



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Muir

**Respondent:** Astra Zeneca UK Limited

**HELD AT:** Manchester

**ON:** 19, 20, 21, 22 & 23  
June 2023, reading 17  
November 2023, 27,  
28, 29, 30 November  
& 1 December 2023,  
deliberations in  
chambers 14 & 15  
December 2023

**BEFORE:** Employment Judge Johnson

**MEMBERS:** Mr B McCaughey  
Ms L Atkinson

**REPRESENTATION:**

**Claimant:** Ms A Gumbs (counsel)

**Respondent:** Mr N J Grundy (counsel)

## JUDGMENT

The judgment of the Tribunal is that:

- (1) The complaint of unfair dismissal is well founded which means that it is successful.
- (2) The complaint of wrongful dismissal/notice pay is well founded which means that it is successful.
- (3) The complaint of disability discrimination because of something arising in consequence of disability contrary to section 15 Equality Act 2010 is well founded which means that it is successful.

- (4) The case will now proceed to a remedy hearing on a date to be advised where the quantification of the claimant's loss will take place and for which a Notice of Hearing will be sent separately to the parties.

## **REASONS**

### **Introduction**

1. These proceedings arose from disciplinary action taken by the respondent in relation to the claimant's conduct and which resulted in his summary dismissal on 11 December 2020.
2. Not surprisingly, this case involves a conduct related unfair dismissal complaint under Part X of the Employment Rights Act 1996 (ERA) and a wrongful dismissal complaint.
3. However, the case also included a section 15 disability discrimination complaint under Equality Act 2010 (EQA), relating to the dismissal and refusal of the appeal against the decision to dismiss. The disability relied upon by the claimant under section 6 EQA, was anxiety and depression.
4. The claimant presented a claim form to the Tribunal on 10 May 2021 following a period of early conciliation with ACAS.
5. The response was presented on or around 15 May 2021 and which resisted the claim.
6. Case management took place before Judge Cookson on 22 October 2021 at a preliminary hearing case management (PHCM), and initially the claim was listed for a preliminary hearing to determine disability, although the respondent subsequently acknowledged the claimant's depression and anxiety amounted to a disability under section 6 EQA on 22 January 2022, while leaving knowledge in issue.
7. Judge Cookson listed the case for final hearing and made appropriate case management orders relating to schedule of loss, disclosure, bundles and exchange of witness evidence.

### **Issues**

8. Judge Cookson was able to identify a final list of issues with the parties at the PHCM and these were outlined in the annex to her Note of PH dated 22 October 2021, (p66-9).
9. Time limits were not an issue as the case related to a dismissal and the complaints were unfair dismissal, wrongful dismissal/breach of contract and section 15 EQA disability discrimination with the sole unfavourable treatment being the dismissal of the claimant.

10. The respondent relied upon conduct as the potentially fair reason for the dismissal in relation to the unfair dismissal complaint.
11. The question of knowledge relating to the disability was another issue and the respondent provided its proposed legitimate aim defence to the section 15 EQA complaint in correspondence at a later date, (see discussion below).
12. Remedy would be dealt with at a separate hearing if relevant.

### **Evidence used**

13. The claimant produced a lengthy witness statement in support of his case and also called Matthew Coath who although now retired, was for many years a union representative working for the respondent.
14. The respondent relied upon the following witnesses and whose evidence was heard in this order:
  - a) Mark Barraclough (former ER Investigation lead UK and investigating officer in this case)
  - b) Ian Bromilow (Senior Director for Product Development and dismissing officer at the disciplinary hearing)
  - c) Helen Boyd (Senior Director in Precision Medicine and Bio Samples and appeal hearing officer at the appeal hearing)
  - d) Helen Smart (Employee Relations Partner and HR advisor following former HR advisor Lesley Bright commencing a period of absence).
15. Documents were provided in two lever arch folders and consisted of 1477 pages including the proceedings, case management orders, policies and procedure as well as email correspondence and documents relating to the disciplinary process. One day's reading time was required on day 1 of the hearing in June 2023, to enable the Tribunal to familiarise itself with the hearing bundle and the witness statement, which were also lengthy.
16. The first part of the hearing involved the Tribunal hearing the evidence of Mr Barraclough and Mr Bromilow and there was insufficient time to hear the remainder of the witnesses. Accordingly, a further hearing date was agreed in November 2023, together with subsequent days for deliberation and a prehearing reading day to ensure that the Tribunal was familiar with the witness evidence previously heard in June 2023.
17. Several additional documents were provided by the respondent at the beginning of the second part of this hearing and which consisted of 31 pages and included an organogram (diagram of relevant chain of management) and table of relevant employee grades, known as the 'Career Ladder'. This bundle was not controversial, and the claimant agreed to its inclusion before the remaining respondent witnesses and then claimant witnesses were heard.

18. The Tribunal would like to mention that both Ms Gumbs and Mr Grundy behaved in a helpful and cooperative way throughout the lengthy process of hearing liability in this case. This helped the Tribunal considerably in allowing the hearing to proceed as smoothly as possible and was particularly welcome considering the first part of the hearing in June 2023 concluding part heard and with many months elapsing before the hearing resumed in December 2023.

## **Findings of fact**

### The respondent

19. The respondent (AZ) is a multi national world leading pharmaceutical company employing thousands employees in the UK across sites primarily in Cambridge and Macclesfield.

20. Given its size, AZ has significant Human Resources (HR) services including Employee Relations (ER) experts dealing with disciplinary and grievance matters and providing advice and support to managers as required. There are also many policies and procedures including:

- a) Employee Improvement Policy (effectively AZ's disciplinary policy pp71-4)
- b) Employee Concerns Policy (effectively AZ's grievance policy pp75-7)
- c) Code of Ethics (pp78-83)
- d) Global Standard on Bullying and Harassment (pp84-5)

The Tribunal noted that none of these documents in the hearing bundle were dated, but presumably they would have been reviewed from time to time. It is understood that individual employees were given training as appropriate in relation to the policies and procedures.

### The claimant

21. The claimant (Dr Muir) commenced his employment with AZ on 5 January 1998. At the time of his dismissal on 11 December 2020, he was employed as an Associate Principal Scientist in the Chemical Development department managed by the Alan Watt (director). More specifically, Dr Muir worked within a team managed by Lyn Powell (Team Manager). At the material time he was employed on a project that was named Capiersatib (Capi), where he held the role of Technical Lead.

22. Dr Muir did not hold a management position within his substantive team in Chemical Development. However, when working on the Capi project, he was responsible for the 'technical' management of the project which consisted of a number of scientists from other teams. However, the actual line management of these other scientists remained with their substantive departments and their individual team managers. Not surprisingly, this could cause issues if disputes arose between Dr Muir and members of his project team and which provides the background to this claim.

The claimant's disability

23. As discussed above, Dr Muir's claim includes a complaint of disability discrimination and by letter dated 25 January 2022, AZ admitted that Dr Muir was disabled by virtue of his depressive illness and generalised anxiety disorder, (p70). However, what remained in issue was the question of whether AZ or its employees had actual or constructive knowledge of Dr Muir's disability during his employment and also, whether he was symptomatic as a result of his disabilities at the material time to which this case relates. Although the question of whether or not Dr Muir was asymptomatic at the material time remains an issue identified by AZ, the Tribunal noted that no positive case was advanced to demonstrate that this was the case.
24. The medical report of Dr Gowrisunkur (consultant psychiatrist) dated 18 April 2021 provided a history of Dr Muir's mental health condition, (pp1000-1011) and several witnesses were referred to this report during the hearing. Mr Grundy in his final submissions did raise the question of whether Dr Gowrisunkur should have been called to give evidence in this case, especially as the report was produced following the dismissal by Dr Muir prior to his appeal. However, the Tribunal noted that the available GP records (pp1190-1237), made reference to the following relevant events:
- 29 September 2014 – stress at work
  - 3 November 2017 – mixed anxiety and depressive disorder
  - 1 November 2018 – stress at work, going on past 2 to 3 months...reached breaking point.
  - 12 November 2018 – telephone encounter, doing OK with 50mg ceraline and 100mg pregabalin. Throughout November 2018, Dr Muir continued to suffer from anxiety and depression and is referred to Stepping Hill Hospital for his mental health on 23 November 2018.
  - 18 February 2019 – referred to Priory Psychiatry
  - 27 February 2019 – prescribed quetiapine, (a tranquiliser).
  - Throughout 2019 – continuation of anxiety and depression
  - 6 November 2019 – prescription for increased dosage of pregabalin, which is then gradually reduced from 15 November 2019.
  - April 2020 – continued care of psychiatrist and 'weaning regime' for pregabalin continuing to 26 October 2020, when mixed anxiety and depression replaced anxiety NOS? the Tribunal noted that Dr Muir's condition was not subsiding and if anything, it was hardening at the time to which this case relates.
  - During 2021 reference to attendances at psychiatry and mental health clinics.

In accordance with his job role, Dr Muir was entitled to access AZ Advantage which provided certain employee benefits such as access to AXA PPP Healthcare, (pp86-7). He took advantage of this benefit in 2018 in relation to ongoing mental health problems and the AXA letter dated 18 December 2018 explained that funding for further treatment was being withdrawn because '*[a]s part of the Terms and Conditions agreed by Astra Zeneca, your plan unfortunately does not cover chronic conditions*'. (p93). This appears to have been prompted by Dr Gowrisunkur recommending further treatment. In

response to AXA's decision, she wrote a letter to them on 30 November 2018 expressing her surprise that they were proposing to withdraw funding, (91). Her focus was upon providing symptom relief for Dr Muir and she recommended that funding continuing at least until the end of the year so that she could *'finalise his medication regime'*.

25. Dr Muir had a chronic mental health condition and Dr Gowrisunkar had diagnosed him with a depressive illness and generalised anxiety disorder, having first seen him on 13 December 2017 and identifying his chronic condition during 2018. This was recognised by his company health provider AXA which resulted in an ending to their funding.
26. The Tribunal accepts on balance of probabilities that the condition continued and it affected him throughout the material period in this case. While it was not surprising that a condition of this nature had ups and downs. This was supported when Dr Muir privately instructed Dr Gowrisunkar on a single occasion following the withdrawal of funding by AXA, but it was a long term condition which could reemerge at any time, especially when triggers such as him being placed under significant stress arose.

#### Knowledge of the claimant's disability

27. On 19 November 2018, Dr Muir was seen by Dr Gowrisunkar and she reported that he had had a *'traumatic month in the context of a flare-up at work which was very stressful...he felt that he could not carry on and was very distressed'*, pp1004-5). At this point, Dr Muir was line managed by David Klauber and following this incident line management was transferred to Lyn Powell.
28. He was absent from work for 3 weeks and Med3 fit notes were submitted on 1 and 15 November 2018 describing the reason as *'Anxiety NOS' (i.e. Not Otherwise Specified, pp912-3)*.
29. Dr Muir gave convincing evidence about his perceived treatment by Mr Klauber and reference was made to 2018 End of Year Review, which was an appraisal completed by Mr Klauber, (p95) at the time of the change of management. It is fair to say that this document does raise the question of Dr Muir's behaviour noting that he could be seen as *'defensive'* and that he should *'[a]dopt a player attitude.'* However, while critical of him in that way, it also expressed concern regarding the impact this behaviour could have on his *'wellbeing'*. This demonstrated management awareness of Dr Muir's mental state and the way in which his behaviour could adversely affect it.
30. The Tribunal finds on balance of probabilities that Lyn Powell who was Dr Muir's next line manager was aware of the previous incidents as this was connected with him becoming Dr Muir's line manager. While the 3 week absence might appear to a line manager as an isolated incident, the Tribunal noted that Mr Powell had more significant concerns about Dr Muir's ongoing mental health issues. In an interview with Mr Barraclough on 18 August 2020, Mr Powell stated that *'he was a broken man when he joined my team'* (at the beginning of 2019), (p307).

31. Indeed, during Mr Brimelow's interview with Stefan Taylor on 18 November 2020, Mr Taylor when asked about events in June 2020, said that he had expressed concerns about Dr Muir's mental health and wellbeing, to which Mr Powell replied *'I am not managing a mental health concern.'* While it was not clear to the Tribunal precisely what was meant by Mr Powell's comment (and Mr Bromilow confirmed that he did not investigate this matter), we were concerned that Mr Taylor was troubled that there may be a mental health issue affecting Dr Muir during the summer of 2020.
32. On 15 July 2020 at 08:54, Mr Powell emailed David Klauber (copying in two other members of staff) and said that he was *'...having some issues with Dr Muir atm...[b]ehaviours issues again and his mental health – bit worrying,'* (p205-6). There was a brief acknowledgement from Mr Klauber at 08:58 which did not query the subject matter and did not express any surprise. Instead, he simply said he would try to help. The Tribunal found this was evidence that Mr Klauber was well aware of Dr Muir having mental health issues and this would be consistent the End of Year Report described above. Mr Powell was also worried about Dr Muir's behaviour and the Tribunal accepts that this was not a minor concern on his part. He sent a further email later that day which provided further insight into his perception of Dr Muir at that time:

*'Hes been "good" overall this past 18 months, he's shown flashes of alternating into "mr Hyde" mode now and again but recently hes been mainly in Hyde mode.*

While the use of the term 'Mr Hyde' might be seen by some to be unfortunate, it demonstrated an awareness of a tendency for Dr Muir's persona to change into something more disturbing than his usual demeanour and it developing to become the normal personality state in 2020. This was of course at the relevant time to which this case relates.

33. Also on 15 July 2020, Mr Powell sent an email to the Senior Director (and his line manager) Alan Watt, (pp210-11). This email related to the incident which will be discussed below, and which led to the disciplinary action against Dr Muir. Mid-way through this lengthy email he said the following:

*'The **behaviours** is the issue here and I had a brief chat F2F [understood by the Tribunal to mean Face to Face] with James [Dr Muir] yesterday and Im worried about him tbh [to be honest] – he's become obsessed with people not doing their job about everything falling to the chemists to pull together and people not being held accountable etc and yes, in many respects he is right and he has a good point with all of these issues – you cannot labour the issues though or it will be [sic] become a battle with yourself and the "rest of the World" and I think that's what happened.*

*I'm sure at some point he'll say he's not been supported -Im certain that I (we?) could have done more but I have always supported his technical ideas and I have acknowledged and openly praised the results from the people working on some of these stages including him....I have tried hard to help him*

*since he joined my Team at the end of 2018 – he had improved enormously, he has recently moved backwards though and Im struggling with it now.'*

34. Having considered the email correspondence involving Mr Powell as Dr Muir's line manager from around the end of 2018, the Tribunal finds on balance that he and indeed other relevant managers were aware that he had ongoing mental health issues and a vulnerability to becoming stressed and anxious in the workplace.
35. Mr Powell and his colleagues were witnessing and discussing these described behaviours during the summer 2018 and Mr Powell was clearly expressing his concerns about Dr Muir's health, which was something that both he and Dr Klauber had been aware of for some time. Clearly other managers and in particular Mr Taylor and Mr Watt were also becoming aware of Dr Muir's mental health issues. This would have been a good time to refer Dr Muir to OH to see what support could be provided and even if Mr Powell did not wish to suggest this, it is surprising that Mr Watts as the more senior manager did not seek to support Dr Muir, his managers beneath and the employees within the teams.

#### The disciplinary investigation

36. On 17 July 2020, Mr Watts raised a 'ticket' with HR entitled '*Potential Bullying and Harassment in the Workplace*'. HR Manager Lesley Bright replied the same day to Mr Watts and explained that Mark Barraclough would be appointed as investigating officer. He was newly appointed and had been given responsibility for carrying out all investigations in AZ UK relating to bullying and harassment.
37. Once Mr Barraclough introduced himself to Mr Watts on 17 July 2020, Mr Watts replied a few days later on 23 July to explain that '*I may be approached by the individual who is being accused (which the Tribunal understood to be Dr Muir) in this process for information – should they be told about the allegations or is it not appropriate at the moment?*' The Tribunal noted that he did not ask whether it was appropriate for Dr Muir to attend meetings with the complainants while the investigation was taking place.
38. Mr Barraclough responded by advising Mr Watt the same day that '*[u]nless he asks I would not mention that complaints have been made yet, as it might stress him more than is needed.*' This correspondence showed that management were at this point aware of the stress that might be placed upon Dr Muir by being made aware of these allegations, but perhaps more importantly, no steps were taken to ensure that he did not meet with the complainants before the investigation was complete or alternatively to consider whether this was a disciplinary matter where suspension would be appropriate, (pp1260-2). While we acknowledged Mr Barraclough's evidence that AZ were reluctant to suspend because of the impact it could have on the person under investigation, there was no consideration given as to how Dr Muir should be managed while the investigation progressed given the stressful matters it related to, (other than to stay silent for as long as possible).



39. As will be discussed below, a further meeting with those involved took place on 30 July 2020, with Dr Muir oblivious to the management concerns regarding his previous meetings. Not surprisingly, this meeting was extremely difficult and his behaviour took a similar form to those earlier meetings which gave rise to the investigation. Despite these events, Mr Watt asked Mr Barraclough how the investigation was progressing by email on 6 August 2020 and yet made no mention of that meeting even though it would have been highly relevant to the investigation, (1260).
40. Mr Barraclough emailed Ms Bright on 20 July 2020 at 09:43 to explain what he had learned about the bullying and harassment allegations, made against Dr Muir and identified that there were three complainants, namely Rachel Sullivan (Senior Scientist), Andrew Phillips (Associate Principal Scientist) and Amy Robertson (Principal Scientist – Crystal and Particle Science), (p1255-6). He believed that Mrs Sullivan and Mr Phillips would raise a formal complaint, although he was less certain about Ms Robertson. He noted that Mr Watts understood the complaints related to poorly worded emails, raised voices and difficulties working together, which was impacting on the project they were working on. Mr Watt also told him that he believed the three complainants had raised the matter individually rather than *'ganging up on James'*. He then emailed a colleague the same day asking that they approach Mrs Sullivan's manager Stefan Taylor to see whether she wished to raise a formal concern and made a similar request in relation to Mr Phillips' manager Lucie Miller Potucka.
41. The Tribunal understood that ordinarily concerns raised by employees would be dealt with under the Employee Concerns Policy, (p75-7). This involved an informal step 1 complaint to a line manager, a formal step 2 complaint in writing (if step 1 exhausted or matter particularly serious), with the possibility of an appeal if a complainant was unhappy with the outcome. This process appeared have an emphasis on problem solving and did not appear to involve any disciplinary action. However, this policy was not used in Dr Muir's case. Mr Barraclough confirmed in his evidence that no written complaints were actually received from any of the complainants and the matter was driven by Mr Watts.
42. Instead, Mr Barraclough decided that AZ should instead use the Employee Improvement Policy. Despite its innocuous title he acknowledged that this was the AZ disciplinary policy which could impose sanctions up to and including summary dismissal, (pp71-4). The policy also comprised of a number of stages, with step 1 being an informal discussion with the person under investigation and their line manager. A formal investigation under Step 2 was the step for more serious matters which would involve a meeting where a union representative could attend and in serious cases, suspension could be imposed. Step 3 would be used where it was not possible to resolve the concern informally or where the investigation under Step 2 revealed potential misconduct requiring a formal improvement meeting. There was an emphasis upon employees being able to have representatives present and to have the right to respond to allegations. Examples of misconduct were identified and of relevance were failures to follow the Code of Ethics and a lack of cooperation

with colleagues. Examples of gross misconduct which were relevant included bullying and harassment. If allegations were proven, sanctions ranged from improvement notices which appeared to be analogous to warnings (verbal, written and final) to dismissal with sanctions short of dismissal also being described. A right of appeal was allowed for employees unhappy with the outcome of the process.

43. Mr Barraclough did not believe that an informal step 1 stage was appropriate in Dr Muir's investigation. His reasoning for deciding to proceed directly to step 2 was because of this belief that the allegations were of a more serious nature and because he had been made aware that more than two people had said they felt bullied. This was despite the Tribunal being informed that none of these complainants had raised a formal complaint (thus making it impossible to use the Improvement Policy) and having failed to explore whether the matter was something which should be explored on an informal basis in order that some context could be identified to matters under investigation. As it was, he began a formal disciplinary process against Dr Muir without any formal concern being raised.
44. Mr Barraclough began his investigation by interviewing witnesses, beginning with Mrs Sullivan on 29 July 2020, (222-8). The Tribunal were surprised to note that despite these steps taking place, Mr Barraclough confirmed that Dr Muir was not actually informed of the *'internal investigation in response to concerns regarding inappropriate workplace interactions'* until an email was sent to him on 18 August 2020 at 20:17 (well into the evening that day). However, equally surprising was that this letter did not actually inform Dr Muir that he was being investigated under the Employee Improvement Policy for concerns relating to bullying and harassment, nor did it mention the potential sanctions that might arise from this process. In the meantime, Mr Barraclough had interviewed as part of his investigation, seven witnesses who were all the key witnesses and included Mrs Sullivan, Mr Phillips and line managers.
45. As we have mentioned above, this investigation was commenced by Mr Barraclough without any formal complaint documents to assist him in what he was investigating other than the vague comments made by Mr Watts in his initial emails of instruction.
46. Ms Anna Jawor Baczynska who was interviewed on 6 August 2020, raised complaints about Dr Muir to Mr Barraclough.
47. Mr Barraclough produced his report into the allegations on 2 October 2020 and emailed it to Ms Bright in HR, (pp1277 and 1278 to 1305). He identified seven concerns having been raised and that four of these concerns were supported by the evidence he had obtained. His opinion was that the conduct in question raised concerns under the Code of Ethics and the Global Standard on Bullying and Harassment, with his recommendation that the matter should be referred to an Improvement Hearing. Effectively, Mr Barraclough felt that there was a case against Dr Muir which should proceed to a disciplinary hearing.

48. Mr Barraclough also recorded '*counter-concerns*' raised by Dr Muir against colleagues and although they amounted to 15 in number, only one was supported by evidence and he found that no further action should be taken.
49. The report considered each concern in turn and summarised the relevant evidence obtained, an analysis of that evidence and a recommendation. Concerns 1, 2, 4 and 5 were identified as having sufficient evidence to support action being taken. Concern 6 was found to have sufficient evidence *in part*. A conclusion was provided together with details of mitigation including a '*lack of engagement*' on the part of Ms Sullivan which placed a greater burden upon Dr Muir and that bullying, and harassment training was not provided to him until 23 July 2020.
50. The Tribunal acknowledges that the report was detailed, and Mr Barraclough had put a lot of effort and time into carrying out the investigation. However, he displayed a lack of curiosity in relation to some of the matters which arose from his interviews of witnesses. An example of this is when he interviewed Mr Powell on 18 August 2020 and at the end of the interview, Mr Powell described Dr Muir as being '*...a broken individual when he joined my team.*' (p307). This was an obvious reference to Dr Muir's mental health and yet, there appeared to be no exploration by Mr Barraclough concerning this issue. Under cross examination, he did say that '*...if I had been put on actual or constructive notice of mental health concerns [regarding Dr Muir's conduct] I would have considered a referral to OH*'. Mr Powell's comments do appear to amount to at the very least, constructive notice of mental health concerns and yet Mr Barraclough appeared to do nothing. The interview note on p307 suggests that Mr Barraclough did not even consider it necessary to ask further questions of Mr Powell on this matter, which the Tribunal finds very surprising.
51. Mr Barraclough sent a separate letter to Dr Muir on 2 October 2020 and enclosed his findings in relation to the counter allegations made by him and which he raised during the investigation process. He confirmed that there was insufficient evidence for 14 of the allegations and that while the one remaining allegation was supported by evidence, it did not amount to a breach of policy and did not warrant any action being taken. (pp560-570).

### Disciplinary Hearing

52. Once Ms Bright had the investigation report, she informed Mr Bromilow that he would be acting as the disciplinary hearing officer. Dr Muir was also provided with a copy of the investigation report into his conduct. Dr Muir had joined a union at this point and Mr Coath was appointed to support him. On 12 October 2020, Ms Bright informed both Dr Muir and Mr Coath of Mr Bromilow's appointment. (p679)
53. A letter was sent by Mr Bromilow to Dr Muir on 13 October 2020 inviting him to a formal hearing on 16 October 2020. He was informed that due to the ongoing Covid pandemic, the hearing would take place remotely, but that he could still be supported by a union representative. The letter explained that the hearing would take place under the UK Improvement Policy and would consider the following allegations:

- a) repeated inappropriate conduct toward Rachel Sullivan which amounts to bullying and harassment.
- b) Repeated inappropriate conduct towards Anna Jawor Baczynska which amounts to bullying and harassment.
- c) Inappropriate conduct towards Amy Robertson.
- d) Inappropriate conduct during a team meeting.
- e) Unprofessional/inappropriate business emails to Andy Phillips.
- f) Excluding one or more key people from the AZ 5363 project team from discussions/information sharing with Dottikon [the Swiss company who carried out the crystallisation work which Ms Sullivan did not complete while on the project].

It was noted that Mr Bromilow would consider whether these allegations occurred as alleged and if so, whether they breached the Code of ethics and Standards on Bullying and Harassment. He reminded him that if the allegations were found to be proven, they could amount to gross misconduct and a possible outcome was dismissal. He is also confirmed that Dr Muir's appeal against the findings in relation to his counter complaint would also be considered at this meeting. (pp687-8).

54. There was some additional evidence received by Mr Barraclough following his completion of the investigation. These were shared with Dr Muir, who requested that the disciplinary hearing be delayed so that he could consider this evidence and a new hearing date was arranged for 22 October 2020.
55. The disciplinary hearing proceeded on 22 October 2020 and Mr Bromilow chaired the meeting, with Ms Bright providing HR support and a note taker being present. Dr Muir attended with Mr Coath supporting him. Dr Muir provided background information and was questioned by Mr Bromilow. Then allegations were then considered including Ms Sullivan's role in the project, the meeting on 4 June 2020, Dr Muir's alleged behaviour towards Ms Robertson, a meeting on 9 July 2020, before the hearing ran out of time and it was agreed that it would resume on 2 November 2020.
56. On 2 November 2020, the hearing resumed as planned and the further events were considered in relation to the allegations, beginning with 19 June 2020 meeting (which was briefly considered), the meeting dated 9 July 2020 and concluding with the meeting on 30 July 2020. The hearing then moved on to consider what were described as 'New Concerns' and which included Dr Muir's argument that he did not have management support at the time from Mr Powell and Mr Watt. The meeting then concluded, and Mr Bromilow decided that he needed to interview witnesses in relation to matters raised by Dr Muir during the two hearings. He interviewed 6 witnesses (Mr Watt was interviewed twice), but he was unable to interview Ms Jawor-Baczynska because she was unwell.
57. Following his deliberation, Mr Bromilow arranged a meeting to take place on 11 December 2020, in order that he could deliver his decision to Dr Muir, (p753). The Tribunal noted that Mr Bromilow gave evidence which asserted that Dr Muir '*...displayed behaviours*' during the disciplinary hearing meetings

which *'...supporting the findings and outcome being delivered.'* This effectively related to Mr Bromilow's observation of *'Dr Muir's ability to stay calm was limited.'* Accordingly, the Tribunal accepts that Dr Muir's behaviour during the hearing was a material factor in Mr Bromilow reaching the decision to dismiss him. There was no evidence that he considered Dr Muir's mental health and whether this was a factor in how he behaved when under stress, such as would be the case at a disciplinary hearing. Mr Bromilow had interviewed Stefan Taylor (Ms Sullivan's line manager) on 18 November 2020 and Mr Taylor specifically mentioned *'I expressed concern with JM's mental health and well being'*. This was a surprising omission on Mr Bromilow's part, especially as he earlier interviewed Mr Powell the same day and this witness had previously made reference to Dr Muir being *'a broken man'* in the original interview with Ms Barraclough during the investigation, (pp724-8).

58. The decision of Mr Bromilow was delivered at a meeting held remotely on 11 December 2020 as arranged, with the same persons attending before and Dr Muir was once again supported by Mr Coath. Mr Bromilow read through his findings and discussed each concern/allegation with those present and following each finding, there was some discussion with Dr Muir. At times the meeting became quite heated. Mr Bromilow then moved on to a discussion regarding his findings and his belief that Dr Muir in behaving the way that he did, showed a lack of understanding of the Code of Ethics and that his conduct towards Ms Sullivan and Ms Jawor-Baczynska met the definition of bullying and harassment. He found that this amounted to gross misconduct, and he decided that the correct sanction was summary dismissal.
59. Mr Coath made his feelings very clear at this meeting and was demonstrably shocked with the decision to dismiss Dr Muir. The Tribunal noted that the following paragraph in the hearing note, provided a good summary of what had happened in relation to Dr Muir:

*'...probably pointless me saying this, but the thing that is very evident, when you boil it down, it's a couple of meetings and frustrations on JM part. I'm sure he has said over and over again he has been frustrated that not [sic] work has been getting done. A lot of this has been invisible to us, now we're bringing in the COVID thing. JM has had no prior issues, no warning, this is straight to dismissal. This does not feel right LB [Ms Bright], this is not how the AZ process should work.'* (p828).

Mr Bromilow in his evidence said that he did consider alternative sanctions but concluded that Dr Muir's behaviour, (including that witnessed in the disciplinary hearing), *'...rendered his ongoing employment untenable'*. He said that *'I didn't expect he would be able to return to the workplace and refrain from doing it again.'* However, there appeared to be no consideration of the reasons behind the behaviour and the impact of any mental health issues, which he should have been aware of at the time he reached his decision.

60. A formal dismissal letter dated 18 December 2020 was sent to Dr Muir and which explained the outcome of the disciplinary process and summarised the allegations and findings made. In this letter he argued that he had considered

whether ‘...the significant mitigation and concerns put forward by you should have a bearing on the outcome.’ Mr Bromilow felt that this did not excuse the behaviour alleged. However, he also mentioned that ‘...the events of this case were not foreseeable by line management and hindsight cannot be used to substantiate that the outcome would have been different had line managers intervened earlier.’ The Tribunal would once again note that the investigation by Mr Barraclough and interviews carried out by Mr Bromilow would have revealed real concerns on the part of management before the incidents took place (which were the subject of the disciplinary hearing), concerning Dr Muir’s mental health. While the behaviour witnessed by Dr Muir’s colleagues during the meetings in the summer of 2020 would have been unacceptable and intimidating, there seemed to be a complete ignorance on the part of Mr Barraclough and Mr Bromilow as to the impact of mental health issues on Dr Muir’s behaviour and the reaction to the delays in the completion of the project which was causing him a great deal of frustration. (pp841-843)

61. The Tribunal also noted that although there were six allegations made against Dr Muir at the disciplinary hearing and while ‘*Inappropriate conduct during a team meeting*’ could be related to allegations involving named individuals, there seemed to be little mention of the allegations made against him in relation to inappropriate emails to Mr Phillips and excluding key people from discussions with Dottikon. Taking into account the sanction being imposed which was the most severe available to Mr Bromilow, his decision did appear to the Tribunal to be incomplete. Considering the detail of the findings which were made, it is surprising that the decision did not include his view concerning all of the allegations made.
62. The letter concluded confirming that the final date of employment for Dr Muir was 11 December 2020 and that he had a right of appeal, (p843).

### The appeal

63. Dr Muir appealed the decision of Mr Bromilow and provided his detailed written grounds of appeal in a document sent to Ms Bright on 8 January 2021, (pp857, 858-889).
64. Helen Boyd was appointed as the appeal hearing officer and she confirmed in evidence that although she had previously dealt with disciplinary matters as a manager, Dr Muir’s case was the first appeal that she had heard.
65. Surprisingly, Ms Boyd decided to speak with Mr Bromilow on two separate occasions to discuss the case with him. She said it was simply for the purpose of obtaining background concerning the disciplinary to date and the technical aspects of the area of work where Dr Muir and his colleagues worked. Mr Bromilow’s evidence was that the meetings took place, and he provided her with ‘...an overview of my findings.’ It is understood that although HR were not present at the first of these two meetings, they had a representative present at the second meeting.
66. There was a handwritten note included within the bundle which was entitled ‘*Handover to Helen S as Lesley...*’ This appeared to mean Ms Smart taking

over responsibility of the case from Ms Bright who had begun a period of long term absence. However, when questioned during the hearing, Ms Boyd confirmed that it was her handwritten note and Ms Smart confirmed this to be the case. Accordingly, it was a record of Ms Boyd's thoughts on 18 January 2020. Two references are made to Dr Muir's mental health. A further note asked the question '*...can we stand the red face test?*' The Tribunal understood from the evidence heard, that this was AZ concept concerning the risk of embarrassment to the company arising from Dr Muir's disciplinary process, (1357-58).

67. Ms Smart when asked whether these meetings were normal, she replied '*occasionally*', but acknowledged that it fell outside of normal AZ practice and that neither Dr Muir nor his trade union representative were informed of these 'pre-meetings'. Management did not appear to show any concern for these meetings taking place, whereas Mr Coath was clearly very unhappy with what had taken place and said that had he been aware of what was happening at the time, he would have challenged Ms Boyd given that she was appointed as an independent appeal. The Tribunal were surprised by Ms Boyd's actions and lack of awareness, given the impression that such a meeting would reasonably give to any objective observer as to the apparent fairness of the process.
68. Ms Boyd did agree to treat the appeal as a complete rehearing of the disciplinary meeting, rather than simply consider the individual grounds raised by Dr Muir. This gave her the opportunity to address any of the problems arising from Mr Bromilow's decision that she might identify, (pp1135). She did take into account mitigation including Dr Muir's long, unblemished service and experience as a technical lead.
69. In the appeal hearing note of the appeal which took place on 25 January 2021, Mr Coath clearly stated Dr Muir's history of mental health issues and anxiety and failure on the part of management to act, despite having had knowledge of these issues for some time. Ms Boyd confirmed in reply that these comments would be '*...duly noted*', (p924).
70. Ms Boyd concluded the appeal hearing on 25 January 2021, but like Mr Bromilow, decided to carry out further interviews taking into comments which arose during this hearing. This included Mr Powell on 29 January 2021, and she specifically asked him about whether he was aware of mental health issues when Dr Muir joined his team in 2020. Mr Powell replied, '*not as such, no*'. This was a very odd answer to give considering what he had said previously to Mr Barraclough during the original investigation and is wholly contradictory. Moreover, it contradicts the answer given by Mr Taylor to Mr Bromilow and that statement would have been available to Ms Boyd. It is not clear why he gave a different answer. Although Ms Boyd did explore this matter a little further with Mr Powell, she did not challenge about other contradictory evidence which was unfortunate given the decision that she was considering at the appeal, (p929).
71. The additional witness evidence obtained by Ms Boyd was shared with Dr Muir before she concluded her decision, and he provided a lengthy response

in reply. In relation to questions surrounding his mental health he described having had many conversations with Mr Powell *'about my state of mental health and what I felt caused it.'* He also mentioned that he was receiving ***'regular professional treatment in this regard'*** [Dr Muir's emphasis], (p939). Medical reports from Dr G were provided to Ms Boyd in advance of her making her decision in the appeal.

72. On 24 May 2021, Ms Boyd emailed Dr Muir enclosing her decision letter of the same date. She summarised in her email that she had decided to uphold Mr Bromilow's decision to dismiss him for gross misconduct, (p1168).
73. The appeal decision letter was four pages in length and followed a familiar format by summarising the decision made and the grounds of appeal, with each ground being considered in more detail. She determined that the sanction was not too harsh and a lesser sanction from dismissal was not appropriate. She acknowledged the grounds put forward including a lack of support and mental health issues but did not go so far as to accept that this influenced his behaviour. She noted the grounds of mitigation and explained that she had completely reheard the evidence, but upheld three allegations made against Dr Muir, namely the meetings 4 June (involving Sullivan), 9 July (involving Jawor-Baczynska) and 30 July 2020, (everybody in the team). She determined the allegations relating Ms Robertson and Mr Phillips as being proven but described them more as occasions of misconduct rather than gross misconduct, which was applied to the three meetings in July 2020.
74. In relation to Ms Boyd's consideration of the medical evidence, she said that: *'...the medical opinion does support that your conduct during the period of June to July 2020 was materially impacted by your underlying mental health condition.'* (p1171).
75. The Tribunal understood that the opinions under consideration by Ms Boyd included the draft medical report of Dr Gowrisunkur (referred to above in relation to disability and knowledge), dated 18 April 2021, (pp1000-1011). She did acknowledge in her report that it:
- 'It is more difficult to link these issues to the timeline of the complaint, i.e., between June and July 2020 as when Mr Muir was seen in my outpatient clinic, he reported feeling well in himself from the point of view of the depression and anxiety.*
- However, his underlying vulnerability to stress would have continued to operate as would the underlying dynamics of being unable to manage uncertainty and his tendency to take on too much responsibility and to try to fix things in this case to take excessive responsibility for the project's success and for his colleagues' work and contribution which would have resulted in the aspects of his behaviour which led to issues with his colleagues.'* (p1007).
76. She went on and was of the opinion that *'...on balance of probabilities, it is likely that the Anxiety Depression and long-term vulnerability to stress as well as the coping strategies deployed by Mr Muir i.e. a tendency to take on too much responsibility for the actions of others, to ensure that everything worked*



*and to fix problems would have magnified the perceived negative impact of Mr Muir's view that his colleagues were not contributing effectively or sufficiently.'* (p1008).

*Moreover, 'In my opinion, it is highly likely that Mr Muir's condition will have had a detrimental impact on his ability to manage interpersonal interactions and to register any breaches of an appropriate interpersonal line for the reasons stated above ie*

*The effects of depression and anxiety  
The effects of high levels of stress'.*

This medical evidence was available to Ms Boyd when she was considering her appeal decision and yet, her brief consideration of it as described in the appeal decision letter, failed to take account of the serious grounds of mitigation identified by Dr Gowrisunkur and she failed to address whether the disciplinary process arose from circumstances where a referral to Occupational Health (OH), might have been a more appropriate to take.

77. Ms Boyd also produced a more detailed 'Rationale' document, which was produced internally for management to explain her findings and she also made recommendations which appeared to be 'learning points' for future management of employee relations, (1134-1158). She made three recommendations relating to the resourcing of projects, better management support for employees and workplace training for employees using inappropriate comments relating to mental health issues. This last point was particularly interesting because Ms Boyd made reference to the term '*Mr Hyde*' being used in relation to Dr Muir. The Tribunal concluded on balance of probabilities that Ms Boyd would have seen the email sent Mr Powell to Mr Klauber on 15 July 2020, (p205). This email was sent at the time when the meetings were taking place which became the subject of the disciplinary investigation and Mr Powell was clearly expressing real concern about Dr Muir's mental health and that at that time '*...he's been mainly in Hyde mode*'. The Tribunal found that this email is at odds with Ms Boyd's conclusion reached in her appeal concerning the impact of Dr Muir's mental state in relation to the conduct under investigation.

## Law

### Disability (section 6 EQA)

78. Section 6 of the Equality Act 2010 (EQA), provides that a person has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities. Section 212 provides that 'substantial' means 'more than minor or trivial'. Schedule 1 of the Act provides that the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. An impairment is to be treated as having a substantial adverse effect on the ability of the person

concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect.

Discrimination arising from a disability (section 15 EQA)

79. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.
80. Ms Gumbs reminded the Tribunal of the relevant provisions of the Equality and Human Rights Commission (EHRC), Code of Practice on Employment.
81. Ms Gumbs referred to City of York Council v Grosset 2018 ICR 1492 in her submissions. The Court of Appeal held that where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to unfavourable treatment under S.15, even if the employer did not know that the disability caused the misconduct. The causal link between the 'something' and the unfavourable treatment is an objective matter that does not depend on the employer's knowledge.
82. She also referred to Baldeo v Churches Housing Association of Dudley & District [2019] UKEAT/0290/18/JOJ, where it was determined that the 'something' arising in consequence of a disability only has to have a significant influence rather than a sole or principal cause.
83. Concerning, the question of knowledge, she referred to the case of Reynolds v CLIFIS (UK) Ltd [2015] ICR 1010 CA and that those responsible for the alleged discrimination are the Tribunal's principal concern when considering knowledge of disability. In this case, she referred to Brimelow as dismissing officer and Boyd as appeal officer.
84. Mr Grundy referred to the case of Pnaiser v NHS England and Coventry City Council [2016] IRLR and the correct approach set out by Simler J, to be adopted by Tribunals when determining section 15 claims.
85. Mr Grundy also made reference to Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 and the guidance that the Tribunal should first of all consider the 'something' relied upon before considering whether the 'something' arise in consequence of a claimant's disability when considering a section 15 EQA complaint.
86. He noted that in Kimathi and others v The Foreign and Commonwealth Office [2018] EWHC 2066 (QB), Stewart J held that memories of witnesses are inherently unreliable.

Unfair dismissal (ERA)

87. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).
88. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.
89. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.
90. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, the Tribunal must consider a threefold test:
- a. The employer must show that he believed the employee was guilty of misconduct;
  - b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
  - c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
91. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.
92. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within

the range of reasonable responses that a reasonable employer might have adopted.

93. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430.
94. In respect of certain claims, such as unfair dismissal and breach of contract, Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer or employee has unreasonably failed to comply with the Code of Practice, it may, if it considers it just and equitable in all the circumstances to do so, increase or reduce compensation awards by up to 25% (this does not apply to any Basic Award for Unfair Dismissal).
95. The 'Polkey' principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects, then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact.
96. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.
97. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

#### Breach of contract/wrongful dismissal

98. Contract complaints can be considered by the Tribunal in accordance with the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1984, if the claim arises out a termination of contract of employment. Statutory rights to notice pay upon termination are provided by section 86 Employment Rights Act 1996. If there is a breach of contract in respect of notice pay, a claimant may be able to recover the payment he should have received, unless he has committed gross misconduct, in which case a dismissal can usually be effected by the employer summarily.

#### **Discussion**

##### The question of disability

99. For the avoidance of doubt, there has been no dispute throughout this hearing that Dr Muir was disabled within the meaning of section 6 by reason of his depressive illness and generalised anxiety disorder.

Discrimination arising from disability (section 15 EQA)

Unfavourable treatment?

100. There can be no doubt that the dismissal relied upon by Dr Muir amounts to unfavourable treatment.

Something arising in consequence of the claimant's disability?

101. *'His dealings with colleagues'* is the 'something' identified within the list of issues.
102. Dr Muir was not a line manager of his colleagues who were working on the Capi project in 2020. He was a technical lead in the project and was line managed in Mr Powell's team. It is fair to say that line management of employees was not part of his normal job description, and he could find it difficult. It is also correct that the Capi project required the involvement of the Crystallisation scientists within the team and Ms Sullivan (who was a Crystallisation scientist) was failing to engage sufficiently with the project. This was causing increasing amounts of stress for Dr Muir as the project moved towards the planned deadline for completion.
103. The medical report of Dr Gowrisunkur dated 18 April 2021 while acknowledging the difficulties in linking the issues under investigation with the Dr Muir's mental health, confirmed his underlying vulnerability to stress and his inability to manage uncertainty in a healthy way. This would result in him taking responsibility for his colleagues' work and, *'...would have resulted in the aspects of behaviour which led to issues with his colleagues'*. The doctor remained of the opinion that Dr Muir had anxiety and depression with a long term vulnerability to stress and that his self imposed coping strategies would significantly contribute to the behaviour which took place at the meetings in June and July 2020.
104. Her conclusion was that it was highly likely that Dr Muir's condition would have a *'detrimental impact on his interactions and to register any breaches of an appropriate interpersonal line'*. She was of the view therefore that by reason of his anxiety and depression, Dr Muir was unaware as to how he was coming across in meetings, (pp1000-1011).
105. Having heard a great deal of evidence in this case concerning the behaviour under investigation, the issue as appeared to be the way in which Dr Muir was speaking to colleagues rather than the actual content of what he said. On balance of probabilities, we accepted that he was talking about technical, and project matters with other team members, but was doing so in an overly forceful way. That is not say it was acceptable behaviour but given Dr Muir's underlying levels of anxiety and depression, aggravated by his frustrations about the project and lack of management support its magnitude was largely connected with his mental health issues rather than something which he could reasonably be expected to control.

106. This means that the way in which Dr Muir was dealing with colleagues in June and July 2020, arose as a consequence of his disability. This disability was something which played a significant role in the way in which he related with his employees while working on the Capi project.

Did the respondent dismiss the claimant because of this thing (i.e. his behaviour towards his colleagues)?

107. The respondent AZ clearly dismissed Dr Muir because of the way he behaved towards his colleagues at the meetings in June and July 2020.

108. In his letter which confirmed that Dr Muir was dismissed dated 18 December 2020, Mr Bromilow determined that Dr Muir's conduct towards Ms Sullivan and Ms Baczynska met the definition of bullying and breached the AZ Code of Ethics. He believed this behaviour constituted gross misconduct and consequently he decided to dismiss him.

109. This decision was confirmed by Ms Boyd in her appeal decision letter of 24 May 2021, and she referred to Dr Muir's inappropriate conduct to Ms Sullivan and Ms Baczynska at meetings on 4 June, 9 July and 30 July 2020.

Was the dismissal a proportionate means of achieving a legitimate aim?

110. The legitimate aim advanced by AZ in Mr Grundy's submissions was 'to ensure that the Code of Ethics and AZ values were followed and respected and also that there was a safe working environment for employees'.

111. This was slightly different wording to that used by his instructing solicitor who sent an email to the Tribunal in accordance with Judge Cookson's case management orders from the PHCM dated 22 October 2021, (p1470). The legitimate aim advanced in this email:

*'The respondent had legitimate aims of:*

- 1. ensuring a safe working environment for all colleagues who should not be subjected to bullying [sic] and harassment; and/or*
- 2. upholding acceptable standards of conduct and behaviour in the workplace.*

*The dismissal was a proportionate means of achieving those aims given the findings made following the disciplinary and appeal hearings.'*

112. Ms Gumbs made her submissions in relation to the original legitimate aim advanced on 22 October 2021, but took no issue with the slightly different version advanced by Mr Grundy in his submissions. The Tribunal took the pragmatic view that in terms of substance there was actually little difference between the wording of the two legitimate aims as they focus upon the same concerns. Moreover, the Tribunal accepts that these were genuine legitimate aims, and it is an essential aim for any employer to provide a safe place of work with employees following an acceptable standard of conduct.

113. In this case, the Tribunal is being asked to consider whether the decision to dismiss Dr Muir can be objectively justified and we agree with Ms Gumbs that this decision must be considered against any other lesser sanctions or management intervention which might have supported the legitimate aim, and which did not involve dismissal.
114. The behaviour under investigation happened over a relatively short period of time beginning at a meeting on 4 June 2020 and ending at a meeting on 30 July 2020. Both Mr Powell and Mr Watts were aware of Ms Sullivan's complaint about Dr Muir's behaviour on 5 June 2020 which was the day after the first meeting took place. There was no reason why these managers could not have intervened at this point. Dr Muir accepted that this incident could have been managed informally under step 1 of the Improvement or Concerns Policy, depending upon whether it was treated as a disciplinary matter or a grievance and whether Ms Sullivan was prepared to put her complaint in writing.
115. Moreover, Mr Powell and Mr Watts were expected under the AZ Global Standard Bullying and Harassment policy to '*deal quickly and effectively with inappropriate behaviour*'. The Tribunal does not accept they took any action following this complaint and this failure to act, allowed the problem to develop. Indeed, on 9 June 2022, Dr Muir expressed his dismay about his issues with colleagues managing crystallisation in an email sent to Mr Watts and copying in Mr Powell. In a long explanation he concluded by asking, '*if you feel something has not been done correctly/in time etc,*' (p177). This would have been a perfect opportunity for these managers to resolve this developing problem. Instead, Mr Watts replied on 17 June 2020 and said he would look to '*set up some time to discuss this with you in detail*'. This represented a real lack of concern or reaction to what was effectively a call for assistance from Dr Muir, (pp186).
116. Mr Taylor gave evidence to Mr Barraclough on 18 August 2020 and explained that on 14 July 2020 following another difficult meeting, Mr Powell arranged a meeting with both him and Mr Watt concerning Ms Sullivan and Ms Jawor Baczynska complaining of Dr Muir's poor behaviours having '*crept in again*'. Mr Powell was reported as saying that he would speak with Dr Muir about his behaviour, but the Tribunal was not taken to any evidence to suggest that this happened, and Mr Powell did not give evidence during the hearing.
117. With all this in mind, a reasonable employer who was investigating these complaints, (but who had not yet engaged with Dr Muir), would not have allowed the meeting on 30 July 2020 to take place. No attempt was made to warn Dr Muir of his behaviour and its impact upon colleagues attending the meeting before it took place. Even if the meeting had been necessary, (and it was not clear that it was), measures could have been taken to ensure that Dr Muir was supported to minimise the impact of his mental health issues when he was placed under stress.
118. Accordingly, the Tribunal finds that while the respondent AZ did have a legitimate aim as described above, they failed to apply it in a proportionate way when deciding to take formal disciplinary action against Dr Muir which resulted in him being dismissed.

Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

119. Mr Powell had actual knowledge of Dr Muir's disability from the moment he transferred from Mr Klauber's team to his at a date which appeared to take place in early 2019. He was interviewed by Mr Barraclough and as already described; he recalled Dr Muir being a '*broken individual*' when he arrived in his team.

120. The Tribunal accepts that from at least the beginning of 2019, management would have been aware of Dr Muir having mental health issues which would have affected him in the workplace and this is reflected in an email sent by Mr Powell to Mr Klauber (the comments about 'Mr Hyde'), Mr Powell and Mr Taylor's discussion in July 2020, (relating to Dr Muir's mental health) and Mr Taylor's acceptance when questioned by Mr Bromilow that on 10 June 2020, he had raised concerns about Dr Muir's mental health.

121. On balance, the Tribunal accepted that AZ knew or could reasonably have been expected to know that Dr Muir had the disability of anxiety and depression from no later than January 2019 and they knew that this remained a problem during the relevant period of June and July 2020.

Unfair dismissal

Initial matters

122. There was no dispute that Dr Muir was an employee of many years' service with AZ and presented his claim in time in accordance with section 111 of the ERA following his dismissal by his employer.

The principal reason – was it potentially fair?

123. AZ have clearly shown that the reason for dismissal is '*conduct*' and this is a potentially fair reason under the ERA. This is not disputed by Dr Muir. The Tribunal is therefore left to decide whether the dismissal was fair in all the circumstances considering the well-established questions to be determined in conduct dismissal cases and as described in the case of *Burchall*.

Was the dismissal fair in all the circumstances?

124. The Tribunal would firstly note that the respondent's management of its disciplinary process was both detailed and allowed sufficient time for reflection by those managers involved at the investigation, disciplinary hearing and appeal stages.

125. There was understandable alarm caused by the complaints about Dr Muir's behaviours and there was a need to take action to resolve the problem as quickly as possible. A complaint was raised by Ms Sullivan to Mr Taylor after the meeting took place with Dr Muir on 4 June 2020. However, no action was considered until 17 July 2020 when Mr Watt raised a bullying and harassment



ticket to HR, (pp1261-2). At this point, further meetings had taken place where concerns had been raised by colleagues about Dr Muir's behaviour.

126. We have already noted above that Mr Barraclough who was appointed the investigating officer, dealt with his investigation under step 2 of the Improvement Policy. This was a formal investigation into a potential disciplinary matter based upon there being more than one person making allegations against Dr Muir. However, neither of the complainants had expressed their concerns in writing in order that he could fully understand the nature of the complaints being investigated. He undoubtedly regarded the matters under investigation as being serious and potentially could amount to gross misconduct with a potential sanction of dismissal being imposed.
127. Given the seriousness of the investigation, it was therefore essential that Mr Barraclough properly investigated all aspects of the case he had taken on, that he made thorough enquiries into Dr Muir's mental health and the impact that it might have had on his behaviour at meetings with colleagues. Despite his confirming that had mental health been an issue, he would have referred Dr Muir to OH, he failed to act upon Mr Taylor and Mr Powell both referring to concerns about Dr Muir's state of mind. Had he taken this action during the investigation, it may well have changed the direction of the disciplinary process and Mr Barraclough conceded in evidence that he could have enquired more into Dr Muir's mental health issues in 2018 and whether it was still enduring and the extent to which this was known by management.
128. As it was, Mr Barraclough completed his investigation and determined that there was a case to answer at a disciplinary hearing for potential gross misconduct in relation to behaviour at the meetings in June and July 2020.
129. There was no doubt that Mr Barraclough carried out a detailed and lengthy investigation interviewing a number of witnesses. However, the Tribunal does not accept that it was thorough because of his failure to make obvious further enquiries regarding Dr Muir's mental health.
130. At the disciplinary hearing, Mr Bromilow also carried out a detailed consideration of the evidence before him. However, despite being made aware by Mr Taylor in person and having read Mr Powell's witness statements, he failed to explore the possibility that Dr Muir's mental state had affected his behaviours which he was considering as amounting to misconduct or not.
131. Additionally, he failed to take account of the fact that despite knowing of the complaints about Dr Muir, a disciplinary investigation having commenced and Dr Muir being unaware of this, management permitted him to chair a meeting on 30 July 2020 when the complainants were present. This could have been construed as management failing in its duties towards all of its employees to provide a safe environment as well as allowing the problem to escalate.
132. There was of course misbehaviour which led to the complaints being brought against Dr Muir and it was reasonable for management to take some sort of action. It was also reasonable for Mr Bromilow to find that some misconduct had taken place following the disciplinary hearing. However, while

he genuinely believed that gross misconduct had taken place in accordance with the findings which he made when he decided to dismiss Dr Muir, the Tribunal finds that this was a belief that could not have reasonably been held, had a proper consideration of the evidence concerning his mental health been considered.

133. For these reasons, the Tribunal cannot accept that the decision to summarily dismiss was a sanction that was within the range of reasonable responses available to a disciplinary hearing manager. The Tribunal has reminded itself of its duty not to substitute its decision in place of Mr Bromilow as dismissing officer but makes its findings on the basis that had he obtained all of the relevant information by making appropriate enquiries before making his decision, it would have no longer been reasonable for him to reach the conclusions that he did.
134. Had this been a case where the employer had previously considered Dr Muir's mental health issues and despite attempting to support him, Dr Muir, continued to behave inappropriately, it may well have been a different situation. But in this case, despite having had a number of opportunities to intervene to moderate Dr Muir's behaviour and/or to provide specific training, appropriate steps were not taken by management before the events which gave rise to the disciplinary process began.
135. Ms Boyd in rehearing the case at appeal, had the perfect opportunity to remedy the earlier errors in this disciplinary process, but despite having the same evidence available to her as Mr Bromilow (together with additional medical evidence), she failed to properly take account of the role that mental health issues played in the behaviour under investigation.

*Procedural fairness and 'Polkey'*

136. In terms of steps taken under the Improvement Policy used by AZ for disciplinary matters, they broadly followed the principles expected of a reasonable employer including an investigation with allegations, a disciplinary hearing with sufficient warning of the allegations and potential outcomes being identified and proper appeal process. Additionally, Dr Muir was allowed to fully participate and provide his version of events and be supported by his union representative, Mr Coath.
137. There was a concern on the part of the Tribunal that Mr Bromilow used Dr Muir's behaviour in the way he participated at the disciplinary hearing to be unreasonable. Even without taking into account the mental health issues which were not properly addressed during the investigation, it should be appreciated that disciplinary hearings where an employee's job is at risk can be incredibly stressful. Given what is at stake, some allowance should be made to take into account the impact that this might have on how an employee reacts and great care should be exercised in seeking to use that behaviour as evidence supporting allegations relating to earlier matters where objectively, the same jeopardy did not arise.

138. Procedurally, there was a genuine concern regarding Ms Boyd having two meetings with Mr Bromilow before she began investigating the appeal and while she may have believed that it did not affect her impartiality, it would not appear so to the objective bystander.
139. The process could have been carried out in a more measured and thoughtful way considering the way in which Dr Muir's mental health was impacting upon his interactions with colleagues and without any support having been provided with AZ. However, if this was the case, the Tribunal does not think that Dr Muir would have been dismissed. This is because once Mr Bromilow identified the mental health issues and the role that they were likely to have played in Dr Muir's behaviour at meetings, he could not reasonably have concluded that he had sufficient awareness to understand how he might react and how his behaviour might have affected others. This was not a case of the inappropriate behaviour being abusive or discriminatory and was instead a forceful outburst by a person experiencing a great deal of anxiety as described by the medical evidence and supported by management concerns raised during the hearing process.

*Uplift/reduction for an unreasonable failure to comply with the ACAS Code of Practice?*

140. The Tribunal also considered the question of an uplift to reflect failure by the respondent to comply with the ACAS Code of Practice Disciplinary and Grievance Procedures contrary to section 207(A) Trade Union & Labour Relations (Consolidation) Act 1992 ('TULRCA').
141. This related to Ms Boyd's decision to have meetings with the dismissing officer Mr Bromilow on two occasions before she heard the appeal and without telling either Dr Muir or Mr Coath that this was what she was doing and explaining her reasons behind the decision.
142. The ACAS Code of Practice advises that an appeal should be carried out by someone not previously involved with the disciplinary process and conducted in an impartial way. While Ms Boyd was not connected with the background to the disciplinary process prior to her appointment as an appeal hearing manager, her meetings with Mr Bromilow were ill advised and even if she was rigorous in her attempts to avoid any bias emerging from these discussions, the mere fact that it had taken place and without having first consulted the employee or his representative, gave a clear impression that impartiality was being compromised.
143. Although this was a failure that happened later in the disciplinary process, the fact that it happened twice and without alerting the employee meant that there was an unreasonable failure by AZ's management to comply with the ACAS Code. An uplift is therefore necessary and appropriate and considering its impact the Tribunal feels that a 10% uplift to the compensatory award is appropriate.

Did the claimant contribute to his dismissal?

144. The Tribunal did consider the question of contributory fault on the part of Dr Muir but decided that it was not appropriate to find that he contributed to his dismissal by reason of his behaviour.
145. This was because the behaviour related to his mental health issues. They had not been previously managed or supported and furthermore the meeting on 30 July 2020 was allowed to take place without first warning Muir of the allegations and putting in place measures to support him given management's prior knowledge of his mental health.
146. Had Dr Muir been previously supported as suggested above, continued inappropriate behaviour may well have been relevant, but this was not the case at the time he was dismissed.

Wrongful dismissal/breach of contract

147. By deciding to dismiss Dr Muir for gross misconduct by reason of conduct, he was dismissed summarily and without notice.
148. Considering the Tribunal's decision concerning the complaint of unfair dismissal, the Tribunal finds that his conduct was not sufficiently serious to amount to a repudiatory breach and he should not have been dismissed without notice.
149. His claim of wrongful dismissal/breach of contract succeeds. Although it should be noted that this decision is concurrent to the finding of unfair dismissal. Accordingly, the question of avoiding double counting in respect of remedy for wrongful dismissal and unfair dismissal must be considered at the remedy hearing.

**Conclusion**

150. The complaint of disability discrimination is well founded which means that it is successful.
151. The complaint of unfair dismissal is well founded which means that it is successful.
152. The complaint of wrongful dismissal/breach of contract is well founded which that it is successful.
153. The case will now proceed to a remedy hearing to be listed for a hearing length of 1 day on a date to be confirmed, to be heard in person at Manchester Employment Tribunal.

Employment Judge Johnson

Date: 8 January 2024

JUDGMENT SENT TO THE PARTIES ON  
12 January 2024

FOR THE TRIBUNAL OFFICE