



THE EMPLOYMENT TRIBUNALS

BETWEEN

Mr Andrew Pillay

Claimant

and

Great Ormond Street Hospital for Children NHS Foundation Trust

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Region: London Central

ON: 14, 15, 16, 17, 20, 21, 22, 23, 24
and (in chambers) 29 September 2021

Before: Employment Judge Paul Stewart

MEMBERS: Ms Tricia Breslin and
Mr Martin Reuby

Appearances:

For Claimant: In person

For Respondent: Ms Yvette Genn of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that all claims are dismissed.

REASONS

1. The Claimant was employed as a Clinical Data Manager by the Respondent from the 28 May 2013 until 30 April 2020 when he was dismissed for gross misconduct. After appealing unsuccessfully against the decision to dismiss, the Claimant presented an ET1 to the Tribunal claiming:
 - a) Unfair Dismissal,
 - b) Automatic unfair dismissal pursuant to section.47B of the Employment Rights Act 1996 ERA and
 - c) Discrimination arising from disability under section 15 of the Equality Act 2010.
2. We heard from the following witnesses called by the Respondent:

- a) Ms Omolola [“Lola”] Famakinwa who had been employed by the Respondent since 2014, initially as a Research Associate until 2017 when she was appointed a Senior Research Co-ordinator, a role in which she acted as the Claimant’s line manager.
 - b) Dr Jenny Rivers who joined the Respondent in November 2018 as the Deputy Director of Research and Innovation. In this role, she line-managed Ms Famakinwa and was the initial Commissioning Manager for the formal investigation into the Claimant’s conduct that eventually led to his dismissal.
 - c) Ms Michelle McNicholas who joined the Respondent’s organisation as a Senior HR Advisor in August 2019 and who provided *ad hoc* advice to Dr Rivers and Ms Famakinwa concerning the Claimant’s sickness absence.
 - d) Ms Simi Thankaraj who, from 2017 until May 2020, had been occupying the role of Service Manager for Plastics, Craniofacial, Dental, Maxillofacial and Cleft for the Respondent. She conducted an internal disciplinary investigation into allegations of misconduct on the part of the Claimant that resulted in her recommendation that there was a disciplinary case to answer in respect of three of those allegations.
 - e) Mr Nick Towndrow who joined as an Administrator with the Respondent in 2007 and held the role of acting General Manager for the Operations and Images Directorate when, in October 2019, he took over from Dr Rivers the role of Commissioning Manager of the internal disciplinary process involving the Claimant. In that role, he chaired the Panel that conducted a Disciplinary Hearing into the allegations of misconduct that Ms Thankaraj had identified as giving rise to a case to answer and determined that the Claimant should be dismissed.
 - f) Mr Anthony Sullivan, General Manager for Gastroenterology and Radiography, who heard, and dismissed, the Claimant’s appeal against dismissal.
3. The Claimant gave evidence himself but called no witnesses.

Facts

4. As stated above, the Claimant began working for the Respondent in May 2013. In 2017, his performance in the role of Clinical Data Manager was a cause of concern to his line manager. In February of that year, Ms Femakinwa began informal performance management of the Claimant concerning his timekeeping. On 10 May 2017, the Claimant attended a meeting with Ms Femakinwa and her then line manager, Ms Karen Howe, to discuss issues relating to his performance. A follow up summary of the discussion was provided by Ms Howe on 23 May 2017, the delay being accounted for by the intervention of annual leave for Ms Howe. In the interim, the Claimant had, himself, sent a summary of the discussion to Ms Femakinwa on 16 May, receiving in response from Ms Femakinwa an expression of her view that it was for Ms Howe to provide the summary as she had called the meeting. She went on to say:

“I don’t have anything further to say or discuss as Karen had asked that day after our discussion if I was happy with the outcome and I said yes, I believe she asked you to and you also said yes. I’ll like to draw a line under this and I’ll like us to move forward for the betterment of the team.”

5. A further meeting of the same three individuals was held on 4 July 2017 which Ms Femakinwa summarised in a long email written on 13 July 2017. The object of the meeting was to review and discuss the Claimant's progress since the meeting with Ms Howe in May. Ms Femakinwa had not seen any improvement in the Claimant's conduct and, indeed, considered that it had worsened. The headings she gave to the discussion suffice to indicate the mixture of the Claimant's performance and conduct that was discussed:

Lack of accountability

Challenging

Trying to undermine your line manager: sending of impolite and disrespectful emails.

Priorities

6. Following this meeting, some improvement in the Claimant's conduct was discerned by Ms Femakinwa but his performance issues continued. In March 2018, Ms Femakinwa began a period of maternity leave which lasted until January 2019. On her return, Ms Femakinwa resumed the line management of the Claimant which had been undertaken during her leave by Mr James Calvert. In his handover report, Mr Calvert assessed the Claimant's performance over the 12 months to have been poor. Ms Femakinwa quickly ascertained that his assessment was correct in that the Claimant "had a large backlog of work and was simply not inputting data in a timely manner". Ms Femakinwa started to receive complaints from members of the nursing staff and clinical development fellows working on the trials allocated to the Claimant regarding his filing. She explained what gave rise to such complaints:

The trial nurse carried out study specific assessments for trial patients on particular trials [for] which Mr Pillay was the data manager and she would record the results on forms provided by the Sponsor which she gave to Mr Pillay to input the data on the trial database. As Mr Pillay did not have a proper filing system, he would pile all the forms he's given on his desk. Due to his backlog, he wasn't able to input the data in a timely manner which meant the forms piled up on his desk. A few of the forms ended up missing, therefore Mr Pillay couldn't input the data and he recorded it on the Sponsor database as not done which the Sponsor was not happy about as it was protocol deviation.

7. Ms Femakinwa initially worked with the Claimant on an informal basis to try to resolve the problems that had led to the complaints. An informal chat in or around February or March 2019 involved Ms Femakinwa providing advice on prioritising the important parts of his role and she personally cleared space in a filing cupboard so the Claimant would have somewhere to file forms that otherwise were piling up on his desk.
8. This led to some initial improvement but, after a month or so, his previous poor performance returned.
9. In May 2019, Ms Howe moved on from her role which had entailed line managing Ms Femakinwa and she was replaced by a new manager, Ms Christy Rowley. Before Ms Howe left, she emailed concerns about the Claimant's performance to Ms Femakinwa, copying in Ms Rowley.

10. Ms Femakinwa invited the Claimant to a 121 meeting on 10 June wherein his performance was discussed with Ms Femakinwa asking him, at various times, whether there were any personal issues or concerns which were affecting his performance. To each such enquiry, the Claimant indicated there to be none.
11. During the meeting, Ms Femakinwa had mentioned setting objectives which she hoped would facilitate improved performance on the part of the Claimant. Following the meeting, she provided a summary of the meeting by email of 11 June. She also provided the Claimant on the same day with a list of objectives for improvement in performance with a date on which each objective was to be achieved and informed him that they would have a review of his progress on 18 June.
12. At the review, Ms Femakinwa was somewhat shocked to find that the Claimant had not attempted any of the objectives she had set for him, particularly as earlier he had indicated he would be setting the previous Monday aside for the purpose of addressing the objectives. He gave no reason to Ms Femakinwa for not attempting the objectives.
13. Ms Femakinwa summarised the discussion of the meeting on 18 June in a Support Outcome letter she sent on 20 June by email to the Claimant indicating that, in line with the Performance Management Policy of the Respondent, the matter would proceed to an Informal Stage Meeting. She sent a further letter inviting the Claimant to such a meeting on 21 June. The meeting did not take place because the Claimant refused to attend. Rather than meet Ms Femakinwa by herself, he wanted to discuss areas of concern with her manager, Ms Rowley, and with the Respondent's Human Resources Department.
14. Ms Femakinwa issued a further four invitations to the Claimant to attend meetings, on 10 and 19 July, 13 August and 12 September, making a total of five invitations to the Claimant to meet with her, all of which the Claimant refused.
15. On 16 September, the Claimant started a period of absence from work. To begin with, he failed to supply any medical certificates. He contacted Ms Femakinwa on 30 September to announce he would be absent for a further four weeks but he did not explain the reason for his absence. However, he claimed that Ms Femakinwa was to blame for him suffering an illness. This led Ms Femakinwa into suggesting to Dr Rivers that someone else should take over being the line manager for the Claimant, a suggestion made around the same time as the Claimant wrote an email on 1 October to Dr Rivers requesting such a change. As a result, Dr Rivers took over the line management of the Claimant and informed him of that change in a lengthy letter she emailed to him on 3 October.
16. Dr Rivers did not receive a response to her email and tried on a number of occasions to call the Claimant but could not get through to him. Consequently, on 7 October she requested him in a formal letter to provide reasons for what appeared to be a continued unauthorised absence and warned him that failure to provide such information would result in stoppage of statutory and occupational sick pay.
17. With no reply being forthcoming from the Claimant, Dr Rivers wrote again on 10 October confirming that the Claimant's statutory and occupational sick pay

would stop as from 16 September and informing him that she would be referring him to the Respondent's Occupational Health providers for an appointment.

18. Again, there was no reply from the Claimant and Dr Rivers found herself having reached what she described as a
13. tipping point in that I did not know what else I could do to encourage Mr Pillay to communicate the reasons for his absence so that I could best support him and the rest of the team. There was a complete lack of engagement from him and I did not know why, despite my repeated attempts to reach out to him, both to discuss his absence, hear his concerns and to try to resolve them. It was clear, however, that he had been AWOL for some time and – aside from his previous failure to engage in the performance management process – he was now completely failing to engage in the sickness absence process as well.
14. Further, I was aware through conversations with Ms Femakinwa during this time that there had been an accumulation of similar conduct from Mr Pillay that had been going on for a number of months. Mr Pillay had repeatedly failed to engage with internal processes and his attitude throughout had been poor. I did not think this situation could go on for much longer, so I took the decision to instigate a formal disciplinary investigation into Mr Pillay's actions, as I had written to him on several occasions to advise this may be necessary, to determine if there was a disciplinary case to answer
19. On 18 October 2019, Dr Rivers wrote to the Claimant providing him with a copy of the Disciplinary Policy and informing him that she was of the view that there were facts that need looking into further to best understand the detail about the events surrounding allegations which she set out. These were:
- Serious insubordination including a persistent failure to follow reasonable management request to discuss performance at work;
 - Not behaving in the way that upholds the reputation, standards and expectations of the trust, including repeated unprofessional behaviour and inappropriate communication with staff;
 - Serious insubordination including a failure to comply with the trust sickness policy and procedures. This includes a failure to follow reasonable management request to maintain contact, provide GP footnotes and share accurate contact details when requested;
 - Unauthorised absence since 16/9/19 due to failure to provide GP fit notes.
20. Dr Rivers informed him that she had asked Ms Simi Thankaraj, assisted by Ms McNicholas, to conduct an investigation, the terms of reference for which were:
- To investigate the circumstances surrounding the above allegations, and
 - To advise on whether there is a case of misconduct to answer.
21. On 21 October 2019, the Respondent received two medical certificates concerning the Claimant. The first was dated 16 September 2019 and indicated that the Claimant had been assessed that day and advised he was not fit for work because of the condition of "work stress". This would be the case until 30 September 2019.

22. The second medical certificate was dated 30 September 2019 and indicated an assessment that day had had resulted in the Claimant being certified as not fit for work, again because of the condition described as “work stress” and that this would continue through to 4 November 2019.
23. After she had commissioned the investigation, Dr Rivers became aware that her involvement with the Claimant might lead to difficulties for her becoming the disciplining officer, as was expected of the commissioning manager under the Respondent’s Disciplinary Policy should the investigation result in a recommendation for disciplinary action. As a result, she stepped down from that role and HR selected Mr Towndrow to take her place.
24. Dr Rivers still had to manage the Claimant as she had determined that she be his point of contact in place of Ms Femakinwa. She found it easier to converse with the Claimant by telephone or email for reasons set out in paragraph 22 of her witness statement which we accept.
25. On 1 November 2019, the Claimant submitted a further sick note that signed him off work until 30 November. Dr Rivers took the decision to instigate a Long-Term Absence process to determine what support the Respondent could provide to assist the Claimant in returning to work. As part of that process, she wrote to the Claimant on 8 November to invite him to a Stage One meeting on 20 November 2019. An email she sent to the Claimant on 18 November received an ‘out of office’ notification that the Claimant had set up himself saying that he would not be discussing any matters related to his sick leave until he returned to work.
26. The Claimant did not attend the meeting on 20 November so Dr Rivers and Ms McNicholas conducted a meeting in his absence and Dr Rivers produced a note of the pertinent points they had discussed which she sent to the Claimant on 21 November and giving him notice of a second meeting fixed for 18 December 2019.
27. Meanwhile, although he was absent from work, the Claimant had been busy composing and sending on 18 November 2019 a letter to Mr Matthew Shaw, the CEO of the Respondent. He explained his purpose in so doing thus:

I am writing directly to you as the CEO of Great Ormond Street Hospital to express serious concerns that I have with regards to the way both HR and the Deputy Director of Research and Innovation Dr Jenny Rivers with regards to the managing of matters both prior to going on sick leave and whilst being on sick leave.
28. After taking a page to provide Mr Shaw with what the Claimant described as “Background” and more than a page on what he described as “Summary Background relating to Issues”, the Claimant “Expressed Concerns”. The first of these was to accuse Dr Rivers of seeking retribution from the Claimant for having made a formal complaint about his line manager, for having criticised the handling of that complaint by HR and for filing on the Respondent a Subject Access Request following the refusal by HR to share with him any email communications “that were in part or in full about me or contained references to me”.

29. His second concern was with the decision of Dr Rivers in conjunction with HR “to raise historical allegations regarding both my performance and conduct”. In effect, this was a description of the retribution that he had accused her of seeking.
30. The third concern was a complaint that a performance metrics devised by the Claimant had been sidelined for several years before someone else’s performance metrics had been introduced. His fourth concern was an assertion that the expressions of concern that Dr Rivers had made regarding his health and wellbeing were undermined by her action in instituting a disciplinary investigation into his conduct.
31. His final concern took matters no further other than to attach the label “abuse of process” to the decision of Dr Rivers to instigate a disciplinary investigation.
32. The Claimant then proposed that Mr Shaw arrange for a full independent review which, if arranged, would cause the Claimant to accept a temporary suspension on the part of the Respondent in dealing with the Claimant’s Subject Access Request which “involves the accessing of current employee email inboxes to obtain those emails that make reference to me either directly or indirectly”.
33. His letter finished with an acknowledgment of the degree of support he had had from Ms Michelle Lennon, an Occupational Health practitioner.
34. The second meeting that Dr Rivers had arranged under the Long-Term Absence process for 18 December did not take place because, on 2 December 2019, the Claimant began a phased return to work and, on 9 December, he was interviewed by Ms Thankaraj as part of her investigation.
35. On 23 December 2019, Ms Caroline Anderson, the Director of HR, wrote to the Claimant informing him of the conclusions of her investigation into the matters he had complained about in his letter to Mr Shaw. Her overall conclusion came in the following paragraphs:

I met with Dr Rivers on 17th December 2019 and we discussed in detail the background and context to this case. I am satisfied that she is clear in her responsibilities and that her actions and decisions to date have been appropriate and in line with GOSH policies. That includes her responsibilities to you and her duty of care to support you, but this must be balanced against her duty of care to patients and your colleagues.

It is clear to me that part of the reason you find yourself in this process is that you have failed to engage in previously planned discussions aimed at addressing concerns about your performance and it would appear from the notes of the investigation meeting that disengagement continues. I would therefore urge you to engage more fully in the process which I'm sure would assist in a more speedy resolution. I also note that you have not involved a colleague or trade union representative in your meetings to date as is your right. I would advise that you do so, as this might provide helpful guidance and support through the process.

36. Dr Rivers continued to manage the Claimant into January 2020 but, as her written evidence recorded, she:

29. ... was finding Mr Pillay increasingly difficult to work with. As part of my management, I would try to arrange a weekly call with Mr Pillay to discuss his return

and the work he was doing, but Mr Pillay was dismissive of these meetings and told me he did not see the point of them. He was also generally reluctant to follow my suggestions for what work he should be doing and showed little interest in doing it. Sometimes he would make poor excuses for not attending the meetings, including one saying that he had forgotten where my office was, and on the other occasions he would simply not attend at all. I would try to focus the meetings on clear and specific objectives for him, as I thought it would help him get back into his work at the Trust but he would seem more focused on irrelevant matters, or issues that had been resolved some time ago.

30. For example, Mr Pillay would repeatedly make the allegation that Ms Femakinwa covertly recorded the call she had with him in September 2019, despite me reassuring him on a number of occasions that it would not be possible for her to have done so. Mr Pillay would also frequently lie about relatively minor issues: for example, he would say he was working on one particular project, but when I would catch up with Ms Femakinwa she would say he was working on something different.

31. Mr Pillay would also be selective about what he wanted to talk about, so he would refuse to comment about what sort of support he was receiving from his GP, which made it more difficult to determine what support we could offer him at the trust. More troublingly, Mr Pillay would occasionally become aggressive during our meetings and would frequently interrupt me or talk over me.

32. It got to the stage where I was not looking forward to interacting with Mr Pillay because he made everything more difficult, and I was concerned that the working relationship was breaking down. Whenever Mr Pillay was behaving inappropriately towards me, I became concerned about how he was interacting with other members of his team. Given his disruptive nature I also had concerns about him continuing to have access to patient data as part of his role as data manager. To be clear, I did not think there was a risk he would breach confidentiality, but I was concerned that he was simply not doing his job and the data were not being filed and processed correctly. Mr Pillay was also fixated on the internal disciplinary investigation and his own complaints, to the extent that I believed he would continue to be disruptive and difficult to work with until the internal process had been concluded.

33. Taking all of the above into account I took the decision to suspend Mr Pillay on full pay pending the conclusion of the investigation. This was a difficult decision that I did not take lightly: I appreciate that suspension is regarded as “neutral” and it does not imply guilt, but it can still have an effect on someone when they are suspended from work. In this case, however, Mr Pillay was disruptive and taking up a lot of management time. Moreover, I did not have any evidence that he was carrying out his duties and tasks set for him as he was spending most of his time responding to correspondence regarding the investigation. I considered transferring him to another team, but I did not have any confidence that his behaviour / conduct would improve, and I was worried about the impact this would have on other teams. We had also already taken steps for alternative contact arrangements than his current line manager while the investigation was in progress, so I was not confident that a different manager would be able to encourage him to improve his conduct and performance until we had resolved his outstanding concerns as part of the process.

37. Dr Rivers informed the Claimant of her decision to suspend him on 18 February 2020 and followed up that discussion with a letter providing the Claimant with confirmation of her decision and emphasising that suspension was a neutral act.
38. On 6 March 2020, Ms Thankaraj completed her report. As she wrote in her witness statement:

38. In relation to each of the allegations that formed the basis of my investigation, I found as follows:

38.1 Allegation one: I found that there were five opportunities for Mr Pillay to discuss his concerns with his line manager, all of which he rescheduled or declined. It was reasonable for Ms Femakinwa to have requested Mr Pillay to attend these meetings and, even if Mr Pillay had issues with the procedure being followed, he could have discussed it with Ms Femakinwa and to refuse to engage entirely was unacceptable. I therefore felt that this was misconduct.

38.2 Allegation 2: I found considerable evidence that Mr Pillay communicated to trust staff inappropriately. I saw many emails to a number of different members of staff and I had experience of Mr Pillay's poor behaviour myself. I was satisfied that this was also misconduct.

38.3 Allegation 3: I found but there was evidence that Trust staff members had difficulty in contacting Mr Pillay during his absence, despite being informed of the need to keep in touch. Throughout the investigation Mr Pillay was unable to explain why his phone did not accept calls. Occupational Health also confirmed that they had difficulty in contacting Mr Pillay. Mr Pillay accepted that [he] had not been in contact but did not give a good explanation for this and did not seem to show any insight as to why his behaviour was unacceptable. I therefore felt that this was misconduct on his part as well.

39. I therefore recommended that there was a disciplinary case to answer in respect of all three allegations. I provided my report and the supporting evidence to Mr Towndrow, and I understood that he agreed with my decision and arranged a disciplinary hearing with Mr Pillay.

39. Mr Towndrow scheduled a disciplinary hearing for the Claimant to attend but it was twice postponed at the Claimant's request. It finally went ahead on 23 April 2020 with participants connecting via video conferencing. The Claimant did not attend and did not give any reason for not attending. Mr Towndrow and a Ms Ruth Leighton formed the panel. There was an HR officer to advise the panel present and Ms Thankeraj, together with Ms McNicholas as HR support to the investigating officer, was also present.
40. In accordance with her instructions, Ms Thankaraj had concluded there was a case to answer in respect of the Claimant's misconduct. The Disciplinary Policy of the Respondent had specified, at paragraph 7.5.2, that the Investigating Officer's Report will include her recommendation not only as to whether there was a case to answer and, if so, for what allegations but also whether the allegations may constitute gross misconduct. Ms Thankaraj's report specified misconduct only.
41. The Disciplinary Panel considered the Investigatory Report and Appendices which comprised a total of 689 pages. It heard evidence from Ms Femakinwa and Dr Rivers. Its conclusions were expressed on 30 April 2020 in an outcome letter drafted by Mr Towndrow that we considered to be a model of its kind (save only that, at times when clearly Mr Towndrow was referring to the decisions of the Panel, he expressed himself as though they were decisions of himself alone). All the allegations were upheld. The misconduct giving rise to both Allegations 2 and 3 was considered to be gross misconduct but that giving rise to Allegation 1, because of mitigating factors, was considered merely misconduct. The Panel's decision on the sanction to apply was dismissal with

effect from the date of the letter. Although a finding of gross misconduct would have entitled the Respondent to have dismissed the Claimant summarily, the Panel determined he would be paid 8 weeks' salary in lieu of notice.

42. The Claimant exercised his right to appeal by submitting a letter to that effect on 4 May 2020 and he submitted amended (and detailed) grounds of appeal on 21 May 2020.
43. Mr Sullivan was appointed to hear the Claimant's appeal on or around 27 May 2020. Ahead of the appeal hearing that had been fixed for 16 June 2020, the Claimant emailed Mr Sullivan over 1500 pages of documents that he wished to refer to at the hearing. Because of issues in relation to the password protection that had been used by the Claimant for certain of the documents, the appeal hearing was postponed to 2 July 2020.
44. The Claimant attended the appeal hearing which was conducted by video conferencing. The procedure adopted by Mr Sullivan to conduct the hearing is outlined in his statement and appeared to us to be fair. After the hearing and because the Claimant had raised concerns about his letter to Mr Shaw, Mr Sullivan interviewed Mr Shaw. And, as the Claimant had expressed a concern that Mr Shaw had communicated about the Claimant's case to Mr Towndrow, Mr Sullivan asked the Respondent's ICT team to carry out a search of email communications between Mr Shaw and Mr Towndrow between 22 October 2019 and 30 April 2020 discussing either "Andrew Pillay" or "AP".
45. In addition to conducting the hearing and interviewing Mr Shaw, Mr Sullivan spent six full days working on his decision and the outcome letter and, as he put it

... working on nothing else for this time and working longer than my contracted hours of 9am-5pm. I essentially sequestered myself from my main duties to complete this job, because I could appreciate the complexity and the need for a comprehensive response. I thought extremely hard about whether it would be appropriate to overturn the original decision to dismiss Mr Pillay and approached this with an open mind, but ultimately, I decided to uphold the original decision to dismissed Mr Pillay summarily for gross misconduct.

46. Mr Sullivan confirmed his decision in a letter dated 12 August 2020.
47. A further fact emerged during the hearing before me which clearly was not known to Dr Rivers, Ms Thankaraj or Mr Towndrow during the events which led to the dismissal of the Claimant. Ms Lennon of the Occupational Health provider had made notes of her various attendances on the Claimant and the one dated 05/11/2019 at page 2087 of our Bundle recorded this:

Off with work stress since September. Manager unable to contact him as he went on sick leave without sending in a fit note. Andrew states he did not send this in. Now he is under investigation for 3 allegations of misconduct and has anxiety regarding the outcome of this.

States he went on a retreat to Cambodia which is why his manager could not contact him.

48. The Claimant was being cross-examined when Ms Lennon's notes were brought to his attention. He sought to prevent the Tribunal from perusing these notes on

the basis that the notes were made of confidential discussions. However, an answer he gave under cross-examination relating to medication he alleged he had been prescribed for depression was inconsistent with the notes Ms Lennon had made and thus Counsel for the Respondent was given permission to make use of the notes – which is how the Tribunal came to be directed to Ms Lennon’s notes and learned that the Claimant had been in Cambodia.

49. Initially when asked for the dates of his visit, the Claimant said he went there on around 24 / 25 September 2019 and was there about four weeks to around 23 October. Later, when given the opportunity to clear up any matter that arisen in cross-examination (in effect, to perform the function that re-examination would have provided had he been represented), the Claimant corrected the dates he was away. Instead of being away for the period 24 / 25 September to 23 October, he asserted that his trip had started on 24 September and had ended on 14 October. He had been able to make the correction because, he told us, he had his diary notes. However, he did not choose to share his diary notes.
50. The Claimant’s period of absence from work began on Monday 16 September 2019. He told us he had “probably booked [*flight*] tickets [*to Cambodia*] at the last minute around 23 September”. He agreed that on the 8th day of his absence, that being the last day when he was expected to provide sickness certificates accounting for his absence, he was in Cambodia.

Discussion

51. We start our discussion with an observation relating to the disclosure of the Claimant’s trip that emerged during the hearing. The Claimant had not mentioned that he was in Cambodia to Ms Thankaraj when she was conducting her investigation, nor had he mentioned it either to Mr Towndrow or to Mr Sullivan. His witness statement which, in the amended version provided to us, ran to 36 pages and 178 paragraphs, is devoid of any mention of Cambodia.
52. The overriding objective of the Employment Tribunal Rules is to enable Employment Tribunals to deal with cases fairly and justly. The Rules require parties and their representatives to assist the Tribunal to further the overriding objective. Our observation is that we do not see how concealment by the Claimant of his trip to Cambodia assists us to further the overriding objective.
53. We understand that the parties had not formally agreed a List of Issues. Employment Judge Angela Stewart at the Preliminary Hearing conducted on 30 November 2020 had ordered that the Respondent draft and serve an updated draft List of Issues and that has been included in our bundle at pages 131 – 136. We have found it very helpful and propose to deal with the issues in the order listed.

Unfair Dismissal

54. The Respondent satisfied us that the reason for dismissal related to conduct, that being a potentially fair reason for dismissal as per section 98(2)(b) Employment Rights Act 1996. We were satisfied from the evidence of Mr Towndrow that the Disciplinary Panel held a belief, was based on reasonable grounds, that the Claimant had committed the alleged misconduct and had

reached that belief at the conclusion of a thorough and fair investigation process.

55. We were satisfied that the procedure followed by the Respondent was both fair and in accordance with its own disciplinary procedure. The failure of Ms Thankaraj to make a recommendation as to whether the allegations that raised a case to answer amounted to gross misconduct as opposed to misconduct does not, in our view, invalidate her conclusions and it was always open to the Disciplinary Panel to form their own view on the seriousness of the misconduct.
56. We were surprised that the Disciplinary Panel considered there to be sufficient mitigation in respect of Allegation number one to regard the misconduct of “Serious insubordination including a persistent failure to follow reasonable management request to discuss performance at work” as not amounting to gross misconduct. However, such a conclusion was open to the Disciplinary Panel to reach in the same way that it was open for it to conclude that the misconduct found to be proved in Allegations 2 and 3 was gross misconduct. It follows that we considered dismissal for the gross misconduct found to be proven was within the range of reasonable responses for the Respondent.
57. Dealing with the specific allegations of unfairness that the Claimant makes as set out in paragraph 6 of the List of Issues, we were wholly unpersuaded by the Claimant’s arguments on each point.
58. The Claimant had an issue which arose from the wording of the performance policy. Section 8 of that policy under the heading “Supporting Staff to Improve their Performance” set out the ways whereby management might choose to provide support. The sub-headings give an indication of these ways:

Initial Support

Informal Stage

Formal Stage

Formal Capability Hearing

Appeal

59. Movement from the Initial Support stage to the Informal Stage should be triggered when staff failed to improve “within an agreed timeframe with the support in place”. The Claimant’s issue, as he explained it to us, was that, while Ms Femakinwa had left the meeting on 10 June saying she would set objectives and put them in writing, when she put the objectives in writing, she incorporated a timeframe that she alone had determined. Therefore, the timeframe was not agreed.
60. Ms Femakinwa emailed the Claimant on 8 July to assure him that the meeting she had requested was in line with the Respondent’s performance policy and that his desire to meet with her line manager or HR should not get in the way of the process. The Claimant’s response to this was to state that he wanted to ensure that Ms Femakinwa was performing all of her line management duties in a fair, balanced and constructive manner, an approach which, understandably,

Ms Femakinwa considered to be “another example of his disrespectful attitude towards” her.

61. It was difficult for the Tribunal to understand how the Claimant allowed this issue – that is, the failure of Ms Femakinwa to agree with him the timeframe for him to meet the objectives she set for him - to colour the whole approach he adopted thereafter. He could have discussed with Ms Femakinwa his concern about the timeframe for meeting his objectives at the meeting he had with her on 18 June. He could have attended any one of the five occasions on which she sought a meeting and made as one of the first items for discussion his reasons as to why the timeframe suggested by her was unacceptable. However, he chose not to. Instead, he sought to have his line manager’s approach to be declared at odds with the Performance Management Policy. When his line manager was unpersuaded by his approach which entailed him refusing even to start attempting to achieve the objectives she set for the improvement in his performance and refusing to meet with her on five occasions, he chose to keep arguing with her about the process rather than agreeing timeframes with her. When that failed to achieve the result he wanted, he approached Mr Paul Perkins of HR. When Mr Perkins told him that Ms Femakinwa’s approach was in line with the policy (save for the initial lack of agreement on timeframes), he went to the Head of HR, Ms Caroline Anderson. And when she did not give him what he wanted, he went to the Respondent’s CEO.
62. We were of the view that it was a reasonable, indeed a very reasonable, response on the part of the Respondent to regard the Claimant’s refusal to engage with stage 2 of the internal formal performance management process as being insubordination.
63. The issue relating to Dr Neha Jain was not covered in the resumé of the facts of the case. What happened was that the Claimant had a conversation with Dr Jain on 22 August 2019 at the point when Dr Jain was leaving for the day. After her departure, the Claimant sent Dr Jain an email to which Dr Jain took exception. Dr Jain suggested to Ms Femakinwa, as the Claimant’s supervisor, that they both have a meeting with the Claimant in order to improve team work and communication. The Claimant refused initially to attend such a meeting by making it a condition for his attendance that Dr Jain’s line manager also attend, a proposal that Ms Femakinwa found ridiculous as, in her words:

Dr Jain is a medical doctor and a senior member of the team and there was no need for her line manager to attend. Dr Jain’s line manager, Professor Darren Hargrave, is a senior consultant in the Trust with multiple positions and would not be needed at any meeting to discuss this incident. I confirmed that I would like to have a meeting that day. Ultimately, I compromised: Prof. Hargrave did not attend the meeting, but I agreed that I would copy him into any subsequent summary.
64. The meeting was held and, in the Claimant’s view, resulted in “an amicable and satisfactory outcome”. When the incident with Dr Jain was cited in the terms set for the investigation as an example of the second allegation [“Not behaving in the way that upholds the reputation, standards and expectations of the trust, including repeated unprofessional behaviour and inappropriate communication with staff”], the Claimant considered it to be wholly unnecessary as, as he put it:

... following the 23rd August 2019, the issue of “unprofessional behaviour and inappropriate communication and [sic] staff”, relating to allegation 2 and which Neha Jain was involved in was no more.

65. The Claimant advanced his view that “Dr Jaine [sic] was asked and possibly encouraged by management and HR to make a formal allegation against the claimant.” As an issue in the List of Issues, the specific allegation of unfairness cited was “that the disciplinary allegation concerning Dr Neha Jain was resolved on 23 August 2019 and should not have formed part of the disciplinary process.” That seems to us to miss the point that the incident with Dr Jain was an example both of unprofessional behaviour and inappropriate communication that was cited in the second allegation.
66. As for the assertion at 6(c) of the List of Issues:
- that it was unfair to regard the Claimant’s failure to comply with the Respondent’s internal sickness absence reporting procedure because the reasons for this lack of participation was because of the Respondent’s previous failure to take the Claimant’s mental health seriously
- we were unable to see any particular failure to take the Claimant’s mental health seriously on the part of the Respondent prior to the Claimant’s absence from work that began on 16 September and for which the Claimant provided fit notes on 21 October. It seemed to us that the reason for the Claimant’s failure to comply with the Respondent’s internal sickness absence reporting procedure was much more likely to be connected to the Claimant’s desire to have his travel plans implemented than any reaction to behaviour on the part of the Respondent.
67. We reject the contention that the Respondent did not adequately consider the Claimant’s mental health issues during the disciplinary and appeal processes. Mr Towndrow’s letter of dismissal noted that:
- a) Ms Femakinwa had an awareness that the Claimant was suffering from stress and thought that the stress was related to her addressing issues of the Claimant’s performance, and that
 - b) she had offered her support by providing information about both Care First (a counselling service) and Occupational Health and offering referral to the latter which the Claimant declined.
 - c) Mr Towndrow’s letter also noted the actions that Dr Rivers had undertaken resulting from her recognition that the Claimant had asserted Ms Femakinwa to be the cause of his health issues. Of the Claimant’s health issues that the Claimant contends he suffered from, the Respondent could only consider work related stress because that was the only information concerning his mental health issues that the Claimant shared with it.
68. As for the appeal hearing, in his letter to the Claimant providing the outcome of the appeal hearing Mr Sullivan appeared to us to acknowledge the Claimant’s contention that he was discriminated against on the grounds of disability resulting from severe mental impairment. We adjudged Mr Sullivan considered that allegation adequately, notably at points 2, 3 and 5 of his discussion of Allegation 3.

69. We have already indicated that we do not agree the decision to dismiss was outside the band of reasonable responses to the findings of the Disciplinary Panel. We saw nothing unfair about the Respondent, at the disciplinary hearing conducted on 23 April 2020, taking into account allegations that arose in the period from 1 December 2019 to 6 January 2020 that had not been formally investigated. Ms Thankaraj had been asked on 18 October 2019 to conduct an investigation and report thereon. She did not report on allegations that arose from conduct after 18 October 2019. Her report was produced on 6 March 2020. Given that it was a report investigating the Claimant's conduct, the ongoing conduct of the Claimant was clearly a matter of concern to the Disciplinary Panel.
70. In respect of the allegation contained at Issue 6(g), we understand the untrue statement that the Claimant asserts Dr Rivers to have made was either the reason she provided to the Claimant in person on 18 February 2019 for his suspension from duty – that being because of his health – or the reason she gave in the letter dated the same day confirming his suspension – that being “the breakdown in working relationship during your phased return to work while the investigation is in progress” it being the case that Dr Rivers felt “it is in the best interests of all involved for you to be away from work until the investigation process is completely concluded.”
71. We were not satisfied that there ever was an untrue statement made by Dr Rivers. The best interests of all involved that the Claimant be suspended can include the benefits to the Claimant's health from continuing to work whilst the investigation is ongoing. It may be that Dr Rivers might have emphasised the latter when speaking to the Claimant but we accept that the reasons contained in her letter for the suspension were those outlined by her to the Claimant in person and which he accepted “graciously” at the time. In any event, any divergence between what was written in the letter and what was said to the Claimant as being the reason for suspension did not have any impact on the disciplinary panel or on Mr Sullivan: the disciplinary panel's task, after all, was to assess the allegations that Ms Thankaraj had investigated as opposed to what the Claimant was told as regards the reason for him being suspended.
72. We did not think that the action of Dr Rivers in both commissioning the investigation and subsequently contributing to it rendered the dismissal unfair. It is to her credit that she realised the role of being the commissioning officer / disciplinary officer of the investigation potentially conflicted with that of being a witness to the alleged misconduct being investigated and therefore passed to Mr Towndrow the commissioning officer's role.
73. We have already noted that Ms Thankaraj did not make a recommendation regarding whether or not the alleged misconduct was gross misconduct. We interpret the Disciplinary Policy as entitling the Disciplinary Panel, if deprived of a pointer provided by the Investigating Officer, to make up their own mind as to the seriousness of the misconduct they find proven. Necessarily, this must be the case as, of course, the Panel is required to consider the appropriate sanction on a finding that any one allegation is proven.
74. The letter sent by the Claimant to the CEO of the Respondent was marked “Confidential” by the Claimant. It contained criticism of the disciplinary

investigation being undertaken by the Respondent. We think the argument that a CEO should keep such criticisms to himself because of the “Confidential” marking is misguided. The very act of sending such a letter containing such criticisms must have been made with the expectation that, if the CEO agreed with the criticisms, he would act to correct the faults in the investigation. And, as it could have been reasonably foreseen that the CEO was unlikely to know anything about the investigation, he would need to receive his organisation’s view of the criticisms in order to know whether he agreed with the criticisms. That necessarily meant sharing the Claimant’s criticisms. In any event, such action – even if it transgressed any convention regarding the labelling of a letter as “Confidential” by the sender – did not, in our view, render the dismissal unfair.

75. Having observed both Ms Thankaraj and Ms McNicholas give their evidence, we are satisfied that Ms McNicholas acted properly as an adviser to Ms Thankaraj and left Ms Thankaraj to make up her own mind on whether there was a case to answer in respect of the allegations she was investigating. The fact that the Head of HR, Ms Anderson, conducted an enquiry into the criticisms made by the Claimant of the disciplinary investigation process being conducted by Ms Thankaraj, which enquiry did not support the Claimant’s criticisms, does not invalidate or compromise the role that Ms McNicholas would have had in providing advice to Ms Thankaraj. Ms Anderson would expect a member of her staff to be able to brief her on the matters referred to in the Claimant’s letter to the CEO. We found no conflict of interest in Ms McNicholas both acting as an advisor to Ms Thankaraj and reporting on what was happening to the head of her department. And we discerned no evidence that suggested Ms McNicholas had acted as an advocate for the views of Ms Thankaraj to Ms Anderson or vice versa.
76. We have already dealt with the issue set out in the List of Issues at paragraph 6(k) at our paragraphs 69 and 70. We did not think any discrepancy between the oral reasons and the written reasons advanced by Dr Rivers to the Claimant for his suspension influenced in any way the later decisions of the Disciplinary Panel to find the allegations proven, to conclude that certain of the allegations established gross misconduct on the part of the Claimant and to decide upon the sanction of dismissal.
77. Should we be wrong in holding the dismissal to have been fair, our view is that the Claimant’s conduct contributed to his dismissal and that his compensation should be reduced 100%.
78. If we are wrong about the fairness of the procedure that was adopted to dismiss the Claimant, we do not consider any correction to that procedure would have lengthened the period of time that the Claimant was employed by the Respondent. Bearing in mind that the Claimant was paid money in lieu of notice – something which he might not have expected upon being dismissed for gross misconduct – we do not see that any correction to the procedure adopted by the Respondent would have led to the Claimant receiving more salary than he actually received.

Disability Status - section 6 Equality Act 2010

79. We examined the medical evidence that the Claimant submitted in compliance with the Case Management Order of 30 November 2020 which consisted of:

a) A letter from his GP dated 4 January 2021 in which the Claimant's GP reported the Claimant to have:

initially experienced mild but manageable mental health issues in June 2019 as a result of the conduct of his manager. The following month he brought this to the attention of his employer seeking follow up action to address the cause with the hope of resolving the issues experienced.

No resolution was forthcoming and a few months after he ended up going on long term sick leave.

Mr Pillay was prescribed Citalopram for his anxiety and depression, as the disciplinary investigation then commissioned by his employer exacerbated his mental health issues. The dose was started at 20mg daily and then had to be increased to 40mg.

Although the medication has helped, it seems to be just helping him to manage the symptoms. The current issues do have a detrimental effect and impact on him being able to carry out activities of daily living such as shopping, house cleaning, going for a haircut et cetera.

He continues to get episodes of low mood, panic attacks and feelings of claustrophobia. In addition he is sensitive to noise.

All the above issues have been exacerbated further since he lost his job in July 2020.

b) The Tribunal's attention was brought to two charts in the bundle of documents relating to mental health, however the significance of these chartes was never adequately explained to us.

c) A disability Impact statement from which we cite the following extracts:

2. I first began to experience the above mental health issues towards the end of June 2019, triggered by the actions and conduct of my line manager. It was not until approximately 3 months later September 2019, that I spoke with my GP, about taking time off work to manage mental health issues. At the time the issues were manageable without the need for medication. However in October 2019, my illness was exacerbated by the decision taken by the respondent [Dr Rivers] to inform me whilst I was on sick leave managing my mental health issues that she had commissioned a disciplinary investigation against me regarding allegations of gross misconduct. Following notification I became even more distressed and anxious more than before. The decision to proceed with a formal disciplinary investigation sabotaged my prospects of a prompt recovery.

3. Prior to receiving the email from Dr Rivers my state of mind was fragile to say the least. Notification of a formal investigation only compounded and exacerbated my illness to the extent I felt the need for medication (followed by the latter of which I have now been taking on daily basis for

over a year to help me get through each day and a need to seek one to one counselling and medication following my return from sick leave. The one to one with a counsellor with a qualified clinical psychologist Ms Sanford resulted in an average score of 27.25 [clinically significant] out of 40 using a PHQ- 9 and GAD- 7 general anxiety scale.

4. The decision to return back to work in December 2019 following a period of sick leave, even though my mental health issues were still ongoing, a fact that the respondent was made aware of. The decision to return whilst my mental health issues were still present was for fear of that not returning would strengthen the Respondents case for dismissing me on either grounds of misconduct or and ill health capability.

Put simply, I felt that any decision to delay a return would do more harm than good and increase the chances of being dismissed.

5. Overall my illness has had and continues to have a detrimental and adverse effect on being able to carry out things on a day to day basis from household chores, food shopping, travelling on public transport, communicating with utility and financial companies regarding owed monies, through to sleeping. As a result, I can only limit my time to no more than two hours a day when dealing with specific tasks that require, say reading a set number of documents or providing written responses.

6. The above of which has got worse since the respondent terminated my contract of employment on the 30th of April 2020 given that the inability to pay my utility bills, rent loans and credit cards has resulted addition stress and anxiety from a financial perspective, triggered by the real threat of eviction in the event that the provisions of the Coronavirus Act 2020 is not renewed beyond March, along with debt collectors knocking on my door,... all of which is only gone on to amplify my current mental health issues to the extent that I no longer consider or feel I am able to return back to work. In my mind its clear that my mental health has become irreparably impaired.

7. The issues that I am having to deal with on a daily basis and require the need to take medication on a daily basis is not something that I have experienced before. Before June 2019, I had no such issues in terms of travelling on public transport shopping, having a haircut, carrying out household chores

8. In terms of treatment, as mentioned previously, I began taking Citalopram and then moved onto Mirtazapine which increased from 20mg to 40mg. In terms of drug efficiency efficacy, the effect is limited to only helping me manage my illness and as a result requires the drug to be taken on daily basis... as opposed to resolving fully my mental illness... however after a while, the efficacy of taking such a drug reduces over time. That said, the drug being currently taken only has a limited effect as they do not prevent the above issues arising but only limit the frequency and severity. In sum there are more days than not that my current mental health issues make life a real challenge to get through on a day to day basis. And in terms of taking over the counter medication to treat migraines, the need is

avoided, as the migraines tend to resolve by self-isolating in a dark room for approximately 30 minutes.

80. More recently, the claimant has disclosed further medical evidence, namely:
- a) A letter dated 17 December 2019 confirming that Ms Cheryl Sandford, a psychotherapist, had been instructed by Care First on 11 December 2019 to arrange 6 face to face counselling sessions with the Claimant, the dates of which were provided, in December 2019 and January 2020.
 - b) A letter dated 28 April 2021 from the St Albans & Dacorum Wellbeing Team to the Claimant confirming his first telephone appointment in a psychoeducational program was fixed for 10 May 2021.
 - c) A report dated 23 May 2021 from Ms Sandford providing confirmation that the Claimant attended 5 of 6 weekly counselling sessions that had been authorised by Care First in December 2019 and January 2020 during which the Claimant had “evidenced an inability to function with day to day tasks, the fear and anxiety triggered by work events outside of his control were having an enormous impact on his sense of self, confidence and general ability to function with his previous belief in self”. At the last session on 27 January 2020, the Claimant’s “levels of stress (triggered by work and the lack of support and isolation he experienced) remained extremely high again impacting his ability to function. Thus, Ms Sandford was able to provide confirmation that the Claimant was receiving treatment / counselling for Stress and Anxiety in December 2019 and January 2020.
 - d) A letter from his GP at the Lincoln House Surgery dated 7 June 2021 referencing three consultations that the Claimant had at the practice in July, September and October 2019 where, in July, the Claimant informed the doctor that he was suffering with work stress with associated insomnia and episodes of irritability but had moved to describe in October deterioration in his symptoms leading to him being prescribed anti-depressants for symptoms described as “depression, anxiety, panic attacks, insomnia and irritability”. The Claimant was said to be having regular review with the author of the letter.

20. Section 6 of the Equality Act 2010 provides us with the definition of Disability:

- (1) *A person (P) has a disability if—*
 - (a) *P has a physical or mental impairment, and*
 - (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

21. As to what “long-term” in that context means, we look to paragraph 2 of Schedule 1 of the Act where we are told that:

- 2(1) *The effect of an impairment is long-term if: -*
 - (a) *It has lasted for at least 12 months*
 - (b) *It is likely to last for at least 12 months or*
 - (c) *It is likely to last for the rest of the life of the person affected.*

81. We were referred by counsel for the Respondent to *Herry v Dudley Metropolitan Council* (2016) UKEAT/0100/16 and, through it, to *J v DLA Piper* [2010] ICR 1052 and to the guidance provided by *Underhill P* at paragraph 42:

42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness—or, if you prefer, a mental condition—which is conveniently referred to as “clinical depression” and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or—if the jargon may be forgiven - “adverse life events”. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians—it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case—and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as “depression” (“clinical” or otherwise), “anxiety” and “stress”. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant’s ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering “clinical depression” rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived.

82. We start, therefore, by considering whether the Claimant’s ability to carry out normal day-to-day activities had been substantially impaired by symptoms characteristic of depression for 12 months or more at the date of the alleged discrimination. That raises the question as to when the date of the alleged discrimination was, a question which causes us to go back to the Claimant’s ET1 and his Particulars of Claim where the Claimant set out his case with regard to “Discrimination discriminatory dismissal (s.6(1)(a) and (b) Equality (Act)” thus:

- i) The Claimant was discriminated against due to my mental illness / stroke due to actions taken that were as a result of my mental state with regard to allegation #3
- ii) It was wrong [and discriminatory] for the Respondent to conduct an investigation whilst the Claimant was on sick leave managing mental health issues, issues caused by the Respondent [not disputed]. And further exacerbated by:
 - (a) The failure of the Respondent to take an expected and reasonable cause of action to address the cause of the issue directly.
 - (b) The decision taken by the Respondent to commission a formal investigation while the Claimant was on sick leave.
 - (c) The refusal of the Respondent to take seriously the mental health issues raised or as early as the 23rd July 2019, and instead choosing to take the mental health issues “... with pinch of salt...” contrary to the advice given to employers by ACAS.

83. So, the first date on which we should consider whether the Claimant was adversely affected by a physical or mental impairment is 23 July 2019. The only document we can see in our Bundle of 2,276 pages bearing that date was an email from the Claimant to Ms Femakinwa providing her with an update of

events following the Claimant's decision of 19 July to decline her invitation to attend an Informal Stage Meeting Discussion. Nothing in the Claimant's email even hints at him being disabled. We do have an email from Ms Femakinwa to Mr Paul Perkins of HR which is dated 10 July 2019 in which Ms Femakinwa informs Mr Perkins that the Claimant was asserting to her that her line management of him was making him ill such that he was unable to perform tasks to the best of his ability, an assertion that Ms Femakinwa found unconvincing and led her to write:

I take this with a pinch of salt as the issue with his performance has been ongoing since 2019.

84. We then look to the date of the next allegation of discrimination, the date on which Dr Rivers decided to commission a formal investigation whilst the Claimant was on sick leave, that date being 18 October 2019. At that time, the Claimant had twice been assessed as unfit to work by his GP although the Respondent was not to receive those fit notes until 21 October. The first of these fit notes was dated 16 September 2019 and cited the condition causing the Claimant to be unfit as "work stress" as did the second note dated 30 September which certified the Claimant to be unfit to 4 November.
85. We have the Claimant's account of his condition as set out in his disability impact statement, see paragraph 78(c) above. From it, it is clear that whatever mental health issues the Claimant experienced during the summer of 2019, he only sought his GP's assistance on 16 September, the date on which he started his period of absence from work. Furthermore, he asserts that "the issues were manageable without the need for medication" which very much suggests that he was able to manage day-to-day activities successfully. The decision of Dr Rivers to commission a disciplinary investigation into the Claimant's conduct "exacerbated" the Claimant's illness. That seems to us to have been a reactive response to the news of the disciplinary investigation. So, when the decision was taken, the Claimant was not experiencing an impairment which has a substantial and adverse effect on his ability to carry out normal day-to-day activities.
86. If we are wrong about that and the impairment had a substantial and adverse effect on the Claimant's ability to carry out normal day-to-day activities, it was not a long-term effect given that the earliest mention of the Claimant being ill was his assertion sometime shortly before 10 July 2019 to Ms Femakinwa that her line management of her was making him ill. She had been on maternity leave from March 2018 until January 2019 and there was no complaint from the Claimant prior to March 2018 (or indeed prior to July 2019) that her line management was making him ill. Her first step in managing his performance was an informal chat in or about February or March 2019. Even if that had the immediate effect of making him ill, that would have meant that the Claimant had only experienced that impairment for 8 months by 16 September 2019. So, the impairment does not meet the requirement of paragraph 2(1)(a) of Schedule 1 of the Act. The Claimant has produced no evidence in the form of a medical report containing a prognosis suggestive of any impairment being likely to last for at least 12 months or longer, so the impairment does not meet the requirements of paragraph 2(1)(b) or (c) of Schedule 1.

87. Thus, we are not satisfied that, at the time of the alleged discrimination, the Claimant was suffering from a disability. It follows that, if the Claimant is unable to demonstrate to us that he suffered from a disability at that time, he is not able to demonstrate that the Respondent knew him to have a disability when Dr Rivers took her decision to commission the formal investigation into his conduct. Furthermore, we see nothing in the mere absence of the Claimant from work from 16 September until 18 October 2019, an absence unexplained by any fit note until 21 October, that should reasonably have led the Respondent to know that the Claimant had suffered an impairment which a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

Disability Discrimination

88. We move on to consider whether the Respondent unlawfully discriminated against the Claimant on the grounds of his disability as per the Equality Act and our conclusion is that the Respondent did not so discriminate. In the absence of knowledge, actual or constructive, of the Claimant's disability, the Respondent could not have discriminated against him on that ground when it determined to commission a disciplinary investigation into his conduct. Added to which was the fact that there appeared to be cogent grounds for a reasonable employer to have taken the action it did,

Discrimination arising from disability – section 15 of the Equality Act 2010

89. For this claim, the Claimant relies on specific allegations:
- a) That his dismissal on 30 April 2020 was unfavourable treatment and that he was dismissed for carrying out actions that, in respect of those contained in allegation number 3, were primarily caused by his medical condition; and
 - b) That the rejection of his appeal against dismissal also amounted to unfavourable treatment for the same reason.
90. The finding of Ms Thankaraj in respect of allegation number 3 should be borne in mind:
- I found but there was evidence that Trust staff members had difficulty in contacting Mr Pillay during his absence, despite being informed of the need to keep in touch. Throughout the investigation Mr Pillay was unable to explain why his phone did not accept calls. Occupational Health also confirmed that they had difficulty in contacting Mr Pillay. Mr Pillay accepted that [he] had not been in contact but did not give a good explanation for this and did not seem to show any insight as to why his behaviour was unacceptable. I therefore felt that this was misconduct on his part as well.
91. It was apparent to us that there was a simple explanation as to why Trust staff members had difficulty in contacting the Claimant during his absence and that was that the Claimant had chosen to travel to, and reside at, a retreat in Cambodia for the period from 23 / 25 September until 23 October. We cannot be sure of the dates as the Claimant, in his evidence, initially asserted that he returned from Cambodia on 23 October but later, after he said he had consulted his diary (which he did not produce for us to see), he substituted 14 October as being the date on which he returned. Trust staff were unable to contact him by telephone. The Claimant could have explained why his phone did not accept calls but he chose not to.

92. We accept the submission of counsel for the Respondent that the Claimant under cross-examination made concessions as set out in paragraph 33 of her written submissions that demonstrated his behaviour in this regard – of communicating as it suits him and not responding to reasonable management requests - has been long standing and cannot reasonably be said to arise from any (mental) health concerns. Thus, we cannot ascribe the misconduct that Ms Thankaraj identified to his medical condition.
93. We further accept the proposition that the Respondent's status as the only specialist Biomedical Research Centre for paediatrics and, together with UCL, as the largest paediatric research and teaching centre in the UK gives rise to a legitimate aim that the research centre be managed properly. When faced with the difficulty created by long term absence on the part of employees, it is a proportionate means of achieving that legitimate aim (and of supporting those employees) that the Respondent requires such employees to keep in contact and provide fit notes within given time frames.
94. Thus, to regard as gross misconduct a failure on the part of an employee to keep in contact and to provide, within given time frames, fit notes (allegation 3) is, in our view, consistent with employing a proportionate means of achieving the legitimate aim of managing the important research service provided by the Respondent.

Protected Disclosure

95. The Employment Rights Act 1996 s 43B , as amended, provides:-

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

96. So, we must start with establishing whether the Claimant made a protected disclosure. The Claimant submits that he made a protected disclosure in emails dated 28 February 2019 and on 18 November 2019. However, in his pleadings, he only specified the letter to the CEO of the Respondent, Mr Shaw, of 18 November 2019 and, indeed, in paragraph 46 of his Particulars of Claim under the heading of "The Protected Disclosure", the Claimant made clear that the heading referred to his letter to Mr Shaw of 18 November 2019.

97. Counsel for the Respondent, Ms Genn, in her submissions written ahead of sight of the Claimant's written submissions assumed that the references in the letter to patient health and safety concerns meant that the Claimant was relying on the qualifying category set out in section 43B(1)(d) – health and safety. The Claimant's written submissions do not themselves specify that qualifying category but merely assert that the Claimant “made a protected disclosure in email correspondences dated 28.02.19 and 18.11.19 to the Respondent highlighting concerns about patient safety being placed at risk due to inadequate resource, of which resulted in the the [sic] Respondent being reported to the MHRA for patient safety breached in 2018.” We make the same assumption as Counsel.
98. We further agree that the letter of 18 November 2019 contains no qualifying disclosure. The particular paragraph of it that comes closest to containing such a disclosure would appear to be the following paragraph numbered 5 under the heading of BACKGROUND:
5. However in 2018 following a number of serious complaints regarding the failing to report patient safety data within the required 24 hours and therefore a breach of GCP a decision was taken by the sponsor to bring the breach to the attention of the MHRA. Only then did the Trust begin to take serious the subject of insufficient resource within Data management... of which was described by one lead investigator as “... dire ...” in June 2018, [if my memory serves me correct] which resulted in hiring additional, inexperience employees new to data management as opposed to employing experienced data managers.
99. The failure in 2018 of the Respondent to report patient safety data within 24 hours being a breach of GCP [Good Medical Practice] is information which tends to show that the health or safety of individual patients has been, is being or is likely to be endangered. The decision taken by a sponsor to report that breach of CGP to the MHRA (Medicines and Healthcare Regulatory Authority) in 2018 would, had the sponsor been a worker, have been a disclosure falling within section 43B(d). Clearly, the Respondent must have known about the report of the sponsor to the MHRA because it was only after that report that the Claimant asserts the Respondent began to take seriously the subject of insufficient resource in Data management.
100. The Oxford English Dictionary defines *disclosure* as being:
- a. The action or fact of disclosing or revealing new or secret information; the action of making something openly known; an instance of this.
101. We cannot help but think that the CEO of the Respondent must be taken to know that that sponsor made such a report. Therefore, mention by the Claimant of that report having been made does not disclose or reveal new or secret information and nor does it make the breach of GCP openly known.
102. The Claimant's letter is, as submitted by Counsel, “manifestly primarily concerned with the Claimant's personal concerns about the operation of the internal disciplinary process”. As Ms Genn goes on to argue, this strongly suggests that the disclosure was an act of self-interest and not in the public interest. Ms Genn has referred us to two cases - *Ibrahim v HCA International Ltd [2019] EWCA Civ 2007*; *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed*

[2017] EWCA Civ 979 . In the latter case, Underwood LJ set out at paragraphs 27 and 28 the correct approach in whistleblowing cases to determining whether a worker had made an allegedly protected disclosure in the reasonable belief that it was in the public interest, so as to be a qualifying disclosure within the Employment Rights Act 1996 s.43B(1), where the disclosure related to a breach of the worker's own contract of employment. He wrote:

27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula v Waltham Forest College [2007] EWCA Civ 174. The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

103. We formed the view that the Claimant did not, at the time of writing the letter to Mr Shaw, have any concern about the public interest. He was entirely concerned with attempting to persuade Mr Shaw to intervene in the way the Claimant was being managed for performance issues both before and while he was on sick leave. The information he advanced concerning the breach of GCP was merely part of the background as portrayed by the Claimant that would explain his individual failings in performance.
104. For completeness, we will mention the other communication that the Claimant in his submissions has referred to, that being the email of 18 February 2019. This email was not pleaded as a protected disclosure and so we do not regard it as such primarily for that reason. But, lest we we err in taking the pleading point, we will deal with it substantively.
105. That email, drafted by the Claimant, purported to be an email to the Haematology / Oncology / BMT Research Consultation from the Claimant and three others in the Haem-Onc Data Management Department. There is mention of the under-reporting of SAEs and expected SAEs (an acronym for a three word but – *to us* - undisclosed phrase representing a reportable result) to data management which resulted in the matter being reported to the MHRA as a serious breach of GCP. We repeat what we said in paragraphs 97 to 99 about the meaning of disclosure. A reference to what might have been a protected disclosure by another party does not, in our view, mean that the reference itself assumes the quality of being a protected disclosure: what was uncovered, or

not openly known, ahead of the other party's disclosure, has by that disclosure ceased to be so uncovered or not openly known.

106. Turning to the causal connection between what the Claimant has advanced as the protected disclosure and the detriment – a connection which the Claimant must prove - we accept the evidence of Ms Femakinwa that she had no knowledge of the February email and the evidence of Dr Rivers that she had no knowledge that the Claimant had contributed to the consultation exercise which she did know about. Therefore, given that the disciplinary investigation which led to the dismissal of the Claimant was commissioned by Dr Rivers in her role as line manager of Ms Femakinwa and temporary line manager of the Claimant, we consider the Claimant has failed to establish any causal connection between the February email and the detriment he claims to have experienced. We go further: we are satisfied that the detriment the Claimant asserts he suffered because of any protected disclosure was the result of a thorough and honest consideration of his conduct and had nothing to do with either of the two communications which the Claimant asserts were protected disclosures.

Breach of Contract

107. We note that the ET1 is devoid of any indication that the Claimant was bringing a breach of contract claim. On that basis, we reject the claim because, if the Claimant wished to have it considered, he should have sought to have amended his ET1, something he has not done.
108. However, if we are wrong so to have done, we note that the Claimant in his closing submissions has argued that there were breaches of the Respondent's disciplinary policy and he cites the following five sections of the disciplinary policy as having been breached by the Respondent:
- i) Paragraph 4.1.1,
 - ii) Paragraph 5.5.1
 - iii) Paragraph 7.1.3
 - iv) Paragraph 7.4.1
 - v) Paragraph 7.5.2.
109. We have looked at each of these sections. We have also looked at paragraph 2.3 which states that the policy does not form part of any employee's contract of employment and may be amended from time to time in line with the Trust's policy approval processes. We consider this express provision must cause the Claimant's five allegations of breach of contract stemming from alleged breaches of the policy to fail.
110. The Claimant has also alleged that there was a breach of the Grievance Policy at paragraph 4.5. We could not see a paragraph 4.5 in the Grievance Policy at page 1936 of the Bundle. The Claimant had asserted in his written submissions that paragraph 4.5 might be found at page 877 of the Bundle but page 877 formed part of Ms Thankaraj's investigation report. In any event, paragraph 3.7 of the Grievance Policy makes it clear that the "Policy does not form part of any employee's contract of employment and may be amended at any time and the

Trust may need to depart from it depending on the circumstances”. We therefore considered any claim for breach of contract based on a breach of the Grievance Policy must fail.

111. As we understand one of the Claimant’s complaints, it is to the effect that a grievance he raised about the conduct of the disciplinary process was referred to Ms Thankaraj who was conducting the Disciplinary Investigation. However, it seems his complaint fails to take into account the Disciplinary Policy at paragraph 6.7 which provides for grievances raised during a disciplinary process to be dealt with as part of the disciplinary process.

Summary

112. For the reasons set out above, we dismiss all the claims.

18 November 2021

Employment Judge Paul Stewart

**DECISION SENT TO THE PARTIES ON
18/11/2021.**

FOR SECRETARY OF THE TRIBUNALS