



## EMPLOYMENT TRIBUNALS

**Claimant**

Mrs S Bates

**Respondent**

Hull University Teaching Hospitals  
NHS Trust

**Heard at: By CVP**

**On: 7-11 December 2020  
14-15 December 2020  
(deliberations)**

**Before: Employment Judge Davies  
Mr D Fields  
Mrs J Hiser**

**Appearances**

**For the Claimant:**

**Mr M Brien (counsel)**

**For the Respondent:**

**Mr C Adjei (counsel)**

## RESERVED JUDGMENT

1. The claims of disability discrimination and unfair dismissal are not well-founded and are dismissed.

## REASONS

### Technology

1. This hearing was conducted by CVP (V - video). The parties did not object. A face to face hearing was not held because it was not practicable and all the issues could be dealt with by CVP.

### Introduction

2. These were claims of unfair dismissal and disability discrimination brought by the Claimant, Mrs Bates, against her former employer, the Hull University Teaching Hospitals NHS Trust. The Claimant was represented by Mr Brien, counsel, and the Respondent by Mr Adjei, counsel.
3. There was an agreed file of documents and everybody had a copy. We admitted a small number of additional documents by agreement during the course of the hearing.

4. The Tribunal heard evidence from the Claimant and from Ms R Smith (Trade Union representative) on her behalf. For the Respondent, the Tribunal heard evidence from Ms M Veitch (former Operations Director), Mrs T Cope (Chief Operating Officer), Ms J Myers (Director of Strategy and Planning) and Mr L Bond (Chief Finance Officer).

## The Claims and Issues

5. The Claimant brings complaints of unfair dismissal and disability discrimination. The Respondent admits that at all relevant times she had a disability within s 6 Equality Act 2010, namely depression/anxiety with symptoms of post-traumatic stress disorder. The parties also agreed that “inability to work due to a mental health crisis and/or a maladaptive coping mechanism (i.e. resorting to the use of alcohol)” was something arising in consequence of the Claimant’s disability. The Claimant said that this was the cause of unfavourable treatment (see below). The remaining issues to be determined by the Tribunal were recorded by EJ Smith following a preliminary hearing on 18 December 2019 and the parties agreed at the start of the hearing that the list was correct. The issues for the Tribunal to decide are therefore:

### Disability discrimination

- 5.1 Did the Respondent treat the Claimant unfavourably by:
  - 5.1.1 deciding to go behind the reflective learning statement for the disability-related incidents on 30 December 2017 and 23 February 2018;
  - 5.1.2 deciding to classify the change of medication issue on 23 February 2018 as part of a pattern of alcohol related absence;
  - 5.1.3 deciding to discipline the Claimant for disability related incidents on 30 December 2017 and 23 February 2018;
  - 5.1.4 deciding to introduce five previously unnotified allegations in order to ensure the Claimant’s dismissal could be justified;
  - 5.1.5 deciding to dismiss the Claimant, which was perverse and despite clear evidence to the contrary;
  - 5.1.6 attempting to portray the Claimant as alcohol dependent rather than someone who had mental health issues who occasionally used alcohol as a maladaptive coping strategy; and
  - 5.1.7 dismissing the Claimant?
- 5.2 If so, was it because of the Claimant’s inability to work due to a mental health crisis and/or a maladaptive coping mechanism (i.e. resorting to the use of alcohol)?
- 5.3 If so, was the treatment a proportionate means of achieving the legitimate aim of ensuring the health, welfare and safety of the Claimant, patients and staff?
- 5.4 Were the complaints of discrimination brought within the time limit in section 123 Equality Act 2010 or is it just and equitable to extend time for bringing them?

## Unfair dismissal

- 5.5 What was the reason for the Claimant's dismissal? (Although the Claimant concedes that the Respondent dismissed her for a potentially fair reason it is necessary for the Tribunal to determine what that reason was.)
- 5.6 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Claimant says that it did not because:
- 5.6.1 there was no evidence to support the Respondent's contention that the Claimant's behaviour caused the Respondent reputational damage. The Respondent ignored evidence from the NMC and the Claimant was not afforded a proper opportunity to address this allegation;
  - 5.6.2 the Claimant clearly acknowledged the seriousness of her actions and it was wrong for the Respondent to find that she had failed to do so;
  - 5.6.3 it was wrong to find that the Claimant had failed to manage risk or that it was her responsibility to do so as she was not afforded the proper opportunity to address those allegations;
  - 5.6.4 it was improper for the Respondent to conclude that the Claimant was engaged in "inappropriate behaviours" when the Claimant was not afforded the proper opportunity to address those allegations;
  - 5.6.5 it was inappropriate for the Respondent to conclude that there was a "breakdown of relationships in the member team" as the Claimant was not given the proper opportunity to address those allegations;
  - 5.6.6 there was no evidence to support the Respondent's allegation that the Claimant was absent due to alcohol misuse or that there were "wider implications for your welfare, your role, your colleagues, the service you lead/manage and the wider Trust;"
  - 5.6.7 there was no evidence to support the Respondent's contention of absenteeism;
  - 5.6.8 it was unreasonable to conclude that "it would not be reasonable or safe to risk further loss of directors on-call cover" when other directors did not operate the on-call; and
  - 5.6.9 dismissal was outside the band of reasonable responses because:
    - 5.6.9.1 it was discriminatory;
    - 5.6.9.2 it was inappropriate to dismiss when on 7 September 2018 the Claimant's manager had instigated stage I of the Respondents supporting and managing attendance policy;
    - 5.6.9.3 dismissal was inconsistent with the Respondent's willingness to have the Claimant perform her role between 23 April 2019 and dismissal;
    - 5.6.9.4 the Respondent failed to acknowledge the role workplace events had played in causing the Claimant's mental health and should have demonstrated extra concern before implementing a dismissal and the decision was inconsistent with expressions of support to the Claimant from her line manager; and
    - 5.6.9.5 the Claimant was in the Respondent's eyes providing satisfactory service except for twice monthly Director on-call duties, which could have been addressed by alternative arrangements.

## The Facts

6. We start with some general observations about the witnesses. The Tribunal found Ms Veitch, Mrs Cope and Ms Myers extremely impressive witnesses. Each of them was careful, thoughtful and conscientious in giving their answers. They were able to give clear and comprehensive explanations of their actions and the reasons for them at the time. Mr Bond's evidence was less extensive, but he, like the Respondent's other witnesses, gave a clear account of his thinking and made appropriate concessions in cross-examination. The Tribunal found each of their evidence reliable.
7. The Claimant's evidence was less reliable. We have no doubt that she was doing her best to give an honest account, but it seemed to the Tribunal that much of her evidence was given with the benefit of hindsight, and from a perspective of minimising her own level of responsibility and casting the Respondent in a negative light, rather than always accurately reflecting thoughts and events at the time. By way of example, one of the incidents about which the Tribunal heard evidence was an occasion on 30 December 2017 when the Claimant missed a Director on-call shift because of an episode of (disability-related) drinking. She sent a WhatsApp message to her manager thanking him for covering her shift and saying that she thought she had norovirus. She had previously admitted that this was untrue. However, at the Tribunal hearing, when it was put to her that she accepted that she had not had norovirus, she said that she did have diarrhoea and that this was part of anxiety. It was put to her that this was not the same as having norovirus, and she was asked again whether she was accepting that the message she had sent at the time was untrue. She said that she was being sick and did have diarrhoea. When pressed a third time, her response was that she had not had a norovirus test. That seemed to the Tribunal to reflect a tendency to minimise her own responsibility, even on an issue where she had previously admitted that the message was untrue. Evidence like this meant that the Tribunal approached all of the Claimant's evidence about the events with a degree of caution.
8. The Tribunal made the following findings of fact.
9. The Claimant is a qualified nurse. She started working for the Respondent in May 2000. At the time of the events with which the Tribunal was concerned, she was Deputy Director of Quality, Governance and Assurance.
10. The Claimant has a long-standing mental health disability. She was first diagnosed with depression and anxiety in 2006 and has more recently been identified as having symptoms of post-traumatic stress disorder ("PTSD"). She has had episodes of severe mental ill-health and periods of relatively better mental health. Alongside her mental health disability, the Claimant has at times drunk alcohol to excess. The medical and occupational health evidence describes this as a maladaptive coping mechanism, secondary to the Claimant's mental health disability, and that was not disputed.
11. The Tribunal saw evidence of extensive involvement from Occupational Health. The Claimant was seen on several occasions by the Consultant Occupational Health physician, most recently Dr Quinlan. She was referred to Occupational

Health by line managers, but she also knew that she could self-refer if required. She was also supported by the Head of Occupational Health, Ms Taylor, whom she could call when she needed to, and there was reference to referrals for CBT and therapeutic counselling through Focus.

12. Part of the Claimant's role as Deputy Director was to be the Director on-call approximately twice per month and she was contractually required to perform these duties. The Tribunal heard evidence that the Director on-call is a critically important role, and we accepted that. The Director on-call is the most senior responsible individual for the hospital. S/he has to make operational decisions quickly and appropriately, for example arranging cover if there is critical personnel absence, coordinating assistance from other departments in the Trust if A&E is overcrowded to ensure that the Trust maintains its services, and negotiating and agreeing with directors on-call in neighbouring Trusts if ambulances require diverting to other hospitals. Those are relatively common issues, but it is important to note that in a more serious emergency the Director on-call would take the "Gold Command Role." In the event of a major incident such as a complete IT failure, flood or incident with multiple fatalities such as a train crash, the Director on-call is required to coordinate a rapid response. The absence of an on-call Director represents a risk to the Respondent and its patients. Mrs Cope and Ms Myers each confirmed in their evidence that in their lengthy careers they had never known a Director fail to attend a Director on-call shift, apart from the Claimant in the events described below. As Chief Operating Officer, Mrs Cope had been contacted by Directors on-call for supplementary advice in difficult circumstances, but she had never been contacted by the on-call team or site team because the on-call Director could not be contacted.
13. The Director on-call shift runs from 8 am one day to 8 am the following day. On weekdays, the Director on-call will be at work as well as covering the on-call. It is likely that the other Directors will also be at work and able to deal with issues that arise. The Director on-call will in practical terms assume full responsibility for the site at the end of the normal working day, 5 pm. The Director on-call is expected to attend the 4 pm bed meeting and a further bed meeting at 7 pm. At weekends, the whole period is regarded as "out of hours" and the Director on-call is the senior person in charge of the organisation for the whole 24 hour period.
14. As well as a Director on-call, there is also a Manager on-call, who is a middle manager within the Respondent. There is no formal backup or policy for dealing with the non-attendance or unavailability of the Director on-call. The evidence of the Respondent's witnesses was really to the effect that this was not necessary. This was such an unusual occurrence that no policy was required. In practice, the Manager on-call or the site team would contact another Director if necessary, as had happened in the Claimant's case.
15. That brings us to the events of 2017. At this time, the Claimant had responsibilities for Patient Experience, in respect of which she reported to the Chief Nurse (Mr Wright) and responsibilities for Governance, in respect of which she reported to the Chief Medical Officer (Mr Phillips). Her evidence is that Mr Wright was unhappy with her appointment and micromanaged, undermined and belittled her. The Tribunal did not hear detailed evidence about this, and we are

not in a position ourselves to make findings about it. There is no dispute, however, that the Claimant's mental health began to decline in 2017 and she had an episode of depression and extreme anxiety, with symptoms of PTSD. In late December she was not sleeping and was hypervigilant and experiencing frequent panic attacks. Her evidence was that by Friday, 29 December 2017 she was in mental health crisis and feeling suicidal. She booked into a local hotel and drank alcohol to "knock her out" as a maladaptive coping strategy associated with her mental health.

16. The Claimant was due to be Director on-call on Saturday, 30 December 2017. She did not attend the 8am handover call, the 9am bed meeting or the midday bed meeting. The Manager on call was Ms Cairns. After the Claimant did not attend the midday meeting, Ms Cairns tried to contact her on her mobile via the switchboard. There was no answer and she left a message. At about 1:30 pm she received a call via switchboard from the Claimant's daughter, who told her that the Claimant was unwell, had gone to bed vomiting and could not do her on-call shift. Ms Cairns contacted Mr Wright and he took on the responsibility for the Director on-call.
17. That is the context for the WhatsApp messages, referred to above. At around 7 pm the Claimant messaged Mr Wright to say, "Thanks for picking up today I think I've got norovirus never felt so shocking XX." Mr Wright sent a sympathetic reply: "Thanks Sarah. Everyone was really worried that they hadn't heard anything. Hope you feel better soon. I've had Noro four times so you have my sympathy. The hospital is fine. Take care X." They exchanged further friendly messages, wishing each other happy new year and concluding with X's.
18. In fact, before contacting switchboard, the Claimant's daughter had contacted one of the Claimant colleagues. She told her that she was worried about her mother's mental state and reported that she was drunk. The colleague contacted Ms Hunter, the Head of Occupational Health, who had supported the Claimant over the years. After speaking to Ms Hunter, the colleague advised the Claimant's daughter to call in sick on her behalf and to make the Trust aware that the Claimant would not be able to cover her on-call. That is what led to the call to the switchboard. On Monday, 2 January 2018 Ms Hunter spoke to Mr Phillips and made him aware of the true reasons for the Claimant's absence.
19. The Claimant was signed off sick and Mr Phillips referred her to Dr Quinlan for Occupational Health advice. She was seen on 9 January 2018. Dr Quinlan reported that she had issues at home and work that had given rise to some maladaptive coping strategies. The Claimant was motivated to engage with appropriate intervention. She had seen her GP and started new medication. Dr Quinlan was arranging CBT to help the Claimant develop a robust relapse strategy and avoid reverting to maladaptive coping strategies in the future. The Claimant had improved but still had symptoms consistent with anxiety and mood disturbance and was not yet fit to return to work. Dr Quinlan advised that she should be fit to return to work on 18 January 2018 but suggested that she focus on the Clinical Governance aspect of her remit. He advised that the Respondent was likely to have to undertake a Stress Risk Assessment before the Claimant returned to the Patient Experience part of her role, in the light of concerns she had raised today regarding the reporting arrangements. Dr Quinlan described

this as a “heads up for the moment.” Dr Quinlan reported that the Claimant regretted what happened on 30 December 2017 and reassured him that she felt able to continue with on-calls. He was prepared to support her resuming on-calls and felt it would be of therapeutic value helping her to maintain professional self-esteem and confidence.

20. Dr Quinlan reviewed the Claimant on 6 February 2018. He said that she had “pretty robust” relapse management arrangements in place, including appropriate medication and CBT. She remained signed off work because she had been struggling with some side effects with one of her medications, which she was being weaned off. She planned to return to work on 19 February 2018, after a week’s annual leave. Dr Quinlan’s advice remained that she should focus on the clinical governance aspect of her work when she returned. Dr Quinlan recorded that the Claimant had told him she had spoken to Mr Phillips off-site the previous day and had been open and honest with Mr Phillips about the current line management arrangements in relation to the Patient Experience part of her remit. Dr Quinlan reported that if the Claimant were to resume that part of her remit with the current line management arrangements then they would need to undertake a formal Stress Risk Assessment. Dr Quinlan had not arranged a further review but recorded that he would see the Claimant again if requested by her manager or the Claimant herself.
21. The Claimant did return to work on 19 February 2018. She was Director on-call from 8 am Friday, 23 February 2018 for 24 hours. There were difficulties contacting her when an issue arose overnight. In her evidence to the Tribunal the Claimant insisted repeatedly that she had missed one call on that occasion. However, all of the contemporaneous evidence before the Tribunal, including Dr Quinlan’s report of what the Claimant said to him at the time (see below) pointed to her having missed multiple calls. It seemed to the Tribunal most likely that this was accurate, and this appeared to be another example of the Claimant minimising events with hindsight.
22. The Manager on-call on 23/24 February 2018 was Ms Mableson. She prepared a written statement, which she sent to Mr Wright on 2 March 2018. She recorded that she and the Claimant had attended the 7 pm bed meeting. Shortly before midnight, Ms Mableson was contacted by Ms Bennett, the Matron on site. Ms Bennett told her that she had been contacted by the Claimant earlier to discuss a situation with a neighbouring Trust which had no CT scanner because of a mechanical failure. The Claimant had told Ms Bennett not to take a divert from that Trust. Ms Bennett had discussed this with the Emergency Physician in Charge (“EPIC”) within the emergency department, who was uncomfortable with the decision and felt that any emergency life/limb patients requiring a scan should be accommodated. Ms Bennett had tried to discuss these concerns with the Claimant but had been unable to contact her. Ms Mableson wrote that she had then tried to contact the Claimant to understand her rationale, because she did not feel it was appropriate to decline patients requiring emergency CT for potentially life-threatening conditions either. Ms Mableson tried the Claimant’s mobile number and got no response. The switchboard operator told her that the Claimant had contacted him about half an hour earlier with a temporary number. The operator tried that number for Ms Mableson but there was no answer. Ms Mableson then spoke to the neighbouring hospital and was told that there was a

patient who had deteriorated and required an urgent CT scan. Ms Mableson agreed to the transfer. She tried again to contact the Claimant with no response. She texted her to inform her of the decision she had taken in discussion with the EPIC. Around 12:15 am the switchboard operator contacted Ms Mableson to say that the Claimant was not answering her phone and that a Director from the neighbouring Trust had been attempting to make contact with her. Ms Mableson spoke to that Director, who expressed frustration about the lack of response from the Claimant and said she had spoken to her “hours ago.” The Director reported to Ms Mableson that she had spoken to the Claimant earlier in the evening and requested a divert and that the Claimant had told her she would take some advice and call back. The Director had been waiting for a decision and was concerned that there was no resolution. Ms Mableson confirmed that she had now agreed the divert. Ms Mableson instructed the switchboard to transfer the Director on-call to herself for the rest of the night and emailed her concerns to the Deputy Chief Nurse, Ms Ledger. At around 7 am Ms Mableson received a text from the Claimant replying to hers from the previous night and saying, “yes I tried to talk to their on-call but kept getting cut off.”

23. The Claimant called Ms Hunter, Head of Occupational Health, on 26 February 2018. Ms Hunter’s notes record the Claimant telling her that she had taken her medication and that the on-call team tried to telephone her during the night and were unable to wake her. She was referred to Dr Quinlan and he saw her on 8 March 2018. He reported that she told him she had failed to respond to “some calls from midnight onwards Friday 23/Saturday 24 February all relating to one issue that required her input.” That is reflected in the notes Dr Quinlan took at the time. As indicated above, in view of all the contemporaneous evidence, including what the Claimant apparently told Dr Quinlan, it seems most likely that more than one call was missed.
24. Dr Quinlan reported that the Claimant had been prescribed mirtazapine to help with sleep. She recalled awakening to the call but feeling disoriented and going back to sleep leaving the action to the Manager on-call to resolve. In the morning she recalled a “dreamlike experience.” Dr Quinlan said that based on what the Claimant reported and given the primary purpose of the prescribed mirtazapine it would be sensible to restrict the Claimant’s on-call commitment from 8 pm, i.e. no night on call for the foreseeable future. Dr Quinlan expected the Claimant to be on her current regimen for the next 6 to 9 months. Dr Quinlan noted that otherwise the Claimant had resumed her full clinical governance remit and was working full-time hours. She was now keen to pick up Patient Experience again. Dr Quinlan advised that her health was compatible with this but that the management arrangements needed to be proactively addressed.
25. There is no dispute that the reason the Claimant missed calls on 23/24 February 2018 was the mirtazapine medication she was taking.
26. Ms Mableson told Mr Wright about the missed calls on 26 February 2018. He asked her to make her written statement and raised concerns with Mr Nearney, Director of Workforce and Organisation Development and Mr Long, Chief Executive. He requested that these matters be investigated in accordance with Trust policies.



27. Mr Phillips was evidently on leave. He met the Claimant on 12 March 2018 and wrote to confirm what they had discussed the same day. He identified two incidents: not attending on-call on 30 December 2017 and failing to answer her telephone in the late evening as the Director on-call on 23 February 2018. Mr Phillips said that they had agreed to follow the Informal Accepted Responsibility Approach detailed within the Trust's Disciplinary Policy. This required the Claimant to write a reflective statement. The decision to proceed in this way had been taken following receipt of a letter from Dr Quinlan, which explained the mitigation. Mr Phillips noted that not being available whilst on-call was a serious concern. He explained that the written reflective statement should contain, as a minimum, details of the incidents, the Claimant's responsibility for them, what she had learnt from them, and what measures or actions she would take to ensure they did not recur.

28. The Claimant wrote a statement on 20 March 2018. It said:

I take responsibility for not being able to perform one on-call and failed to answer the telephone during a second. As you are aware, this is entirely to do with my ill-health and the medication I am now taking, which affected the second time on-call. I regret the impact this had on colleagues and it has never been my intention not to fulfil my duties. I have taken GP and occupational health advice, I understand the implications of the medication I am taking and I am managing this situation in line with this advice. We have discussed this and you know how disappointed and distressed I have been with this situation. I take responsibility for my actions and have relayed honestly to you my medical condition and factors that affected my health and the impact this had on those two occasions. I feel I have taken the correct actions since and I appreciate your support during this time, and to discuss what steps I should take with on-call for the next few months.

29. There was clearly a difficult relationship between the Claimant and Mr Wright. At this time, she was raising concerns about his treatment of her with Dr Quinlan, Mr Phillips, Mr Long and others. Mr Wright was also raising concerns about the Claimant and her performance. Correspondence from the time shows that a decision was taken to remove the Patient Experience role from the Claimant and leave it to be managed directly by Mr Wright. Mr Phillips informed the Claimant of this in a letter dated 14 March 2018. The Claimant replied on 20 March 2018 expressing her disagreement. She said that she had had a difficult conversation with Mr Wright the previous day, in which he had told her that her work was not good enough. She thought this was why Patient Experience was being removed from her. She also expressed her disagreement with the disciplinary process that had been followed. She was aware that staff had prepared statements about both on-call issues. She said that she had never been asked to provide her own or to participate in a formal investigation process. She described Mr Phillips's letter of 12 March 2018 as the conclusion of a disciplinary investigation in which she had never participated and said that she felt that this was unfair and contrary to policy, especially as she said she had not had the opportunity to explain that this related to a long-term medical condition. She questioned whether it was appropriate for Mr Wright to obtain statements and pass them to Mr Phillips. She said that Mr Phillips's letter asked her to take accepted responsibility, which she had. She did not want to take further part in a disciplinary process. In the conclusion to her letter the Claimant returned to

concerns about her relationship with Mr Wright and she expressed the view that her mental health was being used against her.

30. The Patient Experience role was removed from the Claimant, despite her disagreement. At that stage Mr Wright stopped having any line management responsibility for her.
31. In accordance with Dr Quinlan's recommendations, the Claimant did not do any overnight Director on-call shifts for a period. However, she started doing them again at some point during the summer. It was not clear precisely when nor in what circumstances. The Claimant's evidence was that she was made to feel by people such as Mr Nearney that she was putting a burden on her colleagues by not taking on the full on-call. The Tribunal did not hear evidence from him, but we noted that at the Claimant's subsequent disciplinary hearing (see below) Mr Nearney said that he was encouraging her to volunteer to cover colleagues on-call shifts when they needed cover, and by doing so was trying to be supportive.
32. Mr Phillips stepped down from his role in the summer and Mr Wright took over as the Claimant's direct line manager on 4 June 2018. The Claimant's evidence was that she told Mr Long, the Chief Executive, that Mr Wright was bullying her and that she would find it very difficult to be line managed by him. She said that Mr Long reassured her that she had his support and that Mr Wright would be retiring within a few months, so she just needed to keep her head down until he left. We have expressed some concerns about the reliability of the Claimant's evidence and we have not heard evidence from Mr Long, nor direct or detailed evidence about the allegations of bullying by Mr Wright. In those circumstances it would not be right for us to make any finding about them. We do accept that the Claimant was raising concerns about Mr Wright's treatment of her.
33. The Claimant had four days off work between May and August 2018. Mr Wright therefore invited her to a meeting on 23 August 2018 to discuss the absences. He wrote on 7 September 2018 to confirm their discussion. He recorded the Claimant's explanations for the absences: an occasion when she had been tearful and needed to see her GP, an episode of diarrhoea and vomiting and two episodes of anxiety. Mr Wright recorded the Claimant telling him that she was feeling better but still not quite right. She believed she was receiving the appropriate care for her current symptoms and felt that there was nothing that Occupational Health could support her with, so no referral was necessary. Mr Wright noted that this could be activated should the need arise. Mr Wright reported their agreement that the Claimant had triggered Stage One of the Attendance Management policy and that they would meet in eight weeks' time to review progress. Mr Wright concluded by assuring the Claimant of his continuing support for her and asked the Claimant to let him know at any time if he could help or support her in any way. The Stage One Review Meeting took place on 18 October 2018. The Claimant had not had any further absences. Mr Wright recorded that she told him she was feeling "much better." She was taken off the sickness review process. Mr Wright reminded her that Occupational Health support was available to her at any time should she need it.
34. In fact, unbeknown to the Respondent, the Claimant's mental health had been declining over this period. She subsequently reported to Dr Quinlan (see below)

that she had three episodes of binge drinking in the 3 to 4 months leading up to 18 December 2018. She attributed this to stress at work and issues in her personal life. Dr Quinlan again described the Claimant's misuse of alcohol as a maladaptive coping strategy rather than dependency.

35. In her witness statement and evidence to the Tribunal the Claimant was at pains to criticise Mr Wright for failing to refer her to Occupational Health at this time. She said that she had not agreed that this was unnecessary and she said that no opportunity was taken by the Respondent to explore her health issues or the potential risks for herself and the organisation. That seemed to the Tribunal inconsistent with the contents of Mr Wright's letters and again to betray a lack of personal responsibility on the Claimant's part. Mr Wright made it clear in his letters that Occupational Health was available whenever the Claimant needed it and that she could simply request it. She had self-referred before. She was also able to contact Ms Hunter if need be. She did not take any of these steps. Mr Wright was not aware of the deterioration in her mental health that she subsequently explained to Dr Quinlan. On the contrary, she apparently reported that she was feeling much better.
36. In mid-December 2018 the Claimant was becoming increasingly anxious about a work -related issue. Mr Wright told her that concerns had been raised about her "interfering" with Patient Experience. She told him that she had not done so, but he said he would facilitate a meeting between her and the Assistant Chief Nurse. That meeting was scheduled for 17 December 2018. The Claimant experienced symptoms of PTSD and anxiety and was not sleeping. In the event the meeting did not go ahead on 17 December 2018. The Claimant's evidence was that coincidentally she overheard the Assistant Chief Nurse criticising her and her management of Patient Experience to the Chair of the Patient Council. She found this very distressing. She finished her day at work but left at 6 pm distraught.
37. The Claimant was scheduled to be the Director on-call on 18 December 2018. Although in her evidence she said that this was from 5 pm on 18 December 2018 until 8 am the following day, the Tribunal accepted the evidence of Mrs Cope and Ms Myers that formally the cover was from 8 am on 18 December until 8 am the next day.
38. When she got home on 17 December 2018 the Claimant started drinking alcohol. Her GP subsequently confirmed (see below) that when s/he saw the Claimant on 19 December 2018 she had been having suicidal thoughts and was in a mental health crisis. That is the context for the events that follow.
39. At 6:47 am on 18 December 2018 the Claimant sent a WhatsApp to her colleagues Ms Daniel and Ms Southgate (her two direct reports saying, "Sorry ladies off down to my mum's she has fallen again in the night XX." In response to a reply from Ms Daniel, the Claimant sent a further message at 7:13 am saying, "she won't bloody go in she is a nightmare XXCXX." Those messages were untrue. The Claimant's evidence was that she had no recollection of sending them.

40. At around 9 am the Claimant was involved in a minor road traffic collision. Her car rolled into another vehicle. She was arrested and found to be four times over the drink drive limit. She was kept on suicide watch and her mobile phone removed from her until she was released by the police at 11:15 pm on 18 December 2018. By then, she had of course missed her Director on-call shift.
41. The Manager on-call for that shift was Ms Magee. She emailed Mr Wright on 21 December 2018 to say that the Claimant had not attended the 4 pm bed meeting however she did not think this was an issue as not all Directors on-call attended this meeting. The Claimant did not attend the 7 pm bed meeting either. Ms Cope was present. Ms Magee texted the Claimant to ask if she was attending the meeting and did not get a response. After the meeting Ms Magee tried to contact the Claimant but was unable to do so. Ms Cope agreed to cover the Director on-call.
42. On the morning of 19 December 2018, the Claimant contacted Ms Hunter and told her what had happened. She was distraught. She asked Ms Hunter to tell Mr Wright. Mr Wright was absent that day, so, with the Claimant's agreement, Ms Hunter told Ms Ledger, the Deputy Chief Nurse. Mr Nearney and Mr Long were also informed. During their conversations, the Claimant told Ms Hunter that she was "fed up of people tearing strips off her" and that "the Humber Bridge had seemed like a good option." The Claimant told Ms Hunter about the incident at work and also a conversation with her mother that had contributed to how she was feeling. She spoke about having suicidal thoughts.
43. The Claimant was signed off work, and remained on sick leave until 31 March 2019. She notified the Nursing and Midwifery Council soon after her arrest. She attended court on 23 January 2019 where she was convicted and disqualified from driving for 34 months.
44. Mr Wright wrote to the Claimant on 20 December 2018. He started by saying how sorry he was to learn of her current situation and assured her of his ongoing support. He understood that she was due to see Dr Quinlan on 7 January 2019. He explained that they would need to investigate the circumstances around the Claimant's recent non-attendance at work and failure to undertake her Director on-call duties. He had been advised by Ms Ledger that the Claimant understood that this would be necessary, but he added that the first priority was for the Claimant to get the right help for her current health matters. Mr Wright wrote again on 7 January 2019. He enclosed Terms of Reference for the investigation and told the Claimant that Ms Veitch would be the case investigator and he would be the Case Manager. Subsequently, Mr Wright stepped back and Mrs Cope was appointed Case Manager.
45. The Claimant saw Dr Quinlan on 7 January 2019 and he provided the advice to which we have already made brief reference above. Dr Quinlan reported that the Claimant had been abstinent of alcohol since 18 December 2018 and was engaging with an appropriate advisory service. As noted above, she reported binge drinking on three occasions over the preceding 3 to 4 months. She was getting support from her GP and family, and Ms Hunter was arranging a referral to Focus for CBT. The Claimant was not currently on medication, having discontinued treatment with the knowledge of her GP in October 2018. Dr

Quinlan advised that the Claimant was not fit to work but was fit to participate in the investigation. Dr Quinlan added that there appeared to be significant issues to resolve at work. The Claimant had referred to dysfunctional working relationships with some senior management and cited behaviours towards her that she felt bordered on bullying. Dr Quinlan suggested formal evaluation of those concerns as part of the investigatory process and “as advised in previous reports a formal Stress Risk Assessment should be conducted (I understand that advice however was never actioned) as it may help identify root cause stresses and more importantly the actions required to move matters forward in a mutually acceptable (sic) and one that secures Sarah’s successful and sustained return to work in due course.” The Tribunal noted that there was some disconnect between Dr Quinlan’s earlier advice that a Stress Risk Assessment was required *if* the Claimant continued in her Patient Experience role and this advice.

46. Mr Wright wrote to Dr Quinlan on 17 January 2019 with some follow-up questions and Dr Quinlan replied on 24 January 2019. In the course of his reply he reported the Claimant telling him that she felt embarrassed about her mental health issues and had sometimes found conversations with Mr Wright difficult and this had resulted in her not feeling able to go into greater detail with him about these issues.
47. Mr Wright drafted initial Terms of Reference for the investigation. Mrs Cope reviewed and approved them. On 17 January 2019 the Case Investigator was therefore asked to investigate four allegations, as follows:

The allegations against Mrs Bates are in relation to:

- her failure to attend work on 18 December 2018
- her failure to undertake her Director on-call duties of the night of 18<sup>th</sup>/19<sup>th</sup> December 2018, and;
- her failure to report her absence appropriately on these occasions.

In addition, there is a concern that Mrs Bates’s absenteeism was owing to alcohol misuse, that this is a repetitive issue for Mrs Bates over a number of years and that it has wider implications for herself, her welfare, a role, her colleagues, the services she leads/manages and the wider Trust.

48. The Case Investigator was asked to investigate a number of specific matters including the events of 18 December 2018 and whether the Claimant reported her absence on that occasion; whether this was an isolated incident or represented a pattern of behaviour; what impact it had on colleagues and the Claimant’s ability to undertake her role fully and effectively; the impact of reputational damage to the Claimant, the wider organisation and those external to the organisation; and any mitigation.
49. The Terms of Reference remained unchanged throughout the investigation and disciplinary process. All the Respondent’s witnesses agreed in cross-examination that the focus was on the events of 18 December 2018, with an additional general point about whether there was a pattern of absenteeism owing to alcohol misuse. Mrs Cope wrote to the Claimant on 21 January 2019 setting out the allegations and confirming that a formal investigation would be carried out. The possible outcomes were: no case to answer, the accepted responsibility approach or referral to a formal disciplinary panel.

50. Ms Smith, the National Officer for Yorkshire and the North East for Managers in Partnership (a trade union for senior managers working in health and care), started representing the Claimant in respect of these events in January 2019. It is clear that she is an extremely experienced, well-informed and proactive trade union representative. She represented the Claimant throughout the events that followed. Mrs Cope's letter did not specifically tell the Claimant that she could identify witnesses she considered the Case Investigator should speak to but the Tribunal had no doubt that this would have been obvious to an experienced representative like Ms Smith.
51. Ms Veitch carried out a detailed investigation, supported by an HR manager. She interviewed 14 witnesses and then the Claimant. The Claimant prepared a written statement in advance of her investigatory meeting. It took place on 18 February 2019 and the Claimant was accompanied by Ms Smith. In her written statement the Claimant set out a detailed account of her employment, the events of 18 December 2018 and her mental health issues. She concluded by saying that she took "full responsibility" for her actions but hoped that it could be seen that this was not her normal behaviour. At the investigatory meeting Ms Veitch went carefully through the matters identified in the Terms of Reference with the Claimant. She went through the Claimant's written statement and discussed that in detail. The notes of the investigatory meeting record a discussion about the Claimant's use of alcohol. They record the Claimant saying that there had been three or four instances of binge drinking in 2018. She could not recall the dates but said that there had been some related days off work. There was discussion of 30 December 2017 and 23 February 2018. Ms Veitch told the Claimant that witnesses had suggested that her attendance and timekeeping had not been reliable. The Claimant disagreed. Ms Veitch referred to a log that some witnesses had said they had been keeping. The Claimant asked for a copy but Ms Veitch did not have it. The Claimant referred to her concerns about bullying behaviour and to her mental health.
52. On 22 February 2019 Ms Smith wrote to Mr Long enclosing a grievance on the Claimant's behalf. The grievance was against Mr Wright and set out a range of allegations about his behaviour, which the Claimant described as bullying. Ms Smith asked that the grievance be investigated prior to the completion of the current disciplinary investigation. Mr Nearney emailed Ms Smith on 27 February 2019 to say that he intended to deal with the matter in accordance with the Trust's bullying and harassment policy. Under that policy a member of HR would check with the complainant whether they wanted a formal investigation or something different. Mr Nearney had therefore asked Ms Harding, Head of HR, to talk to the Claimant about her complaint.
53. Mr Wright evidently became aware of the grievance, although he was never provided with a copy of it. The Tribunal saw emails from him to colleagues asking them to provide him with details of what the Claimant had said to them about his working relationship with her. That seemed to the Tribunal to be a surprising course of action by Mr Wright, but he did not give evidence and was not asked about it. The Tribunal saw an email in reply from Ms Southgate, sent on 4 March 2019. Ms Southgate said that the Claimant was apprehensive about Mr Wright taking over her line management but had been "clear that since that time you have had a productive and professional relationship." Ms Southgate

said that the Claimant had mentioned that things were “good” between the two of them and would come back from her one-to-one’s saying so. Ms Daniel also responded. On 4 March 2019 she said that when she was working under Mr Phillips, the Claimant had found some of her interactions with Mr Wright “challenging” and was nervous about Governance coming back into the Chief Portfolio. However, it was Ms Daniel’s understanding that when Mr Wright did become their Director he met with the Claimant and the feedback Ms Daniel received was that the Claimant found Mr Wright to be supportive of, and happy with, the Directorate.

54. Ms Harding spoke to both Ms Smith and the Claimant by telephone on 4 March 2019. Ms Smith emailed Ms Harding, copying in the Claimant, on 5 March 2019. She said that she and the Claimant had discussed the Claimant’s preferences in relation to the handling of her grievance and were clear about how she would like it to be handled. She asked to meet Ms Harding. Ms Harding replied to say that she had understood from their conversations the previous day that they *had* clarity about how the Claimant would like to see her grievance progressed. She had been advised that they did not wish to pursue a formal investigation, nor were there other avenues of resolution the Claimant wanted to explore. Ms Harding had advised Mr Wright that a formal investigation would not be commissioned and he would therefore retire from his post as planned that week without having seen or responded to the concerns raised. Ms Harding considered the grievance closed.
55. Ms Smith replied the same day. She said that it was correct that the Claimant did not want a formal investigation into her grievance, but that the Claimant had not agreed that her grievance should be considered closed. She remained concerned about organisational responsibility in relation to the matters raised. That is what they wanted to discuss at a meeting. Ms Harding replied shortly afterwards. She said that the Claimant had rejected all the avenues available under the bullying and harassment policy. While the Claimant had spoken about having the opportunity to raise organisational learning in a meeting with Mr Long, Ms Harding noted that this would only be from the Claimant’s perspective and did not think it appropriate for her to have a conversation with the Claimant about the wider issue of responsibility within the Trust when these matters had not been determined through a proper investigatory process. She made clear that the Claimant was permitted to say in her conduct proceedings that she felt bullied for a period of time and that this may have contributed to decisions she took, but pointed out that she would also have to concede that the bullying allegations were not investigated at her request and therefore a process was not undertaken to substantiate her complaint.
56. Ms Smith replied the following day. She said that the Claimant was becoming increasingly anxious and unwell. She asked to be provided with a provisional date for the next step in the disciplinary process and to be provided with copies of evidence that had been referred to. She said that they reserved the right to raise the issues covered by the Claimant’s grievance in discussions after the conduct process, in relation to any return to work. If that was accepted, on that basis they would accept that the Claimant’s grievance against Mr Wright was formally closed. Ms Harding replied to confirm that the Claimant could refer to matters raised in the grievance to help shape a return to work plan, but could not

raise issues formally or assume that her version of events had been accepted at face value without anyone in the organisation having had the formal opportunity to challenge or rebut. Since the Claimant had confirmed there were no further actions to be taken in respect of the grievance against Mr Wright, by definition it was closed.

57. In her evidence to the Tribunal, the Claimant said that Ms Harding told her she could not pursue her grievance against Mr Wright because he was leaving the organisation. Her evidence was that she did not agree and that she did not agree to her grievance being closed. She was asked in cross-examination about the above correspondence. She said that she did not ever say that her concerns should not be looked at. She could not explain why the email correspondence did not disagree with Ms Harding's version of events or say that Ms Harding had told the Claimant she could not pursue the grievance. The Tribunal considered that if the Claimant disagreed with what Ms Harding said, she or Ms Smith could and would have said so. If she had wanted her grievance about Mr Wright to be formally investigated, that would have taken place. She chose to proceed differently and, as Ms Harding made clear, she could not approach the disciplinary process on the basis that her complaints about Mr Wright were taken at face value.
58. On 1 April 2019 the NMC wrote to the Claimant to inform her that they had decided not to investigate a concern about her fitness to practice. They had concluded that her conviction for drink-driving did not meet the necessary level of seriousness, for reasons they explained. Nor did her health condition. The NMC referred to Dr Quinlan's view that the Claimant was not dependent on alcohol but had used it as a strategy for coping with mental health issues. They noted that she was in a role that did not require nursing registration, that she was not currently drinking and that she was engaging with an appropriate advisory service and being supported by her GP. The NMC said that there was no evidence the Claimant put patients at risk by attending work while under the influence of alcohol.
59. The Claimant was seen by Dr Quinlan again on 2 April 2019. He wrote to Ms Geary, the Claimant's new line manager. He reported that the Claimant remained abstinent of alcohol and was attending support services and CBT. She was fit to return to work but understandably anxious about the disciplinary process.
60. Mrs Cope was provided with an initial draft of the Management Report on 5 April 2020 and met the Claimant and Ms Smith on 8 April 2019 to confirm the next steps in the disciplinary process. Mrs Cope summarised the main findings of the disciplinary investigation and confirmed that she considered that there was a case to answer and that the Claimant's case would be referred to a disciplinary hearing. Mrs Cope wrote to the Claimant to confirm what had been discussed on 12 April 2019. Mrs Cope's evidence to the Tribunal was that she considered there was a case to answer because there was no dispute that the Claimant did not attend the on call on 18 December 2018, did not report absence and had been convicted of a drink driving offence in relation to that date. This was the third incident of a failure to do her Director on-call in full in 12 months. The accepted responsibility approach was not available under the Disciplinary Policy



because it had already been used for the previous two incidents. That left: no case to answer or proceeding to a panel hearing. Mrs Cope's view was that there clearly was a case to answer, so the appropriate decision was to move to a disciplinary hearing. That would also enable the Claimant's mitigation to be considered in full. Mrs Cope considered that there was a case to answer that the Claimant had committed misconduct. Mrs Cope understood at that point that the Claimant had had mental health difficulties for some time. She recognised that the Claimant had had a difficult few days leading up to the on-call but on the information before her she felt there were actions the Claimant could have taken to manage the situation better in the lead up. Not attending a Director on-call shift was a very serious matter and of huge patient safety risk to the organisation. Part of the process of the disciplinary hearing was to consider all the mitigating facts. That is why Mrs Cope felt it had to go to a panel hearing. She took the decision knowing and understanding the Claimant's long-standing mental health difficulties. Mrs Cope was asked in cross-examination about Ms Veitch's evidence that there was a concern that Claimant was not able to identify when she needed support. Mrs Cope said that she could only agree. She referred to the letter from Dr Quinlan in January 2019 referencing episodes of binge drinking prior to 18 December 2018. This suggested that had the Claimant raised concerns through the Trust's alcohol policy or with her Line Manager, steps could have been taken to support her and perhaps remove her from on-call duties. The evidence suggested to Mrs Cope that the Claimant was not able to take personal responsibility for removing herself from situations that could be risky. Mrs Cope could not see evidence that the Claimant had taken any steps herself to mitigate some of the risks that culminated in the incident on 18 December 2019. The investigation demonstrated that there were warning signs that meant the Claimant could have taken action herself, especially as these issues were long-standing so Mrs Cope would expect her to have insight into her health. This was sufficient to refer the matter to a disciplinary hearing.

61. The Claimant was keen to return to work. On 23 April 2019 Ms Ledger and Ms Harding met with the Claimant and Ms Hunter to discuss this. Ms Ledger had been advised that it would be inappropriate to bring the Claimant back to work in the workplace until the outcome of the disciplinary process was known. They had considered whether suspension might be appropriate, but given the short time before the disciplinary hearing date (by then scheduled for 4 June 2019) they had agreed that the Claimant could undertake some activities working from home. That then took place. The Claimant worked on reviewing some Trust policies. As the Tribunal understands it, she attended Trust premises on a very small number of occasions as part of this work.
62. Ms Veitch finalised her Management Report on 7 May 2019. It was a comprehensive and detailed document. It included typewritten notes of the interviews carried out with 14 witnesses and the Claimant plus extensive written evidence, including: the log of concerns that had been referred to at the Claimant's interview and had now been provided by Ms Daniel and Ms Southgate; copies of the Occupational Health correspondence throughout 2018 and 2019; and copies of an article from the Hull Daily Mail published after the Claimant's court appearance and a Hull Live Facebook article, which had around 100 comments posted on it.

63. The Management Report went through each of the four specific allegations setting out the Claimant's account and the other evidence in respect of each. It went through the bullet points from the Terms of Reference. The report included the following:
- 63.1 In respect of whether there was a pattern of absenteeism relating to alcohol misuse, the report referred to evidence from Mr Southgate, Ms Daniel and another colleague reporting short notice absenteeism, late arrival to work and not knowing where the Claimant was as recurrent behaviour. None of them believed at the time that alcohol was involved.
  - 63.2 The report referred to evidence from colleagues who had worked with the Claimant when she was a Nurse Director between 2011 and 2013. The report said that there was a general consensus that the Claimant had become more unreliable during that time, and that there were concerns about her use of alcohol. Witnesses reported that the Claimant was very unwell during this period and experiencing poor mental health. There was evidence of a formal management approach with Occupational Health support. This culminated in the Claimant being told in July 2013 that she was not fulfilling her role and trust and confidence in her had diminished. She was retained in a senior nursing role within the Trust on the same pay and conditions but was removed from her Nurse Director role. The report included the Claimant's explanation that she had severe depression and anxiety at this time, which she attributed to work and personal issues, and that she had begun to self-medicate with alcohol. The Claimant's view was that there was a pattern of poor mental health but not a pattern of failing to attend work or on-call duties due to alcohol misuse relating to 2012/2013.
  - 63.3 The report included evidence from the Claimant's current direct reports, Ms Southgate and Ms Daniel. This included evidence from Ms Southgate that she had struggled with the Claimant's professional behaviour and attendance at work for a period of time. She had escalated her concerns to Mr Phillips but did not feel she was getting anywhere so she spoke to Mr Nearney and Mr Long. Mr Nearney confirmed that Ms Southgate had spoken to him and told him that she felt she was increasingly placed in a difficult position with the Claimant and felt that this was untenable.
  - 63.4 The report discussed the impact of the Claimant's behaviour on colleagues. It recorded the Claimant explaining that she felt embarrassed and ashamed and recognising that the three specific incidents had impacted on staff and the organisation. It went through evidence from witnesses about the impact of specific events on them, including the Claimant's current and former direct reports.
  - 63.5 The report included numerous specific allegations of inappropriate behaviour by the Claimant, not all of which were directly linked to the specific allegations the subject of the disciplinary investigation.
  - 63.6 The report included discussion of the impact on the Claimant's ability to undertake her role fully and effectively. It referred to evidence suggesting that the Claimant's position as a credible senior member of the Director on-call rota had been severely compromised with a number of Manager on-call members. The report said that participating in the Director on-call rota was not a prerequisite for undertaking the role of deputy Director of Quality, Governance and Assurance but it was one for being a senior manager and leader at the Trust. The report also referred to evidence

suggesting there had been a significant erosion of confidence and trust in the Claimant's ability to perform a role.

- 63.7 There was discussion of the press coverage of the events of 18 December 2018. The Report noted the Claimant's view that the story had been leaked to the press by someone with knowledge from inside the Trust. She explained that there had been no press in court and that her job title had not been mentioned. Nonetheless, the Report concluded that this presented a reputational challenge to the Claimant and the Trust. The report highlighted the risk that the Claimant's ability to develop key relationships with external stakeholders was compromised.
- 63.8 The report noted that current registration with the NMC was not an essential requirement for the Claimant's post. It noted that the Claimant had self referred to the NMC and confirmed that the Claimant had emailed on 3 April 2019 to confirm that the NMC did not intend to pursue a fitness to practice investigation. Ms Veitch was not provided with the NMC's full letter, just a short email from the Claimant.
- 63.9 The report set out the mitigation identified by the Claimant, including her history of her poor mental health since 2006 and specifically in 2017/2018. The report discussed the reasons identified by the Claimant for that poor mental health, in particular her relationship with and treatment by Mr Wright. The Claimant said that the Trust had failed to provide support in managing her mental health. The report included the Claimant's allegation that she had been bullied by Mr Wright and identified those to whom she had spoken about this.
- 63.10 The evidence and discussion were drawn together in a conclusion section in the Report addressing the elements of the Terms of Reference in turn.
64. Ms Myers was appointed to deal with the disciplinary hearing. On 8 May 2019 she wrote to the Claimant inviting her to a hearing on 4 June 2019. The letter set out the four allegations as originally included in the investigation Terms of Reference. The letter identified which of the witnesses who had been spoken to during the investigation Ms Veitch intended to call to give evidence at the disciplinary hearing. The Claimant was invited to identify anybody else from that list whom she wanted to attend. The Management Report was provided to the Claimant in full with Ms Myers's letter. Arrangements were made for the Claimant to receive and review the report with Ms Hunter present to support her.
65. Ms Smith corresponded with Ms Harding following receipt of the Management Report and letter. She said that it was really important for the Claimant to be able to put questions to all of the witnesses who had been interviewed in the management investigation in person. During their correspondence Ms Smith asserted the Claimant's right to identify and call witnesses to the disciplinary hearing. Ms Harding asked for an indication of the nature of the evidence to be given and said that contact should be made through the Respondent. The correspondence appears to have concluded with Ms Smith asserting that actions were being taken to frustrate the Claimant's right to a fair hearing, so they would now contact their witnesses directly and arrange for them to be present on the Claimant's behalf. Ms Smith was well-informed about the Claimant's rights and the Tribunal had no doubt that the Claimant and Ms Smith could and would have identified any witness they wished to attend the disciplinary hearing.

66. The Claimant produced a detailed written response to the Management Report. It began:
- Firstly, I would like to apologise to the Trust for letting the organisation and my colleagues down on 18 December 2018. I am deeply ashamed of what happened and I do not wish to minimise the impact that this has had professionally and personally. However, what happened is not as a result of someone in denial of an alcohol problem, this happened as a result of someone in a deep mental health crisis which had been triggered by events at work that senior members of the Trust knew were happening and had been happening for nearly 2 years. I did not go out on the morning of 18 December 2018 to buy more alcohol as has been portrayed in this disciplinary, I went out that morning with the intention of committing suicide as I believed my life had become so intolerable and I was such a burden to everyone, that they would be better off without me.
67. The Claimant's response said that the whole disciplinary process had failed in every respect to reflect her long-standing mental health issues. It went in detail through the history of her employment and poor mental health from her perspective. The Claimant said that she was extremely upset by the false allegations in the Management Report about her being a bully and her poor leadership style. She said that this was not correct and she totally refuted it. She referred to more than 40 character references she had gathered, which she said showed her true professional character, leadership style and the way she treated people. The Claimant said that the management report was biased and did not seek to find facts to substantiate the "gossip." She said that the real story was the actual misconduct of calculated organisational gaslighting of a vulnerable member of staff with a recognised disability under the Equality Act. The Claimant provided, among other things, medical evidence, information from the NMC, a response to the log produced by Ms Southgate and Ms Daniel, information about Mr Wright's behaviour, and extensive supportive character references.
68. The disciplinary hearing took place over three days: 4, 17 and 24 June 2019. Ms Myers chaired the panel of three. The Claimant attended with Ms Smith and Ms Veitch attended to present the management case, with HR support. The transcripts of the hearing were provided to the Tribunal. At the start of the hearing Ms Myers made it clear that the Claimant would have the chance to call her own witnesses. Ms Veitch went carefully through the management case. Ms Smith and the Claimant asked questions of her. 12 people gave evidence overall, including Mr Phillips, Mr Wright, Ms Daniel and Ms Southgate. There had been an issue with Ms Hunter giving evidence on the Claimant's behalf, but Ms Myers agreed that she should do so and she did.
69. The Claimant and Ms Smith had the opportunity to question each of the witnesses and challenge what they said, and they did so in many respects. The Claimant accepted in cross-examination that she had the chance to dispute people's versions of events and their complaints about her behaviour more generally. She agreed that the Management Report contained Ms Mableson's account of 23 February 2018 and that she could have challenged that account at the disciplinary hearing. She did challenge Ms Southgate's account in some respects. In re-examination the Claimant suggested that she did not challenge the evidence about the February 2018 incident because she was confused about what she was being disciplined for. That allegation did not form any part until the

end of the last day. That seemed to the Tribunal to be an unreasonable view, given that from the outset the Terms of Reference made clear the investigation was to consider whether what happened in December 2018 was part of a wider pattern, and given the clear content of the management report that identified February 2018 as one of two incidents that potentially formed part of such a pattern.

70. In her cross-examination, Ms Smith confirmed that Mr Wright had told the disciplinary panel he had a positive relationship with the Claimant. Ms Smith accepted that she had not disputed that and said that she “did not choose to.” Nor had she challenged Ms Southgate’s email to Mr Wright (referred to above) indicating that the Claimant had reported that she had a positive relationship with Mr Wright. Ms Smith perceived Mr Wright and Ms Southgate to be hostile witnesses to the Claimant’s case so she chose to question them less than she otherwise would have. She did not trust Mr Wright to give true answers. Ms Smith agreed that she is an experienced trade union representative. It was put to her that she would expect to have to challenge disputed evidence. She said that there was no obligation to do that every time. The amount of information in the pack was so vast that it would have taken too long and it was not clear at all which things were pertinent. It was then put to her that this was not about picking up every single point: bullying and harassment by Mr Wright was a very important part of what the Claimant was saying. Ms Smith agreed that it was. The Tribunal found Ms Smith’s reasoning unpersuasive. A central part of the Claimant’s case was that her ill-health and in turn her missed on-call were caused by Mr Wright’s treatment of her. This was not a peripheral matter nor one where there could have been confusion about its relevance.
71. Ms Smith explained in cross-examination that she took the view that Ms Daniel’s account in her email of March 2019 fully supported the Claimant’s case and she did not challenge it for that reason. It was put to her that Ms Daniel did not say Mr Wright bullied and harassed the Claimant and she said that Ms Daniel “chose her words.” Ms Smith accepted that she did not dispute Ms Ledger’s evidence at the disciplinary hearing, that when she carried out a return to work interview with the Claimant in August 2018, the Claimant seemed really well. They had a conversation about whether there were concerns about alcohol use and the Claimant said that she had no issues there. They had a conversation about the anti-depressant medication she was on and she laughed and said she realised how much better she felt when she was on the medication. She said that she felt in a much better place and that her relationship with Mr Wright was better. She did not reference any occupational triggers that were impacting her health and well-being at that time. Ms Smith agreed that she was accepting Ms Ledger’s account of the meeting and said that this was Ms Ledger’s perception. The Tribunal noted that the Claimant told the disciplinary panel that she did not raise concerns about Mr Wright with Ms Ledger because Ms Ledger reported to Mr Wright.
72. In cross-examination Ms Smith was asked about her evidence that there were two specific witnesses she and the Claimant did not have the chance to interview. She accepted that after the investigation but before the disciplinary hearing the Claimant was asked if there was anybody she wanted to have interviewed. She accepted that it was not until the second day of the disciplinary

hearing that these two witnesses had been suggested. She could not explain why they were omitted from the list of witnesses they wanted to invite to the hearing that was sent to Ms Harding in advance.

73. At the disciplinary hearing, Ms Smith made a lengthy presentation on the Claimant's behalf after the witnesses had given evidence. She addressed in detail the allegations referred to in the Management Report and set out the Claimant's mitigation in detail, including aspects relating to her mental health and her relationship with Mr Wright.
74. The Claimant was then asked questions by Ms Veitch and the panel. Ms Veitch asked the Claimant about the relapse in her mental health in 2018. The Claimant explained that the root causes of her poor mental health were not being addressed, so she continued to have absences due to mental health issues. Ms Veitch asked her what actions she took to address this and she spoke about paying for CBT and hypnotherapy and attending her GP and support groups. Ms Veitch noted the Claimant's acknowledgement that she had been using alcohol as a maladaptive coping strategy during 2018 and that she had not volunteered this to her line manager. She explored with her whether she should have done. The Claimant initially said that she did not think she was experiencing difficulties at the time. Then she said that alcohol was not a primary problem in 2018. She was referred to what she had said about using alcohol on three occasions in 2018. She said that was "latterly." She said that when she said, "binge drinking" to Dr Quinlan she meant she had drunk on a night to go to sleep, so it was not a primary issue. Her mental health was a primary issue and she did discuss that with her line manager. Ms Veitch pressed the Claimant as to why she did not offer the information to her line manager that she was using alcohol in the latter part of 2018. She said again that it was not a primary problem. She was not being managed on the Trust's Alcohol Misuse Policy and therefore there was no requirement for her to notify anyone; drinking on your own at home on a Saturday was not illegal. Ms Myers and one of the other panel members returned to this theme in their questions. Ms Myers said that she understood completely that the Claimant was saying her use of alcohol was an occasional coping strategy as a result of her mental health. However, she asked the Claimant, even though that was the case, did she not think it was important to discuss it anyway and was it not important to discuss it even though it was a secondary problem? The Claimant said that it was "not an evident problem" to discuss with her line manager. She could not have discussed it with him. At that point it was just once a month. It was not in the scale of what she would consider to be a problem. People with stressful jobs drink, it was just that alcohol knocked her out.
75. The Claimant was also asked by the panel about her description of a mental health crisis and a decline in her mental health. She was asked whether she considered at any point in that situation when she had an on-call coming up, swapping it with a colleague or changing it in advance. The Claimant said that she did not because she had been told to get off the radar and to do more on-call. This was a reference to the conversation with Mr Nearney that was referred to in the disciplinary hearing (see above).

76. Ms Myers also asked the Claimant a question about the incident in February 2018. She asked her whether she had thought about the potential patient impact of that incident, which had not been addressed in the Claimant's statement. The Claimant said that she never knew about it; she never saw the statements and was never asked about it. She said that the first time she was aware there was a patient wanting to be transferred urgently from the neighbouring Trust was when she saw it in the management case. Ms Myers asked her what her response to it was. She said that she would never want to put anybody at risk. When she read those things she did not recall it happening like that. She prided herself on supporting everybody when she was on-call. She said that it had "got an impact" and she had "done wrong" but she did not know about it until she saw the management case. Ms Myers pointed out that she had now known what Ms Mableson said for a number of weeks and the Claimant interrupted to say, "I was not there for what I should have done."
77. Ms Myers wrote to the Claimant on 1 July 2019 to inform her of the panel's decision. She said that the panel had come to the following conclusions:
- As set out in concern numbers 1 and 2 above, you failed to undertake the critical duties associated with being the Director on-call for the period of the 18/19 December 2018. This was despite having previously failed to undertake these duties and having provided a reflective statement, in accordance with the informal accepted responsibility process, as detailed within the Trust's Disciplinary Policy and Procedure. On that earlier occasion, you accepted responsibility for not undertaking your Director on-call duties on the 30 December 2017 and on the 23 February 2018.
  - As set out in concern 3 above, on 30 December 2017 and 18 and 19 December 2018, you did not follow the Trust procedure for reporting your absence which potentially compromises patient care if no cover is put in place.
  - In addition, on the morning of the 18 December 2018 you were arrested for drink-driving which resulted in you receiving a criminal conviction on 16 January 2019. This followed a period during which you admitted that you had been drinking alcohol in your car at a time when you were supposed to have been at or available for work.
  - Taken together, these failings represent a pattern of behaviour rather than isolated incidents.
  - The panel determined that failing to attend your Director on-call duties represents a risk to patient safety and also has an impact on colleagues who are required to provide cover at short notice. Further the panel found that during your presentation you did not acknowledge the seriousness of not undertaking your Director on-call duties and the potential impact it had on patient safety.
  - In addition to the effects described above, your drink-driving conviction resulted in adverse publicity, bringing both your and the Trust's reputations into disrepute.
  - The panel noted that the Trust had, in recognition of your ongoing mental health condition, made an adjustment to your on-call pattern, providing you with a period of relief from the requirement to cover the 8 pm to 8 am period. The panel considered whether following the earlier failure to undertake on-call and the acceptance of responsibility, you had taken steps to manage the risk to the Trust and patients if you were to miss a further on-call. We found that whilst you were actively engaging with Occupational Health and other services to address your health issues, you did not

manage the risk of failing to undertake your on-call duties, for example by asking to leave the rota or reduce your commitment further.

- As set out more broadly in the fourth concern, your behaviour has had an adverse impact on your colleagues, particularly those that report directly to you. Examples were provided by witnesses who report directly to you, of inappropriate behaviours by you that made clear the extent of the negative impact of your behaviour on them. This has led to a breakdown in relationships particularly with your team.

78. The letter went on to deal with the Claimant's mitigation. The panel recognised that the Claimant had a long-term mental health condition and that this had been known to the Trust and the Claimant's line managers for a number of years. The panel also accepted that the Claimant's use of alcohol, at times to excess, was a problem that was secondary to her mental health condition and that both she and Occupational Health had described as a maladaptive coping mechanism. The panel had received evidence clearly demonstrating the Claimant had received ongoing support, including appointments with the consultant Occupational Health physician, informal support from the senior Occupational Health nurse, access to unlimited counselling and reduced on-call commitment. The panel concluded that the Claimant had been well supported by the Trust over the years. Ms Myers noted that the Claimant had identified one failure in relation to Occupational Health advice, namely the completion of a Stress Risk Assessment. However, when questioned, the Claimant was unable to outline what other adjustments could or should have been put in place had it been completed, except for action in respect of Mr Wright, which it dealt with separately. The panel was satisfied that the Trust had supported the Claimant over a sustained period of time, but considered that even if that had not been the case, the fact that the Claimant had failed to attend as Director on-call, failed to inform the Trust of this appropriately, become drunk during times when she had responsibilities to the Trust and subsequently received a conviction, could not reasonably have been disregarded.
79. The panel noted the Claimant's representations that the events under discussion were the product of a "mental health crisis". The panel was not able to judge whether that was the case, and such a conclusion was not suggested by either Occupational Health or GP letters. However, even if this was the case, given the seriousness of the misconduct and the risk of further repeats, the panel considered that it would not be reasonable or safe to risk further loss of Director on-call cover.
80. The panel did not feel the need to deal with events relating to 2012 to 2013.
81. The panel noted that the Claimant had submitted a grievance against Mr Wright after the Trust's disciplinary concerns had been raised, but that it was subsequently withdrawn, with the effect that the allegations could not be investigated and Mr Wright could not present any response. The panel found that the Claimant provided no evidence of bullying by Mr Wright and so there was no basis to conclude that this had been the case. Mr Wright and another witness expressly rejected this suggestion. It was important that the panel recorded this given the serious nature of the accusations made against Mr Wright. The panel recognised that Mr Wright maintained high standards and expected his senior team to meet them. The panel considered that these were



standards it was entirely acceptable to expect a Deputy Director of Quality and Assurance to meet.

82. The panel noted the Claimant's criticisms about the way the case was investigated and presented but did not accept that there were flaws with the process that would in any way make it reasonable to disregard the serious conduct issues or reduce any sanction. The panel was satisfied that Trust policy had been followed and that the investigation report and subsequent discussion of it was fair, clear and balanced.
83. The panel noted with significant concern the Claimant's suggestion that Mr Wright had influenced witnesses, misled the Trust Chair and spread lies. As with the bullying allegations, the panel said that the Claimant provided no evidence to support these very serious allegations. The panel was satisfied that the Claimant's experienced union representative would have been able to advise her of the seriousness of the allegations and the related need to be able to substantiate them. The panel would have expected evidence of such serious allegations and did not accept that any of the assertions were accurate or true.
84. The panel was quite clear that the Claimant was not being punished for having mental health issues. The outcome of the hearing and sanction related to the serious misconduct under discussion. The panel referred to the Claimant's view that the media attention following her court appearance and conviction had been instigated by somebody in the Trust. This was a serious accusation and one for which the panel said that Claimant had not provided evidence.
85. The panel rejected the Claimant's suggestion that the events related to capability. The Claimant's competence to carry out her role had not been called into question. The concerns related to her failure to attend as Director on-call and the other concerns set out in the invitation letter. The panel considered it was both Trust policy and generally reasonable for the concerns to be treated as conduct concerns.
86. The panel found that the Claimant's actions were serious enough to be considered gross misconduct. However, they decided to dismiss the Claimant for some other substantial reason, which made her eligible for three months' pay in lieu of notice; allowed her to avoid dismissal for gross misconduct; and provided her with the opportunity to reflect on what had transpired, seek help where necessary and look to make a success of her future.
87. Ms Myers confirmed in cross-examination that the reasons the Claimant was dismissed were as set out in the letter. She explained that the panel regarded the first five bullet points set out in the dismissal letter as the primary reasons for dismissing the Claimant. Those were sufficient to amount to gross misconduct and the panel would have dismissed for those five reasons regardless of the other elements. That evidence was not disputed and the Tribunal accepted it.
88. Ms Myers confirmed that the panel did not find that the Claimant's absenteeism was owing to alcohol issues.

89. Ms Myers confirmed that in respect of February 2018, the panel disputed the Claimant's account that she only missed one call, but they did not dispute that new medication was part of the cause. Ms Myers was asked about her questions to the Claimant at the end of the disciplinary hearing about that incident. It was suggested to her that the Claimant had not been given a sufficient opportunity to provide her version of events on that day. Ms Myers disagreed. She said that the management case and appendices made the details as presented clear and that the Claimant was given a generous opportunity to present her response to that case. She had almost a whole day and it was entirely open to her or her representative to dispute the account as set out in the management case. The reason Ms Myers asked a question about it was because she felt that the Claimant had not addressed this in her response to the management case and she wanted to give her a further opportunity. Ms Myers also expressed the view that there had been an opportunity for the Claimant to understand exactly what had happened on 23 February 2018 when she undertook the reflective process. That was the appropriate time to do so and there was an onus on the Claimant to do that as part of the reflective process but she had not. The Claimant's reflective statement related to the missing of calls rather than the detail of what happened when they were missed.
90. Ms Myers was asked about the panel's conclusion that the Claimant had failed to acknowledge the seriousness of not undertaking her Director on-call duties. Her attention was drawn to what the Claimant had said at her investigatory interview, about being ashamed of her behaviour and the potential harm she could have caused. Although it was not entirely clear Ms Myers thought the Claimant was referring to potential harm caused by drink-driving rather than a missed on-call. She accepted, as set out in the Management Report, that the Claimant had recognised that the incidents of December 2017 and February 2018 had impacted on staff and the organisation. She remained of the view that the Claimant did not acknowledge the seriousness of her actions. It was put to her that this was not a specific allegation in the letter inviting the Claimant to the disciplinary hearing or the Terms of Reference. Ms Myers acknowledged that this was not explicitly referred to, but she pointed out that patient safety was core to the Claimant's role and the Director on-call role. The whole purpose of the organisation was to deliver safe care to patients and it was difficult to argue that because this was not explicitly referenced it could not be taken into account.
91. Ms Myers was asked whether, despite what the Claimant said at the investigation, in the Management Report and at the disciplinary hearing, she stood by the view that the Claimant had not acknowledged the seriousness of her actions. Ms Myers said that it was not despite what the Claimant said but because of it. It was an issue the panel were concerned about. They listened carefully to what the Claimant said. It was because Ms Myers was unclear that the Claimant understood the seriousness of her actions and taking responsibility that she asked her the question at the end about 23 February 2018 and gave her the opportunity to make another statement. She considered that the Claimant's final answer was the acknowledgement of a failing but did not think the Claimant addressed the harm issue. She was trying to give her an opportunity to reflect. The context was a discussion earlier in the day when the Claimant and Ms Smith were at pains to appear to try and demonstrate that the Director on-call role was not critical and was not important. Ms Myers wanted to use this concrete

example to give the Claimant the opportunity to discuss that and the potential consequences for patient safety. She did not agree that the Claimant adequately acknowledged the risk to patient safety in her response.

92. Ms Myers was asked about the finding in relation to disrepute. She did not agree that it would be unfair to take that into account if the story had been leaked by a member of Trust staff. Ms Myers explained the panel's view that it was important patients had confidence in the conduct and ability of members of Trust staff to carry out their duties effectively. The newspaper article had wide circulation amongst the core population who accessed the Trust's services. The article would have had an adverse effect on confidence and the ability to feel safe accessing the organisation.
93. Ms Myers was aware of the NMC decision letter, but she said that it was addressing a different question. The panel was not considering whether the Claimant's health condition put patients at risk of harm. She said that the cause of patients being put at risk of harm was the Claimant's failing to attend her on-call duties. She was asked if she said that this was unrelated to the Claimant's health condition. She said that it was not entirely unrelated but it was not the direct cause. There was never any suggestion that the Claimant did not retain full capacity to make decisions. There were opportunities when she could have taken actions and worked with the organisation to mitigate the risk that a deterioration in her health would leave her in a position of being unable to fulfil her duties. She did not take those opportunities. That was the cause. This continued after previous incidents, leading to the incident that was the focus of the disciplinary hearing, 18/19 December 2019. The panel recognised that the Claimant had a long-term health condition and was taking steps to manage it. What she was not doing was taking steps to mitigate the risks that condition presented to her being able to manage her on-call duties. It was not that the onus was on the employee rather than the employer. It was contingent on both to be alive to this. If the employer had concerns arising from their interactions it was on them to initiate a conversation. But the evidence before the panel was that the Claimant was saying she was comfortable to be on-call and happy to continue. The respondent was not in a position to second guess at that stage.
94. Ms Myers was asked about the Occupational Health reports recommending a Stress Risk Assessment be carried out. Ms Myers said that the recommendation in February 2018 was to carry out a formal Stress Risk Assessment if the Claimant resumed the Patient Experience part of her remit, which she did not. Ms Myers was asked about the Claimant resuming her on-call duties and she said that she had tried to establish definitively when this took place in preparation for the appeal against dismissal but was unable to do so. She had done a shift in June. It was put to her that there was no further Occupational Health report before December 2018. Ms Myers agreed, but noted that there had been the stage I absence process and that Mr Wright's letters referred to discussion about a referral to Occupational Health and made clear that the Claimant could request a referral any time. Ms Myers also pointed out that the Claimant had had episodes of binge-drinking in the autumn but that the Respondent had not been aware of them at the time. Ms Myers was asked whether it was potential mitigation for the Claimant that the Respondent could have done a Stress Risk Assessment but did not. She said that it was a potential

avenue of mitigation. The panel did ask the Claimant during the hearing what she would have identified if a Stress Risk Assessment had taken place and the only action she identified was removing Mr Wright as her line manager. That would not directly address the on-call issues. While the panel acknowledged that it was a failing of the Trust not to do a Stress Risk Assessment they did not think it was of such a level that would trump their primary findings.

95. Ms Myers was asked about a letter Dr Quinlan had written to Ms Smith answering questions posed by her, on 14 August 2019. Ms Smith asked whether in Dr Quinlan's opinion the Claimant's state of mind on 17/18/19 December 2018 could be viewed as a mental health crisis. Dr Quinlan referenced his earlier reports and expressed the view that it was reasonable to assume that the Claimant was in a state of mental health crisis at that time and that her state of mind and behaviours were likely to have been related to her mental health condition. Ms Myers was asked whether the panel's decision would have been different if Dr Quinlan's report had been available to them. She said that the panel had considered at the time what their view would be if the Claimant's self-diagnosis was confirmed by medical opinion. They decided that it would not change their opinion. She was asked about this at the appeal hearing and was able confidently to confirm the position because the panel had considered that very possibility when reaching its decision. It was not that the panel did not recognise that it may have been the Claimant's health issues that caused her to miss the on-call. It was the fact that she might find herself in that situation and the panel felt she could reasonably have foreseen the risk because she was resorting to episodes of binge drinking and so on. She could and should have taken steps to address this.
96. In relation to the panel's finding of inappropriate behaviours, Ms Myers explained that in the course of exploring evidence about whether there was a pattern of absenteeism, evidence emerged about the impacts of the Claimant's behaviour more generally on colleagues. She said that the most startling evidence before the panel arose from the Claimant's own questioning of the witnesses, where she challenged them to give examples and they did so. It was not something she was planning to examine in the disciplinary hearing and it was difficult to say whether it would have made it into the panel's findings at all had they not had the startling evidence that came out as a result of those questions. That was what made the panel think it pertinent to include these elements in the decision letter, but as a secondary part. Ms Myers was asked what behaviour the panel was referring to. She said most notably it was addressed by the Claimant's previous direct report. She was challenged by the Claimant to substantiate the part of her statement about poor behaviours. She gave an example of the Claimant shouting at her. The Claimant said that was just one incident, so she gave a second example and then a third. The panel had also heard from Ms Daniel that she had found the previous year working with the Claimant the most difficult year of her professional life. She gave examples of feeling exposed because the Claimant was not where she needed to be. She and Ms Southgate were moved to monitor the Claimant's whereabouts as they felt they did not have a clear understanding of where she would be. Ms Southgate also gave an example of the Claimant shouting at her. Those were some examples. Ms Myers rejected the suggestion that the Claimant did not have a proper opportunity to respond to

these allegations. They were set out in the Management Report and indeed the Claimant chose to address them in her questions to the witnesses.

97. Ms Myers explained in cross-examination that the panel weighed extremely carefully the question whether there was action short of dismissal that could be taken. They went methodically through all the alternatives. They concluded that the Claimant was aware of her mental health condition. The Trust had engaged with her for a long time to support her, including through Occupational Health referrals and informal support from the senior nurse in the Occupational Health Department. There were opportunities for the Claimant to request support to mitigate the risk of what happened on 18/19 December 2018. In the absence of action from her to mitigate that, the panel felt that she must be held responsible for the consequences of her actions. The panel considered whether there was a sanction short of dismissal that could be offered, for example returning to work in other duties or with reduced responsibilities. Their view was that this was too serious an offence in terms of impact and there was a repeated pattern of exposing the Trust to risk. They accepted that the Claimant had a long-term health condition but the panel considered she had been supported and had engaged in services to manage her condition. However, she had not engaged with the Trust to mitigate the risk of missing duties and they did not feel she accepted she should have done that or indeed accepted the seriousness of what she had done. The panel did not consider this was about absence, it was about conduct. Ms Myers confirmed that the Claimant's mitigation had been carefully considered. The Terms of Reference referred to mitigation and the Management Report included a section dealing with it. There was extensive discussion of all the elements of mitigation put forward by the Claimant and Ms Smith at the disciplinary hearing. The panel then strove to address each one and to delineate each aspect and explain how each was weighed.
98. Ms Myers explained that the panel came to the conclusion it did about Mr Wright because they were not provided with evidence as a panel to substantiate the claims of bullying. Ms Myers was aware from the disciplinary pack that a grievance had been put in and withdrawn but the panel did not speculate about that. They felt that if the Claimant wanted to submit as mitigation the allegation that she was being bullied by Mr Wright she would need to substantiate that with evidence. No such evidence was forthcoming.
99. The Claimant appealed against her dismissal. The grounds of appeal were summarised in a letter dated 10 July 2019. She complained about failure to follow the Trust's Disciplinary Policy in respect of Ms Veitch's role at the disciplinary hearing and alleged failure to consider sanctions short of dismissal. She said that the allegations against her were not fully shared with her before the hearing to afford her the opportunity to prepare a full and considered response and that the wrong approach had been taken to the incident and prior incidents. She believed she had been treated differently from other Directors who did not undertake on-call duties because of health requirements. Finally, she said that the decision was not reasonable in all the circumstances. She suggested that categorising the reason for dismissal as some other substantial reason introduced a more serious framing of the allegations. She said that there was a failure to make reasonable adjustments in respect of the "pattern of capability" argument put forward at the original hearing and in respect of the

management of her condition during 2018. She said that the panel did not appear to have taken into account the fact that her actions were taken in a state of mental health crisis and that the impact of her disability appeared to have been misunderstood. She said that there was a failure to deal properly with the circumstances in which she was asked to go back onto the rota and that the dismissal letter was misleading in respect of mitigation she put forward. She also had new evidence to submit.

100. The Claimant then wrote a detailed appeal statement and a paragraph by paragraph response to the dismissal letter. The new evidence relied on included the letter from Dr Quinlan to Ms Smith dated 14 August 2019. It also included a letter from the claimant's GP written 17 May 2019 (but not provided to the disciplinary panel.) The letter confirmed that the GP saw the Claimant on 19 December 2018, the day after she was arrested for drink-driving. The GP recorded that she was "naturally upset following the events of the day before but was completely sober." The letter confirmed that the Claimant had a long-term condition of depression and anxiety, and a history of self-medicating with alcohol in response to her depression and anxiety
101. An appeal hearing took place on 8 October 2019 before a panel of three chaired by Mr Bond. Ms Myers prepared a Management Case in response to the appeal, which was provided to the Claimant in advance. Ms Myers presented the Management Case the appeal hearing. The Claimant attended again with Ms Smith. Ms Smith went through each of the Claimant's grounds of appeal. The panel asked questions of the Claimant. Ms Myers presented the Management Case and was asked questions.
102. The Claimant's appeal was rejected in a letter dated 14 October 2019. The appeal panel concluded that Ms Veitch's role at the disciplinary hearing was as set out in the Trust's Disciplinary Policy, which had been agreed with staff side representatives. The panel were assured that it was not in breach of the ACAS Code of Practice. The appeal panel found that the disciplinary panel had considered alternatives to dismissal and also itself considered the panel's decision to dismiss was a reasonable one. The appeal panel concluded that the disciplinary allegations had been clearly communicated to the Claimant. She had the Management Report 28 days before the disciplinary hearing started. That provided details of the allegations and the evidence collated during the investigation. The panel was satisfied that the Claimant had been provided with sufficient opportunity to provide a full and considered response. The appeal panel also considered the allegations were serious and that it was appropriate to deal with them under the Disciplinary Policy. The panel rejected the complaint of inequity of treatment. The appeal panel noted that dismissing the Claimant for some other substantial reason was intended by the disciplinary panel to be a compassionate response. The appeal panel did not agree that it introduced a more serious framing of the allegations. The appeal panel took the view that there was a pattern of behaviour relating to conduct concerns not capability concerns. The appeal panel noted that the original Occupational Health recommendation for a Stress Risk Assessment was contingent upon the claimant continuing with the Patient Experience role, which she did not. The appeal panel noted that when asked at the disciplinary hearing, the only action the Claimant said she would have identified if a Stress Risk Assessment had

been carried out was the removal of Mr Wright as her line manager. The Claimant had never suggested that fulfilling on-call was a stressor. The panel considered that the Claimant had made a decision to resume full on-call duties in June 2018. The appeal panel concluded that there was no failure to make reasonable adjustments in this respect. The appeal panel concluded that the impact of the Claimant's mental health was understood and considered by the disciplinary panel and taken into account in their deliberations. The appeal panel noted that Ms Myers had explained that the new medical evidence would not have changed the decision of the disciplinary panel. The appeal panel did not disagree.

103. In cross-examination, Mr Bond was asked about comments made by the Claimant at the appeal hearing. She said that she did realise the absolute critical nature of being responsible, but that day when she did not attend for her on-call she was not in sound mind and was not conscious of the decisions she was making. She had made a mistake because she was ill. It was put to Mr Bond that at the appeal hearing the Claimant was acknowledging the seriousness of what happened and he agreed.
104. The Tribunal noted that the Claimant had provided evidence from Ms Hunter about enquiries to establish whether somebody within the Trust had leaked information about her arrest and conviction to the Hull Daily Mail. The Trust's Director of Communications had alerted Ms Hunter in September 2019 to a media enquiry at that stage about the Claimant and whether she was on duty the night she was arrested. He told Ms Hunter in an email that the journalist had been contacted by a "senior member of staff." Ms Hunter then spoke to the Director of Communications, who told her that the journalist was unlikely to disclose his or her source, but added that shortly following the Claimant's trial a senior manager had told him that they were "livid" that the claimant's trial had not been reported because the public needed to know what she had done. That senior manager no longer worked in the Trust.

## Legal Principles

105. Claims of discrimination are governed by the Equality Act 2010, s 4 of which provides disability is a protected characteristic. Discrimination arising from disability is governed by s 15 of the Equality Act 2010, which provides:

### **15 Discrimination arising from disability**

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

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

(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.

106. The time limits for bringing claims of discrimination are governed by s 123 Equality Act 2010. Under s 123(3), conduct extending over a period is to be treated as done at the end of the period. A distinction is drawn between a continuing act and an act that has continuing consequences. The focus of the inquiry is not on

whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but on whether there was an ongoing situation or continuing state of affairs in which the claimant was treated less favourably: see *Hendricks v Metropolitan Police Commissioner* [2003] ICR 530, CA.

107. There are four elements to a claim under s 15: unfavourable treatment; something arising in consequence of disability; the unfavourable treatment must be because of the something; and the employer must be unable to show that the treatment is a proportionate means of achieving a legitimate aim. The unfavourable treatment will be “because of” the something, if the something is a significant influence on the unfavourable treatment; a cause which is not the main or sole cause but is nonetheless an effective cause of the unfavourable treatment: see e.g. *Pnaiser v NHS England* [2016] IRLR 170 EAT; *Charlesworth v Dransfields Engineering Services Ltd* [2017] UKEAT 0197\_16\_1201.
108. It is a defence for the employer to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim. The employer must show that it has a legitimate aim, and that the means of achieving it are both appropriate and reasonably necessary. Consideration should be given to whether there is non-discriminatory alternative. A balance must be struck between the discriminatory effect and the needs of the employer, represented by the legitimate aim. If the employer failed to make a reasonable adjustment that would have prevented or minimised the unfavourable treatment, the employer is unlikely to be able to justify the unfavourable treatment: see e.g. *Griffiths v Secretary of State for Work and Pensions* [2-17] ICR 160 CA.
109. So far as unfair dismissal is concerned, the Employment Rights Act 1996 provides, in s 98, so far as material as follows.

**98 General**

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

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

...

- (b) relates to the conduct of the employee,

...

...

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

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

...

110. It is well-established that in a claim for unfair dismissal based on a dismissal for misconduct, the issues to be determined having regard to s 98 are: did the



employer have a genuine belief in misconduct; was that belief based on reasonable grounds; and when the belief was formed had the employer carried out such investigation as was reasonable in all the circumstances: see *British Home Stores Ltd v Burchell* [1980] ICR 303. The burden of proof has of course changed since that decision: *Boys and Girls' Welfare Society v McDonald* [1996] IRLR 129. Furthermore, the question for the Tribunal is whether dismissal was within the range of reasonable responses open to the employer. The range of reasonable responses test applies to all aspects of the decision to dismiss including the procedure followed: see *Foley v Post Office*; *HSBC v Madden* [2000] ICR 1293 *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23. We emphasise, therefore, that with respect to the unfair dismissal claim, it is not for the Tribunal to substitute its view for that of the Respondent. The Tribunal's role is not to decide whether the Claimant was guilty of the conduct alleged, but to consider whether the Respondent believed that she was, based on reasonable grounds and following a reasonable investigation.

111. The ACAS Code of Practice on Disciplinary and Grievance Procedures is relevant and the Tribunal has had regard to it.
112. In the case of a dismissal for long term absence related to ill health, if the ill health has been caused by the employer, it may have to "go the extra mile" in order to satisfy the test of reasonableness: *McAdie v Royal Bank of Scotland* [2007] IRLR 895. Mr Brien submitted that the same approach should be applied in a conduct case, but he did not refer the Tribunal to any authority to that effect.

## **Application of the Law to the Facts**

113. Applying those principles to the detailed findings of fact, the Tribunal's conclusions on the issues were as follows.
114. We started with the disability discrimination complaints. Mr Brien rightly acknowledged that the key complaint was about the Claimant's dismissal. That was clearly unfavourable treatment of her and the Tribunal had no hesitation in concluding that it was because of something arising in consequence of her disability. The Respondent accepted that "inability to work due to a mental health crisis and/or a maladaptive coping mechanism (i.e. resorting to the use of alcohol)" was something arising in consequence of the Claimant's disability, and that was plainly right in the light of the Occupational Health and medical evidence referred to in the findings of fact. The Claimant was dismissed for the reasons set out in the dismissal letter. Those included that she failed to attend her Director on-call duties on 18/19 December and failed to report her absence. The Claimant's inability to work due to a mental health crisis and/or a maladaptive coping mechanism lay behind her failure to attend the duties on 18/19 December 2018. It was plainly an effective cause of her dismissal, applying the legal test set out above.
115. Of course, that is not the end of the matter. The crucial element in this part of the claim is the question of justification. Was the otherwise discriminatory dismissal nonetheless justified because it was a proportionate means of achieving a

legitimate aim? It was for the Respondent to satisfy the Tribunal of that, and it did so. The Claimant accepted that ensuring the health, welfare and safety of the Claimant, patients and staff was a legitimate aim and the Tribunal agreed. The issue was therefore whether dismissing the Claimant was appropriate and reasonably necessary to achieve that aim. The Tribunal was required to consider whether there was some step short of dismissal that would have achieved the aim, and to balance the discriminatory effect on the Claimant against the needs of the employer.

116. For the reasons articulated clearly and comprehensively by Ms Myers in her evidence, the Tribunal was satisfied that dismissing the Claimant was appropriate and reasonably necessary to ensure the health, welfare and safety of patients. The starting point was that missing a Director on-call duty and failing to notify the Trust in advance about that did pose a serious risk to patient safety. The Director on-call is the most senior responsible person for the organisation and regularly charged with taking important decisions, as outlined in the findings of fact. He or she would have to take charge in the event of a major incident. Once the absence of the Director on-call became known, steps could be taken to arrange alternative cover, but harm might already have arisen and there could well be delay. The events of 23 February 2018 as recorded by Ms Mableson give an illustration of the risks that can arise. There was a patient in urgent need of a scan and delays in making decisions about the transfer of patients.
117. The events of 18/19 December 2018 were treated as a conduct matter. Of course, the conduct was linked to the Claimant's disability but, as Ms Myers explained, it was never suggested that the Claimant did not retain full capacity and the panel considered that it was necessary to dismiss her because of the seriousness of what had happened, even allowing for the fact that her inability to work on 18/19 December was something arising in consequence of her disability. What weighed heavily with the panel was that there were warning signs in the months leading up to the missed on-call. The Claimant had had 3 or 4 episodes of binge drinking, which was a sign that her mental health was deteriorating, but she did not alert anybody at the Trust to that or take steps to mitigate the risk of an episode that impacted her ability to do her Director on-call. The panel considered that she must be held responsible for the consequences of her actions in those circumstances, particularly in the context that it had happened before and been dealt with by a reflective statement. This was too serious an issue in terms of impact in those circumstances to be dealt with by a lesser sanction.
118. The Tribunal agreed that dismissal was appropriate and reasonably necessary for those reasons. We noted that even if the Claimant was uncomfortable raising her deteriorating health and recurrence of episodes of drinking with Mr Wright, she could have raised it with Ms Ledger e.g. in August 2018, or with Ms Hunter at any point. She could also have self-referred to Occupational Health and/or asked to be removed from the Director on-call rota, or simply asked to swap a shift. This was in the context that this had happened the previous December, and she had written a reflective statement about that. The answers she gave at the disciplinary hearing, referred to in the findings of fact above, did not give any reassurance that she acknowledged a need to raise these matters with her employer or take steps herself to reduce risk. It was not an answer to say that

she had asked for Mr Wright to be removed as her line manager and nothing had been done. Even assuming his conduct had been a cause of her declining mental health, that did not absolve her of personal responsibility and accountability. Nor, for similar reasons, was it an answer to say that Mr Nearney had encouraged her to re-start on-call. Even if he had, only the Claimant knew the state of her mental health and she had a responsibility to take steps to mitigate risk.

119. The panel did not consider that there was a step short of dismissal that could properly be taken and the Tribunal agreed. Allowing the Claimant to return to work and removing her from the Director on-call rota would remove the risk of another instance of a missed on-call and the risk to patient safety that brought with it, but such a step would not address the overall conduct issues and concerns, even in the context that the reason the Claimant was unable to work on 18/19 December 2020 was because of her disability. Likewise, allowing her to return to work and carrying out a Stress Risk Assessment would not do so. There was not a non-discriminatory or less discriminatory alternative that was appropriate.
120. Balancing the needs of the employer against the discriminatory impact on the Claimant, the importance of patient safety and the seriousness of the missed Director on-call shift, when this followed a previous occurrence and a reflective statement about that, outweighed the significant discriminatory impact on the Claimant.
121. The complaint of unfavourable treatment in respect of the Claimant's dismissal therefore does not succeed.
122. Mr Brien acknowledged that the other complaints of discrimination were weaker and the Tribunal agreed. None of those complaints succeeds, for the following reasons:
  - 122.1 The Tribunal considered that the instigation of a disciplinary investigation, the referral to a disciplinary hearing and the Claimant's ultimate dismissal plainly amounted to conduct extending over a period. This was one process, starting with the events of 18/19 December 2018. All of the claims were therefore brought within the time limit.
  - 122.2 There was no decision to go behind the reflective learning statement for the incidents on 20 December 2017 and 23 February 2018. The unfavourable treatment did not happen. Those two events were rightly referred to in the disciplinary process following 18/19 December 2018, because it was obviously relevant to understand whether that incident was part of a pattern of similar incidents. That was relevant to understand the level of culpability, if any, and the appropriate sanction, if any. That is not going behind the reflective learning statement or disciplining the Claimant twice for the same thing.
  - 122.3 There was no decision to classify the change of medication issue on 23 February 2018 as part of a pattern of alcohol related absence. The investigation considered whether it was part of such a pattern, but the disciplinary panel concluded that it was not. The unfavourable treatment did not happen.

- 122.4 The Claimant was not disciplined for disability related incidents on 30 December 2017 and 23 February 2018. Those events were considered within the disciplinary process so as to understand the context for the events of 18/19 December 2018 as described in the findings of fact, but the Claimant was not disciplined for them. The unfavourable treatment did not happen.
- 122.5 There was no decision to introduce five previously unnotified allegations to ensure the Claimant's dismissal could be justified. The Claimant said that the five new allegations were: bringing her and the Trust into disrepute; not acknowledging the seriousness of her actions; failing to manage the risk, e.g. by coming off the rota or reducing her own commitment; inappropriate behaviours; and breakdown of relationships in her team. The question of the Claimant's and the Trust's reputation was clearly referenced in the Terms of Reference. The questions whether the Claimant acknowledged the seriousness of her actions and took steps to manage the risk were an obvious part of assessing whether she had committed the misconduct alleged and, if so, what sanction was appropriate. In any event, the Claimant was asked about these matters at the disciplinary hearing and had the chance to respond, as set out in the findings of fact above. Concerns about inappropriate behaviours and breakdown in relationships arose in the course of investigating the fourth allegation in the Terms of Reference. They, too, were addressed with the Claimant at the disciplinary hearing. Further, none of these five matters was included to ensure that the Claimant's dismissal could be justified. On the contrary, Ms Myers's evidence that the findings in relation to disrepute, inappropriate behaviours and breakdown in relationships were secondary and that the panel would have dismissed the Claimant even without those matters was not disputed and was accepted by the Tribunal. Issues relating to acknowledging the seriousness and managing the risk were an intrinsic part of the consideration of the specific allegations and the appropriate response.
- 122.6 There was no perverse decision to disregard evidence. The disciplinary panel carefully considered the evidence. There was evidence before them to support the decision they reached. The unfavourable treatment did not take place.
- 122.7 There was no attempt to portray the Claimant as alcohol dependent rather than someone who had mental health issues and used alcohol as a maladaptive coping strategy. The Management Report set out the Claimant's explanation in detail in the mitigation section and the disciplinary hearing, dismissal letter and appeal letter all explicitly acknowledged that she was someone with mental health issues who used alcohol as a maladaptive coping strategy. The disciplinary panel did not find that the Claimant had a pattern or alcohol related absenteeism. The unfavourable treatment did not happen.
123. That brings us to the unfair dismissal claim. We start with the reason for dismissal. Although the dismissal letter gave the reason as some other substantial reason, that was done to help the Claimant, by ensuring she was entitled to pay in lieu of notice and did not have a gross misconduct dismissal on her record. The actual operative reason for the disciplinary panel was conduct. For the reasons set out above, the Tribunal accepted Ms Myers' account of the

reasons for dismissal. The panel genuinely believed that the Claimant had committed gross misconduct as summarised in the first five bullet points in the dismissal letter. The appeal panel agreed.

124. The next question is whether the Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal found that it did. We have made detailed findings of fact above and we do not repeat them here. They demonstrate that the Respondent provided clear Terms of Reference; carried out a reasonable investigation, providing the Claimant with a detailed Management Report and supporting evidence at the end of it; and conducted a thorough disciplinary hearing over three days at which the evidence was tested and explored in detail and the Claimant, represented by a highly experienced and effective trade union representative, had the chance to challenge witnesses and put forward evidence on her own behalf. There were reasonable grounds for the panel's belief that the Claimant had committed misconduct. The Claimant was provided with a right of appeal and her detailed grounds were considered in full. Dismissal was within the range of reasonable responses. Ms Myers was measured and meticulous. The Tribunal was entirely satisfied in the light of her evidence that the panel was not "out to get" the Claimant or seeking to ensure that her dismissal could be justified. On the contrary, it was at pains to consider all the evidence carefully and reach a fair and balanced decision.
125. Dealing with the Claimant's particular criticisms:
- 125.1 The panel's finding was that the Claimant's conviction resulted in publicity and that this brought the Trust into disrepute. There was clearly evidence to support that finding, in the form of the article in the Hull Daily Mail and the level of comments on the online version of the article. Ms Myers explained that this newspaper has broad coverage among the Respondent's core population. It was not necessary for the Respondent to prove that the press coverage led directly to patients not using the Trust's services in order for it to be satisfied that it had been brought into disrepute. The panel's finding was reasonable. The Claimant was afforded a proper opportunity to deal with the allegation. Reputational damage was explicitly referred to in the Terms of Reference and addressed in the Management Report.
- 125.2 The disciplinary panel did not have before it the evidence from the Director of Communications suggesting that a senior member of Trust staff had leaked the story to the journalist. Even if it had, the Tribunal did not consider that it would have been unreasonable to take into account the impact of the adverse publicity. This was not a formal press release issued by the Trust, it was apparently unauthorised action by an employee, and it related to actions that had led to a conviction that was a matter of public record. In any event, the Tribunal accepted the evidence that the panel would have dismissed the Claimant even without the finding relating to disrepute.
- 125.3 The panel did not ignore evidence from the NMC. Their letter was in the disciplinary pack and the Tribunal accepted Ms Myers's evidence that it was taken into account. However, she explained that it addressed a different matter – the Claimant's fitness to practise as a nurse – not the issues with which the panel was concerned.

- 125.4 The Tribunal considered that it was reasonable for the panel to conclude that the Claimant had failed to acknowledge the seriousness of her actions, for the reasons explained by Ms Myers. The Claimant did acknowledge wrongdoing and apologise in the immediate aftermath of the incident, at the investigation meeting and at the disciplinary hearing, and she said at the disciplinary hearing that she took full responsibility, but that is not necessarily the same as demonstrating clear acknowledgment of the seriousness of her actions. Ms Myers explained why the panel was still concerned about this at the end of the disciplinary hearing, why she asked the Claimant by reference to a concrete example, and why she felt that the Claimant still had not reflected on and acknowledged the patient safety impact of her actions. The Tribunal considered that the panel's conclusion was reasonably open to it on the evidence before it, as summarised in the findings of fact above.
- 125.5 The Tribunal noted Mr Bond's acceptance in cross-examination that the Claimant acknowledged the seriousness of what happened at the appeal hearing, but the Tribunal did not consider that this alone should have led to the Claimant's appeal being upheld. The appeal panel did not hear the evidence as presented at the disciplinary hearing, and it was for the disciplinary panel to reach a view on the basis of the evidence before it. The purpose of the appeal was to consider whether the disciplinary panel had reached a reasonable conclusion, not to re-hear the disciplinary proceedings themselves.
- 125.6 The Tribunal considered that the Claimant was given a proper opportunity to address the concern that she had failed to manage risk and that it was her responsibility to do so. We have set out above the questions asked of her by Ms Veitch and the disciplinary panel about this at the disciplinary hearing. The Claimant had a reasonable opportunity to explain whether she had taken actions to mitigate risk in the lead up to December 2018 and, if not, why not.
- 125.7 The Tribunal considered that the Claimant was given a proper opportunity to address the concerns that she had engaged in "inappropriate behaviours" and that there was a "breakdown of relationships" in her team. Clearly, as part of investigating the four allegations in the Terms of Reference, Ms Veitch was told about broader allegations not directly related to those allegations. That included allegations of inappropriate behaviour and breakdown in relationships. The evidence about those matters was included in full in the Management Report and appendices provided to the Claimant. She had the opportunity to challenge that evidence at the disciplinary hearing and as the findings of fact above record, she did so. Ms Myers's evidence was to the effect that when the Claimant challenged the evidence, the witnesses gave more examples, rather than their evidence being undermined. It was reasonable for the disciplinary panel to make findings about these elements in the circumstances. In any event, the Tribunal accepted the evidence that the panel would have dismissed the Claimant even without these findings.
- 125.8 The next criticisms (5.6.6 and 5.6.7 in the list of issues) appear to be a criticism of the wording of the fourth element in the Terms of Reference. What matters is not the wording of the Terms of Reference but the findings of the disciplinary panel. In any event, it seemed to the Tribunal

that it was reasonable to include these elements as matters for investigation. The Claimant had missed two Director on-call shifts in circumstances where alcohol was involved, in 2017 and 2018, and there had been concerns around alcohol misuse in 2012/2013. It was reasonable to ask the question whether there was a pattern of absenteeism owing to alcohol misuse in those circumstances. The panel, having carefully weighed the evidence, concluded that there was not. Equally, it was plainly reasonable to explore the wider implications for the Claimant, her colleagues and the Trust as part of the disciplinary investigation.

- 125.9 The Tribunal did not consider that it was unreasonable for the disciplinary panel to conclude that “it would not be reasonable or safe to risk further loss of directors on-call cover” when other directors did not operate the on-call. The disciplinary panel was concerned with whether the fact that the Claimant’s conduct was linked to her mental health provided sufficient mitigation for them to impose a sanction other than dismissal. The risk of further loss of Directors on-call cover to which the panel was referring was plainly the risk that the Claimant would again miss a shift under similar circumstances and without notice. That was a concern because she had not taken steps to mitigate against such a risk, even though her mental health was declining and she had experienced episodes of binge-drinking in the preceding months. The fact that there are Directors who do not do on-call at all, whether because they do not have the appropriate skills or because adjustments have been made for them, is a different matter and does not make the disciplinary panel’s conclusion unreasonable.
- 125.10 As explained above, the Tribunal concluded that the Claimant’s dismissal was not discriminatory. The fact that the Claimant’s conduct was linked to her disability is not the end of the matter. An employer can treat an employee unfavourably because of something arising consequence of their disability if that is justified. As explained above, the Tribunal concluded that it was justified in the Claimant’s case, notwithstanding the link between her behaviour and her mental health.
- 125.11 The Tribunal considered that the instigation of stage 1 of the attendance management policy on 7 September 2018 was entirely irrelevant, particularly given that the stage 1 process had been concluded in October 2018.
- 125.12 The Tribunal did not consider that there was any inconsistency between the Claimant’s dismissal and the Respondent’s willingness to allow her to return to work in a limited capacity between 23 April 2019 and her dismissal. As set out in the findings of fact, this was explicitly not an agreement to return to work and the Claimant was told by Ms Ledger that she had been advised that that would be inappropriate. There was simply a limited agreement that the Claimant would work from home on updating some Trust policies. The fact that she attended Trust premises on a small number of occasions in connection with that work does not demonstrate any willingness by the Respondent to have her perform her substantive role.
- 125.13 The Tribunal concluded that the disciplinary panel’s approach to workplace events and the role they played in causing the Claimant’s mental health difficulties was a reasonable one. They did not fail to

acknowledge the Claimant's concern, but they made a finding that it was not substantiated on the evidence before them. That was a reasonable conclusion in circumstances where the panel were aware that the Claimant had submitted a grievance against Mr Wright but had withdrawn it, and where the evidence of Mr Wright, Ms Southgate and Ms Daniel about the relationship between Mr Wright and the Claimant was not challenged at the disciplinary hearing. The Tribunal noted that Ms Harding had made it explicit in her emails to the Claimant and Ms Smith that the Claimant would not be able to assume that her complaints about Mr Wright were taken at face value given that she had withdrawn her grievance. The Claimant did not identify the expressions of support she said were inconsistent with a decision to dismiss her.

125.14 The Tribunal considered that the decision to dismiss the Claimant was reasonable despite the fact that no concerns were raised about her capability to perform her role, the only concerns related to her twice monthly Director on-call duties. This was a dismissal for misconduct, not a capability dismissal. The disciplinary panel's approach to it as such was reasonable.

126. Accordingly, the Respondent acted reasonably in all the circumstances in dismissing the Claimant and her complaint of unfair dismissal does not succeed.

**Employment Judge Davies  
18 December 2020**