Case No: 2301665/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

MEMBERS: **Mr M Sparham**
Mr S Sheath

BETWEEN:

Mrs R Burns

Claimant

and

Surrey County Council

Respondent

ON: **5-7 June 2017 and**
20 July 2017 (in chambers)

Appearances:
For the Claimant: **Rev D Walford, Friend**
For the Respondent: **Mr J Braier, Counsel**

JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant was not subjected to discrimination arising from her disability.

3. The matter will be listed for a remedy hearing.

REASONS

1. In this matter the claimant complains that she was unfairly dismissed and subjected to unlawful discrimination arising from her disability of anxiety and stress. The respondent conceded that she was so disabled at the relevant times and that they had knowledge of that.

Issues

2. The agreed issues arising from those claims are:

3. Unfair dismissal:
    a. Has the respondent shown the reason for the dismissal?
    b. Was it a potentially fair reason? The respondent relies upon conduct.
    c. Was the allegation properly investigated?
    d. Was the dismissal procedurally fair? If not, what chance was there of the claimant being dismissed if a fair procedure had been followed?
    e. Was the dismissal within the range of reasonable responses open to the respondent?
    f. Did the respondent treat the claimant inconsistently with another employee who posted damaging material on Facebook on 16 April 2015?
    g. Did the conduct amount to gross misconduct?
    h. Did the claimant contribute to the dismissal by her own blameworthy conduct?

4. Disability discrimination:
    a. In June 2015 should the respondent have referred the claimant to its occupational health (OH) service in accordance with its policy and if so, did it fail to do so? If so, was this unfavourable treatment because of something arising in consequence of the claimant's disability? If so, was that treatment a proportionate means of achieving a legitimate aim?
    b. Is the allegation at (b) above out of time and if so, should the Tribunal exercise its discretion in favour of the claimant?
    c. Did the respondent fail to take the failure to refer referred to at (b) above into account during the disciplinary process from December 2015 to March 2016? If so, was this unfavourable treatment because of something arising in consequence of the claimant's disability? If so, was that treatment a proportionate means of achieving a legitimate aim?
    d. Is the allegation at (c) above out of time and if so, should the Tribunal exercise its discretion in favour of the claimant?

5. At the commencement of the hearing an application was made by the respondent, supported by the claimant, for a restricted reporting order to be made to protect the identity of a resident (who has learning difficulties) of the care home at which the claimant was the manager. That order was made and that resident is referred to throughout this Judgment as "care user A". That order will expire upon promulgation of this Judgment.

Evidence

6. We heard evidence for the respondent from:
    a. Ms P Alisirogu, former Assistant Director
    b. Ms S Dickens, Senior Manager

c. Mr M Rees, IT Enterprise Infrastructure Manager
d. Ms T Hawkins, Assistant Area Director
e. Ms J Victor-Smith, Senior Manager

7. We heard evidence for the claimant from herself, Mr D King (union representative – who attended pursuant to a witness order) and Mr G Pooley, a relative of care user A.

8. We also had a bundle of documents before us together with written submissions from both parties.

Relevant Law

9. Unfair dismissal: By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

10. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

11. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing her.

12. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

13. Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

14. The approach in Burchell is modified to the extent that even if the respondent fails to establish one or more of the three limbs above the Tribunal must still ask itself if the dismissal fell within the range of reasonable responses referred to below. Further, in a case where the underlying facts were not in dispute then it will not always be necessary to

adopt the Burchell approach (Boys and Girls Welfare Society v Macdonald 1997 ICR 693).

15. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23). One factor to consider is whether the respondent has acted inconsistently in its treatment of employees but only where those employees are in "truly parallel circumstances". The EAT emphasised in Hadjioannou v Coral Casinos Ltd (1981 IRLR 352) that flexibility must be retained and employers are not to be encouraged to think that a tariff approach to misconduct is appropriate.

16. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

17. In coming to these decisions, the Tribunal must not substitute their own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

18. If the finding is that the dismissal was unfair then when deciding on remedy it is open to the Tribunal to reduce any compensation payable if it is just and equitable to do so having regard to any blameworthy conduct of the claimant that contributed to the dismissal. That assessment of conduct is a matter of fact for the Tribunal based on the evidence it heard (sections 122 & 123 of the 1996 Act).

19. Compensation may also be reduced if it is just and equitable to do so where a dismissal is found to be unfair on procedural grounds but the Tribunal concludes that the claimant would have still been dismissed even if a proper procedure had been followed – known as a Polkey reduction following the case of Polkey v A E Dayton Services Ltd (1988 ICR 142 HL).

20. <u>Disability discrimination</u>: Section 15 of the Equality Act 2010 states:

> (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.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

21. No comparator is needed.

22. The accompanying EHRC Code of Practice on Employment (2011) advises that there must be a connection between whatever led to the unfavourable treatment and the disability. It also sets out guidance on the objective justification test at s15(1)(b).

23. In Basildon and Thurrock NHS Foundation trust v Weerasinghe (2016 ICR 305) Langstaff P gave guidance on the correct approach to applying section 15. He explained that there is a need to identify two separate causative steps. First, that the disability had the consequence of 'something' and second, that the claimant was treated unfavourably because of that 'something'. He considered that it did not matter in which order we approach these two steps. Whether A's treatment was 'because of' will be answered by deciding whether what happened was truly a consequence of the 'something' and in turn that the 'something' was a consequence of the disability.

24. The meaning of 'unfavourable' in section 15 was considered in Trustees of Swansea University Pension & Assurance Scheme & anor v Williams (2015 IRLR 885) and described as having 'the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person…'.

25. Any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the Equality Act 2010). That period may be adjusted in accordance with the early conciliation provisions. Where the alleged discriminatory act is one of the failure to act, section 123(4) provides that in the absence of evidence that failure is taken to occur when the alleged discriminator does something inconsistent with doing the act, or otherwise on expiry of the period in which they might reasonably have been expected to do it.

26. There is guidance from the Court of Appeal for Tribunals in exercising that discretion set out in the case of Robertson v Bexley Community Centre (2003 IRLR 434). The Tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant subject however to the principle that time limits are exercised strictly in employment cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. On the contrary the Tribunal cannot hear a complaint unless the Claimant persuades it that it is just and equitable to extend time. The exercise of discretion is the exception, say the Court of Appeal, rather than the rule.

27. In O'Brien v Department for Constitutional Affairs [2009] IRLR 294 the Court of Appeal held that the burden of proof is on the claimant to convince the Tribunal that it is just and equitable to extend time. In most cases there are strong reasons for a strict approach to time limits.

28. When considering anything that it considers relevant a Tribunal may also look at the factors listed in section 33 of the Limitation Act 1980 which include a) length and reasons for delay, b) the likely affect of the delay on the evidence c) the promptness with which the claimant acted once they knew the facts d) their knowledge of the time limits and e) the steps they took to get professional advice (British Coal Corp v Keeble 1997 IRLR 336)

Findings of Fact

29. Having assessed all the evidence, both oral and written, we find on the balance of probabilities the following to be the relevant facts.

30. The claimant commenced employment with the respondent in 1995 as a Care Assistant. She progressed and by the time of the termination of her employment in 2016 had been promoted to Team Manager (at grade 10) and Registered Manager of Park Hall, a residential care home for elderly and vulnerable adults. As a Registered Manager she had overall responsibility for the safety and well-being of both residents and staff of the home and ensuring that the standards set by legislation and the Care Quality Commission (CQC) were met. The CQC carry out regular inspections of such services and over the course of recent years, the regulatory regime has become stricter with greater accountabilities.

31. The respondent operates a number of policies relevant to the claimant's employment and the issues in this case; these policies appeared on the respondent's intranet. In particular:

    a. Personal Use of Social Media - this states that if an employee identifies themselves as an officer of the Council or can be so identified, any communication made in a personal capacity through social media must not breach confidentiality, for example by revealing confidential information owned by the organisation or by giving away confidential information about an individual.

    b. Code of Conduct – this states that any breach of the code of conduct will be regarded as a disciplinary offence. Under working relationships it states that internal and external relationships with colleagues, service users and contractors should be conducted in a professional, friendly and respectful manner. Further that close personal familiarity can damage the relationship and should be avoided. Further under use of social media, it repeats the statements made in the personal use of social media policy.

    c. Disciplinary – this sets out the process to be followed in the event of misconduct. In relation to penalties it also provides for action short of dismissal where the offence would normally result in dismissal but there is mitigation to warrant lesser action and that conditions may be attached. This includes a final written warning with an offer of a post at a lower grade and no salary protection. It states that where those conditions cannot be met, for example following an

unsuccessful redeployment attempt, then the dismissal may still proceed.

d. Occupational Health - this describes the OH service provided to the respondent and the circumstances in which a referral should be made. These include that a manager should discuss with HR the need for a referral if, inter alia:
    i. an employee is absent because of stress and/or depression;
    ii. an employee is absent due to sickness for a continuous period of 20 working days;
    iii. a pattern of absence is causing concern and there is a need for medical advice;
    iv. the employee's health raises concerns in relation to their ability to perform their duties safely and effectively.

    The policy also describes the health and well-being programmes provided by the OH service to address specific needs, for example programmes to reduce stress.

32. As a manager the claimant was fully familiar, or should have been, with these policies and knew where to find them.

33. The claimant also referred in the Hearing to the respondent's Change Management Policy and its provisions regarding redeployment in a redundancy situation. Those provisions however are not relevant to a disciplinary demotion which was the issue in this case.

34. In addition to her role as Team Leader, the claimant also attended the home on Friday evenings to participate in musical entertainment for the residents. These events were very well received. The claimant's managers knew about them and apart from advising her to more clearly separate them from her official duties, condoned her participation.

35. The claimant sadly suffered a series of close bereavements in short succession and her husband's health (he had had a brain tumour removed) also seriously deteriorated. She had previously been diagnosed with and treated for depression/anxiety and this was re-diagnosed in June 2015 and she was prescribed antidepressants. Notwithstanding this the claimant continued to attend work and fulfil her duties throughout this period. Her only absences were minor ones and related to miscellaneous physical impairments.

36. The claimant accepts that the respondent, through her line manager Ms Victor-Smith, provided her with excellent support throughout this period. This was also reflected in the documentary evidence from the time both in respect of Ms Victor-Smith and other managers. In particular:

    a. In an appraisal on 30 July 2014 Ms Oliver recorded:

    'Rachel has had a hugely difficult time and this has really taken its toll within Rachel's personal life. Rachel has updated and kept informing of events as necessary and support has been given within these'

and under 'Actions agreed with manager' it states:

'Does not currently wish for an OH Referral - To be reviewed as appropriate/necessary. Does not currently wish for a Well Being Assessment - To be reviewed as appropriate/necessary. Will access counselling provided by the EAP.'

b. In a supervision meeting on 5 February 2015, Ms Victor-Smith noted the position regarding the claimant's husband health.

c. In a supervision meeting on 17 March 2015, Ms Victor-Smith noted that the claimant was:

'feeling up and down. Personal issues are continuing… Inform JVS if and when short notice time off needed.'

d. In an appraisal on 10 June 2015, in response to being asked to identify any actions that she felt could help improve her well-being, the claimant recorded:

'Flexible working to accommodate personal issues with family ill-health. Excellent support from line manager JVS to continue.'

e. Throughout this period there were also emails between the claimant and Ms Victor-Smith that show they regularly discussed matters of this nature and caring support was given to the claimant throughout.

37. A factual dispute between the parties is that the claimant says Ms Victor-Smith said on 18 June 2015 that she would refer the claimant to OH. She says that this was during a conversation she had with Ms Victor-Smith who telephoned her after she had been told by another colleague that the claimant had been crying at work. Ms Victor-Smith's recollection of this conversation was that she asked the claimant how she was feeling, that she indicated she was fine but she would be attending the GP surgery later today. She had no recollection of saying that she would refer the claimant to OH and she did not think a referral was necessary.

38. The claimant emailed Ms Victor-Smith on 19 June. In that email she said:

'Just a little courtesy email to tell you I am feeling much better today and and if I have any problems or issues I need support with I will contact Philippa whilst you are away.

I am confident that my GP has recommended the best course of action for me and I am pleased I went to see her.'

Given the contents of this email it is apparent that no OH referral was obviously required at this stage and it was reasonable for Ms Victor-Smith not to refer the claimant to OH at that time.

39. The record of a supervision held between the claimant and Ms Victor-Smith on 21 July states:

'Tablets going well, holiday in September'.

40. A supervision on 1 September 2015 refers to the claimant's forthcoming leave but there is no other reference to well-being issues.

41. On 14 October 2015 in a supervision with Ms Oliver, under Well Being it recorded that the claimant's husband was again unwell and that the claimant had 'appointments' but felt:

    'OH not needed at the moment, but will let Mel know. Been on Anti depressants for 3 months, helping and been for counselling.'

42. Given the detailed supervision notes made by both Ms Victor-Smith and Ms Oliver throughout this period as well as the regular email correspondence between them, we conclude that no statement was made on 18 June by Ms Victor-Smith that she would refer the claimant to OH. If it had, we would expect to see it reflected in the notes produced by Ms Victor-Smith and, crucially, when it did not happen, we would expect to see the claimant chasing for it and a reference to it in her email of 19 June. The nature of the relationship between the claimant and Ms Victor-Smith together with the extensive support given to the claimant, suggests that the claimant would have had no embarrassment, fear or hesitation in chasing if she believed that a referral had been offered, had not been made and she required it. Furthermore, even if Ms Victor-Smith had offered a referral in June 2015, the claimant clearly stated in October 2015 that she felt OH was not needed.

43. It was suggested on behalf of the claimant that she was fearful for her job should she be referred to OH because of possible implications with the CQC. We do not accept that submission. The tone of the correspondence and meetings referred to above indicates an open and frank relationship with no reluctance on the part of the claimant to discuss her situation. She had already freely admitted that she was finding it hard to cope, that she had been prescribed antidepressants and was regularly taking time off due to her personal situation. This does not indicate a person scared of sharing with her line managers the difficulties that she was facing. There is nothing in the correspondence at the time to indicate that she feared repercussions with the CQC. Indeed the reason she gave for not needing a referral was because she had seen her GP and was confident in her advice. There is no hint of a reluctance for any other reason.

44. In early 2015 the respondent made an in principle decision to close Park Hall. The closure was not scheduled to take place until at least 2017 (at the date of this Hearing it was still open.) The closure was expected in due course to lead to redundancies. Funding for those redundancies had been provided for in the proposals.

45. This was, understandably, a controversial decision and it caused the claimant significant anxiety. It led to a considerable amount of comment on social media, in particular a 'Save Park Hall' Facebook page was opened. The activity on social media included some comments by employees of the respondent in inappropriate terms. On 1 March 2015 Ms Alisiroglu emailed a number of senior managers of the respondent,

including the claimant, attaching a document headed 'Social Media Guidance for Service Delivery Staff' and asked the recipients to print it and circulate it to staff. The guidance included the following:

> 'If you do have a presence on any social network, particularly where you are identified as being an employee of the council, you must conduct yourself in a way that is in line with the code of conduct and the social media guidance.
>
> It is potentially a HR matter if any staff member were found to be breaching confidentiality via social media….'

46. On 15 December 2015 Ms Victor-Smith was shown the claimant's personal Facebook page by a colleague on that colleague's mobile phone as it appeared to contain photographs of residents of Park Hall and a video taken during one of the music nights. Ms Victor-Smith checked the page on her own mobile noting that there appeared to be no privacy measures in place preventing access to the page for members of the public. Ms Victor-Smith satisfied herself that the page did contain photographs of residents of the home together with some accompanying text and the video. She formed the view that this was inappropriate.

47. Ms Victor-Smith met Ms Alisirogu on the following day and told her about what she had seen on the claimant's Facebook page. The claimant was asked to attend a meeting on the same day with Ms Alisirogu and Ms Oliver. She was informed of the situation, asked to take the post down, which she did immediately, and was put on special leave while a risk assessment was carried out as to whether she should be suspended. The decision to suspend was made on 18 December and the claimant was informed of this at a meeting on that day and the terms of the suspension were confirmed in writing that day. The claimant's suspension was subsequently extended on two occasions.

48. Mr King commenced representation of the claimant on 22 December 2015.

49. Mr Coleing, Quality Assurance Manager, was appointed as an investigatory officer under the disciplinary procedure and he interviewed the claimant in the presence of Mr King on 15 January 2016. In that interview the claimant admitted making the postings and also that she had accepted a friend request on Facebook from a relative of a resident of the home. She accepted that she had made a mistake, expressed her regret and apologised. She explained that she had been on medication, had been depressed and had significant issues in her personal life.

50. Mr Coleing produced an investigation report on 20 January 2016 and recommended that a disciplinary hearing be convened to consider appropriate action and that it may be beneficial to refer the claimant to OH. He recommended that four allegations should be pursued in a disciplinary hearing, namely:
    a. posting photographs of Park Hall residents on her personal Facebook account;
    b. identifying residents by name and, by default, their address;
    c. posting video footage of residents; and

d. having a 'friend' relationship on Facebook with a resident's relative.

51. Ms Dickens was appointed as the disciplinary manager and she wrote to the claimant on 5 February 2016 inviting her to attend a disciplinary hearing on 18 February 2016 (this was then postponed to 8 March 2016 in order to first obtain an OH report). She confirmed the four allegations and that they may result in dismissal.

52. On 10 February 2016 Mr King emailed Ms Dickens informing her that he would be the claimant's representative at the upcoming hearing and also raising a number of matters. Ms Dickens replied to Mr King on 12 February 2016. In particular, the claimant asked for particular witnesses to attend the hearing. Mr King was asked to indicate the purpose of their evidence so that they could prepare but no detail was forthcoming.

53. The claimant attended the OH meeting on 4 March 2016. A report was prepared on the same day and issued to the claimant who corrected some factual errors. In summary the report confirmed that the claimant was diagnosed with depression and was on medication but confirmed that she was fit to return to work, if deemed appropriate, on a phased basis. Also that she had a good insight into the nature of the events leading to her suspension, had reflected on them and accepted her impairment of judgment and that with continued support and open communication, a recurrence of this nature of incident was unlikely.

54. At the disciplinary meeting Ms Dickens initially said that there would be no decision that day as the OH report had not been received. Slightly later the claimant asked when the outcome would be known as it was very stressful. Ms Dickens then said that if the report arrived that day they could adjourn to get an outcome that day and HR were asked to chase OH.

55. Mr Coleing presented his report, and answered questions from Ms Dickens, the claimant and Mr King. The claimant's case was then presented by Mr King. After a 15 minute adjournment Ms Roche attended and gave her evidence followed by Ms Victor-Smith. Ms Victor-Smith was asked in particular about her supervisions with the claimant but, as she did not have the copy documents with her, was unable to answer specific questions about when they took place, any requests made and support offered including OH referrals. Ms C Fowler then attended and similarly answered questions. After she left it was agreed that there would be a break of an hour while efforts were made to get the OH report. Immediately before the break the HR representative asked the claimant what she thought the OH referral would be able to advise that her Doctor could not and she responded that she thought it was a way to get some proper counselling. She went on to say that although Ms Victor-Smith did not remember the conversation she, the claimant did, and she had wanted an OH referral but acknowledged that she had not followed it up with Ms Victor-Smith.

56. The meeting adjourned between 12 and 13.20. OH had still not made contact but Ms Dickens suggested waiting another hour as the claimant was anxious to get an outcome that day.

57. The meeting reconvened at 14.05 as the OH report had arrived in the meantime and Ms Dickens had read it. She asked Mr King for a summary which he gave including a request to be allowed to give some examples of other people making comments on-line about the council. Ms Dickens said that she was not in a position to make any comment on other people's situations; that she did not know if they had been taken down a similar route and that it had nothing to do with this case.

58. She then asked the claimant if she had anything to add to which she said:

> 'at the time I posted pictures I was very low. I feel better now. I feel I could go back to my role. I don't feel I would get into that situation again, I am truly sorry. I know I could phone my managers if I wanted to. I have learned a life lesson in all of this.'

59. Without adjourning any further, Ms Dickens summarised the situation and confirmed that all four allegations were upheld. She indicated that the usual penalty for these allegations would be dismissal but having heard the claimant's mitigation she issued a final written warning with an offer of continuing employment at a lower grade without salary protection. She accepted that the claimant had had a difficult time and said she would try and get a meeting with Ms Oliver and Ms Alisirogu and that they would be looking at a senior post with a four-week trial. The claimant asked what was meant by senior and would that be an ATM. Ms Dickens replied no it would be a senior support worker but she could consider a senior role within PLD or reablement.

60. Ms Dickens wrote to the claimant on 10 March 2016 confirming that the allegations were upheld and the penalty imposed. This letter stated that the post being offered was one of senior care officer and that if she was unwilling to accept this alternative, or the trial period proved unsuccessful, then dismissal with notice would follow. The respondent accepted that these posts were five grades below the Team Manager post with a significant drop in salary.

61. The claimant appealed that decision by letter dated 22 March 2016. In particular she alleged that the decision was made before all mitigation was heard and that Ms Dickens had refused to consider information gathered. She also said that she felt she was being singled out and victimised.

62. The claimant's appeal was held by Ms Hawkins on 19 April 2016. The claimant was again accompanied by Mr King. Mr King presented the claimant's case in detail including criticisms of the way the disciplinary hearing had been handled including in particular an allegation that Ms Dickens had shaken her head at Ms Victor-Smith during the disciplinary hearing to prevent her answering a question from Mr King. He also referred to his attempts at the disciplinary hearing to present evidence regarding other employees breaching the social media policy. Ms

Hawkins indicated that she did want to see this evidence and he showed it to her.

63. Ms Dickens then gave the management's response to the claimant's appeal and was questioned in detail. Ms Victor-Smith joined the meeting to give her evidence as did Ms Fowler.

64. Ms Hawkins then summed up and brought the 3½ hr meeting to a close. She requested an extension from 5 to 10 working days to be agreed to allow her to come to her decision. The claimant agreed.

65. Later that day Mr King forwarded to Ms Hawkins screenshots taken from another individual's Facebook page where the person in question posed in his underpants. Associated comments showed the man's name and a reference to him as an ex care leaver about to do three days of interviews for new care leavers social workers for the respondent. He made flippant remarks about this role and subsequently posted quite detailed comments about the three candidates and their scores. These comments were clearly highly inappropriate to be shared on social media. Enquiries were undertaken between 26 & 28 April at Ms Hawkins' request to establish if this individual was or had been an employee of the respondent. There was no evidence that he was and Mr King was unable to provide any further information with regard to the individual.

66. Ms Hawkins wrote to the claimant a detailed, six page letter dated 26 April 2016 stating that the appeal was not upheld and that action short of dismissal was appropriate. She set out her reasoning on each of the claimant's grounds as well as other points raised during the appeal meeting. She did not however expressly refer to the issue of whether Ms Dickens had shaken her head at Ms Victor-Smith. Whilst it would have been preferable to deal with that point, in the context of the overall appeal process this was not a significant flaw. We conclude, having reviewed the notes of the disciplinary hearing, that Ms Dickens may well have shaken her head at that point but not in an inappropriate way. In respect of the postings on Facebook by the ex care user, Ms Hawkins confirmed that she had been unable to find any trace of that individual ever having worked for the respondent and that when asked for further details Mr King was unable to provide anything meaningful. She therefore concluded that the new evidence had not added anything to the appeal. She also confirmed that she had reviewed comparable cases across the respondent relating to these types of breaches and the inappropriate use of social media and was satisfied that appropriate action had been taken.

67. Ms Hawkins did conclude however that there were two learning points for the respondent namely that the claimant should have been referred to OH in 2015 and also that she should not have been allowed to participate in the music nights at the home as this blurred boundaries.

68. Although the sanction imposed was found to be correct Ms Hawkins expanded the options open to the claimant for the lower graded role which

included one role at grade 8, although the grade was not expressly confirmed in the letter, which said she could consider roles

> '…such as Senior Care Officer, Senior Residential Social Worker in PLD or Reablement Team leader…If you get on well within one of these roles, there may be opportunities to progress to Team Leader level and beyond.'

and the claimant was asked to confirm that she accepted this offer of a new role by Monday 9 May (2 weeks) so the necessary arrangements could be made.

69. This letter was not actually posted to the claimant until 4 May but was also emailed to her on that date, together with notes of the meeting, which is when she received it by email and the hard copy some days later. There was no explanation from the respondent for this delay. Given that the internal enquiries regarding the Facebook postings were continuing on 26, 27 & 28 April, this suggests that the although the letter was drafted on 26 April it was not sent until 4 May because those enquiries were outstanding. When it was sent, however, it seems no corresponding adjustment was made to the date by which a response was required.

70. On Thursday 5 May the claimant requested an extra 5 working days to make her decision. Coincidentally, if this had been granted it would have brought the deadline in line with the originally planned 2 week timescale.

71. The following morning Ms Hawkins replied:

> 'I need from you by Monday 9th May as to whether you accept the redeployment offer in principal (sic). If you require an extra couple of days to consider which one I can give you to Wednesday 11th May.'

72. The claimant replied very quickly saying she would appreciate until 11 May to make her decision. Ms Hawkins replied that same morning saying she required a decision by Monday 9 May as to whether she agreed in principle to redeployment.

73. On Monday 9 May Ms Alisirogu emailed the claimant inviting her to attend a meeting on Wednesday 11 May with her and Ms Dickens to discuss possible suitable opportunities within service delivery. She asked the claimant to respond to confirm her attendance.

74. The claimant replied on the same day saying she had been signed off sick with work-related stress and anxiety. She apologised that she was not well enough to attend the meeting and said that her GP felt she could not make such a life changing decision at present.

75. Ms Alisirogu replied that afternoon saying that she understood Ms Hawkins had been trying to contact her to confirm her decision regarding the offer of redeployment and asking her to confirm her mobile number. She also clarified that the provisional meeting date of Wednesday was put in the diary on the understanding that she accepted in principle the offer of redeployment. She said that the claimant had been aware that this was

the offer open to her since 8 March 2016 and asked her to confirm her decision by the end of the day otherwise her dismissal would take effect from that day. She also asked her, if she did accept the offer of redeployment, to confirm when she would be available to meet.

76. Ms Hawkins then spoke to the claimant and recorded in an email to Ms Fowler that the claimant would not accept the offer of redeployment and was aware that she would be dismissed from that day. Accordingly 12 weeks' notice was given to the claimant and this was confirmed by letter to her dated 10 May.

77. The claimant contacted ACAS on 24 May 2016. The conciliation period closed on 24 June 2016 and the claimant presented her claim form to the Tribunal on 1 September 2016.

78. In addition to the disciplinary process, we heard evidence from Mr Pooley, a relative of care user A. We recognise that the dismissal of the claimant not only had a significant impact on her life but also on the lives of the residents of Park Hall with whom undoubtedly she had a very good relationship. We understand the frustration of Mr Pooley whose evidence was that care user A very much enjoyed the music nights organised by the claimant and would have freely consented to the postings in question and indeed consent had previously been given for photos of care user A, and others, to appear on the respondent's website. That was not, however, the issue before the respondent when it made its decisions. Broader matters of principle were in issue.

79. We were referred to a document dated 18 March 2016 signed by care user A that confirmed he had no concerns and gave his full permission for photographs, videos and other media featuring him taking part in activities at Park Hall to be shared with others and posted on social media. We heard evidence as to when this document was created: March 2016 or January 2017. Whichever is correct, it was not in front of Ms Dickens or Ms Hawkins when they made their decisions. It is therefore not relevant to the question of fairness that we have to decide. We express no view on when the document was created.

Conclusions

80. Disability discrimination without implying any criticism of the claimant or her lay representative, the precise formulation of her case by reference to the component parts of section 15 is not very clear. In particular how it is argued that there was a causal link between the alleged unfavourable treatment and something arising in consequence of the claimant's disability. However the starting point in any section 15 claim is whether there was any unfavourable treatment.

81. As far as the first allegation is concerned, namely the failure of the respondent to refer the claimant to OH in June 2015, we have found as a fact that Ms Victor-Smith did not say in June 2015 that she would so refer. Further, we have found (notwithstanding Ms Hawkins' view to the contrary

expressed in the appeal outcome letter) that it was reasonable for Ms Victor-Smith, and therefore the respondent, to not refer at that time. Accordingly, there was no unfavourable treatment of the claimant in that respect.

82. Turning to the second allegation, the failure during the disciplinary process to take that earlier failure into account, it is clear that Ms Dickens was aware of a difference of view between the claimant and Ms Victor-Smith as to whether there was an agreement to refer and therefore it must have been in her mind at least to some extent when she made her decision. Even more significantly the claimant was later referred and the resulting OH report was taken into account at both stages of the disciplinary process. Further at the appeal stage Ms Hawkins clearly did take the earlier failure to refer into account as she made an express finding in that regard. Accordingly, we conclude that on the facts there was no failure of the respondent to take the earlier failure to refer into account during the disciplinary process and therefore, again, there was no unfavourable treatment.

83. The claims of disability discrimination, therefore, fail and are dismissed.

84. It is not therefore necessary to consider the question of whether those claims were in time but for completeness, we conclude that the first claim was out of time but in all the circumstances we would have extended time in favour of the claimant as we would have concluded it just and equitable to do so. We conclude that the second claim was in time as it amounted to a continuing act that concluded on 10 May 2016 (at the earliest) and, when the early conciliation provisions are taken into account, was in time when the claim form was presented on 1 September 2016.

85. <u>Unfair dismissal</u>

86. Given that the claimant admitted the underlying allegations against her, namely posting the photographs, video, and text on Facebook and accepting the friend request by a resident's relative, it is clear that the respondent had a genuine belief in her misconduct, that they had reasonable grounds for that belief and no investigation was required into the issue of her culpability.

87. They did still have a responsibility, however, to investigate properly any matters that went to mitigation, and therefore appropriateness of penalty, and to follow a fair procedure.

88. A number of matters in that regard were raised either during the process itself or in submissions that require careful consideration.

89. First, we agree with the claimant that Ms Dickens should have allowed Mr King to submit the evidence that he wanted to at the disciplinary hearing with regard to possible inconsistent treatment of a similar offence – it was clearly potentially very relevant. That flaw however was corrected on appeal as Ms Hawkins did consider that evidence, properly investigated it

and reasonably concluded that it was irrelevant. For the same reason that she concluded it was irrelevant, we also conclude that the fact that the respondent took no action in relation to the Facebook postings by the ex care user does not fall within the category of inconsistent treatment that could make a dismissal unfair. He was not an employee and was not in truly parallel circumstances. In addition, the response of the respondent to the comments by employees on the Save Park Hall Facebook page was not inconsistent with its treatment of the claimant. The circumstances were very different.

90. Second, it was suggested that there was something improper about a colleague finding the claimant's Facebook posts from some time before and that this might indicate a campaign to catch her out. We find there is no basis at all for such a suggestion. In a similar regard, we are not persuaded that the action against the claimant was to save redundancy costs.

91. Third, the claimant invited us to conclude that by waiting one day before reporting what she had found, Ms Victor-Smith did not really think it was very serious and/or that she was then also guilty of putting residents at risk and should also have been disciplined but was not. We do not share that view. In all the circumstances Ms Victor-Smith's actions were entirely reasonable.

92. Fourth, we find that Ms Dickens could and should have adjourned the hearing after the closing summary from Mr King and the claimant's final comments in order to give them proper consideration before she delivered her final decision. We do recognise that by that point the hearing had been going for some time and there had already been a number of adjournments. However in order to consider properly those final submissions it would have been better to take a break. This was not sufficiently serious however to be a breach that would render the process unfair and even if it was, it was cured by the appeal. Notwithstanding this and our finding that Ms Dickens should have considered the additional evidence that was offered, we find that there was nothing intrinsically inappropriate or unprofessional in the way that she conducted the disciplinary hearing as has been suggested.

93. The final procedural point, which we do find renders the dismissal unfair, relates to the sequence of events on conclusion of the appeal and the offer of redeployment to the claimant. The starting point is that Ms Dickens had awarded action short of dismissal with a demotion to grade 5 role with consequential loss of salary. That in itself was within the band of reasonable responses to the admitted misconduct by the claimant. It follows, therefore, that the decision at appeal to improve upon that penalty by offering the claimant a wider range of alternative roles including ones at a higher grade, was equally within the band of reasonable responses. It was the claimant's refusal of redeployment, however, that led to the dismissal.

94. The respondent's argument is that the claimant had had more than enough time to consider her position with regard to the alternative roles on offer as she had known from March, when she was first told that she would have to decide whether she wanted redeployment. The claimant says that as she was appealing against that penalty, she should have been given more time than she was when the outcome of her appeal was confirmed, to consider her position. We agree with the claimant that it was legitimate for her to defer her consideration of the offer of redeployment until the outcome of her appeal was known.

95. Accordingly, when the claimant was told the appeal outcome on 4 May she was asked to make a decision by 9 May. This was only two clear working days. As a timescale for making such a decision this would, in normal circumstances, be barely long enough. In the claimant's circumstances, noting that she had been flexible in agreeing an extension of 5 working days for conclusion of the appeal (which even then was not complied with), where she was suffering from stress and anxiety and had informed the respondent that her GP considered she was not able to make such a decision at the time, this was an unreasonably short period. The fact that the respondent had originally intended to give the claimant two weeks to make that decision supports that conclusion.

96. We conclude, therefore, that in this one procedural respect, the dismissal was unfair. We have also considered whether even with that finding, the dismissal when looked at in the round was reasonable but conclude that that flaw was too fundamental.

97. The Tribunal had hoped at this point to be able to make a formal finding in respect of a reduction to compensation payable to the claimant because of contributory fault and/or Polkey. However on reviewing our notes, we see that although both these issues were dealt with in the respondent's written submissions, they were not dealt with by the claimant in writing or orally (nor indeed was there any indication of whether the claimant is seeking re-employment). It is only right, therefore, to give the claimant an opportunity to make any submissions that she wishes in these respects. We can indicate now, if it is helpful to the parties, that on the evidence we have heard our provisional view is that there was only a slim chance that the claimant would have changed her mind about accepting redeployment even if she was given the extra time that she had been requesting. We can also indicate that given the misconduct was admitted, there will inevitably be a finding of contributory fault and a corresponding reduction in compensation. Before we make actual percentage findings, however, we do want to hear any submissions the claimant wishes to make.

98. The matter will be listed for a remedy hearing and the parties will be advised of that date in due course. In the meantime if the parties reach any agreement between themselves as to remedy, would they please inform the Tribunal promptly.

Employment Judge K Andrews
Date: 21 July 2017