressing nature of the dispute, her strong preference remains to return to work. As mental health professionals, our impression is that this deep and sincere vocational drive is central to Patricia's sense of self-worth, (it is also at the heart of her undeniable effectiveness as a mental health advocate). Losing the outlet for this drive would, in our opinion, have a markedly detrimental impact upon her mental health. This is why we have consistently supported Patricia in her attempts to resolve the dispute with Advocard and return to work."

149. Following confirmation by Ms Crichton and her GP that the claimant was fit to return to work, the claimant met with Beverley Francis and Julia Fitzpatrick on 30 January 2020 to discuss her return to work on a phased basis. The claimant returned to limited duties under the management of Ms Francis, and engaged in report-writing for both her and Ms Fitzpatrick. Given the onset of the global pandemic in early March 2020, the claimant worked at home and met with her supervisors remotely by video conference.

150. She continued to work until November 2020, when a number of events occurred which led to her being absent on sick leave again. Since then until the date of this Hearing, the claimant has not returned to work. She received full pay until the end of May 2020, then half pay until the end of

November 2020. Thereafter the claimant received four payments of £806.44 net in respect of holiday pay, the last of which was paid at the end of March 2022.

151. The claimant remains in employment with the respondent to the date of this Hearing. To date, no disciplinary hearing has been convened, although the allegations remain in place and have not been withdrawn.

The Issues

152. On the day upon which the Tribunal heard submissions from the parties, an Agreed List of Issues was produced.

153. The List of Issues are as follows:

1. **Was the claimant a disabled person at all material times?**
2. **Was the respondent aware of the claimant's disability at all material times?**
3. **Are the claims advanced by the claimant *prima facie* time barred?**
4. **If the claims are *prima facie* time barred, is it just and equitable for the Tribunal to extend the period within which the claimant be permitted to lodge her claim to 1 December 2019?**
5. **Was the respondent's practice of dealing with complaints and the application of that practice a PCP within the meaning of section 20 of the Equality Act 2010?**
6. **Did the PCP detailed in Issue 5 place the claimant at a substantial disadvantage in comparison with non-disabled colleagues?**
7. **What reasonable adjustments would have alleviated the claimant's substantial disadvantage in connection with this PCP and did the respondent implement such reasonable adjustments?**

8. **Was the respondent's grievance procedure and its application a PCP within the meaning of section 20 of the Equality Act 2010?**

9. **Did the PCP detailed in Issue 8 place the claimant at a substantial disadvantage in comparison with non-disabled colleagues?**

10. **What reasonable adjustments would have alleviated the claimant's substantial disadvantage in connection with this PCP and did the respondent implement those adjustments?**

11. **Did the respondent's practice of instituting a disciplinary process for misconduct constitute a PCP within the meaning of section 20 of the Equality Act 2010?**

12. **Did the PCP detailed in Issue 11 place the claimant at a substantial disadvantage in comparison with non-disabled colleagues?**

13. **What reasonable adjustments would have alleviated the claimant's substantial disadvantage in connection with this PCP and did the respondent implement those adjustments?**

14. **Was the practice of medical suspension and the application of that practice a PCP within the meaning of section 20 of the Equality Act 2010?**

15. **Did the PCP detailed at Issue 14 place the claimant at a substantial disadvantage in comparison with non-disabled colleagues?**

16. **What reasonable adjustments would have alleviated the claimant's substantial disadvantage in connection with this PCP and did the respondent implement those adjustments?**

17. **In proceeding with disciplinary action against the claimant, did the respondent treat her less favourably because of her disability?**

18. In conduct the grievance process in the way that they did, did the respondent treat the claimant less favourably because of her disability?

19. In medically suspending the claimant and extending the medical suspension from August 2019 until January 2020, did the respondent treat the claimant less favourably because of her disability?

20. In considering whether the respondent breached their section 13 duty what comparator does the claimant rely upon?

21. In the event that the claimant succeeds on liability, what level of compensation would be just and equitable to award the claimant?

Submissions

154. Submissions were presented to the Tribunal by both representatives.

155. For the claimant, Mr Bathgate presented a written submission, to which he spoke. He pointed out that in the first four years of the claimant's employment, there were no difficulties in her work, despite her suffering from the disabilities she did. The respondent, in recognition of her disabilities, had worked in collaboration with Susanne Crichton and the claimant to identify and agree a number of reasonable adjustments to allow her to continued work effectively.

156. He invited the Tribunal to find the claimant to be a witness who gave her evidence in a reliable and credible manner; indeed, he submitted that the other witnesses called on her behalf, Ms Crichton and Dr Steel, should also be found to be reliable and credible witnesses. He invited the Tribunal to find that in the event of a conflict between the evidence of the claimant and the respondent's witnesses, that of the claimant should be preferred.

157. By contrast, he submitted that Mr Broatch was vague and inspecific in his evidence, and in particular his evidence that he had told the claimant that the complaint was not being proceeded with was wholly inaccurate and was not supported by any documents. Mr Mackie's evidence was largely uncontentious and agreed with the claimant's version.

158. Mr Bathgate submitted that the way in which the meeting was convened, how it was conducted and its aftermath caused the claimant to have a panic attack, an outcome which should have been foreseen by the respondent, who failed to support her after the meeting. They failed to process any response to the complaint, failed to provide the claimant with supervision and direction over an extended period of time, failed to deal with the grievance in a timely manner and concluded the appeal against the grievance outcome without giving the claimant an appeal hearing. The disciplinary hearing was never proceeded with to a conclusion.

159. He set out the different claims presented by the claimant, and took the Tribunal through the Issues set before us. We address these Issues in the decision below.

160. Mr Bathgate then moved to the question of remedy. He referred to the claimant's Schedule of Loss (925). He accepted that the claimant has suffered little by way of loss of earnings to the date of the Tribunal. He argued that the effects of the discrimination upon the claimant have been considerable, spoken to not only by the claimant but also by Dr Steel and Ms Crichton. While it is accepted that there are underlying conditions, he submitted that it is open to the Tribunal to award a payment for both injury to feelings and psychiatric injury. He placed the injury to feelings award at the higher middle band of Vento, which would be just and equitable in all the circumstances; and sought a payment of £20,000 in respect of psychiatric injury.

161. He invited the Tribunal to uphold the claimant's claims and to award compensation as sought.

162. With regard to time bar, he submitted that the balance of prejudice would fall upon the claimant more significantly than upon the respondent, and that time should therefore be extended.

163. Mr McCormack, for the respondent, made a brief oral submission in reply.

164. He contended that all claims were time barred. He argued that the issues arising on 23 February 2018 were a distinct act from what followed, and left it to the Tribunal to determine whether there has been sufficient evidence to allow whether the claims should be allowed to proceed though lodged out of time.

165. Katie James plainly provided support from approximately the beginning of April 2018.

166. He said it was regrettable that circumstances conspired to make a difficult situation on 23 February 2018 a more difficult one beyond that date. Mr Mackie went off sick after that meeting until August 2018. The respondent is a small organisation, a fact to be taken into account by the Tribunal when determining what is reasonable.

167. Mr Broatch was “in and out of things”. The respondent was left with having to deal with 10 grievances, in the end.

168. Mr McCormack dealt with the Issues in turn.

169. He concluded by arguing that he would never contend that the manner in which the case had dragged on would be the way in which things should be handled. However, it did not amount to discriminatory conduct.

170. He argued that there is no basis for any award for either loss of earnings or psychiatric injury. If any injury to feelings award were to be made, it should be within the lower Vento band.

171. He invited the Tribunal to dismiss the claims.

Observations on the Evidence

172. While it is true that much of the evidence was not factually contentious as between the parties, there were some important divergences which mean that it is appropriate for the Tribunal to make some observations as to the evidence given.

173. The claimant gave evidence over an extended period of time, during which Dr Steel's evidence was interposed. She gave her evidence in a largely straightforward manner, occasionally overcome by strong emotion which we regarded as not only understandable but an obvious feature of her illnesses. She is an articulate and forthright person, whose attributes clearly suit her choice of profession as an advocate on behalf of sufferers of mental ill health. No attack was made on the claimant's credibility by Mr McCormack, who was careful and commendably sensitive in his handling of her cross-examination.

174. There was a short episode during her evidence when, during questioning by the Employment Judge, she became agitated and upset, suggesting that she felt threatened and subject to accusation and judgement. Notwithstanding assurances by the Employment Judge that no accusation nor threat was being made to her, a short adjournment was required. Following her return from that adjournment, and an explanation as to her reaction from her solicitor which was helpful and indeed entirely understandable, the claimant's equilibrium returned and she was able to attend to the remainder of her questioning without interruption.

175. We found the claimant to be an impressive and credible witness, and considered that we could accept her evidence as accurate.

176. Dr Steel emerged from questioning as a witness of considerable expertise and experience in the field in which the claimant's condition arises. He was careful and precise in his evidence, and his manner was straightforward. He explained his terms clearly and provided evidence which was of considerable value to the Tribunal. His evidence, and his

conclusions, were not challenged in any significant way by the respondent.

177. Ms Crichton we found to be equally impressive witness. She gave her evidence in an entirely professional and straightforward manner, which allowed us to understand her conclusions clearly. Again, she was not challenged significantly under cross-examination.

178. We concluded that the evidence of Dr Steel and Ms Crichton could be relied upon in their entirety.

179. Mr Mackie gave evidence carefully and straightforwardly. Other than disputing the claimant's assertion that he had attempted to stop her from leaving the room on 23 February when she had become distressed, there were no significant differences in his evidence from that of the claimant or her witnesses.

180. Where we had some difficulty with his evidence was his reasoning as to why he had not put in place the reasonable adjustments which he had drawn up and agreed with the claimant, in advance of the meeting of 23 February. We were left unclear as to why he had not put arrangements in place, knowing what he knew about the claimant's condition, in advance of that meeting. His explanation, that those adjustments did not apply to 1:1 meetings with the claimant was not one which we found helpful or indeed believable.

181. Where there was a difference between the claimant's evidence and that of Mr Mackie, we were inclined to prefer that of the claimant.

182. Mr Broatch's evidence, as we have indicated above, was less satisfactory, and did give rise to factual disputes with the claimant's evidence. We have explained before why we preferred the claimant's evidence that she was not told that SAMH had decided not to pursue the complaint, at the time when the respondent became aware of it. While we understand and accept that Mr Broatch was a volunteer who was Chair of the Board of the respondent for a relatively short period of time, he took

upon himself a heavy responsibility, and we were not satisfied that his evidence was reliable in all regards. He was unable to remember much detail of events which, while happening some years ago, had been known to be of significance at the time. We did not consider that Mr Broatch was being deliberately untruthful but did not find his evidence to be helpful, and where there was a difference to that of the claimant, we preferred the claimant's evidence.

The Relevant Law

183. Section 13(1) of the Equality Act 2010 ("the 2010 Act") provides:

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

184. Section 20 of the 2010 Act sets out requirements which form part of the duty to make reasonable adjustments, and a person on whom that duty is imposed is to be known as A. The relevant sub-section for the purposes of this case is sub-section (3): *"The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

185. Section 21 of the Equality Act 2010 provides as follows:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…"

Discussion and Decision

186. We approach this task by addressing the Issues as they have been listed before us on the Joint List of Issues, though we have not taken them in precisely the same order as they appear there.

1. Was the claimant a disabled person at all material times?

2. Was the respondent aware of the claimant's disability at all material times?

187. We take these two issues together. Although they are no longer live, we address them for completeness.

188. The claimant is admitted by the respondent to have been a disabled person at all material times; and the respondent admits that they were aware of the claimant's disability at all material times.

5. Was the respondent's practice of dealing with complaints and the application of that practice a PCP within the meaning of section 20 of the Equality Act 2010?

6. Did the PCP detailed in Issue 5 place the claimant at a substantial disadvantage in comparison with non-disabled colleagues?

7. What reasonable adjustments would have alleviated the claimant's substantial disadvantage in connection with this PCP and did the respondent implement such reasonable adjustments?

189. As we understand it, the claimant's criticism of the respondent is that they dealt with a complaint from a third party in the manner in which they did, that is, informally.

190. There is no doubt that the respondent followed a process whereby they received a complaint from a third party and sought to address it with the subject of the complaint. Mr Mackie gave evidence to the effect that this was how they would normally deal with a complaint, although the Tribunal

was not shown any process or procedure written down in the form of a policy.

191. The informal process involved inviting the subject of the complaint to a meeting without disclosing the written complaint to them in advance, or giving them any warning of the content of the complaint. This is the process which was followed in the claimant's case.

192. It is our conclusion that the respondent did have an informal approach to external complaints, since no formal policy was produced to us nor referred to in evidence by them; and that that amounted to a provision, criterion or practice which was then applied to the claimant.

193. The next question, then, for the Tribunal to address is whether that placed people suffering from a disability or disabilities like the claimant at a substantial disadvantage, and whether that substantial disadvantage was suffered by the claimant herself.

194. The claimant's clear position here is that there were a number of ways in which a substantial disadvantage arose to people sharing her disabilities by this informal process, and which therefore applied to her:

- Mr Mackie did not advise the claimant in advance of the meeting of 23 February that it had the purpose of discussing with her a complaint received from SAMH;
- The purpose of the meeting was, so far as the claimant was aware, to have a supportive catch-up and discuss the ongoing situation at Redhall. She had no advance warning that the meeting would relate to a complaint against her;
- The complaint was not disclosed to the claimant in advance of the meeting, either in writing or in summary, nor even its existence;
- When the complaint was raised at the meeting, no adjustments had been put in place, as previously agreed, to enable the

claimant to signal her discomfort or anxiety about the meeting as it progressed;

- The claimant was entirely unprepared for the complaint when it was raised with her, and suffered a panic attack, which was foreseeable in light of what was known about her disabling conditions of PTSD and C-PTSD;

- The claimant left the meeting in a state of distress, and required to leave the building immediately.

195. In our judgment, the claimant was subjected to a substantial disadvantage by the respondent in the informal manner in which they insisted on dealing with this complaint.

196. Mr Mackie, in evidence, appeared to suggest that he knew that the claimant's reaction would be strongly negative whenever confronted with the complaint, and therefore it was better not to give her advance warning but raise it when he was with her. The difficulty with this approach was that it ignored all the agreed adjustments which had been carefully agreed between the respondent and the claimant in order to ameliorate the impact of stressful meetings or situations within meetings, and made it much more likely that her reaction at the meeting would be an extreme one.

197. He also said, during the meeting, that he would require to investigate the complaint, and that in doing so he would require not only to consider the claimant's position but also the reputation of the organisation; further he instructed the claimant that she was not to work with the Redhall Trainees any longer. In doing so, he heightened the claimant's anxiety and made her feel that he had already determined the matter in favour of the complainer. Even though that was not necessarily the meaning which Mr Mackie intended to attach to the statement, the claimant's reaction was, in our judgment, predictable given what was known about her medical conditions. She felt that she was being blamed already for what was being said by SAMH, and this provoked her panic attack.

198. The TAP had included two adjustments in particular which were, in our view, not followed by the respondent on that date, namely:

- *"Patricia being able to remove herself from stressful situations/conversations with relative ease*
- *Having a supportive line manager"*

199. The claimant gave evidence that when she attempted to leave the room, Mr Mackie placed his hand upon the door, which she interpreted as him endeavouring to prevent her from leaving, despite her having her employer's agreement that she could remove herself with relative ease from stressful situations; and that he did not follow the CUTS approach (Compassion, Understanding, Tea and Sympathy) which had been agreed with her in advance. There was no room or space made available to the claimant where she could go in order to calm down from her attack, and there was no "traffic light" system available at that meeting, whereby a card with red, amber and green circles was in front of her, to which she could point as her anxiety increased. If she pointed at red, it was understood by Mr Mackie that she required to leave the meeting immediately. Had that been available, she could have pointed to it and brought the conversation to an immediate end, and left straight away.

200. We found Mr Mackie's attitude to this meeting both at the time and before us to be quite perplexing. One of the attributes of the respondent's organisation is that it seeks to have on its Board at least 50% of its members with lived experience of mental health. It is a charity whose very purpose is to stand up for those with mental health needs. Yet, in these circumstances, when it was clear that the claimant would be vulnerable when confronted with a complaint, no agreed adjustments were put in place in order to seek to avert the reaction which the claimant ultimately suffered. The claimant was well known to the organisation as one who had, in the past, suffered a number of traumatic incidents and occurrences which had led to her diagnosis of PTSD and C-PTSD, and yet no account was taken of this in the preparations for what was known

by her line manager to be a sensitive meeting in which a complaint was to be presented to her.

201. It is our finding that Mr Mackie failed to make reasonable adjustments in the manner in which he dealt with the meeting, which would, in our judgment, have alleviated the substantial disadvantage to which the claimant was placed in its course.

202. The matter does not rest there, however. The claimant also criticises the respondent for their failure to make reasonable adjustments in the manner in which they dealt with the complaint following the meeting of 23 February 2018.

203. In particular, the claimant complains that:

- The respondent failed to inquire after her health, notwithstanding their knowledge that she had suffered a panic attack following the meeting, but Karen Barr left a voicemail message for her on 26 February 2018, three days after the meeting, in which she simply told her that she must not have contact with the Redhall Trainees. Ms Barr did not inquire after the claimant's health.

- The respondent failed to provide the claimant with clarity or specification as to the detail and content of the complaint following the meeting.

- The respondent failed to provide support and guidance to the claimant as to the process to be followed in dealing with the complaint; and

- The respondent failed to address the matter timeously and allowed unacceptable delays to be introduced to the situation, increasing the claimant's anxiety and failing to take any account of her disabilities.

204. In our judgment, these criticisms are well-founded. We found it extraordinary that in the days following the claimant's notification of the

complaint, nobody from the respondent's organisation provided her with any support or attempted in any way to establish how she was, or what steps required to be taken to understand why she had reacted the way she had. The only communication from the respondent was the voicemail from Karen Barr telling not to contact the Redhall Trainees, within the days following the meeting.

205. The respondent appears to have completely failed to take any account of the information of which they were already well aware about the claimant's vulnerability, arising from her disabilities. The delays which were caused by their failure to address this matter were conceded by them to be unacceptable in the Navigator report by Stephanie Harper, into the claimant's grievance (299).

206. The respondent was repeatedly advised by Dr Steel and others that the claimant's condition would not improve until the workplace situation was resolved. The claimant made clear that she was prepared to meet in order to deal with this issue, but the respondent decided that they were unable to address this matter while Mr Mackie remained absent.

207. It is important to distinguish between the two matters which the respondent believed required investigation at that point, namely the SAMH complaint and the claimant's conduct towards Mr Mackie on 23 February. The respondent's position was essentially that they were prevented or inhibited from investigating the claimant's conduct on 23 February while Mr Mackie, the only direct witness, remained absent on sick leave. There is some force in that, in our view, since it would be important to gather facts about what happened on that day before reaching any conclusions about it. The difficulty, in this case, is that the claimant perceived that she had already been penalised for her actions (whether on that date or earlier, it is not clear) by having the Redhall advocacy work removed from her; and, even more significantly, was not told that SAMH had decided not to proceed with the complaint.

208. The respondent argues that they did not take any view as to the SAMH complaint on 23 February, but in removing the claimant from the project they took a decision which conveyed to her that they were supportive of the SAMH complaint. It is understood that SAMH is a very significant organisation which plays an important role in the work among mentally ill people in Scotland, and that a small charity such as the respondent would understandably take seriously any complaint raised by them. In fairness, though, the claimant took the complaint seriously too; her reaction on 23 February clearly demonstrates that. She clearly had the sense that the respondent was more concerned to allay the concerns of SAMH rather than to attend to her needs as an employee.

209. The delay in investigating the events of 23 February could have been shortened by taking steps to establish what the claimant's position was about that meeting, and the reasons for her reaction, taking into account the reasonable adjustments agreed with her. However, we do accept that in order to complete that investigation it would have been essential to speak to Mr Mackie.

210. The delay in dealing with the SAMH complaint is of greater concern. Indeed, it is entirely unclear to us how the respondent actually did deal with that complaint, beyond the steps taken on 23 February. We have found that they did not convey to the claimant the crucial information that SAMH had advised them that they did not wish to pursue the matter. The complaint itself seems to have been superseded by the respondent's concerns about the claimant's subsequent actions, and in detaching the complaint from the claimant's actions, it is our judgment that the respondent failed to take any consideration of the claimant's disabilities into account in their anxiety to ensure that the SAMH complaint was taken seriously.

211. While Mr Mackie was absent from his role as Chief Executive, it was entirely unclear to us who was taking full responsibility for managing the claimant and the situations which arose around her. Even in a small organisation, it is essential that an employer has clear lines of authority,

especially where the senior officer requires to take time away from the workplace due to illness. There appeared to us to be a vacuum, and a lack of decision-making about the claimant's circumstances, which led to a failure to understand the impact of these events, and the delays, upon the claimant.

212. It is our judgment, therefore, that in failing to communicate effectively with the claimant both about the complaint and the respondent's response to it, the respondent failed to make reasonable adjustments in the circumstances to ameliorate the impact of the substantial disadvantage to which she was subject as a result of her disabilities.

8. Was the respondent's grievance procedure and its application a PCP within the meaning of section 20 of the Equality Act 2010?

9. Did the PCP detailed in Issue 8 place the claimant at a substantial disadvantage in comparison with non-disabled colleagues?

10. What reasonable adjustments would have alleviated the claimant's substantial disadvantage in connection with this PCP and did the respondent implement those adjustments?

213. The respondent had, and operated, a grievance policy, to which the claimant was subject (48-51). This was the policy which they applied when a grievance was presented by an employee. This amounted to a provision, criterion or practice, and it was applied to the claimant in this case.

214. The claimant submitted a grievance to the respondent on 5 September 2018 (203-206), supplemented by a further email on 26 September 2018 (a copy of which was not produced).

215. The respondent decided that the appropriate way to deal with the grievance would be to invite Navigator Law to investigate it, as an independent adviser to the respondent.

216. Navigator Law provided a lengthy, detailed and serious report, which sought to address the claimant's grievances carefully. A considerable amount of work was put into that report, and we accept that the respondent acted reasonably in outsourcing the investigation to an independent specialist with experience in this kind of work. The report was produced to the claimant on 21 December 2018, and the outcome of the grievance panel's deliberations were conveyed to her on 19 February 2019.

217. We accept that the grievance required considerable investigation, and that while a grievance procedure must not be subject to excessive delays, it was important that detailed consideration be given to the claimant's concerns. It did mean that having lodged her grievance in September 2018, the claimant had to wait until February 2019 before receiving confirmation of the outcome, and in the circumstances of her disabilities, that uncertainty was unhelpful to her.

218. However, the claimant's appeal seems to have taken from February until June 2019, with an initial decision being issued without a hearing having taken place. Our strong impression was that the respondent became uncertain as to how this appeal should be dealt with, and as a result it drifted out of focus for a time.

219. Overall, the length of time taken to investigate and conclude the grievance procedure was excessive, taking into account the lengthy delays in the grievance appeal process. In our judgment, that placed the claimant at a substantial disadvantage when compared with non-disabled employees, on the basis that the uncertainty and lack of effective communication, especially during the appeal process, created additional anxiety for a claimant already suffering from a condition which made her particularly vulnerable.

220. As a result, we consider that the respondent failed to make reasonable adjustments by dealing with the grievance appeal more quickly, and by

providing effective support for and communication with the claimant during the course of that grievance appeal.

11. Did the respondent's practice of instituting a disciplinary process for misconduct constitute a PCP within the meaning of section 20 of the Equality Act 2010?

12. Did the PCP detailed in Issue 11 place the claimant at a substantial disadvantage in comparison with non-disabled colleagues?

13. What reasonable adjustments would have alleviated the claimant's substantial disadvantage in connection with this PCP and did the respondent implement those adjustments?

221. In determining these matters, it is important to consider the disciplinary allegations which were raised against the claimant, and the context in which they were presented to her.

222. The allegations were:

1. *"That during a meeting at the Clock Café on 16 February 2018, you complained to Redhall trainees about the amount of hours that you were working at that point.*

2. *That you sent an inappropriate email to SAMH on 25 February 2018, with various presumptions and inappropriate wording, specifically 'Finally, I appreciate that removing me from the situation at Redhall suits your agenda and that of SAMH'.*

3. *That you sent an inappropriate text message to a SAMH trainee based at Redhall, after being instructed not to contact staff or trainees.*

4. *That your reaction to a Board member contacting you was inappropriate, after receiving repeat instructions not to contact Redhall staff or trainees.*

5. *That you sent an inappropriate email to a Redhall trainee, under the name 'SK', after being instructed not to contact Redhall trainees or staff.*

6. *That you sent 89 text messages, with some containing inappropriate language, to a Redhall trainee."*

223. We accept that the institution of a disciplinary process amounts to a PCP by the respondent, which was applied in this case.

224. Did that place the claimant at a substantial disadvantage in comparison with non-disabled colleagues? In our judgment, it did. The allegations are essentially related to actions taken by the claimant in the immediate aftermath of the meeting of 23 February, other than allegation 1. As Mr Bathgate put it in his submissions, the allegations are indelibly linked to the claimant's disabilities. Her emotional outbursts are a feature of her medical conditions, as a reaction to stress. The impact upon her of issuing her with disciplinary allegations and an invitation to a disciplinary hearing (which has never yet taken place, we note) in June 2019 (some 16 months after the alleged incidents took place) was much more significant than it would be upon a person not suffering from PTSD and C-PTSD.

225. The question for us, then, is whether there were reasonable adjustments which might have alleviated the situation for the claimant in light of her disabilities.

226. What is most striking about this is that no account has been taken by the respondent of the claimant's disabilities in determining that disciplinary action should be taken against her. No attempt was made by the respondent to establish whether or not the claimant's reaction to the meeting of 23 February was caused by or contributed to by her disabilities. Their priority was to find out whether or not the claimant would be fit to attend a disciplinary hearing.

227. The respondent may have taken the view that there were actions by the claimant which amounted to breaches of direct instructions, and that those required to be addressed by the disciplinary process, during which the claimant could present her defence, including any medical evidence.

228. We do not accept that as a justification for their actions, however. Had the respondent taken time to communicate with the claimant, and meet with her to discuss these matters, the requirement to commence disciplinary proceedings may have been avoided. It is notable, in our judgment, that the allegations include nothing about her actions in the meeting with Mr Mackie on 23 February, and therefore that the delay in bringing these allegations cannot have been caused by his absence from work. The respondent had been advised by the medical advisers on the claimant's behalf that a prompt resolution would be of medical benefit to her, but they entirely failed to address these matters in a prompt or effective way.

229. Accordingly, it is our judgment that the respondent failed to make reasonable adjustments in the disciplinary process by failing to communicate effectively with the claimant or her representative about the reasons for her actions; by failing to avoid excessive delays in raising the allegations formally, 16 months after the incidents took place; and by failing to accept the advice from the claimant's medical advisers that the matter should be dealt with promptly.

14. Was the practice of medical suspension and the application of that practice a PCP within the meaning of section 20 of the Equality Act 2010?

15. Did the PCP detailed at Issue 14 place the claimant at a substantial disadvantage in comparison with non-disabled colleagues?

16. What reasonable adjustments would have alleviated the claimant's substantial disadvantage in connection with this PCP and did the respondent implement those adjustments?

230. The claimant was medically suspended by the respondent in light of correspondence which suggested that she was suicidal, and therefore that there were concerns that she was not fit to attend her work.

231. It was suggested on the part of the claimant that she could simply have been instructed to attend a further medical appointment with her GP or OH, and then signed off as unfit for work.

232. In our judgment, it is not clear that the decision to place the claimant on medical suspension amounted to a PCP. It was a decision taken in the particular circumstances of this case, and it is not clear in what other circumstances such a decision might have been taken by the respondent.

233. In any event, we do not consider that this decision placed the claimant at a substantial disadvantage to non-disabled employees. Any employee expressing suicidal thoughts to their employer is bound to cause great concern and it is unsurprising that the respondent took steps to act upon that. We do not consider that they should be criticised for doing so. Indeed, had they not acted in some way to respond to the matter, it is likely that they would have been subject to criticism for that.

234. Accordingly, we do not consider that the respondent failed to make reasonable adjustments in this regard.

17. In proceeding with disciplinary action against the claimant, did the respondent treat her less favourably because of her disability?

18. In conducting the grievance process in the way that they did, did the respondent treat the claimant less favourably because of her disability?

19. In medically suspending the claimant and extending the medical suspension from August 2019 until January 2020, did the respondent treat the claimant less favourably because of her disability?

20. In considering whether the respondent breached their section 13 duty what comparator does the claimant rely upon?

235. We take these issues together on the basis that they give rise to similar legal considerations.

236. As to Issue 20, we understand that the claimant relies upon a hypothetical non-disabled comparator.

237. With regard to the decision to take disciplinary action against the claimant, we accept that the respondent was entitled to consider the claimant's actions as indicative of potential misconduct on her part. If it were true that the claimant had disobeyed a clear management instruction to refrain from contact with the Redhall Trainees and others, for example, we accept that the respondent would be entitled to consider disciplinary action against her. We also accept that if the claimant had not been disabled, the same action is likely to have been taken against her. We understand it to be the claimant's contention that she was not guilty of these allegations, or that if she were, that was explicable by reference to her disabilities. In our judgment, however, that does not demonstrate that she was treated less favourably than a non-disabled colleague would have been, on the grounds of disability.

238. As a result, we are not persuaded that the decision to issue the claimant with an invitation to a disciplinary hearing amounted to an act of direct discrimination on the grounds of disability.

239. We appreciate that the respondent's position is also that they did not take disciplinary action against the claimant, in the sense that no decisions were taken or findings made which upheld those allegations, but in this case it is plain that the reference to disciplinary action is a reference to the claimant having been invited to attend a disciplinary hearing to answer allegations of misconduct.

240. Next, the Tribunal considered whether, by dealing with the grievance in the way that it did, the respondent treated the claimant less favourably than they would have treated a non-disabled colleague.

241. The fundamental difficulty here was the failure to deal with the grievance in a timely manner and a supportive way. In this case, the respondent instructed an external organisation to carry out the investigation, and the major delay arose, in our view, at the appeal stage. There is no evidence that they would have dealt with the grievance more expeditiously had the claimant not been disabled. We were left with the impression that the respondent lacked a clear focus and understanding as to how best to deal with the grievance appeal, and there is no evidence on which we could base a finding that they would have a greater focus if the grievance had been presented by a non-disabled employee.

242. We do, as will be apparent from our findings above, find that the respondent failed in some significant respects to make reasonable adjustments for the claimant, but we have not concluded that the respondent treated the claimant less favourably than they would have treated a non-disabled employee in the manner in which they dealt with the grievance.

243. Finally, we do not consider that the decision to place the claimant on medical suspension amounted to less favourable treatment on the grounds of disability, in comparison to the treatment to be afforded a non-disabled colleague. Indeed, we do not consider that any substantial criticism accrues to the respondent in their decision to suspend on medical grounds given the information which was available to them at that time. The decision was, we consider, taken on the grounds that it was in the best interests of the claimant to take steps to protect her health at a time when a very real concern had been raised about that.

244. We are not persuaded that a non-disabled employee in the same circumstances would not have been treated in precisely the same way,

and accordingly we do not consider that that decision amounted to less favourable treatment of the claimant on the grounds of disability.

3. Are the claims advanced by the claimant *prima facie* time barred?

4. If the claims are *prima facie* time barred, is it just and equitable for the Tribunal to extend the period within which the claimant be permitted to lodge her claim to 1 December 2019?

245. We return now to the question of time bar, which is raised in Issues 3 and 4.

246. The claimant presented her claim to the Employment Tribunal on 29 November 2019. She had notified ACAS of her intention to make her claim on 2 October 2019, and ACAS issued the Early Conciliation Certificate on 2 November 2019.

247. Very little evidence was presented about this matter, and very little was said in submissions by either party.

248. Under section 123 of the Equality Act 2010, the claimant required to present her claim to the Tribunal within 3 months of the date upon which the act to which the complaint relates took place, or such other period as the Tribunal considers just and equitable.

249. In our judgment, the acts complained of by the claimant, in relation to the handling of the SAMH complaint, the grievance by the claimant and the disciplinary process, were acts which amounted to conduct extending over a period, and that period was not over by the time when she presented her claim to the Tribunal. The claimant did not know, by the date of the presentation of her claim (on the evidence we heard) that SAMH had withdrawn their complaint, and accordingly many of her concerns about the original complaint and its handling remained unresolved at that point. The grievance process had been concluded, but again the information surrounding that was very unclear so far as the claimant was concerned. So far as the disciplinary process is concerned, that is an ongoing issue, which has as yet not been resolved.

250. Even if we were persuaded that any of the claims were presented out of time, we would be minded to allow them to proceed on the basis that it would be just and equitable to do so. There is a very clearly defined dispute between the parties; it is in their interests to have that dispute litigated and determined, and in the interests of justice that the Tribunal should proceed to do so; the prejudice to the claimant of not allowing the claims to proceed would be very considerable, whereas it is plain that the respondent has been able to present a defence to the claims in these proceedings; and now that the evidence has been heard, we consider that it would be an affront to justice to dismiss the claims on the grounds of time bar.

251. It is therefore our judgment that even if the claims were time-barred, they are allowed to proceed, and the Tribunal has jurisdiction to hear them, on the basis that the claim was presented to the Tribunal within such time as we consider just and equitable.

21. In the event that the claimant succeeds on liability, what level of compensation would be just and equitable to award the claimant?

252. We have concluded that the respondent discriminated against the claimant in failing to make reasonable adjustments under section 20 of the Equality Act 2010.

253. The claimant was paid until March 2022, and accordingly there is no claim for past wage loss made by her. We did not understand the claimant to be pursuing a claim for significant future loss of earnings, and certainly the submission made on her behalf before us did not suggest such an award. We consider that to be appropriate. The claimant remains in employment with the respondent, and has been absent on sick leave for a considerable period of time. She has expired the right to receive pay from the respondent, which is a contractual matter between the parties. While it might be suggested that the reason for the claimant's absence is related to the matters which are the subject of this claim, we are of the

view that the link is not clear, based on the evidence, and accordingly we are not minded to make any award in respect of future wage losses.

254. Mr Bathgate also tentatively suggested that an award in respect of psychiatric injury should be made, but again provided very little by way of support for such an assertion. In a case in which an award for injury to feelings is made, it is our view that exceptional circumstances require to be demonstrated in order for a separate award for psychiatric injury to be made. It is not possible for two awards to be made in respect of the same injury, and in our judgment, we have insufficient evidence before us on which to find that there are separate injuries being relied upon in this case.

255. However, the claimant does claim that she has suffered injury to feelings, and in our judgment, it is just and equitable to make an award to the claimant in respect of the failings of the respondent to make reasonable adjustments in order to remove the substantial disadvantage caused to her by the application of the PCPs in this case.

256. There is no doubt, based on the evidence before us, that the lengthy delays, lack of communication and lack of support provided to the claimant in these areas have caused the claimant considerable distress, and have prevented her making an earlier recovery from the blows she suffered to her mental health by the actions of the respondent over the period from 23 February 2018 to the date of presentation of the claim.

257. Dr Steel and Ms Crichton have provided clear evidence as to the claimant's fragile mental health, which, while pre-dating the incidents which are the subject of these claims, has been aggravated by the respondent's failures. It was clear from the claimant's distress in her evidence before us that the effect of the respondent's treatment upon her has been significant and long-lasting.

258. In our judgment, it is just and equitable to locate the claimant's injury to feelings within the middle Vento band, and to award her the sum of £20,000 by way of compensation.

259. Interest falls to be added to the award, at the rate of 8%, from the date of the unlawful act of discrimination. It is for the Tribunal to determine that date. It is very difficult to do so on the basis that the claimant sustained injury to feelings as a result of, among other things, delays and lack of communication and support following the original incident in February 2018. Accordingly, it is our judgment that the interest on this award shall run from the date of 21 February 2019 to the date of promulgation of this Judgment, being the date upon which the claimant was notified of the outcome of her original grievance.

260. We would wish to express our gratitude to the representatives in this case, for the mature and moderate manner in which they conducted themselves in this difficult and at times intense Hearing. They provided considerable assistance not only to their own clients but also to the Tribunal. We record our thanks to them for this.

Employment Judge: Murdo Macleod
Date of Judgment: 09 June 2022
Entered in register: 10 June 2022
and copied to parties