EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Vladimir Filipovich	**v**	East & North Hertfordshire NHS Trust

Heard at: Cambridge

On: 9 May 2023 (in person)
10 May -12 May 2023 (hybrid)
15 May 2023 (by video)
15 and 16 May 2023 (in chambers)

Before: Employment Judge L Brown

Members: Ms L. Davies and Ms. J. Schiebler

Appearances
For the Claimant: In person.
For the Respondent: Mr T. Sheppard, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The Claimant's claim for Unfair Dismissal contrary to s.94 of the ERA 1996 succeeds.

2. The Claimant's claim for Direct Discrimination contrary to s.13 of the Equality Act 2010 fails.

3. The Claimant's claim for Discrimination Because of Something Arising in consequence of his disability, Post Traumatic Stress Disorder (PTSD) (s.15 Equality Act 2010 ('EqA')) fails.

4. The Claimant's claim for Failure to Make Reasonable Adjustments contrary to s.20 of the EqA 2010 fails.

REASONS

Structure of this judgment:

A) The judgment starts with a formal declaration of the outcome without details. The details are set out below the formal judgment.

B) I then include some introductory comments to set the context for the hearing and the judgment including setting out the Issues in this case.

C) The next section sets out the Tribunal's findings of fact.

D) Then, I make reference to the applicable law and I explain how the Tribunal applied the law to the facts; that is how we reached the judgment.

Section B

Introduction:

1) The Claimant presented his claim to the Tribunal on the 19 December 2019.

2) There have been several preliminary hearings in relation to case management. The details of those hearings are set out in their own minutes and Orders.

3) The Claimant has suffered from post-traumatic stress disorder ('PTSD') during the course of his employment and following a hearing before Judge Bloom on the 12 November 2021 it was determined that he was disabled by reason of his PTSD in accordance with s.6 of the Equality Act 2010. It was later defined by Judge Welch, at a preliminary hearing on the 1 November 2021 that for the purposes of this claim the defined period of disability for this claim ran from for the period 18 January 2017 to 19 December 2019.

4) We heard this case over five days from the 9 May to the16 May 2023. The 9 May 2023 was taken as a reading day by this Tribunal with evidence commencing on the 10 May. The case had been listed from the start as a hybrid hearing but as the first day was to be taken as a reading day the hybrid facility was cancelled for the first day. However Counsel said the witness attending remotely wanted to watch all the proceedings but she was content to attend the next day, on day 2, without issue. Day 2 of the hearing therefore commenced as a Hybrid Hearing on the 10 May until the 12 May. It was agreed oral submissions on the morning of the 15 May would take place by video and so the hearing was then converted to a CVP hearing for the 15 and 16 May. Oral submissions concluded at noon and the afternoon of the 15 and the 16 May were spent with members in Chambers.

5) On day 2 of the hearing at the outset I raised with Counsel for the Respondent the issue of the witness statement filed by the Claimant. The Claimants witness statement omitted from it many important elements of his claim. Those parts of his claim were however contained in his statement of case attached to his claim form. I proposed to Counsel that when the Claimant confirmed his witness statement that his statement of case was also introduced as his evidence in this case to stand alongside his witness statement insofar as it related to the defined issues in this case and that I would direct him to also make a statement of truth about the evidence he gave in that statement of case.

6) Counsel objected to this proposal and said this would be unfair on the Respondent as this case had been case managed extensively and the issues were defined, and that the Claimant had had the opportunity to include in his witness statement all matters he alluded to his statement of case but had not done so.

7) We reminded Counsel that the Claimant was a litigant in person, and that in accordance with the overriding objective I must endeavour to put the parties on an equal footing, and that by allowing the matters referred to in the Claimants statement of case as the evidence of the Claimant to stand alongside his witness statement this did put the parties on a more equal footing.

8) I also referred to the Equal Treatment Bench Book and in so doing alluded to the fact that it was clearly set out there that a Judge should endeavour to assist Litigants in Person in a neutral manner.

9) I concluded that the Claimant be allowed to introduce his Statement of Case as his evidence and informed Counsel if he wished to take the whole day to revise his cross examination he may do so. In the event the hearing adjourned at 10.30 am for 45 minutes after Counsel for the Respondent advised this would be enough time. In the event on returning at 11.15 am Counsel for the Respondent stated he needed more time and so it was agreed we would adjourn again until 1.30 pm, at which point the hearing then recommenced.

10) When the Claimant was in the witness box, and after being sworn in at 13.40 pm, a further issue arose. At the point I asked him to turn to his statement of case in the bundle, and when I asked him if it was true to the best of his knowledge, information and belief he said some parts of it were not true.

11) I asked him to clarify which parts were not true and he took me to paragraph 7 of his statement of case and stated that part of the first sentence was wrong. He explained that his BMA representative had amended it just before it was submitted by him with his ET1 Form online, and she had insisted he add the words to the statement about being sorry and he was not sorry and could never apologise for being unwell.

12) I directed that we adjourn for ten minutes so that he could go and review all of the statement of case and then confirm to the Tribunal which parts of his statement were not true. Counsel said he had no objection to the Claimant referring to his notes for the purposes of checking his statement of case even though he had now been sworn in to give evidence. I made clear to the Claimant he could only strike out parts of the text and he could not introduce new allegations at this stage. The hearing adjourned at 13.50 pm and reconvened at 14.15 pm.

13) When the hearing resumed the Claimant pointed out that in the middle of the first sentence at paragraph seven of his statement of case and as underlined in the quote, he needed to strike out part of the sentence as follows: -

> ‘‘With regard to allegation 2 (disclosure of diagnosis) I accepted that I did not inform the Trust ~~and in hindsight this was a mistake for which I was sorry,~~ but I did inform my GP the next day despite this un-confirmed diagnosis was just in the need for further medical clarification.”

14) He also clarified that the paragraph with the first bullet point next to it also had a section he needed to strike out as follows: -

> “The Trust has been made aware that I have had difficulties with my mental health during my employment with them, but despite numerous medical referrals I did not know what was happening with me. ~~Although I believe that the Trust has been reluctant or declined to accept that this is the case I do in fact accept that the Trust’s reluctance may in part be due to my fear of disclosing medically sensitive information to the Trust, acknowledging that I have mental health difficulties, asking for help and my desire to continue working for and heling my patients.~~”

15) After clarifying these parts were not true and after allowing him to delete those parts, he then confirmed he had read the statement of case, that he submitted it with his claim form and that it was true to the best of his knowledge information and belief.

Evidence Used

16) The Claimant gave evidence and did not call any witnesses in support of his claim.

17) The Respondent called the following witnesses who gave evidence in the following order: -

(i) Mr Mathavakkannan;
(ii) Mr Samuels;
(iii) Ms Potts; and
(iv) Mr Chilvers.

Issues in this case

18) The issues the Tribunal had to decide are set out below.

Jurisdiction

18.1 Taking into account the extension of time provided by ACAS Early Conciliation, the latest date by which any claim could be presented in time would be 25 July 2019.

18.2 Can the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time pursuant to s123(3)(a) EqA?

18.3 Was any complaint presented within such other period as the Tribunal considers just and equitable pursuant to s123(3)(b) EqA?

Disability Discrimination

18. 4 The Claimant has been found to be a disabled person for the purposes of s6 EqA 2010, by virtue of Post-Traumatic Stress Disorder and Recurrent Depressive Disorder, for the period 18 January 2017 to 19 December 2019.

Knowledge

18.5 Did the Respondent have knowledge of the Claimant's disability at the relevant time?

Direct Discrimination – s13 EqA 2010

18.6 Did the Respondent subject the Claimant to the following less favourable treatment?

18.6.1 Dismissing him on 26 July 2019; and
18.6.2 Publicising/ publishing his suspension in mid-2018?

18.7. If so, was the Claimant treated less favourably than someone who did not suffer from the Claimant's disability? Specifically:

18.7.1 Are there facts from which the Tribunal could conclude that such treatment was because of the Claimant's disability?

18.7.2 If so, does the Respondent prove a non-discriminatory reason for the treatment?
18.7.3 If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

18.9. The claimant has not named anyone in particular who he says was treated better than he was and is therefore relying upon a hypothetical comparator.

Discrimination Arising from Disability – s15 EqA 2010

18.10 Did the Respondent subject the Claimant to the following unfavourable treatment? -

18.10.1 Dismissing him on 26 July 2019; and
18.10.2 Publicising/ publishing his suspension in mid-2018?

18.11 If so, was this treatment because of something arising in consequence of the Claimant's disability?

18.12 The claimant says the something arising in consequence of his disability was:

18.12.1 His inability to concentrate;
18.12.2 Memory loss;
18.12.3 Exhaustion; and
18.12.4 Flashbacks.

18.13 If so, was any such treatment a proportionate means of achieving a legitimate aim?

Failure to make Reasonable Adjustments – ss20-21 EqA 2010

18.14 Did the respondent have the following provision, criterion or practice:

18.14.1 Continuing with disciplinary process regardless of the employee's state of mind or physical condition; and/or
18.14.2 Holding a disciplinary hearing in an employee's absence?

18.15 Did any PCP put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

Direct Discrimination – s13 EqA 2010

18.16 Did the Respondent subject the Claimant to the following less favourable treatment?

18.16.1 Dismissing him on 26 July 2019; and
18.16.2 Publicising/ publishing his suspension in mid-2018?

18.17 If so, was the Claimant treated less favourably than someone who did not suffer from the Claimant's disability? Specifically:

18.17.1 Are there facts from which the Tribunal could conclude that such treatment was because of the Claimant's disability?
18.7.2 If so, does the Respondent prove a non-discriminatory reason for the treatment?

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

18.19 The Claimant has not named anyone in particular who he says was treated better than he was and is therefore relying upon a hypothetical comparator.

18.20 Did the Respondent subject the Claimant to the following unfavourable treatment?

18.20.1 Dismissing him on 26 July 2019; and
18.20.2 Publicising/ publishing his suspension in mid-2018?

18.21 If so, was this treatment because of something arising in consequence of the Claimant's disability?

18.22 The claimant says the something arising in consequence of his disability was:

18.22.1 His inability to concentrate;
18.22.2 Memory loss;
18.22.3 Exhaustion; and
18.22.4 Flashbacks.

18.23 If so, was any such treatment a proportionate means of achieving a legitimate aim?

Failure to make Reasonable Adjustments – §.20-21 EqA 2010

18.24 Did the respondent have the following provision, criterion or practice ('PCP'):

18.24.1 Continuing with disciplinary process regardless of the employee's state of mind or physical condition; and/or

18.24.2 Holding a disciplinary hearing in an employee's absence?

18.25 Did any PCP put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

18.26 Did any such PCP put the Claimant at such a substantial disadvantage?

18.27 Was the Respondent aware of (or should it reasonably have been expected to be aware of) the Claimant's disability and possible substantial disadvantage?

18.28 If so, did the Respondent take such steps as were reasonable to avoid any such disadvantage?

Unfair Dismissal

18.29 Was there a potentially fair reason for dismissal? The Respondent relies on conduct as the reason for dismissal (s98(2)(b) ERA 1996).

18.30 Was there genuine belief in the Claimant's misconduct?

18.31 Did the Respondent undertake a reasonable investigation (within the band of reasonable investigations)?

18.32 Did the decision to dismiss fall within the band of reasonable decisions open to an employer?

18.33 In all the circumstances, was the decision to dismiss fair?

18.34 Did the Claimant contribute to his dismissal?

18.35 If there is found to be any procedural unfairness, what is the percentage likelihood that notwithstanding any such unfairness, the Claimant would have been dismissed anyway (Polkey reduction)?

Section C

Findings of Fact

Background

19) The Claimant joined the Respondent's employment as a Staff Grade Doctor in Trauma and Orthopaedics on the 1 October 1999 and worked for them until the date of his dismissal on 26 July 2019.

20) Initially the Claimant was employed as an Associate Specialist in Trauma and Orthopaedics specifically Triangulation in the TSF, Illizarov and arthroscopic surgery.

21) By the time of his dismissal he had conducted over twenty-five thousand operations without any deaths occurring. At the time of his dismissal, he was 60 years old.

22) Prior to coming to the UK to work the Claimant had been a doctor on the frontline in field hospitals in the conflict in Bosnia and was exposed to severely injured and dying patients. He described in enormous detail some of the things he had witnessed and the images he described were almost impossible to imagine.

23) On the 30 April 2014 the Claimant was found to be under the influence of alcohol at work. The next day he was suspended. Blood test results that day showed that his alcohol reading was twice the legal limit for the purposes of driving. Following the incident the Trust started an investigation under its Conduct, Performance, and Ill-Health Procedures.

24) On the 14 May 2014, the Occupational Health Services of the Respondent wrote to the Claimants GP, and it referred to the Claimants experiences working as a Trauma Surgeon on the front line in the war in Bosnia. The letter also referred to the resulting post-traumatic stress symptoms for the last five years following the war. Dr Stuart Miller the occupational health physician asked the Claimants GP Dr Parry to arrange for an urgent psychiatric opinion to assist with his management. [P284].

25) The Claimant was then interviewed as part of the investigation by the Trust (MHPS investigation) by Carolyn Meredith [P301] and the resulting Investigation Report made reference to the fact that the Claimant told the Trust he was under the care of a psychiatrist. It wrongly referred to him fighting in Croatia when in fact he fought in Bosnia.

26) On the 30 April 2015 a Disciplinary Hearing took place. On the 15 May 2015 the Claimant was given a final written warning for eighteen months and was no longer allowed to do on call work. In addition, all his surgical work was to be supervised, and random drug and alcohol testing was to take place, and he was allocated a named supervisor. [P305]

27) Restrictions were also placed upon the Claimants work by the General Medical Council ('GMC').

28) On the 16 March 2016 the Claimant was cleared by the GMC and his restrictions to practice were lifted. Throughout this time all unannounced blood tests carried out by the GMC were clear of alcohol.

29) Following the removal of his restrictions by the GMC however the Respondent insisted that he must continue to be supervised. The Claimants statement of case attached to his claim form sets out that on the 12 April 2016 he met with the Respondent and although the Claimants ability to practice was no longer limited by the GMC conditions he was told he would need ongoing supervision and he was advised by Mr Sofat that he should approach a Mr Chattoo to ask if he would be willing to provide supervision.

30) This explained the increasing pressure the Claimant felt in the workplace as he then struggled to find a supervisor. This Tribunal finds that he was treated poorly over this issue by the Respondent, and he was left in limbo where he was continually trying to find someone to supervise him, and no positive efforts were made by the Respondent to allocate him a supervisor. Without a supervisor the Claimant would not be able to return to surgical work. At this point in time the Claimant was still restricted to outpatient clinics.

31) Following this meeting the Claimant struggled to find anyone to supervise him and the culmination of this was that on the 5 October 2016 Mr Sofat told him he was willing to supervise him. However, when the Claimant was advised of this we found, pursuant to the Claimants evidence on this, that Mr Sofat shouted at him and stated no one wanted to supervise him because 'he was good for nothing and not fit for purpose.' The Claimant was highly distressed by this meeting [p32 and p42]. He stated that he felt Mr Sofat was trying to get rid of him [p376 and p383]. He stated that he was so distressed by that meeting that he started having nightmares [p383]. We accepted the Claimant's account of this meeting and find that he was spoken to in an abusive manner by Mr Sofat, and we found that for anyone this would have been highly distressing and more so for a disabled person suffering with PTSD and who was extremely anxious about not being successful in their application for revalidation as a doctor.

32) On the 30 October 2016 the Claimants final 18 month written warning arising out of the alcohol incident in 2014 expired [p37], and during this time all blood tests showed no evidence of alcohol in his blood stream.

Preliminary Diagnosis of PTSD

33) In late November 2016 and after the Claimant had seen various psychiatrists over the years to try and ascertain the cause of his various psychological symptoms Professor Hirsch made a preliminary diagnosis of PTSD (the 'Hirsch Report') [p312].

34) It was put to the Claimant in cross-examination that the purpose of the Hirsch Report was in fact obtained for the purposes of a personal injury claim and was not obtained by the Claimant for the purposes of trying to ascertain the root cause of his ongoing psychological problems. It was put it to him that he was being disingenuous in suggesting it was anything other than a medico-legal report. It appears that this was put to him for the sole purpose of attacking his reliability and honesty as a witness.

35) The Claimant during cross examination said that whilst it was correct that the purpose of the report was for his personal injury claim he also used the appointment as an opportunity to find out the cause of his ongoing mental health issues. This Tribunal noted that the report is headed 'medico-legal report' and that it was produced at the request of Stone Rowe Brewer LLP. We found that it was a plausible explanation by the Claimant that he would have used the opportunity during his personal injury claim to explore his mental health issues with Dr Hirsch and we accepted his evidence on this.

36) We have noted that nowhere in the report does it make any reference to a recommendation that the Claimant should take Citalopram. This was an issue that in part led to his dismissal and we deal with this issue in more detail below. We found that had Professor Hirsch positively told him he needed to take Citalopram that Professor Hirsch would have written to the Claimants GP in late 2016 advising him that he felt that the Claimant would benefit from it and should be prescribed it or that he would have prescribed it himself at the end of the consultation, and there would have been a reference to it in the report. However, it is accepted by this Tribunal that this report was not seen by the Respondent prior to his dismissal, and it was only seen by them after these proceedings were commenced.

37) The day after seeing Professor Hirsch the Claimant called his GP. This is set out in the Claimants statement of case attached to his ET1 form and in other parts of the bundle [P30 and P384]. At this point the Claimant gave evidence that when he saw his GP his GP advised they must obtain Professor Hirsch's report before he would prescribe Citalopram for him. We accepted his evidence on this and found that it was entirely reasonable for the Claimant to await further advice from his GP on this issue and he could not take Citalopram if he had not been prescribed it [page 32].

38) Part of the Respondents reason for dismissing the Claimant was that it was said he was in breach of the document entitled 'Good Medical Practice' ('GMC Policy') which is a guide produced by the GMC for all doctors registered with the GMC [P237-27]. The GMC Policy on the disclosing of any medical condition set out as follows: -

> "28. If you know or suspect that you have a serious condition that you could pass on to patients, or if your judgement or performance could be affected by a condition or its treatment, you must consult a suitably qualified colleague. You must follow any advice about any changes to your practice they consider necessary. You must not rely on your own assessment of the risk to patients."

38) This tribunal noted that there is no reference in this policy to taking prescribed medication, yet the GMC Policy was relied upon by the Respondents in stating that one of the reasons for the Claimants dismissal was failing to take his prescribed medication, Citalopram, and the Respondents asserted it was gross misconduct to fail to do so. The allegation against the Claimant amongst other things was that,

> *"In breach of paragraph 28 of Good Medical Practice, you failed to take the recommended medication prescribed in light of the above diagnosis thereby putting patients at risk."*

39) We found that there was no policy of the Respondent or of the GMC in relation to the consequences of failing to take prescribed drugs which in this case was Citalopram.

Alcohol incident on 18 January 2017

40) On the 16 January after attending an International Conference, during which other occupants of the hotel heard the Claimant shouting and distressed while having nightmares, the Claimant discovered that his appraisal had been rejected by his appraiser. It arose out of the process for an appraisal conducted by his appraiser who worked in the Gynaecology Department. [p13 and p14 of witness statement of Claimant]. The Claimant gave evidence he was the first doctor to be given an appraiser that did not work in his department. Without a satisfactory appraisal the Claimant would not be able to obtain revalidation to continue working in the UK. The Claimant became highly stressed. That evening of the 16 January 2017 the Claimant suffered with nightmares. The next night of the 17 January 2017 the nightmares returned, and he stated he had two small glasses of wine to try and aid his sleep but still did not sleep well. [p385].

41) On the 18 January 2017 the Claimant gave evidence that he thought he had a work clinic and so drove into work. The car had a mechanical problem relating to the suspension, but it was still drivable, and so he decided to park it in the hospital car park. He had contacted a mechanic who was going to pick it up in a truck later.

42) The Claimant was then told by his Line Manager that he was not on duty that day in accordance with his job plan, and so he returned home in a taxi leaving his car in the car park. He then began to suffer from flashbacks and so drank two cups of warm wine and went to bed at 11.00 am having had little sleep the night before due to flashbacks and nightmares [p28].

43) At around 2.00 pm that day he then received a call and was told he was due in at work that afternoon. He ordered a taxi and went into work.

44) It was put to the Claimant in cross-examination, and as set out in the witness statement of Dr Samuel at paragraph 10, that the Claimant had somehow been untruthful about the issue of the taxi. The Respondents contended that

he had said in the investigation that he came to work in a taxi for his shift at 2.00 pm [p385] but that this appeared to be incorrect as the General Manager said the Claimant had told her that his car was at work, and she then ordered a taxi for him so he could return home due to being inebriated in the workplace. The suggestion of Dr Samuel, the person who was appointed Investigator for the Respondent, [Para 10 of his witness statement] was that he had not been truthful about this during the Investigation.

45) On this issue we preferred the Claimants evidence and found that he had initially come into work that morning in his car and then left it in the car park for the mechanic to attend to later. He then returned home in a taxi, and then after receiving a call saying he was on duty he came to work in a taxi when he returned at 2.00 pm. We found that his reference to the General Manager about his car being in the car park made sense as that reference was due to the Claimant leaving it there that morning for the mechanic to later repair. We found that there was a simple misunderstanding between the Claimant and Respondent on this issue.

46) After returning to work at 2.00 pm the colleagues of the Claimant noticed he seemed to be behaving strangely. In short Donna Buckley noticed that the Claimant smelled of alcohol [p56]. He was removed from his outpatient clinic. The Claimant agreed to have a blood test and he was found to be 3.5 times over the limit. None of this was disputed by the Claimant and he gave evidence that he didn't know why he had so much alcohol in his bloodstream and that the flashbacks the night before had also caused amnesia. Amnesia was not defined as 'something arising from his disability' in the defined List of Issues in this case (para 18.22 above) which set out his symptoms of PTSD.

47) It is not in dispute that the Claimant was drunk at work, and he referred in evidence to himself 'being a blathering drunk' at work. He stated he couldn't understand how he had that level of alcohol in his blood.

48) The Claimant did assert in a general sense throughout the hearing that excessive alcohol consumption was a symptom of PTSD, and he put this to the witnesses for the Respondent during cross-examination. Whilst this Tribunal noted it did not have expert evidence on this issue and as pointed out by me to the Claimant during the hearing, we found that the Claimant had clearly been drinking in the period before going to work, and that he had done so due to being in a state of distress about his revalidation being at risk. We found that he became drunk due to extreme work stress caused by the Respondents poor treatment of him over the issue of a supervisor and also the appraisal process, and he lost his ability to make good decisions and attended at work in an inebriated state. We did not find he knowingly attended work aware that he was a danger to patients but instead we found that his disability caused him to lose control over his urge to soothe himself with drink.

49) Following the incident on the 18 January 2017 the Claimant was then removed from the outpatient clinic by Michele Murphy and Jodie Mc Elligott. Michelle Murphy arranged for a taxi to collect the Claimant and take him home. Thereafter he was initially placed on sick leave.

50) On the 20 January 2017 the Claimant was invited to an investigation meeting on the 23 January 2017. [p57]. This meeting was postponed twice at the Claimants request as he was unable to arrange representation [p378].

51) On the 24 January 2017 the Claimant spoke to both Jo Stiles, and Michele Murphy by telephone. Michelle Murphy was told by the Claimant during that telephone call that he had been diagnosed with post-traumatic stress disorder, and as a result they arranged for psychiatric help to be provided that evening by the Respondent and a Psychiatrist attended at his home that night. He was then signed off as unfit for work from the 30 January to the 22 February 2017 [p57].

The Hirsch Report

52) Much was made by the Respondent of the issue of the Hirsch Report during cross examination and closing submissions and that the Claimant never in fact provided a copy of the Hirsch report despite agreeing to do so during the Investigation meeting. The Respondents case was that the first time they saw this report was during these proceedings.

53) The Claimant gave evidence that he had difficulties obtaining the password to send it to the Respondent in an unprotected manner. He stated he eventually sent it to his BMA representative in a series of photographs of each page. It was not clear to this Tribunal whether or not his BMA representative forwarded this on or not. However, it was accepted by this tribunal that the first time the Respondent saw the Hirsch Report was after the proceedings were issued.

54) However, whether or not they had seen the actual report the Claimant told the Respondents about his diagnosis of PTSD on the 24 January 2017, and they were sufficiently concerned about him to arrange for a psychiatrist to attend at his house that night.

55) At this juncture we comment on the issue of his relationship with his British Medical Association (‘BMA’) representative Natalie Mathison. It is clear to this Tribunal that the relationship broke down but the Claimant was reminded on more than one occasion throughout the hearing that the competency or otherwise throughout the investigatory and disciplinary process of his BMA representative was not an issue in these proceedings, save that he did rely on it as a reason for not issuing proceedings earlier, and we comment on this where we deal with the issue of limitation below.

The Investigation

56) Following a meeting on the 22 February 2017 the Claimant received a letter from Nicholas James dated the 3 May 2017. In that letter two new allegations were made against the Claimant and those were that he had informed them that on the 26 November 2016 he had been diagnosed with an illness, PTSD, which could have impacted on his ability to carry out his role and that he had failed to take the recommended prescription. There were no notes of this meeting before this Tribunal in the bundle. He was told he was being excluded with effect from the 22 February 2017 for a further two weeks [p337].

57) He then attended a further meeting on the 10 March 2017 and by letter dated the 27 March 2017 he was advised he was formally excluded from the workplace with effect from the 10 March 2017[p339].

58) On the 5 April 2017 a Senior Health and Work Advisor Mrs Black for the Respondent then wrote to the Lister Hospital and asked that Professor Burke provide a medical report covering his current health concerns, any underlying condition of PTSD and if it was treatable, any addiction disorders and if under care, any further treatment prescribed or planned, their opinion on the Claimants fitness to return to work, and finally for copies of any relevant specialist reports to be disclosed. [p343] No identifiable report relating to this request was in the bundle.

59) On the 4 May 2017 the Investigation Meetings with the Claimant and other employees took place[P383]. At the conclusion of that meeting the Claimant was excluded from the workplace for a period initially of two weeks from the 22 February 2017.

Issue of Citalopram

60) We found that the Claimant, during the Investigation that led to his dismissal and referred to below, did state to the Investigator Dr Thomas Samuel, that when seeing Dr Hirsch,

> *"He told me to continue Citalopram and to see my GP and he said to wait for the report to come through."*

He was then asked by Dr Samuel if he was currently taking it and replied

> *"Yes, a while before then. I was not taking them currently."*

In answer to the further question of,

> *"Did he tell you to continue it?"*

he replied,

"Yes he told me to see my GP and I took his advice to wait until the report came through."

This Tribunal noted that the answers the Claimant gave to Dr Samuel did not directly relate to the questions asked and it was clear any reasonable investigator would ask follow up questions such as, 'why are you not currently taking Citalopram,' 'why did you stop taking it?' or 'has your GP told you to wait for the report from Dr Hirsch before he prescribes you Citalopram?'

61) We found the answers given by the Claimant on this issue made clear that he was not currently taking Citalopram but nothing in his replies indicated he had a current prescription for the drug and of his own volition had decided to stop taking it. [p384]. It was clear to this Tribunal from that exchange set out in the minutes that he did not convey to Dr Samuel that he had failed to take his medication, and all that was clear was that he told Dr Samuel that after he saw Dr Hirsch, and Citalopram had been discussed, that he had gone to his GP and was then being treated by his GP who advised waiting for the Hirsch report to come through.

62) During re-examination of Dr Samuel Counsel took the witness to this page and asked as follows:

"Counsel: *Issue of Citalopram – go to p 469 – to record what was before you – did you have all that before you the pack and appendices?*

Dr Samuel: *Yes.*

Counsel: *Did you have interview minutes before you Dr Samuel?*

Dr Samuel: *Yes.*

Counsel: *Let's look at that together please – at 383 – this is specifically about allegation 3 – allegation 3 – that the claimant did not take medication following diagnosis of PTSD – taking you now to the minutes of claimants interview meeting – 383 there – in terms of reference – 384 – talk about diagnosis and did he make any recommendations – did you read minutes before the determination in May 2019?*

Dr Samuel : *We did yes.*

Counsel: *What was the claimant's evidence re PTSD and medication - what was evidence before you?*

Dr Samuel: *The claimant said he had taken it before and 'the Professor Hirsch told me to continue citalopram and see GP.'*

Counsel: *Any other evidence obtained about if he had taken or refused to take recommended medication?*

Dr Samuel: No we didn't."

63) The exchange in the minutes which the witness Dr Samuel was re-examined on [p384] included a section that Mr Samuel failed to read out when re-examined and which Counsel did not refer him to. The following reply on the page of the minutes clearly qualified what the Claimant had said about the taking of Citalopram: -

> *"Were you previously on Citalopram? 'Yes, a while before then. I was not taking them currently.' Did he tell you to continue it? 'Yes, he told me to see my GP and I took his advice to wait until the report came through."*

64) Firstly, the re-examination above did not satisfy this Tribunal that the Investigator Dr Samuel established the Claimant was failing to take his medication. [p384] What it did establish was that the investigator failed to investigate this matter at all after this brief exchange with the Claimant as when asked by Counsel if any other evidence was obtained on this the reply in re-examination was

> *"No we didn't."*

66) During cross examination of the Claimant Counsel asked him if the findings of the Investigator Dr Samuels were findings he could make. During submissions Counsel submitted that the Claimant agreed that the factual conclusions reached by Dr Samuels in his investigation were open to him based on the evidence before him. Whilst it is correct that the Claimant conceded this in cross examination on the evidence before us it pointed to the opposite conclusion on the issue of Citalopram.

67) However even if we as a Tribunal are bound by a general admission from the Claimant on that question put to him, while the Disciplinary Panel were entitled to rely on the Investigation Report they still had to take into account the Claimants submissions for the Disciplinary Hearing and he gave a clear account that the Citalopram allegation was not true and no further discussion about that took place at the Disciplinary Hearing apart from a concession by Mr James that:-

> *"For Allegation 3: it is not so clear around the evidence."* [p476]

68) In his statement for use at the Disciplinary Hearing the Claimant explained to the Respondent that at the time he saw Professor Hirsch on the 26 November 2017 he had not been prescribed Citalopram and was not taking Citalopram [p471]. He also explained that on the 25 January 2018 Dr Farrow (who was the psychiatrist who visited him at home on behalf of the Respondent) advised he obtain Citalopram from his GP, and that he thought she then spoke to his GP and as soon as it was prescribed, he started taking it.

69) We found no evidence whatsoever that he had failed to take Citalopram and the evidence on this from the Respondent was poor. There was a wholesale failure by the Investigator Dr Samuel to ask further questions on this issue after the brief exchange on it during the investigation interview. The Respondent later dismissed the Claimant, amongst other things, for failing to take his Citalopram [p384, p386 and p387].

70) Dr Samuel relied on the GMC Policy and referred to it in his witness statement at paragraph 2 on the issue of Citalopram. The disciplining officer Dr Suresh Mathavakkannan also referred to it at paragraph 16.2 of his witness statement. However, we found that nowhere does the GMC Policy refer to taking recommended medication for any health issue, nor does could we find any policy of the Respondent covering this issue.

71) in any event on the 10 May 2017 the GP for the Claimant wrote to Mrs Black for the Respondent and made reference to the Claimants diagnosis of PTSD by Dr Hirsch at Imperial Medical School who recommended him restarting Citalopram, and which he had now been prescribed on a regular basis at a dose of 20 mg. He said he did not have a copy of the Hirsch report but that the Claimant had a copy. He said as to health concerns the Claimant was fit and well. [p345] This date was only six days after the Investigation when the Claimant had been interviewed about this and we found that at this point he was now taking Citalopram, and the Respondent was now on notice he was taking it.

72) On the 18 July 2017, following the alcohol incident in January 2017, the GMC issued an interim order on the Claimant, and he was suspended from holding an appointment as a medical practitioner while he was subject to the interim order. [p416] Throughout the period up to his dismissal he subjected himself to random unannounced bloods tests all of which, apart from one false positive test which was later discounted by the GMC and was not referred to by the Respondent at any point during the hearing, came back as negative for alcohol. This Tribunal was not provided with any details about the outcome of this save that the Claimant advised the Tribunal that following his dismissal revalidation was no longer possible and he had removed himself from the GMC register. There was no evidence before the Tribunal that the Interim Order had been made permanent.

73) A further report was provided by the Claimant to the Respondent from his Consultant Psychiatrist on the 10 October 2017 and it stated that the Claimant was now not on Citalopram and had been prescribed sertraline instead but that he had since been advised not to take the anti-depressant as he also had a reaction to that too [p458-459], and we are satisfied the disciplining panel saw this letter as it was part of the pack sent to them by the Claimant prior to the Disciplinary Hearing. Whilst this change in his mediation post-dated the allegation that he had failed to take it we found that this was clear evidence that there were problems with Citalopram being prescribed for the Claimant and should have alerted them to the need for further investigation on this allegation against the Claimant.

74) In a much later email from the Claimant to the Respondent on the 21 August 2018 he sent his consulting psychiatrists report, that being the report of Dr Bhandari, and stated that

> *"…he does not want to prescribe me any pharmaceuticals due to my serious side effects I had experienced in the past. One was causing me arrhythmia and the other has left me with a complete loss of sense of smell and a subtotal loss of the sense of taste."* [p350]

We find it was entirely reasonable of the Claimant to follow his Consultant Psychiatrists advice on this and what medication he should be taking. The investigatory process and disciplinary process took two years and five months to complete and during that time the prescribing of drugs to control the PTSD was changed so that by the time of the Disciplinary Hearing much had changed on this issue and had evolved.

75) This report of the psychiatrist Dr Bandari dated 20 August 2018 stated that the Disciplinary Hearing should be postponed until he commenced psychological treatment. It went on to state that he had not prescribed him any medication apart from the promethazine for his sleep but would refer him for psychological treatment for his low mood and PTSD. [p355].

76) The witness for the Respondent, Dr Mathavakkannan said in his witness statement that he did not see this report from Dr Bhandari at the time, and this is set out at paragraph 5 of his witness statement. However, this Tribunal is satisfied that he must have seen this letter prior to the Disciplinary Hearing that took place on the 19 May 2019 as it was part of the pack sent by the Claimant to the Respondent prior to the Disciplinary Hearing and was marked by the Claimant as 'VF Page 19' [p463].

Alleged Failure to Disclose PTSD

77) The other allegation made against the Claimant was that he did not disclose his PTSD to the Respondent in November 2016. The Claimants explanation for this was that he had a fear of 'monstrous scrutiny' if he disclosed it to the Trust. However, he also gave evidence that he was told by his GP not to disclose it. The Claimant also said he wanted a second opinion before telling them. In addition, he then gave evidence that he intended to tell the Occupational Health Department of the Respondent about it but every time he tried to call them, he was told there was no doctor available. Counsel suggested to the Claimant in cross-examination that this was not true and that this was self-serving evidence. Mr Chilvers did confirm however, a witness for the Respondent, that the department was short staffed, and it may well have been true that when the Claimant tried to ring them there was no one available to see him.

78) We found that there was a short delay in telling the Respondent, which was from mid-November to the 24 January 2017, and which was only two months delay. We also found that he felt so harassed by Mr Sofat that he feared if

he told the Trust there would be further repercussions. Whilst we had sympathy for the Claimant, we did find there was some delay in advising the Trust and found that even though he had not been able to tell an Occupational Health doctor at the Trust he could have told another colleague and not Mr Sofat about the diagnosis.

Knowledge of the Respondent about PTSD

79) During cross-examination the Claimant put it to all the witnesses of the Respondent that they knew nothing about his disability of PTSD and each witness that this was put to admitted they did not know anything about PTSD. We found that the Respondent knew very little about his diagnosis of PTSD and that they wrongly referred to his diagnosis of PTSS when disciplining him for failing to disclose a medical condition, and that PTSS was a different medical condition.

80) The Claimant put it to Josie Potts in cross-examination that they should have at least obtained an up-to-date report from a suitably qualified person about his PTSD before deciding to dismiss him. She replied that they were satisfied at this juncture, in May 2019, that he did not have an alcohol problem at that time and that it would not help them resolve the allegation of his being drunk at work in 2017. This issue is addressed in detail in our findings below.

Publication of the Claimants Suspension

81) In or around mid-2018 the Claimant alleged that the details of his suspension were leaked to the local press [p911 onwards]. The article was run in the Welwyn Hatfield Times and was headed 'Orthopaedic doctor at Stevenage's Lister Hospital is currently suspended.' The article ended by stating,

> "A spokesperson for the East and North Herts NHS Trust, which runs Lister, said the investigation follows the Trusts referral of Dr Filipovich to the GMC earlier this year."

82) It was the Claimants case that the Respondent must have disclosed these details to the press as the reasons for interim orders made by the GMC are not made public and the article referred to 'a spokesperson' for the trust as the source of the information.

83) During the course of the hearing there was a disagreement between the Claimant and Counsel about whether the Medical Practitioners Tribunal Service ('MPTS') did or did not publish on its website the interim orders made and the suspension of doctors. The Claimant asserted they did not whereas Counsel asserted it was all public information on their website. After further investigation Counsel handed to the Tribunal a print off from the Tribunal website which simply stated that: -

> "All interim orders tribunal hearings are held in private. This means that whilst the doctors name will appear on the MPTS website under their list of recent interim orders tribunal hearings, no further details regarding the allegations under investigation are released to the public."

84) Having regard to the fact that it could be deduced from the website that a particular doctor had been the subject of an order we went on to consider if we could find that the Trust must have provided further information over and above the fact of a doctor's name being on the website about the actual fact of an interim order. We found that we could not. Whilst the article referred to the hospital being the source of the information, we had no independent corroborative evidence about who that source was. It could for example have been a retired doctor who no longer worked for the Trust and on the balance of probabilities we could not find that this article was based on a source from an employee of the Trust. In any event as set out in our findings on the law below this allegation was brought outside the statutory time limit of three months from the date of the incident.

Postponing Disciplinary Hearing

85) On the 9 August 2018 the Claimant received a letter which advised him that he was now required to attend a Disciplinary Hearing with Mr James of the Respondent on the 24 August 2018. He was advised that the allegations of being drunk at work, of failing to disclose his PTSD, and failing to take his Citalopram could each on their own constitute gross misconduct and could result in his dismissal.

86) There was some confusion on the Respondents part about whether the Disciplinary Hearing that was then convened was postponed once or twice. However, it was clear to this Tribunal that the hearing was postponed, on at least one occasion, at the request of the Claimant due to his ill health. He was initially invited to attend a disciplinary hearing on the 24 August 2018 [p347] and, at the request of the Claimant, that was then postponed and was reconvened for the 13 May 2019.

87) Part of the Claimants case was that the disciplinary hearing on the new date of the 13 May 2019 should not have gone ahead in his absence [p354]. A letter was sent to Dr A.R.J Parry his GP from Dr Bhandari on the 20 August 2018 stating he had advised the Claimant to postpone the Disciplinary Hearing for the 24 August 2018. As set out above it was clear to us that the Disciplining Officer Dr Mathavakkannan must have seen this letter, and in submissions Counsel for the Respondent advised that the documents seen by the Respondent prior to the Disciplinary Hearing sent by the Claimant were the Claimants documents at p438 – 467 of the Bundle, and the letter at p354 from Dr Bhandari was also at page 462 and so this letter must have been seen by Dr Mathavakkannan and by the panel when making their decision to dismiss the Claimant.

88) We think it likely that by the time Dr Mathavakkannan, the chair of the Disciplinary Panel, prepared his witness statement he simply could not remember what he had or had not seen, and we found him to be an honest witness. Many of his replies were that after this passage of time he could not remember what he had or had not seen but it is not in dispute the letter by Dr Bhandari recommending the Disciplinary Hearing be postponed again was sent by the Claimant as part of his pack prior to the Disciplinary Hearing and so we find that the letter was seen by the panel.

89) Dr Bhandari said in his letter that the Claimant had become so distressed at the thought of attending the Disciplinary Hearing that it had made him unwell, but Josie Potts gave evidence that postponing it again after the first postponement would not help matters and the issue had become circular. Until the Disciplinary Hearing had taken place then the Claimant would continue to feel anxious, and it was only when it had taken place that the specific anxiety about the Disciplinary Hearing would cease.

90) The List of Issues in this case was defined as whether the Respondent had a PCP of firstly continuing with a disciplinary process regardless of the employee's state of mind or physical condition, and secondly whether they had a PCP of holding a disciplinary hearing in an employee's absence. We deal with this in our conclusion sections. However, it is not in dispute that the Respondent did on at least one occasion postpone the Disciplinary Hearing and we found Josie Potts on behalf of the Respondent overall to be an honest witness. She gave clear evidence that she would for every employee, and did consider in the case of the Claimant, whether to proceed in his absence, but had concluded that the issue had become circular, and that the Disciplinary Hearing needed to take place. We therefore found that she did consider the Claimants state of mind or physical condition before proceeding with the adjourned disciplinary hearing.

91) After the first Disciplinary Hearing was postponed, there was then a long delay before the Disciplinary Hearing was arranged for another date. Neither the Claimant nor the Respondents witnesses gave any evidence about the reason for this delay but matters clearly stalled for the following ten months. This delay was however significant for the Claimant as during this delay and on the 31 January 2019 the Claimant reached the age of 60 which meant he was no longer eligible to be given ill-health retirement. At no point did anyone from the Respondent point out to the Claimant that if he wanted to apply for ill-health retirement he must do so before he reached his sixtieth birthday, and this was despite their illness policy stating ill-health retirement should be considered where a practitioner was unwell.

92) On the 3 May 2019 the Respondents invited the Claimant to a Disciplinary Hearing on the 17 May 2019.

93) In an email then sent by Nick James to Dr Mathavakkannan he set out the MHPS framework and the Trusts Policy and recited Part V that dealt with health. He said it stated a policy of,

> "The principles for dealing with individuals with health problems is that, wherever possible and consistent with reasonable public protection, they should be treated, rehabilitated or re-trained (for example if they cannot undertake exposure prone procedures) rather than be lost from the NHS," [p428]

and also

> "wherever possible the Trust should attempt to continue to employ the individual provided this does not place patients or colleagues at risk."

He then stated that

> "I would argue that if VF is retained and employed the Trust cannot guarantee patient or colleague safety."

He also added,

> "All the actions investigated could be construed as gross misconduct, but it can be argued that this is a result of health problems."

We found that at this point the illness policy and the misconduct policy of the Respondent were still being followed by the Respondent.

94) Natalie Mathison in her email of the 13 May 2019 sent to Dr Mathavakkannan stated that the Respondent should address its concerns though the health policy, which we took to be a reference to the Illness Policy, rather than treating the allegations as wilful misconduct. She attached the report of Dr Bhandari dated the 10 May 2019 which stated that he was in a heightened state of emotional distress about the impending Disciplinary Hearing and that the increased distress had caused him to break his front two teeth through grinding in his sleep [P431]. She asked that they postpone the hearing on health grounds [page 430].

95) Nick James of the Respondent in an email to Josie Potts went on to say in an email on the 14 May 2019 that, 'My view is a further postponement and to arrange a meeting with VF and BMA to discuss fact he will not be fit to work again and push for retirement on health grounds if they do not buy into this we have panel to terminate contract for any other substantial reason as he cannot work or be retrained.'[P432] This was the first time a reference had been made to 'he cannot work or be retrained,' whereas we found that at no point did the Respondent ever discuss with the Claimant working again or being retrained. The Respondents gave no explanation as to why Mr James had not been called as a witness at this hearing despite being the officer presenting the management case for the Trust.

96) Josie Potts then advised that they would be going ahead in the Claimants absence but sent to the Disciplinary Panel the bundle of documents they had received from the Claimants BMA representative, and this included the Claimants case statement. [P436 and P468].

97) Without repeating the entirety of the Claimants case statement, he made the following points: -

(i) He accepted he attended work under the influence of alcohol but that he did not deliberately intoxicate himself and that he had drank some alcohol to try and sleep.

(ii) He accepted that he had not told them about the Dr Hirsch diagnosis but asked that they look at the relevant points he made about that. In short, he said he had been afraid to disclose the diagnosis for fear of repercussions but that he accepted he ought to have disclosed it to this employer. He also stated that he wanted a second opinion before he disclosed it to the Respondent.

(iii) He did not accept that he had failed to take the recommended medication therefore putting patients at risk, and stated that once he was prescribed the medication, he took it. He stated that on the 25 January 2018 Dr Farrow advised he get Citalopram from his GP and that as soon as his GP prescribed it, he started to take it until it then caused an arrhythmia and he had to discontinue [p471].

(iv) He attached his psychiatrists reports to his statement of case. The one entitled 'VF page 15' [p458] was dated the 10 October 2017 It clearly stated that his citalopram had been changed to sertraline due to a raised QTC interval. It went on to say that he had bad side effects to the sertraline and had therefore had to stop taking it as it was causing severe nightmares. He described that he continued to suffer from flashbacks due to the PTSD. Distressing details of the flashbacks were given such as a memory of a patient he operated on and when he removed the blanket over their head, he had no skull left but the jaw was still moving, and this was a recurrent nightmare. The report finished by saying he had advised the Claimant to stop taking his anti-depressant for the time being and that he had prescribed him promethazine to help him sleep. He said that he had received an acknowledgement of his referral to psychology and is awaiting an appointment, and that he would review him further on the 3 November 2017.

(v) The second report was dated the 17 April 2018. It referred to the effect the publication of the news about his suspension had had on him. He became aware of it when neighbours started to ask him about it. It referred to the fact he was no longer suspended by the GMC and was eligible to go back to work with direct supervisions, but they had not yet identified any supervisors for him [p460].

(vi) The third report was dated the 20 August 2018 [p462]. The report concluded by stating that the Disciplinary Hearing should be postponed until he commenced psychological treatment.

98) He concluded his statement by asking the Trust to help him return to work and overcome the health difficulties he had experienced. He stated that he was unwell, and the Trust should have dealt with the allegations against him as arising out of his illness under the Trusts relevant policies regarding ill health throughout the disciplinary processes and that,

> *"acting as a reasonable employer and considering the objective test evidence and psychiatric reports is that the concerns are seen and managed as a health and not as misconduct."* [p473].

99) At pages 475 onwards of the bundle are a short set of notes of the Disciplinary Hearing but it did not list the evidence the Disciplinary Panel had before them, or the documents sent to them by the Claimant. However, we found that the documents were before them and that they would have read them prior to making their decision to dismiss the Claimant.

100) This Tribunal noted that at page 476 it stated a comment by Mr James who was presenting the management case at the Disciplinary Panel,

> *"For Allegation 3: it is not so clear around the evidence but in VF statement he said that was going to keep taking Citalopram as it was helping, and he was advised by Dr Hirsch."*

We found no reference anywhere to the Claimant saying he,

> "was going to keep taking Citalopram as it was helping"

and we found this was inaccurate representation by Mr James to the Disciplinary Panel.

101) Discussions took place about whether the Claimant could return to work. Mr Mathavakkannan asked Mr James if there were any other solutions other than dismissal. Mr James said,

> *"There is, and it is retirement on health grounds."*

102) We found that in this Disciplinary Hearing that the Trust referenced continuously its policy entitled 'Handling Concerns About a Practitioners Health' ('Illness Policy') [p225] as part of the Disciplinary Hearing as well as applying its Disciplinary Policy. The Illness Policy stated that

> "Matters relating to a Practitioners ill-health and sickness absence should generally be dealt with in accordance with the Trust's Absence Policy subject to the additional requirements set out below."

The Trusts Absence Policy was not in the bundle and so we confined ourselves to what this Illness Policy said based on the Illness Policy being said to be 'additional requirements' to the Trusts Absence Policy.

103) We found no evidence that the Respondent made a clear decision that this section of its Illness Policy did not apply to the Claimant and there were repeated references to this Illness Policy throughout the process conducted by the Respondent. The Illness Policy stated that where there is an incident which indicates that the Practitioner has a health condition; the Practitioner should be referred to Occupational Health. When the Claimant was first suspended there was a referral to Occupational Health [page 343] evidencing clear application of this Illness Policy.

104) The Illness Policy goes on to say that on receipt of the Occupational Health Report there should be a meeting between the Director or Head of Human Resources, the Medical Director or Case Manager, the Practitioner, and a representative from Occupational Health. It was not clear to this Tribunal if this meeting took place and there was no reference to this in any of the witness statements of the Respondent and so we found that, after the initial referral, no such a meeting took place. We found that the Trust breached its own internal procedures in failing to follow this Illness Policy in full throughout the investigation and disciplinary processes leading to the Claimants dismissal. [p343].

105) The Illness Policy went on to say that the Trust should consider what action can be taken to support the Practitioner to remain at/return to work, ensuring that any such action would not place colleagues and at risk. At this juncture the Tribunal noted what was said in the Disciplinary Hearing by Mr James where he firstly referred to the incident in 2014 and stated that: -

> *"He went to health at work, GP and a private psychiatrist. In the last hearing the mitigating factors were also due to his health issues. At that time, he was given a final written warning for 18 months."*

106) Mr James was then asked if he could come back in a different role. He replied: -

> *"He could come back to work however there would be concerns. Firstly, he has not worked for two years. In 2013/2014 he was referred to the GMC and was put on restrictions. After this incident he was suspended. He would therefore need retraining which would take approximately 12 to 18 months."*

107) The Illness Policy referred to above refers to a possible supportive measure of 'arrange re-training' and this was more evidence that this Illness Policy was referred to above and applied throughout the Disciplinary Hearing.

108) Mr James was then asked if retraining 'could be considered a reasonable alternative to dismissal.' Mr James reply simply stated that: -

(i) *"Due to the significant issues in his behaviour, it would probably be difficult finding individuals to mentor him in this organisation but would do so if needed. It may be possible to find another local Trust to support his retraining,"* and,

(ii) *"Thirdly we recognised over the years there have been health issues and despite putting in support, this last episode still happened. He may still have problems in the future, and we have a duty to protect the patient plus also a duty of care towards him. A return to work for him despite putting in restriction would still be a risk and it could end his career if something went wrong."*

109) The exchange above was another reference to the Illness Policy and in particular the last paragraph which referred to where a practitioners ill health made them a danger to patients, and they do not recognise that, or they are not prepared to co-operate with measures to protect patients then exclusion must take place and the appropriate body informed. The Claimant was excluded, and the referral was made to the GMC as referred to in this Judgment.

110) When Mr James was asked if there were any other solutions apart from dismissal, he replied there was, and this was retirement on ill-health grounds which was also referred to in the last line of the Illness Policy. He stated he would support that but that the Claimant was unlikely to accept it.

111) The Claimant gave evidence this was never discussed with him, and we find that ill-health retirement was never discussed with him at any point prior to his dismissal.

112) Mr Mathavakkannan then asked 'if health at work reassesses VF and they confirm that he has been treated and they put recommendations in, would it be possible to accommodate those adjustments. Mr James replied that: -

> *"The Trust would do everything to accommodate him. However, we have already done that."*

The above reference was referring to support given in 2014 and not the incident which was the subject of the Disciplinary Hearing that being the incident in 2017.

113) Further discussions took place and Mr James stated:

> *"He has been advised to take medication, but he did not do that."*
>
> *"The only way to restrict his duties would be to stop his clinical practice …he is passionate about his job, but he has a lack of insight into his behaviour."*

114) This reply by Mr James above was another reference to the Illness Policy which stated that,

> "If a Practitioners ill health makes then danger to patients and they do not recognise that…"

115) Further discussions took place and Mr Mathavakkannan asked if more could have been done in terms of getting VF a different supervisor. Mr James replied that: -

> *"Hindsight was a wonderful thing' and then referred to the two trigger points of being diagnosed with PTSD which caused him anxiety, and that he then went to a conference and started drinking."* [p478]

116) The issue of retraining was then discussed, and Mr James stated there

> *"would be a significant cost."*

117) Josie Potts then stated that the hearing was adjourned 'to make a decision.' There were no notes of any further deliberations following this hearing in the bundle. However, in paragraph 13 of the witness statement of Dr Mathavakkannan he stated: -

> *"The Disciplinary Hearing was adjourned on 17 May 2019 because we considered that, particularly given that the Claimant had not attended the Disciplinary Hearing, we needed advice from Occupational Health as to the Claimants* ***current state of health*** [our emphasis added] *before we could come to a decision as to whether he might be able to return to work."*

118) Josie Potts in her statement however stated that at paragraph 13 of her witness statement that: -

> *"As part of those deliberations, we requested* ***historical*** [our emphasis added] *Occupational Health records in order to ascertain whether the Claimants illness was a factor in his behaviours at the time of the incident on the 18 January 2017. This was important as it may have explained why he acted in the way that he did and whether this should be taken into account when determining the outcome."*

119) We found that the purpose of the adjournment was to obtain advice from Occupational Health as to the Claimants current state of health as set out in Dr Mathavakkannan's statement, and not to simply obtain 'historical occupational health records' as asserted by Josie Potts. The Illness Policy the Respondent was following was designed to obtain current occupational health advice where a practitioner had a health problem. The Illness Policy would be redundant if only historical records were obtained.

120) We found that the difference between the two witnesses of the Respondents to be troubling and whilst we generally found Josie Potts to be a credible witness, we did not accept her evidence on this point, and we preferred Mr Mathavakkannan's evidence on this as it was more clear evidence of the Illness Policy they were following and had followed up to this point in the disciplinary procedure [p225].

121) However, the Respondent having adjourned to obtain advice from occupational health about the Claimants current state of health failed to do so. Instead, we found that after requests were made by Josie Potts for the Claimants occupational health records, [p479-482] and after some delay in obtaining them, on the 13 June 2019 the Claimant gave his consent, and the records were forwarded by his BMA representative [p483].

122) The actual records attached to the email sent to the Respondent by the BMA representative on behalf of the Claimant were not in the hearing bundle and during the hearing I requested Counsel obtain a copy. It then became

apparent that they could not be obtained without the witness Josie Potts, who was off sick from work, going into the workplace to try and retrieve them, and even then, there was no guarantee they would be obtained as Josie Potts no longer had access to the emails due to an archiving issue. In the event the hearing concluded without this Tribunal seeing the attachments to the email from the BMA representative. However, Counsel directed us to pages 938 to 953 of the bundle and he stated that they were the medical records that the Respondent reviewed before taking the decision to dismiss. These records were sparse and started in 2015 and ended on the 5 September 2017 and so were nearly two years old at the point the Disciplinary Panel adjourned to look at them.

123) In an email from the Claimants BMA representative she asked them to confirm the date that the panel anticipated meeting to consider the medical information. No reply to that email could be found in the evidence before us and we accepted the evidence of Josie Potts that there was no further meeting to discuss the medical evidence referred to above and that all discussions then took place by email. This tribunal asked for a copy of the emails, but we were told by Counsel for the Respondent that they were all interlaced with legal advice and so the emails would be almost entirely blanked out. Having considered this no order for disclosure of the emails was made by this Tribunal.

124) The records the Disciplinary Panel looked at, [p937 to 953] were a collection of occupational health reports ranging from the 12 November 2015 to the 5 September 2017. The Claimant confirmed in evidence that the 5 September 2017 [p952] was the last time he saw anyone from the occupational health department of the Respondent.

125) We found that at this point of the procedure the Respondent stopped following its own Illness Policy and in particular abandoned the requirement to obtain current occupational health advice as referred to by the Respondents own witness, Mr Mathavakkannan. We found it would be absurd for it to be suggested (as the witness Josie Potts suggested) that such advice could be based on historical records when the purpose of the Illness Policy was to try and support practitioners who were currently unwell back to work.

126) As at the point of the adjournment of the Disciplinary Hearing the records looked at were nearly two years old we found that there was a wholesale failure by the Respondent to follow its own internal policies and procedures that they had until this point elected to follow, and in particular its Illness Policy.

127) We found that the Respondent, having adjourned to obtain occupational health advice about the current health of the Claimant instead then based their decision to dismiss the Claimant on occupational health reports that were nearly two years out of date at the time of dismissal.

128) The Claimant put it to Josie Potts, as referred to above, that an updated report on his health should have been obtained before dismissing him. She replied that as they believed he did not have an addiction problem it was not necessary to obtain an updated report as it would not inform their view about the alcohol incident in January 2017. Her evidence in her statement was that; -

> *"As part of those deliberations, we requested historical Occupational Health records in order to ascertain whether the Claimants illness was a factor in his behaviours at the time of the incident on the 18 January 2017".*

As the stated purpose of the adjournment of the Disciplinary Hearing, according to its own witness Dr Mathavakkannan was to obtain current occupational health advice, we could not accept Josie Potts explanation for this failure. Instead, we found that by this point the Respondent had decided it was going to dismiss the Claimant and simply abandoned and breached its own illness policy and curtailed the procedure, and simply looked instead at old historical records as set out in the bundle [P937-953].

129) In any event, even if Josie Potts evidence was to be accepted, no reference was made to the Citalopram allegation in any of the medical records they looked at. There was no reference either to the drinking episode in 2017 so the stated purpose of Josie Potts that they only needed to look at historical records to try and understand whether his illness was a factor in his drinking and the cause of it in 2017 was not assisted by the records they looked at.

130) On the 4 November 2019 the Claimant was invited to an appeal hearing to take place on the 13 November 2019. We found the Respondents witness Mr Chilvers to be an honest and credible witness. However, the deficiencies in the process were not addressed in any way by the appeal process. In particular during the appeal hearing the Claimants representative asked what records had been looked at in relation to his health and it was simply confirmed that his 'occupational health records were looked at.' This was a reference to the historical health records of the Claimant.

131) On the 10 February 2020 the Claimants appeal was dismissed.

Section D

The Law and Conclusions

Jurisdiction and Time Points

Disciplinary Processes and Dismissal

132) Considering the extension of time provided by ACAS Early Conciliation, the latest date by which any claim could be presented in time would be 25 July

2019, and any claim that related to events prior to this date was potentially out of time.

133) We had to consider whether the Claimant could prove that there was conduct extending over a period which was to be treated as done at the end of the period ending on the 25 July 2019, and whether such conduct was accordingly in time pursuant to s123(3)(a) of the Equality Act 2010? ('EqA')

134) If the test at above was not made out we then had to consider whether any complaint was presented within such other period as the Tribunal consider just and equitable pursuant to s123(3)(b) EqA?

135) In relation to the claims under the EqA the Claimant complained of the way he had been treated in relation to the disciplinary processes carried out which started when he was excluded from the workplace in January 2017 and ended when he was eventually dismissed on the 26 July 2019.

136) Pursuant to s.123 of the EqA 2010 it is provided that: -

> (1) … proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period.

137) We had regard to the case of Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16. In this the EAT observed that H had been subjected to disciplinary procedures and was ultimately dismissed — suggesting that the complaint was of a continuing act commencing with a decision to instigate the process and ending with a dismissal. In the EAT's view, by taking the decision to instigate disciplinary procedures, the Trust had created a state of affairs that would continue until the conclusion of the disciplinary process. This was not merely a one-off act with continuing consequences.

138) As with the above case referred to we found that the process adopted by the Respondent when it first suspended the Claimant, and then commenced its investigations which concluded with a disciplinary process which lead to the Claimants dismissal on the 26 July 2019, was a state of affairs that would continue until the conclusion of the disciplinary process and as such was conduct extending over a period which ended with the date of his dismissal on the 26 July 2019. Accordingly we treated such conduct as being done at the end of that period and all matters of which he complained in relation to

the process leading to his dismissal and the act of dismissal itself, such complaints being contained within the proceedings that were brought, were brought within the period of three months from the end of that period in accordance with s.123(3)(a) of the EqA 2010.

Publication of Claimants suspension in mid-2018

139) We then turned to the issue of the alleged publication in the local press of the Claimants suspension by the Respondent in mid-2018. It was the Claimants case that the Respondent published details of his suspension. In mid-2018 it came to the Claimants attention that local newspapers had published details of his suspension [P911 onwards]. It was the Claimants case that the Respondent must have disclosed these details to the press as the reasons for interim orders made by the GMC are not made public and the article referred to 'a spokesperson for the trust' as the source of the information.

140) We then asked ourselves if it could be said to be part of the disciplinary processes referred to above which was conduct extending over a period which ended with the date of the Claimants dismissal on the 26 July 2019 and accordingly whether we could treat such conduct as being done at the end of that period as part of the other matters of which he complained in relation to the process leading to his dismissal and the act of dismissal itself?

141) We concluded that such an act was a one-off discrete act and that accordingly the time limit for bringing such a complaint would have expired on around the middle of October 2018. By the time this complaint had been presented on the 19 December 2019 the proceedings had been presented approximately fourteen months out of time.

142) In reaching this conclusion we had regard to the case of South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR168 EAT, where the EAT set out that when a claimant wishes to show that there has been 'conduct extending over a period' — i.e. a continuing act — for the purposes of s.123(3)(a) EqA 2010, he or she will need to set out a series of acts, each of which is connected with the other, to demonstrate that either they are instances of the application of a discriminatory policy, rule or practice, or because they are evidence of a continuing discriminatory state of affairs.

143) We did not find that the allegation concerning the newspaper articles was possibly connected in any way to the disciplinary processes of the Respondent. The identity of who had contacted the newspaper was not known and so factually we could not make a finding that it was part of conduct extending over a period of time.

144) We then considered whether this complaint was presented within such other period that we considered just and equitable pursuant to s.123(3)(a) of the

EqA 2010. During cross-examination the Claimant admitted he knew about the time limit of three months for presenting a claim in the Employment Tribunal. He gave clear evidence that he had, as a result, had a disagreement with his BMA representative about this, who told him in effect to leave it with her and let her get on with her job.

145) We found that it was open to the Claimant to issue his own proceedings on this allegation alone, and that the fact his representative had not done so for him was not a reason for us to find that the period within which he did present his claim, over fourteen months later was within a period of time we considered just and equitable, and as such we found that we had no jurisdiction to hear this claim and this claim is dismissed.

List of Issues – s.5 – Did the Respondent have knowledge of the Claimant's disability at the relevant time?

146) The Claimant has been found to be a disabled person for the purposes of s.6 EqA 2010, by virtue of Post-Traumatic Stress Disorder and Recurrent Depressive Disorder, for the period 18 January 2017 to the 19 December 2019.

147) One of the defined issues was whether the Respondent had knowledge of the Claimant's disability at the relevant time? We found that after the Claimant told the Respondent on the 24 January 2017, as set out at paragraph 50 above, and when the Claimant spoke to both Jo Stiles, and Michele Murphy by telephone, that he had been diagnosed with PTSD, they then arranged for psychiatric help to be provided that evening by the Respondent and a Psychiatrist attended at his home that night and we find that they had actual knowledge of his disability from the 24 January onwards.

148) In any event we found that the Respondent would have had constructive knowledge if not actual knowledge. In reaching the above conclusion we had regard to the case of Morgan v Clearwater Fire Ltd. and ors ET Case No.4103070/19:

> "the employee who was both an employee and director of CF Ltd, had a history of alcohol and prescription medication misuse for which he was prescribed medication to relieve symptoms of stress and anxiety, which was contraindicated with alcohol, but he continued to drink. In February 2018 he was admitted to hospital. He resigned and claimed disability discrimination. The employer resisted the claims on the basis that it had neither actual nor constructive knowledge that he was a disabled person. The employment tribunal found that the Claimant had informed the employer of his stress and details of the medication he was taking (including Valium), and they would reasonably have known that this was prescribed to relieve stress and anxiety. Previous messages sent by, and concerns expressed about the employee, would further have put a reasonable person on notice that he had material mental health problems.

> The tribunal held that they were on notice that he might be a disabled person for the purposes of EqA."

149) The Claimant told his employers he had been diagnosed with PTSD in January, and so we find the diagnosis of PTSD would put a reasonable employer on notice that the Claimant had a disability and as such they had constructive knowledge of his disability even if they did not have actual knowledge of it.

150) Even if we are wrong about, we find that they had imputed knowledge of his disability of PTSD from the 9 March 2017 onwards. Case law has established that an employer cannot claim that it did not know about a person's disability if the employer's agent or employee (for example, an occupational health adviser,) knows of the disability. The EHRC Employment Code states that such knowledge is imputed to the employer (see para 6.21) and established in Hammersmith and Fulham London Borough Council v Farnsworth [2000] IRLR691 EAT. In this case the employer instructed an occupational health physician, to advise whether the employee was medically fit. The tribunal found that the local authority was fixed with the occupational health advisers' actual knowledge of the employees' disability in her capacity as its agent. The local authority could not, therefore, rely on a lack of knowledge to escape liability for breach of the duty to make reasonable adjustments. This conclusion was upheld on appeal by the Employment Appeal Tribunal.

151) In this case various reports of the Occupational Health Doctors of the Respondents, that the Respondent arranged for the Claimant to see, confirmed he had PTSD and that he was likely to be regarded as a disabled person [p947-953], and this covered the period from the 9 March 2017 onwards and we found they therefore that in any event they had imputed knowledge from this date onwards.

152) To conclude while much was made during the hearing by the Respondent that they never saw Professor Hirsch's report until the proceedings were issued by the Claimant it is not in dispute that the Claimant told them about his diagnosis and so they, at the very least, had imputed knowledge of his disability from at the latest the 9 March 2017 onwards when they received the report of Dr John Sterland [p947].

Direct Discrimination Claims

153) Section 13 of the Equality Act 2010 provides,

> 13. Direct Discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

154) In cases of alleged direct discrimination, the Tribunal is focused upon the 'reasons why' the Respondent acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination (this is not such a case), the Tribunals will want to consider the mental processes of the alleged discriminator(s): Nagarajan v London Regional Transport [1999] ICR877.

155) In order to succeed in his claims under the Equality Act the Claimant must do more than simply establish that he has a protected characteristic and was treated unfavourably: Madarassy v Nomura International Plc [2007] IRLR246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long-established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR931. It has been said that a Claimant must establish something "more", even if that something more need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ.1279**.** A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a prima facie case.

156) It is for the Tribunal to objectively determine, having considered the evidence, whether treatment is "less favourable". Whilst the Claimant's perception is, strictly speaking, irrelevant, his subjective perception of his treatment can inform our conclusion as to whether, objectively, the treatment in question was less favourable.

157) The grounds of any treatment often must be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact identifying 'something more' from which the inference could properly be drawn. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not had the relevant protected characteristic: Shamoon v RUC [2003] ICR337.

158) 'Comparators', provide evidential material. But ultimately, they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case disability. The usefulness of any comparator will, in any case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

159) In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, as in this case, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise, some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of

practice or adverse and discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, suffice.

160) Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

161) It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ.33.

162) In our discussions regarding the Claimant's direct discrimination complaints, we have held in mind that we are ultimately concerned with the reasons why the Claimant was dismissed for the three stated reasons of being drunk at work, failing to disclose his PTSD, and for allegedly not taking his medication of Citalopram, all of which the Claimant states were matters which amounted to less favourable treatment and which were matters relied upon by the Respondents as reasons for his dismissal. The dismissal of the Claimant for these matters were in one sense all interrelated, in that he had a disability of PTSD, which the Respondents asserted he failed to disclose to them, and which also meant he was recommended to take Citalopram, which the Respondents asserted he failed to take, and he turned up at work 3.5 times over the legal limit for driving having initially driven to work, and it was the Claimants case he drank to excess without realising it due to his disability of PTSD.

163) Our conclusions in relation to the Claimant's direct discrimination complaint of the act of dismissal are as follows:

List of Issues – 6.1. - Was dismissing him on 26 July 2019 less favourable treatment?

164) The first issue was defined as did the Respondent subject the Claimant to the following less favourable treatment by dismissing him on 26 July 2019.

165) The Respondent relied on all three allegations against the Claimant in dismissing him and stated that each allegation was an act of gross misconduct that on its own could justify the dismissal of the Claimant.

166) We had regard to the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL11, [2003] ICR337 where it was stated that:

> "110. ... the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

167) We also had regard to the case of MacDonald v MoD [2003] ICR937, HL, where it was stated that:

> "All the characteristics of the complainant which are relevant to the way his case was dealt with must also be found in the comparator."

168) We therefore constructed a hypothetical comparator of another doctor who had attended at work to carry out a clinic but who was drunk and who, for the purposes of driving, was 3.5 times over the legal limit when a blood test was carried out, and who sometime later told his employer he had been diagnosed with a medical condition, that was not a disability, but he had delayed in telling them about it for nearly three months, despite a policy that required him to tell his employer about any medical condition, and finally who the Respondent believed had also not followed a recommendation to take medication for his medical condition.

169) We asked ourselves if there were facts from which the Tribunal could conclude that such treatment i.e., dismissal, was because of the Claimant's disability? We do not conclude from these facts that his dismissal for drinking was because of his disability. He was dismissed for being drunk at work, for failing to disclose his medical condition, and for allegedly failing to take his medication and we found a hypothetical comparator would also have been dismissed and he was not dismissed because of his disability of PTSD.

170) We found that the burden of proof did not even pass to the Respondent in accordance with Madarassy v Nomura [2007] EWCA Civ.33 as no prima-facie case was established on this claim by the Claimant and which meant that the Respondent did not have to prove a non-discriminatory reason for the treatment.

171) The second issue was concerning the publicising of his suspension in mid-2018 but having found that this claim was not presented within the statutory time limit we have dismissed this claim.

172) Accordingly, the claim for direct discrimination under s.13 is not well-founded and fails.

S.15 EqA 2010 Claims

173) Section 15 of EqA 2010 provides: -

> 15 Discrimination arising from disability.
>
> (1) A person (A) discriminates against a disabled person (B) if-
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and

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

174) In Secretary of State for Justice and Anor v Dunn EAT0234/16 the EAT (presided over by Mrs Justice Simler, its then President) set out the elements that must be established in a S.15 claim:

(i) there must be unfavourable treatment.
(ii) there must be something that arises in consequence of the claimant's disability.
(iii) the unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability, and
(iv) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

175) Each of these elements, together with the separate requirement in S.15(2) that the alleged discriminator must (or should) have known of the claimant's disability, must be proven. We have already found that the Respondent must (or should) have known of the claimant's disability.

176) It has been established that what must be shown is that the disability is 'a significant influence … or a cause which is not the main or sole cause but is nonetheless an effective cause of the unfavourable treatment as established in Hall v Chief Constable of West Yorkshire Police [2015] IRLR893, EAT and also in Pnaiser v NHS England [2016] IRLR170, EAT**.** 7.

177) In Pnaiser v NHS England [2016] IRLR70, EAT**,** Simler P at [31] gives further succinct guidance on the general approach to be taken by a tribunal under s 15, in order to distinguish it from direct discrimination. The steps set out in that judgement can be divided as follows: -

(1) Was there unfavourable treatment?
(2) What caused the unfavourable treatment?
(3) Was the cause 'something' arising in consequence of the claimant's disability?
(4) There can be more than one link in the causation chain, but the more there are the more difficult it may be to establish causation.
(5) The causation test is an objective one.

List of Issues – s.10 – Did the Respondent subject the Claimant to the unfavourable treatment of dismissing him on the 26 July 2019 because of something arising in consequence of the Claimant's disability?

The things arising in consequence of the Claimant's disability.

178) The things (the 'somethings') arising in consequence of the Claimant's disability were identified in the List of Issues and are as follows: -

(i) His inability to concentrate;
(ii) Memory loss;
(v) Exhaustion; and
(vi)Flashbacks.

179) It is important to note that in this list the need to consult a psychiatrist and then his GP about appropriate medication, in this case Citalopram, is not defined as something arising in consequence of his disability. There is also no mention of amnesia as something arising in consequence of his disability.

180) In addition, we reminded ourselves that s.15 claims do not work on the basis of things occurring 'because of disability,' as this is covered by s.13 of the EqA 2010 but instead it is designed to cover situations where a worker is treated unfavourably 'because of something arising in consequence of his or her disability', contrary to S.15(1). This leads to a double-causation test. In effect the disability causes things to arise from it, in this case the symptoms of the PTSD, and then if something else arises from, as in this case, those symptoms, then the second stage of the double-causation is triggered.

181) We therefore asked ourselves if the things defined in the List of Issues which were the somethings arising from PTSD i.e., the symptoms, then lead to the matters i.e., the unfavourable treatment that the Claimant complained of?

The Unfavourable Treatment

List of Issues - 10.1 – Was the Respondent Dismissing the Claimant on the 26 July 2019 something arising from the Claimants disability?

182) The unfavourable treatment relied on by the Claimant was the act of dismissal.

Because of Something Arising in Consequence of C's disability

183) The stated reasons for the Claimants dismissal were being drunk at work while treating patients, not disclosing his diagnosis of PTSD and allegedly not taking his medication of Citalopram.

184) The Claimant in essence submitted that the drinking arose from his flashbacks, and amnesia, the night before he went to work and, on the day, he went to work and then returned home again, which resulted in him later attending at work 3.5 times over the legal limit. He referred in evidence to suffering from amnesia and flashbacks, and whilst flashbacks were defined as something arising from his disability in the List of Issues amnesia was not, and he asserted that both the flashbacks and the amnesia caused him to drink. In relation to the amnesia, he relied on this as asserting one of the

reasons as to why he drank to excess and referred to it being like a 'fugue state' in his witness statement.

185) We treated his assertion that the flashbacks caused him to drink as being caught by the second stage of the causation test in s.15, and so the excessive drinking was potentially because of something arising from the disability and which led to his dismissal. However as submitted by Counsel for the Respondent the Claimant never put his case to any witnesses specifically that his drinking was something arising out of disability for the purposes of his claim under s.15 of the EqA 2010. He did ask witnesses if they were aware drinking was a symptom of PTSD, and they replied they did not, but he didn't specifically put it to them, or set out in his statement of case, or in his witness statement, that being drunk at work, and then being dismissed, was because of something arising from his disability pursuant to s.15 of the EqA.

186) We were not therefore able to find that this part of his claim, which in essence was misconduct by being drunk at work and then being dismissed for it, was something arising from his disability, and so was not made out.

187) We deal now with the two other stated reasons for his dismissal. As a result of his visit to Professor Hirsch a diagnosis of PTSD was formed, and also a reference to it being possibly helpful to take Citalopram again was made by Professor Hirsch.

188) On the issue of not disclosing his diagnosis of PTSD, the 'somethings arising from his disability', did not in our view then cause him to delay in disclosing his diagnosis. He told his employer that his reason for delaying in disclosing it for two months following diagnosis in November 2016, which he admitted to, was because of his fear of 'monstrous scrutiny' if he disclosed it. We did not find that his fear of monstrous scrutiny was causally linked to the symptoms themselves but was in fact linked to his fear of Mr Sofat who had been abusive to him in the past. We noted that he explained he did try and tell the occupational health department of the Respondent of his diagnosis of PTSD but after phoning on many occasions no one was available. However, this difficulty could have been alleviated by simply telling another colleague and we did not accept his evidence on this and found he did delay for two months in telling his employer about his PTSD.

189) On the issue of failing to disclose his diagnosis of PTSD, and being dismissed for it, we found that this could not be said to be something arising in consequence of his disability.

190) On the issue of Citalopram and allegedly failing to take it, we did not find it was a 'something' arising in consequence of his disability. This alleged failure to take the medication, and this dispute between the Claimant and Respondent was not because of something arising in consequence of his disability but instead it stemmed from his treating psychiatrist and GP making decisions about when he needed to take it, and the Respondent jumping to, in our view unreasonable conclusions no other employer would

reasonably reach as a result of what the Claimant told Dr Samuels the Investigator about his consultation with Dr Hirsch. This was not causally linked to the symptoms of his disability in any direct sense but was part of a factual nexus that developed after he was diagnosed with PTSD and then sought medical help.

191) In addition, and in any event, as set out above, the Claimant did not put to any of the witnesses that he was dismissed because of 'something arising' in consequence of his disability for his s.15 claim under the EqA on any of the three stated reasons for dismissal, and so in the absence of any cross-examination on this issue we could not make findings on these parts of the stated reasons for his dismissal, and therefore his dismissal could not be said to be because of something arising in consequence of his disability.

192) Accordingly, the Claimants claims under s.15 of the EQA fail.

§.20/21 EqA 2010 Claims

193) Section 20 of the Equality Act 2010 defines the duty to make adjustments as follows,

> 20 Duty to make adjustments:
>
> (1) …
> (2) …
> (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.

194) The reasonable adjustments duty is contained in Section 20 of the EqA 2010 and is further amplified in Schedule 8. In short, the duty comprises of three requirements. If any of the three requirements applies, they impose a duty to make reasonable adjustments.

195) Section 21 provides that a failure to comply with one of the three requirements is a failure to comply with the duty to make reasonable adjustments by A (A being the employer or other responsible person) and amounts to discrimination, Section 21(1) and (2).

196) The approach that a Tribunal should take was set out in the judgment of HHJ Serota QC in Environment Agency v Rowan [2008] IRLR 20. We are required to identify: (a) the relevant arrangements (PCP) made by the employer, (c) the identity of non-disabled comparators (where appropriate), and (d) the nature and extent of the substantial disadvantage suffered by the Claimant (as a result of the arrangements). After determining the above we then must consider whether any proposed adjustment is reasonable; in particular, to determine what adjustments were reasonable to prevent the PCP placing the Claimant at a substantial disadvantage.

197) A substantial disadvantage is one that is more than minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact. It is the PCP that must place the claimant at the disadvantage Nottingham City Transport Ltd v Harvey UKEAT/0032/12, and the 2011 Code paragraph 16. Using a comparator may help with this exercise as the purpose of the comparator is to establish whether it is because of disability that a particular PCP disadvantages the disabled person in question, as set out in paragraph 6.16 of the 2011 Code of Practice on Employment.

198) The substantial disadvantage should be identified by considering what it is about the disability which gives rise to the problems and effects which put the claimant at the substantial disadvantage identified, Chief Constable of West Midlands Police v Gardner UKEAT/0174/11. In Griffiths v Secretary of State for Work and Pensions [2014] UKEAT/0372/13, a case concerning the management of sickness absence, it was also explained that the fact that the disabled and non-disabled were treated equally and may both be subject to the same disadvantage when absent in the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled or category of them than it does on the able-bodied.

The claimed PCPs

199) The claimed provisions, criteria, and practices ("PCPs") set out in the List of Issues are as follows: -

List of Issues -16.5.1 - Did the respondent have the following provision, criterion or practice:

(a) Continuing with disciplinary process regardless of the employee's state of mind or physical condition; and/or

(b) Holding a disciplinary hearing in an employee's absence?

200) What amounts to a PCP is not further defined within the EqA, though the expression is to be construed broadly, avoiding an overly technical approach. The EHCR's Employment Code extends to any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications, or provisions. The existence or otherwise of a PCP is to be assessed objectively. In Carerras v United First Partners Research Ltd. EAT 0266/15 the term "requirement" was said to be capable of incorporating an "expectation" or assumption", which might be sufficient to establish the existence of a practice.

201) Our conclusions on the claimed PCP's are as follows:

(a) Continuing with the Disciplinary Process regardless of the Claimants state of mind or physical conditions.

(i) Josie Potts gave clear and credible evidence on this matter. Firstly one of the reasons that the disciplinary process took such a long time to conclude, and which took around twenty nine months from the date of exclusion to the date of dismissal, was in part due to the fact that the first disciplinary hearing was adjourned from the date in August 2018 to the 19 May 2019 and as a matter of fact the Respondents delayed the first disciplinary hearing at the Claimants request for a period of nine months.

(ii) In addition Josie Potts gave clear evidence that she had regard to the Claimants state of mind and health generally and we did not find the Respondent had such a PCP. She stated that the issue had become circular. One of the reasons for the Claimant's continuing ill-health was his anxiety about the disciplinary hearing and until the hearing had taken place that anxiety would not dissipate. The report of Dr Bhandari on this at page 431 [see also page 461] of the Bundle was clear that this was why the Claimant was not fit to attend.

(iii) We therefore concluded that the Respondent did not have such a PCP.

(b) Holding a disciplinary hearing in an employee's absence?

(iv) We found that the Respondent did, contrary to Counsels submissions on this, have a PCP of holding a disciplinary hearing in an employee's absence. Josie Potts gave clear evidence that on a case-by-case basis they did consider, where an employee could not attend, whether to go ahead in the employee's absence. It was clear to us that a PCP existed that on a case-by-case basis the Respondent would, where it thought appropriate, hold a disciplinary hearing in an employee's absence, as it did in the Claimants case. Accordingly, this claimed PCP was established.

(v) Counsel asserted that no such PCP could exist as it had to have an element of repetition and he seemed to be alluding to the fact that the holding of the disciplinary hearing in the Claimants absence was a one-off event.

(vi) However as set out above the issue was not whether the Respondent had a PCP of holding a disciplinary hearing in the Claimants absence but whether, as defined by Judge Welch in the List of Issues, they had a PCP of holding a disciplinary hearing in **an employee's absence** [our

emphasis added] and we find for the reasons set out above that they did.

The claimed disadvantages and the Respondent's knowledge of these, and reasonable adjustments contended for

202) The List of Issues did not identify the disadvantages to which the PCPs gave rise. Counsel submitted that the Claimant did not positively say what other reasonable adjustments he was asking for other than that the Disciplinary Hearing should have been adjourned for a second time. It was correct that nowhere in his statement of case or witness statement did the Claimant set out the other reasonable adjustments contended for, other than his request for the Disciplinary Hearing to be adjourned.

203) During the hearing the Claimant contended in cross examination of Josie Potts that not only should the Disciplinary Hearing have been postponed but he also said that they should have obtained an updated medical report from an appropriate expert on PTSD before dismissing him. The thrust of his cross-examination was that this was ill health and not misconduct. However, it was never specifically put to her as a 'reasonable adjustment' that they should have made in the context of his s.20 claim for Reasonable Adjustments.

204) The Claimants statement of case whilst identifying what he asserts was procedural unfairness, [p36] where he states that 'there was no reasonable investigation into all the relevant facts and circumstances particularly regarding health before the disciplining panel reaching its decision,' does not contend that this obtaining of further medical evidence was a reasonable adjustment that the Respondent should have made.

205) In the letter of appeal, attached to the statement of case, all of which was admitted into evidence, while the Claimant again asserted no fair and thorough investigation had taken place, again he did not set out what reasonable adjustments he contended for.

206) We had regard to the Equality and Human Rights Commission's Code of Practice on Employment, which states: 'The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular [PCP] or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly — and unlike direct or indirect discrimination — under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's'.

207) In the case of Sheikholeslami -v- University of Edinburgh [2018] IRLR1090, EAT it was established that the purpose of the comparison exercise with non-disabled employees is to assess whether the PCP has the effect of producing the relevant disadvantage as between those who are and those

who are not disabled, and whether what causes the disadvantage is the PCP.

208) We asked ourselves if the PCP of proceeding with the Disciplinary Hearing in his absence put the Claimant, a disabled person, at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and whether that PCP caused the disadvantage? We asked ourselves what would have happened if another employee was in hospital after, say, having an accident and they didn't know when they would be fit to attend, or perhaps in the case of an employee who was on extended leave for another reason, whether they would have been at the same disadvantage if the employer had proceeded in their absence with a Disciplinary Hearing? According to the evidence of Josie Potts, which we accepted, this issue was considered on a case-by-case basis for each employee, and whether, if required, they should proceed in their absence. The evidence was clear that where appropriate they would also have proceeded in a non-disabled employees' absence, and so the Claimant was not at a substantial disadvantage in comparison with a person who was not disabled. We found that the hearing taking place without the Claimant there put him at no more of a disadvantage than a hearing taking place in a non-disabled persons absence.

209) We concluded that the Claimant or a person with the Claimant's disability was not placed at a disadvantage by the holding of the disciplinary hearing in his absence. They had the Claimants full submissions, and we could not see how the absence of the Claimant affected his submissions.

210) As the Claimant was not at a substantial disadvantage then the duty to make reasonable adjustments under Schedule.8 and s.20 and s.21 of the EqA 2010 was not triggered.

Reasonable adjustments

211) Reasonable adjustments need only be considered if we hold that the Claimant was at a substantial disadvantage, and we have found he was not. However even if we are wrong about that we went on to consider the issue of reasonable adjustments. We reminded ourselves that reasonable adjustments are with a view to addressing the disadvantages of proceeding with the disciplinary hearing in his absence.

212) The burden of proof does not, of course, ultimately lie with the Claimant. He need only identify in broad terms the nature of the adjustments that would address the disadvantages for the burden to shift to the Respondent to show that the disadvantages would not be eliminated or reduced by the proposed adjustments or that they would not otherwise be reasonable adjustments to make. As the Claimant only identified the further postponing of the Disciplinary Hearing as a reasonable adjustment, we only addressed this matter.

213) We found that where the Disciplinary Hearing had already been postponed once and the Claimant had been suspended on full pay for nearly two and a half years it would not have been a reasonable adjustment to delay it again.

214) We therefore conclude that this claim for a failure to make reasonable adjustments is not well founded and fails.

Unfair Dismissal

215) The Claimant was continuously employed by the Respondent for more than two years and in those circumstances had the right not to be unfairly dismissed by it (section 95 of the Employment Rights Act 1996).

216) Section 98 of the Employment Rights Act 1996 ('the Act') provides that:

> **98 General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it
>
> (a) …
> (b) relates to the conduct of the employee,
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

217) The correct approach for the Tribunal to adopt in considering section 98(4) of the ERA (as set out in Iceland Frozen Foods v Jones [1982] IRLR 439) is as follows:

> "… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

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

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

218) The ACAS Code of Practice on Disciplinary and Grievance procedures sets out matters that may be taken into account by tribunals when assessing the reasonableness of a dismissal on the grounds of conduct, as follows:

'Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

Employers and employees should act consistently.

Employers should carry out any necessary investigations, to establish the facts of the case.

When investigating a disciplinary matter take care to deal with the employee an affair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against it. Be careful when dealing with evidence from a person who wishes to remain anonymous. In particular, take written statements that give details of the time, place, dates as appropriate, seek cooperative evidence check that the person's motives are genuine, and assess the credibility and weight to be attached to their evidence.

Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct. And its possible consequences to enable the employee to prepare to answer the case of the disciplinary hearing. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements within the notification. At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should also be given a reasonable opportunity to ask questions, present evidence, and call relevant witnesses. They should also be given the opportunity to raise points about information provided by witnesses.

Employers should allow an employee to appeal against any formal decision made."

219) For guidance on the level of investigation and on the Respondent's belief that an act of misconduct has occurred, British Home Stores v Burchell [1979] IRLR379 provides as follows:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

220) As at the time of the Claimant's dismissal, the Tribunal is to ask (i) did the Respondent believe the Claimant was guilty of the misconduct alleged, (ii) if so, were there reasonable grounds for that belief, (iii) at the time it had formed that belief had it carried out as much investigation into the matter as was reasonable in the circumstances, and (iv) was the decision to summarily dismiss the Claimant within a range of reasonable responses open to an employer in the circumstances (Yorkshire Housing Ltd v Swanson [2008] IRLR609)? The range of reasonable responses test applies as much to the procedure which is adopted by the employer as it does to the substantive decision to dismiss (Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23).

221) The employer cannot be said to have acted reasonably if he reached his conclusion in consequence of ignoring matters which he ought reasonably to have known and which would have shown that the reason was insufficient (W Devis & Sons Ltd v Atkins [1977] IRLR314, HL).

223) An employee can challenge the fairness of a dismissal if an agreed procedure was not correctly followed (Stoker v Lancashire County Council [1992] IRLR 75).

224) The Tribunal should be satisfied as to the appropriate thoroughness of the investigation in career ending cases, as in this case, or where some form of professional status is in jeopardy, also as in this case, and where the consequences to the employee of a finding of guilt are likely to be severe. Additional care in the investigation is likely to be required as in the case of Roldan v Royal Salford NHS Foundation Trust [2010] IRLR721 in which the Court of Appeal stated:

> "Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In A v B [2003] IRLR 405, the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So, it is particularly important that employers take seriously their responsibilities to conduct a fair investigation, where, as on the facts of that case, the employee's

> reputation or ability to work in his or her chosen field of employment is potentially apposite. An A v B the EAT said this: 'The investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate, or at least point towards the innocence of the employee, as he should on the evidence directed towards proving the charges against him' and … 'there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of one side or the other."

225) The fairness of the procedure adopted by an employer is to be assessed at the end of the internal process, including any appeal process. (Taylor v OCS Group Limited [2006] IRLR613). The process must be considered in the round. Smith LJ stated:

> "If [the Tribunal] find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceedings with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or review, but to determine whether due to the fairness or unfairness of the process procedures adopted, the thoroughness or lack of it of the process and the open mindedness or not, of the decision maker, the overall process was fair, notwithstanding any deficiencies at the earliest stage."

226) Case law has identified that the reason for dismissal will be a set of facts known to the employer at the time of dismissal or a genuine belief held on reasonable grounds by the employer which led to the dismissal (Abernethy v Mott, Hay & Anderson [1974] IRLR213, CA).

Polkey

227) In the event of an unfair dismissal the Tribunal must determine what would have been likely to have occurred if a fair procedure had been adopted, in accordance with the guidance in Software 2000 Ltd v Andrews [2007] IRLR 569. The EAT stated:

> "If the employer seeks to contend that the employee would or might have ceased to be employed in any event, had fair procedures being followed, or alternatively, would not have continued in employment indefinitely, it is for him to adduce relevant evidence on which he wishes to rely. … However, there will be circumstances where the nature of the evidence which the employer wishes to adduce or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on that evidence can properly be made."

List of Issues - 16.9.1 - Was there a potentially fair reason for dismissal? The Respondent relies on conduct as the reason for dismissal (s98(2)(b) ERA 1996)

228) The Respondents characterised the Claimants behaviours as falling into three standalone acts of gross misconduct: -

(i) Being drunk at work and 3.5 times over the limit;
(ii) Failing to disclose his diagnosis of PTSD; and
(iii) Failing to take his medication of Citalopram.

229) We found that being drunk at work and being 3.5 times over the limit was properly characterised as misconduct. We found, that the same was true of the allegation of failing to disclose his diagnosis of PTSD, and so there was a potentially fair reason for dismissal.

230) We did not find that the alleged failure to take Citalopram could amount to misconduct, and so the only potentially fair reason we could ascribe to that was Some Other Substantial Reason as nowhere could we find a stated requirement for any employee to take medication it was prescribed.

231) Throughout the Respondent applied its illness policy as well as its misconduct policy and this Tribunal found the potentially fair reason for dismissal was also capability, and while the principal reason was misconduct capability was also a potentially fair reason for dismissal in this case.

List of Issues - 16.9.2 - Was there genuine belief in the Claimant's misconduct?

232) We found there was a genuine belief in the three allegations of misconduct, subject to our caveat that we did not find the third allegation to be properly characterised as misconduct.

List of Issues - 16.9.3 - Did the Respondent undertake a reasonable investigation (within the band of reasonable investigations)?

233) As set out in the case of J Sainsbury Plc v Hitt [2003] ICR111 the 'range of reasonable responses' test applies not only to the decision to dismiss but also to the procedure by which that decision is reached.

234) We do not find that the Respondent undertook a reasonable investigation within the band of reasonable investigations of any other reasonable employer.

235) Whilst the investigation and disciplinary processes were categorised by the Respondent throughout as relating to misconduct it also applied its Illness Policy and there were repeated references to its Illness Policy throughout the investigatory process and the disciplinary processes, that is until it

adjourned the Disciplinary Hearing to obtain an occupational health report on the current health of the Claimant in order to consider his return to work, at which point it then breached its own internal procedures for the reasons we set out above and below.

236) In evidence and when Josie Potts, Head of HR for the Respondent, was being cross-examined by the Claimant about why she did not obtain an updated report on the Claimants diagnosis of PTSD, prior to the decision taken to dismiss him, this Tribunal was troubled by the answer given. Her answer was that as the Claimant did not have an addiction problem there was no need for further current medical evidence for the historic allegation of being drunk at work in January 2017.

237) Even on her evidence, which stood in direct contradiction to the evidence of Dr Mathavakkannan and who had stated they adjourned the disciplinary hearing to obtain current occupational health advice on his state of health and before taking any decision as to whether the Claimant may return to work, she clearly considered it important to review his historic medical records before deciding to dismiss him to try and understand if his medical condition affected his behaviour (her witness statement paragraph 13). Her suggestion that the two-year-old medical records looked at were sufficient for the purposes of that exercise was not credible as the historic reports the Respondent looked at following the adjournment failed to address the issue of the Claimant being drunk at work in 2017, or either of the other two issues of failing to take medication for his PTSD or delaying in advising of his diagnosis of PTSD. The purpose of those historic reports at the time they were produced from 2015-2017 was to provide the Respondent with an update on the Claimants current state of health generally.

238) On the explanation of Josie Potts, and even if her evidence could stand alongside that of the conflicting evidence of Dr Mathavakkannans, we found that any reasonable employer conducting a reasonable investigation, and having adjourned to look at historic health records to consider if the ill health of the Claimant had affected his behaviour when he arrived drunk at work, and upon discovering the health records did not address that incident, would have obtained an up to date medical report to ascertain if his ill-health had affected his behaviour. We bear in mind in particular the case referred to above of (Roldan v Royal Salford NHS Foundation Trust [2010] IRLR721) which deals with career-ending cases like this case, and which reminds employers that Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances, and that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. Where an employee faces the loss of his whole occupation and reputation in his field at the age of 60, meaning he will never work again in his field, we find the reliance on irrelevant and out of date medical records, was outside the range of any reasonable investigation that any other reasonable employer would have carried out.

239) We found that the Illness Policy they had applied throughout was abandoned at the point of the adjournment of the disciplinary hearing and contrary to Mr Mathavakkannans stated purpose of obtaining occupational health advice on the Claimants current state of health before they could come to a decision as to whether he might be able to return to work there was a wholesale failure to do so, and we found that this was driven by the decision of Josie Potts to simply look at historical records, and none of which informed the panel in any way whatsoever about the allegations against the Claimant.

240) We also found that as part of the Claimants reason for dismissal related to whether or not he had taken his prescribed medication, that any other reasonable employer having adjourned to obtain an Occupational Health Report on his current state of health, as per the evidence of the Chair of the Disciplinary Panel, Dr Mathavakkannan, would then have obtained an updated and comprehensive report on his current state of health so as to assess his fitness to return to work, and also to obtain a report on the history of the prescribing of Citalopram prior to dismissing him so as to properly consider the allegation that he had failed to take his medication of citalopram at the appropriate times as alleged by the Respondent.

241) To summarise, there was no evidence before this Tribunal that any updated medical evidence was obtained, and this was contrary to the Respondents own internal illness policy which it had followed up to the conclusion of the Disciplinary Hearing and which stated [P225]: -

> *"The Trust should consider what action can be taken to support the Practitioner to remain at/return to work, ensuring that any such action would not place patient and colleagues at risk. Examples of such action are below (please note that not all examples will be appropriate in every situation and advice should be obtained from Occupational Health).*
>
> - *Sick leave.*
> - *Removing certain duties.*
> - *Reassigning the Practitioner to a different area of work.*
> - *Arrange re-training.*
> - *Make adjustment to the Practitioner's working environment.*
>
> *In some cases, retirement due to ill-health may be necessary. Such an option should be approached in a reasonable and considerate manner, in line with advice from the NHS Pensions Agency."*

242) Dr Mathavakkannan said as follows in his witness statement: -

> *"The Disciplinary Hearing was adjourned on the 17 May 2019 because we considered that, particularly given that the Claimant had not attended the Disciplinary Hearing, we needed advice from Occupational Health as to the Claimants current state of health before we could come to a decision as to whether he might be able to return to work."*

243) What then happened following the adjournment of the Disciplinary Hearing was not something any of the Respondents gave any meaningful evidence on save for assertions by Dr Mathavakkannan that 'I remember having several phone calls with Josie Potts, but I do not at this distance recall the content of our discussions.' [para 15 of WS] Josie Potts simply said that 'I believe that the panel discussed the outcome via email and telephone as there was an external panel member and it would have delayed matters if we had met in person instead.'[para 16 of WS] In short no evidence was adduced as per the evidence of Dr Mathavakkannan that they adjourned the disciplinary hearing to obtain current occupational health advice on his state of health before taking any decision as to whether the Claimant may return to work on any current occupational health advice being obtained prior to dismissing the Claimant.

244) Instead for the next two months the Respondent appeared to simply take legal advice about dismissing the Claimant and conducted discussions by email and telephone. It was found by this Tribunal that any reasonable employer that had adjourned to obtain advice from Occupational Health as to the Claimants current state of health before they could come to a decision as to whether he might be able to return to work would have done so and it amounted to a wholesale failure by the Respondent to undertake a reasonable investigation within the band of reasonable investigations of any other reasonable employer, and was a complete failure to follow their own internal Illness Policy.

245) We also found that the Respondents investigator, aside from seizing on one statement made by the Claimant during the investigatory meeting about the issue of his taking Citalopram, which in any event was then qualified by his statement that he went to see his GP who advised they wait for Dr Hirsch's' report before anything further was 'done' and this was clearly a reference to prescribing Citalopram, did nothing to investigate this matter in any way whatsoever. Instead, they simply ignored all the Claimants explanations that he had not failed to take his Citalopram and failed to investigate this any further by way of obtaining medical evidence on the issue.

246) We found that no other reasonable employer within the reasonable range of responses in conducting a reasonable investigation would fail to investigate this further by way of seeking a report from their own occupational health department, particularly when the Respondent is an NHS Trust, and we find that on this issue alone it meant the investigation fell outside the range of reasonable investigations of any other employer.

247) In any event the Claimants explanation, on the alleged failure to take Citalopram, was set out very clearly by the Claimant in his written statement for the Disciplinary Hearing, and the Respondent, unreasonably took no account of this very straightforward explanation by the Claimant and took no steps whatsoever to investigate it further. There was a wholesale failure to investigate this flimsy and unsubstantiated allegation in any way whatsoever.

248) This allegation on Citalopram was said by the Respondent to amount to an act of gross misconduct. However, it was an allegation that the Respondent did not investigate apart from simply interviewing the Claimant about it, and instead of seeking exculpatory evidence on this issue as well as inculpatory evidence, and had the Respondent obtained an updated medical report on his health and this issue prior to his dismissal, then they would have been able to address this allegation and investigate it in a reasonable manner that fell within the reasonable range of responses of any other employer.

249) Whilst this Tribunal reminded itself it could only have regard to what the disciplining panel had knowledge of when deciding to dismiss him it found that had the Respondents obtained updated medical evidence on his condition prior to dismissing him, in accordance with their own internal procedures, that would have assisted the Respondent in deciding whether it was appropriate to carry on disciplining the Claimant for what it described as gross misconduct in failing to take Citalopram when they admitted in cross-examination that they knew nothing about the condition of PTSD and in effect what drugs should be prescribed to treat it.

250) In accordance with the case of Polkey v AE Dayton Services Ltd. [1987] UKHL 8, ICR142 we went on to consider what may have happened had an updated report been obtained on the Claimants current state of health to consider whether he could return to work and also on the PTSD allegation, the Citalopram allegation and the drinking allegation.

251) We believe that firstly the Claimant would no longer have been subject to the Citalopram allegation and there was a 100% chance this allegation would have been dropped and this would not have formed part of the reason for dismissing the Claimant. We noted that it was alleged this failure to take his medication was a stand-alone act of gross misconduct. This Tribunal finds, even if it is wrong about the prediction the allegation would have been dropped, then at most even if it was proven he had ignored medical advice and had failed to take it then it could have only merited a first written warning. We did not find that any other employer within a reasonable band of responses would have treated this as an act of gross misconduct and have dismissed him for it.

252) In the case of Halton Borough Council v Hollett EAT559/87 a decision to issue a written warning on the issue of failing to take medication was criticised by the EAT. During a disciplinary hearing, H stated that he had reduced his medication because his GP had said that he could do so if he felt fit enough but the employer instead of investigating the issue of medication further, issued a final written warning, saying H should take the full medication as recommended. Shortly before the written warning was due to lapse, the employer received another complaint about H's behaviour. As the written warning was still current, H was dismissed. On appeal, a consultant psychiatrist's report was produced stating that H's eccentric behaviour was perhaps due to too low a dosage and recommending that it be increased. The EAT upheld an employment tribunal's finding of unfair

dismissal. They stated that a medical investigation should have taken place. H was 'trying his best' and his mental illness should have been considered. As set out in this case also there was a wholesale failure to conduct any medical investigation into the allegation about Citalopram for the Claimant in this case.

253) We turned then to the issue of the PTSD, and the reasons for the failure to disclose it earlier. We found there was a significant chance that the Occupational Health Department may have advised that the Claimant was so distressed by the harassment of him by Mr Sofat it had caused him to act in a fearful and irrational way in not disclosing his diagnosis sooner. We had regard to the fact the delay was only two months, and the likely chance that the Respondent may have decided it could no longer treat that allegation as gross misconduct and may have simply given him a first or final written warning instead. We think there was at least a 51% chance that would have been the outcome had updated medical opinion been sought about this issue and due to the Claimants distressed state of mind at the time he failed to disclose it for the short period of two months.

254) On the issue of being found to be drunk at work, we asked ourselves what difference an updated medical report on his current health would have made to the decision to dismiss him, or even on Josie Potts evidence what difference a report would have made on whether his illness had contributed to his misconduct in turning up at work drunk in January 2017.

255) If the Illness Policy had been followed (which stated policy clearly states that re-training was an option or reassigning the Practitioner to a different area of work) and having regard to the range of questions by Dr Mathavakkannann at the Disciplinary Hearing about alternatives to dismissal, and the fact that the Claimant was said not to be considered to have an alcohol problem at the time of dismissal, whilst we took on board the Trusts fear of re-occurrence, we found that the Trust may have decided to give the Claimant a non-patient facing role, so that the issue of the safety of patients would have fallen away. In an organisation as large as the Respondents there must have been at least a good chance that there were various vacancies that the Claimant could have fulfilled that did not involve patient care. The Respondent could also have made such an offer of employment on the basis of random blood testing for alcohol as had taken place in the past. We found there was some chance they may not have dismissed him. The Disciplinary Hearing minutes recorded Mr James as saying: -

> *"The only way to restrict his duties would be to stop his clinical day practice. That would be worse as he would be in a medical environment but unable to practice. He is passionate about doing his job, but he has a lack of insight into his behaviour."*

256) By contrast the Claimant stated in evidence that he would have been willing to work in the Registrations Department. Had the updated report been obtained by the Respondents in accordance with their own internal Illness

Policy and had the Respondent offered to the Claimant other roles that did not involve patient treatment the dismissal of the Claimant may have been avoided.

257) No evidence was advanced by the Respondent of any such roles being considered by them which were non-patient facing. The Respondents asserted throughout that patient safety was their primary concern, yet nowhere did they adduce evidence that they looked into a non-patient facing role for the Claimant.

258) Counsel submitted that with a misconduct dismissal there is no requirement to look for alternatives to dismissal. However, had the Respondents simply treated this as a misconduct dismissal throughout then that submission could stand. However, they did not. Throughout they applied both their Illness Policy as well as their Misconduct Policy, and in reality, they treated the dismissal of the Claimant as arising from both misconduct and illness, but then failed to follow their own procedures and abandoned any attempt to obtain such an updated medical report.

259) On the issue of the failure to disclose the diagnosis of PTSD whilst it did fall within the definition of examples of gross misconduct, i.e., a serious breach of a professional code of conduct, in this case the GMC Policy, we could not conclude a two-month failure to disclose it, as opposed to an absolute failure to disclose it, could amount to gross misconduct. We found that no reasonable employer within the reasonable band of responses would have dismissed an employee for this as a standalone act of gross misconduct. If the Claimants mental illness was considered, as case law has established it should have been, and in accordance with the case of Halton Borough Council and Hollett referred to above, then taking that into account we found it would not have been within the reasonable band of responses to dismiss for this. It is not as if the Claimant tried to hide his diagnosis indefinitely and he did voluntarily tell his employer about it at the meeting in January 2017. The Claimant was seriously unwell with PTSD and was living in a state of fear of Mr Sofat and others who he thought were trying to get rid of him.

260) We also had regard to the case of City of Edinburgh Council v Dickson EATS 0038/09. In this case the EAT upheld an employment tribunal's decision that D's dismissal for watching pornography on a school computer was unfair. His employer had rejected his claim that his behaviour was the result of a hypoglycaemic episode caused by his diabetes without investigating or understanding his medical condition. This has striking similarities with this case where the Claimant asserted his PTSD triggered his drinking. There was no investigation of this assertion by the Claimant, that his PTSD triggered his drinking in January 2017, and it was simply rejected out of hand by the Respondent and no medical investigation took place into this whatsoever. It was a central plank of the Claimants cross-examination that an updated report from an expert on PTSD should have taken place prior to dismissing him and the Respondents failed entirely to do this.

261) Recent case law has moved away from the distinction between a finding of Unfair Dismissal on procedural grounds as opposed to dismissal on substantive grounds such as in Gover and ors v Propertycare Ltd. [2006] ICR1073, CA; Thornett v Scope [2007] ICR236, CA; Software 2000 Ltd v Andrews and Ors [2007] ICR 825, EAT; and Contract Bottling Ltd v Cave and Anor 2015 ICR146, EAT.

262) While all these cases recognise the remarks made by Lord Prosser in King and ors v Eaton Ltd (No.2) the courts are increasingly drawing back from the view that there is a clear dividing line between procedural and substantive unfairness, and as a result that line is no longer used to determine when it is and is not appropriate to make a Polkey reduction.

263) In King and Ors v Eaton Ltd (No.2) 1998 IRLR686, Ct Sess (Inner House), Lord Prosser observed:

> "[T]he matter will be one of impression and judgement, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been."

264) Whilst it was difficult to say with any, certainty what would have happened if the Respondent had followed its own Illness Policy and, as the Claimant put repeatedly in a broad sense as to the unfair procedure, obtained an experts report on his PTSD prior to dismissing him, we still considered it appropriate in this case to ask ourselves this question and what the chances were of the Claimant being dismissed in any event.

263) We find that had the Respondent obtained such an updated Occupational Health Report including advice on what types of roles the Claimant could carry out having regard to his state of health that the chance of him being dismissed fairly in any event after taking such steps would have fallen to 70% and therefore there was a 30% chance he would have been retained by the Trust and retrained in another non-patient facing role.

265) In reaching this determination we did consider the issue of the Claimants prior expired written warning in 2014 in accordance with the authority in Airbus UK Ltd. v Webb [2008] ICR 561 CA. As the Claimant pointed out that final written warning had expired, and he had submitted himself to random blood tests by the GMC throughout the 18-month period of that warning and did so again throughout the period he was suspended prior to his dismissal in 2019. We did not therefore find that the factor of an expired written warning for an employee with mental illness, but who by the time of dismissal was said to be stable and well again, should have prevented the Respondent considering an alternative sanction to dismissal and found that had the procedure been fairly carried out in accordance with its own policies there was a 30% chance he would have been offered another role in the organisation that was non-patient facing.

266) On the issue of whether the Claimant contributed to his own dismissal we found that such a disabled employee under such fear of his whole future, despite arriving at work drunk, he did not do so intentionally, and this arose from his disability, and so we did not find that he contributed to his dismissal.

267) Accordingly, the Claimants claim for Unfair Dismissal succeeds.

22 June 2023

_____

Employment Judge L Brown

Sent to the parties on: 23 June 2023

GDJ
For the Tribunal Office