



EMPLOYMENT TRIBUNALS

Claimant: Ms N. Bodis
Respondents: Lindfield Christian Care Home Ltd

Heard by: London South
November 2021. **Heard on:** 8 to 12
Chambers 08 December 2021.

Before: Employment Judge T R Smith

Members Mr R. Shaw
Mr K. Murphy

Representation

Claimant: Mr R. Kohanzad (counsel)

Respondent: Mr P.Starvevic (counsel)

RESERVED JUDGMENT

1.The claimant's complaints of a failure to make reasonable adjustments, firstly by failing to notify her of the matters to be discussed at an investigative meeting on 25 February 2019 and secondly by failing to allow her to be accompanied at the same meeting are well-founded and the tribunal declares accordingly. The

residue of the claimant's complaints of failure to make reasonable adjustments are not well founded and are dismissed.

2.The claimant's complaint of unfair dismissal is not well founded and is dismissed.

3.The claimant's complaint of discrimination arising from disability is not well founded and is dismissed.

4.The claimant's complaints of direct race and /or disability discrimination are not well founded and are dismissed.

5.The claimant's complaints of harassment are not well-founded and are dismissed

6.The claimant's complaint of wrongful dismissal is not well-founded and is dismissed

REASONS

Preliminary matters

1.On the first day Mr Kohanzad sought leave to introduce a supplemental statement and additional documentation on behalf of the claimant.

2.Whilst Mr Starcevic contended they had little, if any, relevance he accepted he was not prejudiced by their introduction and for the oral reasons given, the tribunal granted Mr Kohanzad's application.

3.On the third day of the hearing Mr Starcevic sought leave to introduce one document to which Mr Kohanzad did not object and for the oral reasons given this was added to the master bundle.

4.Given it was conceded that the claimant was a disabled person the tribunal raised with Mr Kohanzad whether any specific adjustments were required for the claimant, and was informed that other than breaks, if she became distressed, no further adjustment was required. Regular breaks were provided.

5.The tribunal drew to the party's attention that having accepted their invitation to read the statements, the tribunal had noted the claimant made reference to a without prejudice financial offer which was highly likely to be inadmissible

evidence. The tribunal considered it was able to discount that information from its minds and both counsel signified in those circumstances they were content for the tribunal continue.

The Evidence

6.The tribunal had before it two statements from the Claimant.

7.For the Respondents the Tribunal had statements from:-

- Mrs P. Craen, registered manager.
- Mrs S. Jones, deputy manager.
- Mr J. Nurse, trustee and investigating officer.
- Mr I Johnson, trustee and one of the two determining officers at the disciplinary hearing.
- Mrs K. Taylor chair of trustees.

8.The tribunal heard oral evidence from all the authors of the above statements.

9.The tribunal had before it a master bundle, which eventually consisted of 787 pages. A reference to a document is a reference to the master bundle, unless otherwise indicated.

10.The tribunal also had the claimant's supplemental bundle which numbered 24 pages. A reference to a document in that bundle is preceded by the letter "C". The parties were reminded that the tribunal would only concentrate its attention on documents that it was specifically taken too.

The Issues.

11.Following discussions between the tribunal and the parties a finalised list of issues was agreed, which the tribunal set out below.

12.It was also agreed with the parties that due to the shortness of time the tribunal would determine liability only and not remedy and the expression remedy included both the issue of contribution and any relevant Polkey deduction.

Unfair dismissal.

13.What was the reason for the dismissal? In particular, was the reason for the dismissal the potentially fair reason of conduct, as the respondent contended?

14.If so, did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissal, having regard to equity and the substantial merits of the case. In particular

- Did the respondent hold a genuine belief that the claimant had committed the conduct complained of?
- Was that belief based on reasonable grounds?
- Did the respondent carry out such investigation as was reasonable in all the circumstances?
- Was the sanction of summary dismissal within the band of reasonable responses of a reasonable employer?
- Did the respondent adopt a fair procedure?

In particular the claimant alleged the dismissal was unfair because: –

- The respondent concluded that the claimant was guilty at the outset of the investigation which influenced the manner in which the investigation was conducted.
- The methodology adopted during the investigation in determining that the claimant was guilty rendered the investigation outside the range of reasonable investigations, in particular in respect of identifying the handwriting, identifying who was present and drawing inferences from the manner of the claimant's investigative interview.
- The conclusion that the claimant was guilty of the events alleged was a conclusion outside the range of reasonable conclusions. In part because it was based on an assumption that should have been a conclusion rather than a premise and a faulty investigation.
- The respondent failed to properly take into account the claimant's long service.

Disability.

15.Did the respondent have the requisite knowledge of the claimant's disability (anxiety with depression) at all material times?

Direct discrimination.

16.Was the claimant treated less favourably because of her disability, or race, by being dismissed on 29 March 2019?

- On 27 February 2019 did Mrs White state that the claimant was “*mad*” and “*up and down*” and if so was this less favourable treatment because of the claimant’s disability or race?
- On 01 March 2019 did Mrs White say to Mrs Craen “*now she is married, why is she not going back to her country and look for a job there. Foreigners come here and make troubles*” and did Mrs Craen reply stating that the claimant was “*mentally ill*” and, if so, was this less favourable treatment because of the claimant’s disability or race?

Harassment.

[The claimant pursued the following allegations of harassment in the alternative, to the alleged acts of direct discrimination].

17. Did the respondent engage in unwanted conduct?

- On 27 February 2019 by Mrs White stating that the claimant was “*mad*” and “*up and down*”; Was this because of her relevant protected characteristic of disability?
- On 01 March 2019 by Mrs White saying to Mrs Craen “*now she is married, why is she not going back to her country and look for a job there. Foreigners come here and make troubles*” and by Mrs Craen in reply stating that the claimant was “*mentally ill*”. Was this because of the claimant’s protected characteristics of race and/or disability?

18. Did any such unwanted conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

19. Was any such unwanted conduct related to the claimant’s disability or race?

Unfavourable treatment because of something arising in consequence of disability.

20. Was the claimant treated unfavourably by the respondent by:

- Subjecting the claimant to a disciplinary process in 2019?
- Dismissing the claimant on 29 March 2019?

21. In relation to each of the above, was this treatment because the claimant's answers in the investigation meeting on 25 March 2019 were brief, not free flowing, distracted and different? In particular the "*something*" that the claimant relied upon was the manner in which she answered questions at her investigative and disciplinary hearing which was something arising in consequence of her disability.

22. Was the treatment justified as being a proportionate means of achieving a legitimate aim, in particular the maintenance of proper standards of conduct? The respondent contended that the maintenance of proper standards of conduct was a legitimate aim and that the respondent genuinely believed on reasonable grounds and after a reasonable investigation that the allegation of misconduct against the claimant were established and amounted to a proportionate means of achieving that legitimate aim.

23. Has the respondent shown that at the material time it did not know and could not reasonably be expected to know that the claimant was disabled?

Breach of duty to make reasonable adjustments.

24. Did a policy, criterion or practice, namely the respondent's disciplinary policy, place the claimant at a substantial disadvantage compared to persons who were not disabled? The particular disadvantage relied upon by the claimant was that, owing to her depression and anxiety, the process itself made her anxious to a disabling level and she was unable to properly explain herself or argue her case during the process.

25. The aspects of the disciplinary policy which the claimant relied upon as a PCP were:

- conducting an investigation meeting.
- conducting a disciplinary meeting or process.
- the delivery of letters/notices to the claimant.

26. If so, did the respondent fail to take such steps as it is reasonable for the respondent to take to avoid that disadvantage? The claimant contends that the respondent should have made the following reasonable adjustments:

- The claimant should have been made aware of the substance of potential allegations in writing in advance of the investigation meeting, rather than face them for the first time during the investigation meeting.
- The claimant should have been allowed to bring a companion to the investigation meeting and the respondent should have informed her of that right before the meeting.
- The respondent should have postponed (or temporarily suspended) its disciplinary process until receipt of medical advice.
- The respondent should not have delivered post by hand, including delivery being accompanied by a knock on the door; and
- The respondent should have given the claimant sufficient time to recover so that she could meaningfully participate in the disciplinary process and properly put forward her case.

27. At the material time when the duty to make reasonable adjustments arose, did the respondent not know or could not reasonably be expected to know that the claimant had a disability and was likely to be placed at a substantial disadvantage?

Wrongful dismissal.

28. Did the claimant act in breach of contract by reason of the conduct relied upon in the dismissal letter and entitling the respondent to terminate the contract without notice? In particular did the respondent prove an act of gross conduct, that is that the claimant committed a fundamental breach of contract justifying the respondent in dismissing the claimant.

29. Although a time point had originally been raised by the respondent in a draft list of issues it was conceded during the course of the hearing that all the claimant's complaints from 01 March 2019 were within time having regard for the appropriate extension in respect of ACAS early conciliation.

Findings of fact

30. There were very substantial disagreements in the witness statements, oral evidence, and documentation between the parties. The tribunal has not addressed each and every such factual dispute, only those principal factual disputes required to address the agreed issues.

Background

31.The claimant is of Hungarian heritage.

32.She started working for the respondent as a domestic assistant on 01 July 2008.

33.She was appointed activities coordinator on 01 December 2009.

34.The claimant was issued with written particulars of employment and subsequently any necessary variations thereto in writing.

35.Save in the case of gross misconduct the respondent was obliged to give the claimant four weeks' notice, or statutory notice, whichever was the greater on termination of her employment.

36.The respondent had a disciplinary procedure (356 to 358) and also a comprehensive staff handbook.

37.The respondent is a company limited by guarantee, and a registered charity, operating a care home located in Lindfield, West Sussex.

38.The home, Compton House was subject to external CQC registration and had achieved an "*outstanding*" rating under Mrs Craen's management.

Structure.

39.Compton house employs approximately 60 to 70 members of staff, the majority of whom are part-time.

40.From July 2013 the claimant's line manager was Mrs Craen, who was the registered manager of the home and also a qualified nurse. She was supported by a deputy manager, Mrs S. Jones.

41.Mrs Craen was responsible to the Board of Trustees who operated Compton house, and she reported directly to Mrs K. Taylor the chair of the trustees.

42.Prior to the events leading to the claimant's dismissal the claimant had a clean disciplinary record.

Supervision

43.The claimant, like all other employees of the respondent was subject to supervision and appraisals .The tribunal considered the paperwork supplied by the respondents to be extremely detailed, well-reasoned and demonstrated a fair and supportive employer.

44.The tribunal found that the claimant was considered by the respondent to be a caring, kind, compassionate and committed employee who had considerable

skill in connecting with residents. She was however sensitive and perceived comments, suggestions or proposed changes as a criticism, although the claimant was encouraged not to take such comments personally, but as opportunity to try something different.

The attitude of Mrs Craen to the claimant.

45.The tribunal did not accept the assertion of the claimant that since 2017, because of her health, Mrs Craen wanted the claimant dismissed, had any foundation whatsoever.

46.The tribunal reached this conclusion having regard to the totality of the evidence.

47.The following are non-exclusive examples which supported the tribunal's conclusion, some of which are expanded upon, in more detail, later in the tribunal's judgement.

48.Firstly when the claimant fell ill on or about 12 May 2017 it was Mrs Craen who took steps to support the claimant with her general practitioner, even writing a letter on her behalf.

It was Mrs Craen who supported the claimant on her return to work in June 2017 including making adjustments, such as a phased return.

It was Mrs Craen who sought to assure the claimant that her fears that she would be dismissed were unfounded because she was suffering ill health and she stressed that to both to the claimant's GP in writing and to the claimant herself.

49.Secondly her supervision and appraisal notes from 2017 displayed frequent praise and support for the claimant.

50.Thirdly it was Mrs Craen who arranged for her husband to take the claimant home from Christmas party in 2018 when she appeared unwell which pointed towards Mrs Craen being concerned and supportive towards the claimant.

51.Fourthly it was Mrs Craen who instituted a meeting on 28 January 2019 to see if there was underlying issue, given the claimant's behaviour at the Christmas party.

The claimant's assertion that Mrs Craen, at this meeting, accused her of taking drink or drugs was unfounded and unsupported by factual evidence. At its highest, Mrs Craen expressed concern that the claimant was acting oddly. This was in the context of concern for the claimant's welfare as is clear from the

contemporaneous notes (236) which were supportive and offered further support.

Nor did the tribunal find the claimant could reasonably infer that the fact that concerns were expressed that she had been “*acting oddly*” meant that something was going to happen to her. It certainly did not accept her assertion that Mrs Craen was in some way seeking to ensure the claimant lost her job because of her mental health. Whilst that may have been the perception of the claimant it was a wholly unreasonable perception, unsupported by cogent evidence.

52.Fifthly in the course of the disciplinary proceedings, when the claimant was interviewed by Mr Nurse and Mrs Taylor on 25 February 2019 (289) and asked whether there was any reason for her to be upset with Mrs Craen she replied in the negative.

53.Sixthly Mrs Craen had no direct involvement in the subsequent discipline proceedings at all. She was neither an investigating officer nor a determining officer.

54.The tribunal also found no cogent evidence to suggest that Mrs Craen engaged in any form of specific monitoring of the claimant as the claimant alleged from 2017. The claimant, as the tribunal found she often did, misinterpreted events. Mrs Craen was taking photographs to put on Compton house’s website, not to monitor the claimant.

55.The above findings were not only relevant to whether Mrs Craen wished to have the claimant dismissed but also relevant in terms of the tribunal’s assessment of the claimant’s overall credibility.

56.Before looking at the relevant chronology there are two topics the tribunal should make specific findings of fact upon, the first being that of the respondent’s knowledge and the second as regards what were termed the claimant’s “*contemporaneous*” notes.

Knowledge

57.The tribunal made the following findings of fact in respect of the respondent’s knowledge in relation to the claimant’s health.

58.Both Mrs Craen and Ms Jones were trained nurses. The tribunal considered that they would therefore have a better awareness of mental illness than a non-nurse professional.

59.Mrs Craen instigated a meeting on 13 March 2015 (149) with the claimant because it had been brought her attention that the claimant was tearful and staff were concerned as to her well-being. At the meeting Mrs Craen considered the claimant was a fragile person and appear to be suffering psychologically on some days. She made a number of positive suggestions to assist the claimant, looked at what could be done in respect of her work and offered training (which the claimant did not accept) and a workplace mentor which the tribunal considered evidenced her support for the claimant and concern for her condition.

60.At the claimant's appraisal in December 2015 the claimant completed a pre-appraisal form in which she stated she was "*emotionally overwhelmed*"

61.Mrs Craen accepted that whilst there were long periods of time when the claimant appeared to be functioning well, there were also periods when the claimant appeared to experience low mood

62.On 12 May 2017, in the course of the meeting, the claimant told Mrs Craen and Ms Jones that she was "*mentally ill*". She said that she was depressed and she had complex issues, but there were nothing to do with work. She stated she had been receiving treatment for depression from 2016 and was receiving medication which the claimant considered wasn't effective.

At the meeting it was noted the claimant shrugged her shoulders and was somewhat monosyllabic in some of her responses.

This was the first time the claimant had expressly said she was suffering from mental health challenges but, given the periods of low mood the claimant had previously demonstrated, Mrs Craen was not surprised by the claimant's assertion.

63.Mrs Craen recommended the claimant visit her GP and suggested she could write a letter (199) which might assist the claimant, to which the claimant agreed, and that letter was drafted with her approval as follows:-

"The management team. have noticed that she [reference to the claimant] has not been her usual self over the last few weeks and today I feel compelled to write to you as she broke down in tears whilst in a meeting with the Deputy. Manager.

*Myself and the Deputy Manager met with Naomi who has told us that she feels mentally unwell and has been treated for depression **for the last year.**[Tribunal's emphasis] We are aware that she has had counselling in the past and asked her if she was still receiving this support, she has been open about the fact she has complex emotional issues to deal with but she said she was only offered four sessions as there is a long waiting list. When we asked her when she last saw her GP. she said that she has been trying to make an appointment on and off for several months to see you but has been told she must phone on the day and so far she has been unable to get an appointment, however she did inform us that you had requested to see her regarding .a medication review and was offered an appointment on the 6th June at 09.10*

Naomi said she feels the medication she is currently on is not helping.

We have sent her home from work today and. advised her not to come to work next week, then she is on a week's annual leave and she agreed that if she had a little time to herself she thought she would feel better. We also suggested that. she should phone the surgery on Monday to make an appointment to see you and hope that with the help of this letter an appointment would be possible as she would not need to consider work next week to attend the surgery.....”

64.The claimant was told to take the rest of the week off as she was due to start annual vacation the following week.

65.The claimant was signed off sick from 16 May 2017 to 24 June 2017 with subsequent fit notes making reference to anxiety and depression.

66.The claimant returned to work on 24 June 2017 and confirmed there were no work-related issues but she had difficulties functioning because of the way she felt. She was receiving counselling and medication for depression. The claimant was apprehensive. A phased return to work was facilitated. The meeting was documented and the tribunal accepted that note was a fair reflection of the meeting (208/209)

67.Following the phased return to work a further meeting was held on 16 August 2017 where the claimant told. Mrs Craen that her illness would not resolve quickly and it would take time before she felt completely well. Mrs Craen, to her credit, frankly admitted in cross examination that she was aware there were health issues but did not see the claimant as being disabled because she was doing her job but make adjustments to support her, as and when necessary. The

tribunal should interject at this point that a person may meet the statutory definition of disability even though they can work perfectly normally.

68.Mrs Craen arranged a meeting with the claimant on 09 February 2018 (222) with a view to establishing how the claimant was feeling and what could be done to assist her. When Mrs Craen asked what could be done to make the claimant happy she replied *“it has nothing to do with happiness I’m ill”*. The return-to-work documentation made reference to the claimant receiving counselling (420).

69.A return-to-work interview was held following a period of absence with the claimant on 08 March 2018 (92). This document is dated 08 March 2010 but the tribunal considered the former date was the correct date for the following reasons. Firstly Mrs Craen did not start employment with the respondent until 2013. Secondly it referred to another member of staff who did not start work until 2017. The notes recorded that the claimant reported that she couldn’t *“cope with pressure”* and she was *“not coping”* and she was receiving psychological support outside the NHS.

70.On 28 January 2019 (236/237) Mrs Craen and Mrs Jones met the claimant to discuss her behaviour at the Christmas party. During this lengthy meeting, whilst the claimant engaged fully, there was one occasion when she shrugged her shoulders when an incident was raised with her which she declined to comment upon.

71.When the claimant was absent due to ill-health GP notes were submitted. A number made reference stress related problems and such notes were submitted from the date of the claimant suspension until termination of employment.(422 to 424).

72.When the claimant was asked to attend a disciplinary investigative meeting on 25 February 2019 it was recorded by the investigating officer, Mr Nurse, that the claimant gave short answers. The tribunal noted that it was recorded on three occasions in the notes that the claimant laughed during the investigative meeting, which in the context of the questions should have caused some concern for the respondent. There was also a reference to smiling which in the tribunal’s judgement was inappropriate when looked at in context of the question asked.

73.At the disciplinary hearing held on 22 March 2019 the claimant mentioned that she had a mental breakdown two years previously, had suffered from depression

and was taking medication namely zopiclone, ventafaxine and promethazine hydrochloride. The drugs were to induce sleep and to treat depression.

The “contemporaneous” notes of the claimant?

74.The claimant contended that from 28 January 2019 she made contemporaneous notes (602 to 714).

75.The tribunal did not find that those notes were contemporaneous.

76.Factors the tribunal took into account in reaching this conclusion included the following.

77.Firstly although a disclosure order was made by the tribunal on 03 June 2020 the claimant did not disclose the notes until 25 October 2020. The tribunal did not accept her explanation that she didn't understand the relevance of the documents particularly given she produced them to her solicitors just before the claim form was drafted and was told to keep them as they were important documents.

78.Secondly in respect of the incident of direct discrimination/harassment on 01 March 2019, (see para 16 above) although the claimant purported to quote from Mrs White the tribunal found the language used was not that of an English speaking person, but from a person for whom English was not their first language such as the claimant.

79.Thirdly the claimant recorded in her notes (614) that at a briefing by the trustees to staff on 12 February 2019 they were told “*Two trustees Kirsty and Jackie introduce themselves and they brought up that Paula and Susan pictures were found defaced, diffuser was spelt (sic) in the main office, complaints was (sic) wrote about Christmas presents etc ...*” However the tribunal is perfectly satisfied that the only reference the trustees made at the meeting was to the defacing of managers photos (579).

80.Fourthly the claimant made no reference, at all, at the disciplinary hearing to her “ contemporaneous “ notes which were clearly potentially relevant to her case.

The incidents leading to the disciplinary proceedings

81.From October 2018 a number of unusual incidents started to occur at Compton house such as paper towels being struck down the staff lavatory, displays being damaged or information removed.

82.The incidents were so unusual and frequent that from 27 November 2018 the respondent started a log of the unexplained incidents.

83.The tribunal does not intend to record all those incidents, which were numerous, but only those matters that resulted in the subsequent disciplinary proceedings involving the claimant.

84.On 03 December 2018 it was brought to Mrs Craen's attention that the CQC reports kept in the quiet room had been soaked in water. Twice they were reprinted and twice the same thing happened.

85.On Christmas Day, when Ms Craen went into her office, she was met by a very pungent smell, probably the contents of a reed diffuser oil had been spilt on her desk, keyboard, laptop and radiator. The smell was so unbearable the computer keyboard and radiator had to be replaced. The registered nurse in charge on the shift the previous day held the key to the office and asserted that the claimant had entered the office, she said, to do some photocopying.

86.It was discovered on the same day that the tablecloth for the Christmas lunch for the residents, name cards and the seating plan had been disturbed or removed.

87.On 31 December 2018 it was brought to Mrs Craen's attention that a poster addressed to staff (232) had been vandalised. It originally read "*Happy Christmas to all staff. Please make sure you collect your Christmas gift bags...*" The poster now read "*Happy Christmas to all staff from Aldi before from M&S now change Aldi after Please make sure you collect your Christmas gift bags*"

An arrow was pointed to the name of Mrs Craen. The tribunal considered the respondent was entitled to believe that this implied criticism of Mrs Craen as to the quality of the Christmas bags given by the respondent to staff.

88.In late December/early January a reed diffuser was found placed on a windowsill behind the staff folder cupboard.

89.On 19 January 2019 it came to light that photos of Mrs Craen and Mrs Jones had been defaced by drawing facial hair on the images. Both Mrs Craen and Mrs Jones were upset by this behaviour.

90.The photos were replaced but on 22 January 2019 it was discovered they had, again, been defaced.

91.On 23 January 2019 Compton house seemed particularly cold and on examination by the maintenance technician it was found the boiler had been

switched off. This could not have been done accidentally. There was a large staff notice next to the switch which said *“Please do not touch or adjust the settings on this panel thank you”*. Thus staff were aware that they were not to touch the heating controls. The best estimate of the maintenance technician was that the boiler had been switched off for between 30 to 45 minutes

92. On 01 February 2019 a note was written on a paper towel *“you can use this luxuries (sic) in your own home”* accompanied by a reed diffuser which was found outside Mrs Craen’s office in a plastic carrier bag.

93. Given the number of strange incidents, and the fact there was a possibility they were connected, Mrs Craen, raised the matter with Mrs Taylor, the chair of the trustees on 07 February 2019. Mrs Craen was significantly upset by these incidents which she considered were targeted against her and even considered resigning.

94. The tribunal should add that a further matter came to light, prior to the eventual disciplinary proceedings.

95. On 18 February 2019 the claimant’s own photo was discovered as being defaced by a care worker, Ms Thomas. It was defaced in a different manner to those of Mrs Craen or Mrs Jones. This time a cat was drawn on the photo. Ms Thomas thought it possible that the claimant had scribbled on it because she’d been seen acting suspiciously around the table where the pictures were displayed and the lights were turned off, which was unusual given it was winter and dark. Ms Thomas was to say that the only person she had seen near the photograph was the claimant herself.

The investigation

96. On 11 February 2019 Mr Nurse was appointed by Mrs Taylor to carry out an investigation.

97. Mrs Taylor and Mrs Lee (another trustee) held a meeting with staff on 12 February 2019. Staff were told they had been a number of unexplained incidents and an investigation would be carried out

98. On 15 February 2019 Mr Nurse set aside the day and reviewed various documentation including the management log of the various events, the daily staff sign in and out sheets (475 to 517), various handwritten notes (299 to 301)

photographs of the damaged computer and mobile phone casing (298 and 317 to 323) and various staff application forms.

99. Mr Nurse kept a contemporaneous note of his conclusions (241 to 242)

100. Mr Nurse classified the incidents into three categories. The first was the reed oil diffuser oil splashed about in Mrs Craen's office, a reed oil diffuser been part of a package left outside an office and the handwritten note on the paper towel referring to "*cheap Aldi gifts not M&S*".

101. The second was the defacing of the photographs.

102. The third group was where there was no clear linkage, that was the boiler being turned off, the missing Christmas table plans and the water damage to the CQC's report. He could not obtain precise timings in respect of the CQC's report and therefore gave that issue little attention.

103. Mr Nurse noted there was no direct eyewitness evidence and considered he would have to make an initial assessment based on the circumstantial evidence. He considered, and the tribunal accepted on reasonable grounds, that it was likely that a staff member or members were involved. He reached that conclusion because of restricted access to some of the locations (eg. Mrs Craen's office), the fact part of the allegations related to defacing staff photos and there appeared to be criticism of the respondents management. It was conceded during the hearing that it was not unreasonable for Mr Nurse to confine his enquiries to staff.

104. He worked through the incidents and the staff log. He looked to see which members of staff were on duty at the time of each incident.

105. He found that only two members of staff were present at Compton House in respect of the reed oil diffuser incidents namely the claimant and Ms Asibwa, and only seven staff were present in respect of the two management photographs incidents. Only one member of staff was present for both the three reed defuser oil incidents and the two photographs incidents. A small number of staff were present at the time of two of the three incidents which he had been classed as not being linked. Only one person was also present at the time of the unlinked incidents and this was the same person who was also present for the reed oil diffuser incidents and photographs incidents. That person was the claimant. Thus the claimant was the common denominator in that she was on duty in respect of each of the incidents that caused concern.

106.He looked at the handwriting of various members of staff who fell within the window of opportunity identified from the login and log out sheets.

107.It was not challenged, on behalf of the claimant, that Mr Nurse should have broadened his enquiries in respect of the samples of handwriting of members of staff that he examined (subject to one qualification in respect of the “petals” ,that the tribunal will return too).

108.Whilst Mr Nurse frankly accepted he was not a handwriting expert he considered of the samples before him of the claimant’s handwriting had similarities with the handwriting that appeared on the Christmas gift poster and paper towel. It was never suggested, in the course of the internal proceedings or before the tribunal, that the samples of handwriting of the other members of staff who fell within the window of opportunity bore any relationship to the handwriting on the gift poster and paper towel.

109.Mr Nurse addressed his mind to the possibility of more than one perpetrator but concluded that was unlikely.

110.He considered having studied the various documentation that there was a case to answer by the claimant and at that stage he accepted his “*working hypothesis*” on the basis of the evidence which he looked at, at that stage, was the claimant was the perpetrator, although he was not aware of any particular motive.

111.Between reviewing the paper evidence and subsequently conducting interviews with staff, as the tribunal have already noted, the claimant’s photograph was also defaced.

112.Mr Nurse was later to suggest that the claimant was the likely perpetrator in respect of the defacement, of her own poster having regard to the evidence of Ms Thompson. He speculated the claimant may well have defaced her own photograph to draw attention away from herself.

113.The investigation continued and on 25 February 2019 Mr Nurse and Ms Taylor, accompanied by a notetaker, met a number of members of staff, including the claimant, to obtain further information.

114.The staff who were interviewed were those who were present at Compton house during the window of opportunity for at least some of the incidents. A total of eight staff were interviewed. Not all the staff were available on 25 February

2019 and two were interviewed on 26 February 2019 by Mrs Taylor, again accompanied by a notetaker.

115.Those interviewed were:-

Ms Grout, pa to Mrs Craen.

Mr Higgins, maintenance team leader.

Ms Payne, healthcare assistant.

The claimant.

Ms Sparks, kitchen assistant.

Ms Meloy, senior staff nurse.

Ms Thomas, HCA.

Ms A. Asibwa.

116.The introduction and questions were pre-scripted.

117.Under the respondent's disciplinary procedure an employee attending an investigative meeting had no specific right to be accompanied.

118.At no stage before the meeting did the claimant ask for details of the substance of the matters that were to be discussed.

119.At no stage did the claimant ask to be accompanied

120.At no stage did the claimant indicate when interviewed she was not able to give a full account of herself due to illness.

121.The claimant accepted that she understood the questions asked.

122.The questions the claimant was asked were relatively open and not dissimilar to questions asked of other staff interviewed although their questions varied somewhat depending upon when they were on duty as it impacted upon the incidents that were discussed.

123.The tone used by Mr Nurse was the same for all those interviewed.

124.Mr Nurse accepted that had he been told that the claimant was suffering from a mental health challenge he would not have taken the fact that her answers were sometimes brief and not to the point, as part of his reasoning as to why it was appropriate to proceed to a disciplinary proceedings.

125.The interviews showed that the incidents had caused significant concern for staff. Some staff wanted to be accompanied or wanted permission before they did anything in Compton house.

126.The claimant's interview, in terms of questions was longer than that of others interviewed. The tribunal considered that was reasonable in

order to be fair to the claimant, given that she appeared to be a common denominator in respect of all the incidents of concern. There was simply more to discuss with her.

127.The claimant was shown examples of her handwriting and the documents that contained the disputed handwriting (the Christmas gift poster and the towel).

128.The claimant flatly denied it was her handwriting on the disputed items.

129.Mr Nurse reached his conclusion that the claimant was the probable author of the writing on the Christmas gift poster and the towel having compared handwriting with various application forms, the original documents themselves and handwriting that he believed was the claimant's on three petals.

130.One sample of handwriting relied upon by Mr Nurse were what were referred to by the parties as the three petals. Put simply the respondent erected a poster to promote dignity and staff spent time with residents finding out what they would particularly like, and then writing those wishes on a petal, so the poster formed a flower. When one of those wishes was fulfilled a note was added in different ink. The poster was up for some time, given that not all wishes could be addressed immediately.

131.On 27 February 2019 Mr Nurse, following a discussion with Ms Taylor, concluded that the claimant was the likely perpetrator of several if not all of the incidents. When looking at the handwriting they particularly noted the way the claimant wrote the letter A, F, the use of black Biro, and constant use of exclamation marks which was consistent with both her application form and the documents that have been defaced.

Alleged discriminatory comment 27 February 2019.

132.On the same day, 27 February 2019 the claimant alleged she was subject to discriminatory comments.

133.On claimant's own case she did not hear what she said but relied upon what she was told by Ms S. Ebrahim (who was not called to give evidence) that she in turn had heard Ms J. White say to Mrs G. Griffith that "*oh Naomi is up and down*" near the dining room and that Ms White then said on her way back to the main office in the corridor "*oh she's up and down*" "*she is mad*". The claimant contended she heard the latter comment. The claimant contended she then challenged Ms White.

134. Ms White was not called to give evidence as sadly she had died as a result of a very serious illness on 01 August 2019.

135. The tribunal was not satisfied the alleged comments were made.

136. Firstly in respect of the first comment there was an inherent risk of a misunderstanding.

137. Secondly in respect of the latter comment the tribunal considered it unlikely that Mrs White would have said the same in a public corridor, where residents and members of the public were present and could hear.

138. Thirdly the tribunal considered it unlikely that, if such a comment was made, that she had not raised the matter with the respondent. The first time this appears to be raised by the claimant is in her “contemporaneous” notes which, as the tribunal have already indicated, it did not regard as contemporaneous.

Alleged discriminatory comment 01 March 2019

139. The claimant contended that whilst passing an office door, which was slightly open, she could see through the glass that Mrs Craen and Mrs White were talking. She said she heard Ms Craen say “*Naomi is mentally ill*” and Ms White say “*now she is married, why is she not going back in to her country Hungary and find a job there? Many foreigners coming here and make trouble*”

140. Mrs Craen denied either comment was made.

141. The Tribunal considered the claimant’s memory was unreliable in respect of both comments.

142. Firstly the tribunal had had the benefit of viewing Mrs Craen give evidence, and more significantly had seen her contemporaneous notes over the years in her dealings with the claimant. It did not consider that she would allow a phrase such as “*she is mad*” to go unchecked given how supportive she had been towards the claimant’s health.

143. Secondly given that the claimant married in 2015 the tribunal considered it was most unlikely that the claimant’s marriage would be a topic of conversation some four years later.

144. Thirdly Mrs White was British and it considered the phraseology attributed to her was not that of a fluent English speaker.

145. Fourthly, for the reasons set out in this judgement, it did not regard claimant as a wholly reliable witness. She made well now think that she heard such a comment but the tribunal considered that she did not.

Suspension

146. On 04 March 2019 Mr Nurse and Ms Taylor suspended the claimant. The claimant was informed that she was suspended in respect of allegations of gross misconduct pending a disciplinary hearing (254 to 255). No criticism is made of the letter of suspension or the act of suspension.

147. The claimant handed a note to Mr Nurse and Ms Taylor when suspended asking for a copy of her investigative interview and who was accusing her of wrongdoing and what was it that the claimant had allegedly done (which were subsequently supplied to the claimant). The tribunal noted the claimant made no complaint whatsoever in that letter as to the conduct of the investigative interview itself. This is despite the fact that in her alleged contemporaneous notes she was highly critical of the conduct of the meeting, and also in her witness statement.

148. On the same day, 04 March 2019, a letter was given to the claimant inviting her to a disciplinary hearing to be convened on 18 March 2019 (256 to 257) accompanied by various supporting documentation and statements

149. The letter made it clear that the purpose of the hearing was to consider an allegation of gross misconduct

150. The allegations relied upon were: –

“On the afternoon of 24 December 2018, you spilt strong smelling diffuser oil over Paula Craen’s keyboard, in tray and the laptop and also over the radiator by the side of her desk.

On the afternoon of 24 December 2018, you removed the table plan and some of the name cards for residents Christmas lunch the following day.

On 28 December 2018 you put a handwritten note on top of the post in the office addressed to Paula Craen , writing on the notice inviting staff to collect Christmas gift bags: “from Aldi before from M&S now cheap Aldi gifts.

In late December 2018/early January 2019, you placed a diffuser on the windowsill behind the staff folder cupboard.

On Friday, 18 January 2019 and Tuesday 22 of January you defaced the photos in the hall of Paula Craen and Susan Jones by drawing facial hair on them.

On Wednesday, 23 January 2009 you switched off the boiler for the home.

On Friday, 1 February 2019 you left a bag with the diffuser from allegation four above and a note to Paula Craen: “to Paula, you can use and keep this luxuries (sic) present in your home!”

On the afternoon of 18 February 2019, you drew a picture on your own photo in the hall in the home

The basis for these allegations is that you were the only person who was present in the home for all of these incidents, you were one of only a couple of people who went into the office around the time that the diffuser oil was spilled on Paula’s desk, you are one of only four staff in the lounge at the home near the boiler room at the time the boiler was turned off, the handwriting on the notes appears to be yours and you were seen hanging around in the hall around the time that the cat’s face was drawn on your photo”

151. The tribunal noted that the performance of the claimant at her investigative meeting was not relied upon as a reason for the disciplinary proceedings.

152. The claimant was promised, and subsequently received, the findings of the investigation together with witness statements and other accompanying documentation. The claimant was supplied with a copy of the disciplinary procedure and was warned that if the allegation of gross misconduct was found proven she could be dismissed without notice or pay in lieu of notice.

153. The claimant was told that no witnesses would be called but if she wished witnesses to be presented for cross examination she should inform the respondent. She did not do so. It follows therefore that at the subsequent disciplinary hearing the disciplinary panel had unchallenged witness evidence including evidence from Ms Thomas. The claimant was also invited to submit any documents she relied upon, or if they were not in her possession, to identify them so they could be before the panel. She did not do so.

154. She was advised the hearing would be conducted by two trustees Mr Johnson and Mrs Cowdy.

155. The claimant was advised her right of representation and to inform the respondent if there are any difficulties in attending the hearing.

156. The respondent was anxious the matter was resolved speedily firstly because of the risk to residents following the heating incident, and secondly because of the effect on Mrs Craen’s health and consideration of resignation

and thirdly due to general staff trepidation of recent events. It was said they were walking on egg shells.

157. On 09 March 2019 Compton house received a call to say the claimant was in hospital, although it transpired she was discharged that same day.

158. On 10 March 2019 a letter signed by the claimant and her husband was sent to Mrs Taylor informed her that the claimant was under “doctors review” and could not cope with the disciplinary matter until she recovered. No reference was made to suspending any form of contact going forward. No indication was given as to when the doctors review would be completed.

159. A doctor’s note dated 12 March 2019 stated of the claimant was unfit for work due to a “stress related problem” but did not say whether she was fit or unfit to attend a disciplinary hearing.

160. A letter was sent to the claimant on 14 March 2019 (328) which stated : –

Dear Naomi,

Thank you for sending your medical certificate which tells us that you are unfit to attend work until 26th March due to reported work related stress.

As you know, we have set a disciplinary hearing to take place on 18th March at 3pm at Compton House. We intend to go ahead with that hearing unless you provide us with specific medical evidence from your GP or another medical practitioner that you are not medically fit to attend the hearing and also an indication of when they consider you would become fit.

If we do not hear from you further, we shall expect you to attend on 18 March....”

161. The claimant did not attend the disciplinary hearing convened for 18 March.

162. The disciplinary panel decided to adjourn the hearing.

163. On 19 March 2019 the claimant was invited to a rescheduled hearing on 22 March 2019 (329 and 423/424). The claimant was told that she should attend so her views could be heard and if she failed to attend without good reason the matter would proceed in her absence. Consideration would be given to an adjournment on medical grounds if there were specific medical evidence that the claimant was not fit to attend the disciplinary hearing, accompanied with an indication as when the claimant was likely to be fit.

164. The location of the adjourned hearing was to a neutral venue.

165. The claimant wrote to the respondent on 20 March 2019 indicating that she would attend the hearing on 22 March 2019 and asked for her colleague Ms

Pokrywka to be allowed to attend along along with her pastor, Mr Weeks. This was agreed.

166.For the first time the claimant asked that no more correspondence was to be delivered to her home by hand (330).

167.Thereafter no further correspondence to the claimant was delivered by hand.

The disciplinary hearing

168.The disciplinary hearing was held on 22 March 2019 and notes were taken.

169.The notes appear twice in the bundle. They appear at pages 334 to 337 and then at 716 to 720.

170.The tribunal should deal with a point as regards the notes at 334 to 337, as the claimant accused the respondents of deliberately doctoring the notes to remove any reference to her health, which she had mentioned at the disciplinary hearing.

171.The tribunal rejected that allegation for the following reasons.

172.Firstly, it found it was clear that there was a simple administrative error as the paragraphs were numbered and from that numbering it was obvious that a page was missing.

173.Secondly the pages themselves were numbered and it was obvious that the sequence was incomplete.

174.Thirdly a full set of notes were in the tribunal bundle.

175.This was a further example of the claimant making a serious allegation where, upon proper reflection, she would have realised that there was a far more credible explanation.

176.The notes were not a word for word account of what took place but a summary of most of the significant issues discussed. There were a number of issues that are not recorded in which the parties accepted were mentioned.

177.The meeting was chaired by Mr Johnson and Mrs Cowdy.

178.At no stage did the claimant ask for the hearing to be adjourned.

179.She was asked at the start of the hearing if she was fit to continue to which she indicated she was. The claimant had been advised in writing, twice, on 13 and 19 March 2019 that the respondent would consider an adjournment if she produced a letter from a medical practitioner stating that she is unfit to attend the hearing and could indicate when she would be fit.

180. She was asked whether she had received all the documentation and did not demur, nor did her two representatives.

181. The claimant contended before the tribunal that she was so ill she had not read any of the disciplinary papers. The tribunal did not accept that evidence.

182. Again this was another example of the claimant giving less than credible evidence. The tribunal considered that if that really was the case she would have mentioned it to the disciplinary panel when asked whether she was fit to proceed and more significantly one of her representatives would have mentioned they were without instructions. Even a cursory review of the disciplinary notes shows that the claimant knew full well of the allegations and evidence against her, (see for example paragraphs 21 and 22 on page 718).

183. Mr Nurse, as the investigating officer presented his findings and was offered forward for questioning.

184. Mr Weeks as an advocate for the claimant read out a preprepared statement of the claimant.

185. Ms Pokrywka suggested that the incidents could involve a few people and there should be some fingerprint checks or a lie detector test.

186. Mr Weeks suggested CCTV should be installed in areas of the home as he'd encountered a similar issue in another care home and once CCTV was installed the incidents ended.

187. Other than the above and the claimant's assertion that the handwriting was not hers there was no direct challenge to Mr Nurse's methodology or investigation.

188. In terms of the defacing of the claimant's own photograph it is proper to record the claimant did raise with the panel that she considered that Ms Thomas was a troublemaker.

189. Her explanation at the disciplinary hearing was that she was in the vicinity of the staff photographs reading a Lindfield Life magazine. She saw someone coming down the stairs so she went to put the lights on but turned them off and then turned them on again. She made no reference to Ms Thomas acting suspiciously putting a pen in her pocket, yet that is what was recorded on the claimant's apparently contemporaneous note. The tribunal noted in contrast that Ms Thomas had reported the claimant's suspicious behaviour to management

via the management log that same day. The claimant made no mention whatsoever of what she said she had seen at any stage prior to her dismissal.

190. The claimant spoke at the disciplinary hearing for some 10 to 15 minutes passionately about her faith and feeling crushed and humiliated by the allegations. She said she had no reason to do the matters alleged against her.

191. The claimant accepted that she did not dispute any of the respondent's evidence as to the signing in book. The entries, of course, put the claimant on duty at the time of every incident.

192. The claimant did not offer any alternative explanation to what had occurred, other than denying that she was the culprit. The Claimant did not suggest, for example, that another named employee or employees were likely culprits.

193. The claimant accepted that the hearing was unbiased and reminded of the panel that she'd had a mental breakdown two years previously.

194. The claimant told the disciplinary panel she was taking medication and referred to 3 tablets which she named.

195. The claimant had impressive testimonials which were before panel.

196. By letter dated 29 March 2019 the claimant was summarily dismissed.

197. The panel listed the specific allegations and its findings.

198. The first was on 24 December 2018 spilling strong smelling diffuser oil over Mrs Craen keyboard, intray, laptop and radiator. The panel found the allegation proven because the claimant was only one of three members of staff who had access to the office at the relevant time and was only one of two staff members on duty for all of the reed oil diffuser incidents, which the panel considered were linked.

199. The second was on the afternoon of 24 December 2018 the claimant removed the Christmas table plan and residents name cards.

The panel found the evidence was insufficient to reach a conclusion. Whilst the claimant was one of 11 members of staff on duty at the relevant period and the only member of staff who was on duty during all the incidents it concluded there was insufficient evidence to support the allegation.

200. The third was on 28 December 2018 putting a handwritten note on top of the post addressed to Mrs Craen, writing on the notice to staff to collect their Christmas gift bags the words *"from Aldi before from M&S now cheap Aldi gifts"*

The panel found the allegation proven having regard to samples of the claimant's handwriting which displayed similar characteristics to the writing on the note; the fact the claimant was present at Crompton house at the time of the incident and one of only two staff who was present for all the reed oil diffuser incidents.

201. The fourth was that in late December 2018/ early January 2019 placing a reed oil diffuser on the windowsill behind the staff folder cupboard.

The allegation was found proven on the basis the claimant was only one of two staff present for all the reed oil diffuser incidents and what appeared to be same reed oil diffuser was found outside the office, in a bag, in early February

202. The fifth was that on 18th and 20th of January 2019 the claimant defaced the pictures of Mrs Craen and Mrs Jones by drawing facial hair upon them. The claimant was one of only seven people who was present on both occasions and given the claimant was in the close proximity when her own photo was defaced it was considered the incidents were connected and on the balance the allegation was proven.

203. The sixth was that on 23 January 2019 the claimant switched off the boiler. Although the claimant was one of four on duty in the vicinity and that one of those for staff raised the concern which meant it was unlikely that they were the likely culprit the respondent found there was insufficient evidence.

204. The seventh was on 01 February 2019 the claimant left a bag which contained a reed oil diffuser with a note to Ms Caern stating "*Paula, you can use and keep this luxuries present in your home!*". The panel concluded that the allegation was proven on the basis of the similarity between the writing and that the claimant was one of only two members of staff were present in respect of all the reed oil diffuser incidents.

205. The eighth incident was that the claimant drew a picture of a cat on her own photo. The allegation was found proven on the basis that the claimant was in the vicinity when the incident occurred. The claimant was one of a small number of staff who were present in respect of both the other photograph incidents. The panel considered that the claimant may well have acted to divert suspicion away from herself.

206. In conclusion the panel found on the balance of probabilities the claimant was guilty of disrupting the running of Compton House and harassing Ms Craen and Ms Jones.

207. In looking at penalty the panel noted the claimant's clean disciplinary record and length of service. However the panel considered that the claimant's behaviour was inappropriate, the manager and deputy manager were very upset by the incidents and the employment relationship had totally broken down. For those reasons dismissal was considered the appropriate penalty with immediate effect, the date for dismissal 30 March 2019.

208. The claimant was advised the right of appeal in the letter of dismissal.

209. By a letter dated 05 April 2019 the claimant said she rejected the allegations (345) and on receipt Mrs Taylor wrote to the claimant on 08 April 2019 asking whether she wished to appeal and to respond, if she did wish to do so, by 12 April.

210. The claimant did not indicate an intention to appeal although on 12 April 2019 she did ask, amongst other things for her personal details retained by the respondent to be deleted, the return of her personal effects and handwritten notes of disciplinary hearing.

211. The tribunal was satisfied that reasonable attempts were taken to bring the right of appeal to the claimant's attention and she chose not to exercise that right.

212. No further incidents occurred at Compton House following the claimant's dismissal.

Submissions

213. Both counsel prepared helpful written submissions and the tribunal is grateful for their assistance. They also addressed the tribunal orally for some 30 minutes each.

214. The mere fact the tribunal has not repeated each and every submission does not mean that they were not considered.

215. Much of the submissions related to how the tribunal should find the facts and the conclusions to be drawn.

216. In terms of the law Mr Starcevic referred tribunal to **All Answers Ltd -v- W [2021] IRLR 612**, a decision of the Court of Appeal upon knowledge. The tribunal did not consider the case raised any new point of law that had not already been determined by the courts.

217. When addressing the tribunal on harassment he made reference to the well-known authorities of **Richmond Pharmacology -v- Dhaliwal [2009] IRLR 336**,

Pemberton -v- Inwood [2018] IRLR 542 and **Bakkali-v- Stage Coach Manchester [2018] IRLR 906**. Given the tribunal's findings of fact is not necessary for the tribunal to spend any time upon those cases other than to state that in the tribunal's judgement they correctly set out relevant legal principles applicable to a complaint of harassment.

218. On the section 15 claim he referred the tribunal to **Hall -v- Chief Constable West Yorkshire Police [2015] IRLR 893**, a case emphasising that the "something" in consequence of the disability need not be the sole or main cause. The tribunal accepted that was an accurate statement of the law.

219. At a disciplinary hearing he said the tribunal must look at what operated on the mind of the putative discriminator and referred to **Robinson -v- DWP [2020] IRLR 884 CA** and **Done -v- the Secretary of State for Justice [2019] IRLR 298**

220. Mr Starcevic suggested that where the unfavourable treatment consisted of dismissal and the complaints was both of unfair dismissal and contravening section 15 it was likely that the defence of justification for the latter would align with the range of reasonable responses test for the former and he relied upon **O'Brien -v- Bolton's and St Catherine's Academy [2017] IRLR 547** although accepted that was not a rule of law and there may be cases where matters diverged, **City of York Council -v- Grosset 2018 IRLR 746**.

221. Mr Kohanzad did not take the tribunal to any specific case law but made detailed submissions in respect of the facts which he said should be found and the conclusions to be reached from such findings.

Unfair dismissal.

222. The Tribunal applied section 98 (1), 98 (2) and 98 (4) of the ERA 96 which provides as follows: –

"98 (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 either it is 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.*

98 (2) – a reason falls within this subsection if it.....

(b) relates to the conduct of the employee.

98 (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 the 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.”

223. In **Abernethy – v – Mott, Hay and Anderson 1974 IRLR213** the Court of Appeal held that a reason for dismissal was a set of facts known to the employer or beliefs held by him which would cause him to dismiss the employee.

224. The Tribunal had regard to the guidance given in **British Home Stores Ltd -v- Burchall 1978 IRLR 379** on the section 98 (4) question. However, the Tribunal reminded itself that **Burchell** was decided before the alteration of the burden of proof effected by section 6 of the Employment Act 1980.

225. In that case the first question raised by Mr Justice Arnold: “did the employer had a genuine belief in the misconduct alleged?” went to the reason for dismissal. The burden of showing a potentially fair reason rests with the employer. However, the second and third questions, the reasonable grounds for the belief based on a reasonable investigation, went to the question of reasonableness under section 98 (4) of the ERA 96 and there the burden was neutral.

226. The Tribunal also applied the guidance given in the case of **Iceland Frozen Foods Ltd -v- James 1992 IRLR 439**: –

“The authorities establish that in law the correct approach for an employment Tribunal to adopt in answering the question posed by section 98 (4) is as follows.....

(1) the starting point should always be the words of section 98 (4) themselves.

(2) in applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair.

(3) in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another quite reasonably take another.

(5) the approach of the Employment Tribunal, as an industrial jury, is to determine whether the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses in which a reasonable employer might have adopted. If a dismissal falls within the band the dismissal is fair..... If the dismissal falls outside the band it is unfair.”

227.The approach to fairness and procedure is the standard of a reasonable employer at all three stages:- **Sainsbury's Supermarket-v- Hitt 2002 EWCA CIV 1588.**

228.Whilst the Tribunal must have respect for the opinion of the dismissing officer it is ultimately for the Tribunal and not for the Respondent to decide whether the dismissal fell within or outside the range of reasonable responses open to an employer in the circumstances.

229.Before addressing the specific allegations of unfairness raised in the issues or during the hearing the Tribunal reminded itself of the importance of an investigator looking for both evidence that supported the allegations but also evidence that would assist the employee. An employee is in a difficult position because, as here, they are frequently suspended.

230.The tribunal started with the investigation and reminded itself it was not just what Mr Nurse knew, but what he ought to have known, had he carried out a reasonable investigation, see **London Waste Ltd -v-Scrivens UK EAT/0317/09**

231.In particular the claimant alleged the dismissal was unfair because: –

- The respondent concluded that the claimant was guilty at the outset of the investigation which influenced the manner in which the investigation was conducted.
- The methodology adopted during the investigation in determining that the claimant was guilty rendered the investigation outside the range of reasonable investigations, in particular in respect of identifying the handwriting, identifying who was present and drawing inferences from the manner of the claimant's interview.
- The conclusion that the claimant was guilty of the events alleged was a conclusion outside the range of reasonable conclusions. In part because it was based on an assumption that should have been a conclusion rather than a premise and a faulty investigation
- The respondent failed to properly take into account the claimant's long service

Was the investigation predetermined?

232. The tribunal did not accept Mr Kohanzad's submission that Mr Nurse's investigation was predetermined in the sense that he had concluded the claimant was guilty from the outset.

233. Mr Nurse initially started by looking at the documents and recorded his findings in a note dated 15 February 2019 (241/242).

234. He recorded there was no direct eyewitness reports and he was therefore dependent on circumstantial evidence.

235. He considered the possibilities that the incidents were caused by more than one person either separately or working collaboratively or that someone else outside the staff might have been responsible for some or all of the incidents.

236. These were all possibilities which in the tribunal's judgement demonstrated Mr Nurse started his investigation with an open mind. The fact that Mr Nurse arranged to interview other employees who whilst not on duty during every date in the window of opportunity, but were present on some of the dates, was a factor the tribunal considered pointed away from a rigid assumption by Mr Nurse that the perpetrator had to be one person.

237. Mr Nurse considered the likely culprit or culprits was an employee. In the tribunal's judgement his decision was a conclusion a reasonable employer could have come to, given that a number of incidents were directed against

management and the location of some of the incidents were in areas where residents and members of the public did not have access, such as a locked office. The tribunal noted Mr Nurse was not challenged on this assumption at the disciplinary hearing.

238. Mr Nurse was not challenged with any vigour on this assumption before the tribunal

239. Mr Nurse looked at each incident and the window of opportunity and then examined the staff signing in and signing out log which substantially narrowed down the number of employees who could have been involved. Again the tribunal considered that was a reasonable decision of a reasonable employer.

240. He then looked at known samples of handwriting to see whether there were any similarities between the control exhibits, (the Christmas poster and the towel, which it was common ground were written by the same person) and then samples of handwriting of employees who fell within the window of opportunity. He found similarities, a matter the tribunal will return to.

241. The tribunal is satisfied that on the basis of that information a reasonable employer could come to the conclusion that the claimant was a primary suspect. In particular it was never suggested at any stage, in the disciplinary process or before the tribunal that the handwriting of the others who featured in the window of opportunity, had any similarities whatsoever with the control exhibits.

242. Criticism was made that following the examination of the documents and signing in logs Mr Nurse had already reached a conclusion and he utilised the subsequent interviews with staff to confirm that view. The tribunal is satisfied that whilst Mr Nurse had come to a provisional view that the likely culprit was the claimant, that was not an unreasonable hypothesis. The tribunal accepted if Mr Nurse had closed his mind to any other explanation that would be worthy of criticism. However that was not the case as he very fairly outlined in his report to the disciplinary panel an inconsistency in evidence between Mrs Sparks and another witness, Mrs Melay (245), in respect of one of the incidents, which potentially benefited the claimant.

243. The tribunal considered, applying its own industrial knowledge it was neither unfair or unreasonable for investigating officer to come to a provisional view. By way of illustration if an employer considered money has disappeared from a till the employer would carry out an investigation to identify when the shortage

occurred and who had access to the till when it occurred. That investigation would likely lead to a provisional view as to the culprit.

244. A further factor that pointed away from Mr Nurse having a closed mind, and only trying to find evidence to implicate the claimant, was that he was scrupulous to emphasise, in his initial report, that the evidence was circumstantial, and in his final report to the disciplinary panel that there was no clear evidence of motive. Again these were relevant factors that potentially were of assistance to the claimant.

245. In the tribunal's judgement pulling together the above factors pointed away from Mr Nurse having a closed mind and only looking at evidence that would implicate the claimant. He acted reasonably.

246. Nor in the tribunal's judgement could it be said that the disciplinary panel did not apply their own independent mind to matters.

247. This is evidenced by the fact the tribunal found that on some of the allegations there was insufficient evidence to conclude the claimant was guilty.

248. Mr Nurse did give consideration to whether there might be multiple perpetrators, possibly acting in concert, encouraging each other to do further foolish acts. He considered that unlikely given, firstly that there was a link with some of the incidents, such as the reed oil diffusers which pointed to a single perpetrator and secondly that there no history of reports of similar behaviour. The tribunal also noted there was no history of staff discontent. Whilst Mr Kohanzad submitted as a trustee Mr Nurse could not have such knowledge the tribunal considered that any such significant events would have reported to the trustees and therefore he would have knowledge. It was exactly because of the number of incidents that a report was made to the trustees which led to the current investigation. This was a reasonable conclusion a reasonable employer could have come to.

249. The claimant did not suggest at the disciplinary hearing that there was a named group of staff, perpetrating acts of vandalism.

250. The tribunal considered that Mr Nurse approach was a reasonable one. He had not closed his mind to the possibility of more than one perpetrator in his investigations and when he found, looking at the signing in sheets that the claimant was on duty when each incident occurred, and given the lack of any contrary evidence of a number of perpetrators, he was entitled to take the stance

he did. The tribunal was satisfied from the contemporaneous note of Mr Nurse that he had addressed his mind to the possibility that there were a number of staff perpetrating the acts at the start of the investigation. He did not have a closed mind.

251. The tribunal concluded that the stance taken by Mr Nurse that it was unlikely that there were a number of culprits was not an unreasonable conclusion that a reasonable employer could have taken in the circumstances of this case.

252. Mr Johnson, who chaired the disciplinary hearing, as a trustee visited the home almost every day and was not aware of a similar course of behaviour in the past which was a factor that led him and his fellow panel member to believe that this was likely to be the work of one person rather than a number of disgruntled employees.

253. The disciplinary panel considered whether it was likely that there was just one perpetrator and came to the conclusion, in the tribunal's view reasonably, because the incidents appear to be aimed at management and when the window of opportunity was looked at the claimant was the most likely culprit.

Handwriting and interviews.

254. Mr Nurse whilst making it clear that he was not a handwriting expert formed the view that there was a similarity between the claimant's handwriting and that on the two control items.

255. The tribunal was satisfied that there were similarities between, for example, known examples of the claimant's handwriting, her application form and the control samples. There was a particularly unusual tail at the start of the letter "A".

256. Whilst Mr Kohanzad was entitled to suggest that the claimant's handwriting was not identical in all respects with the control samples, he referred to the way the letter "S" was formed what was clear is from the other samples of handwriting those also in the relevant window of opportunity did not have handwriting that in any way resembled the control samples.

257. Mr Nurse however did not base his conclusion simply on one letter of the alphabet but looked at the handwriting in the round, including the punctuation.

258. Criticism was rightly made of what we refer to as the "petals" as samples of the claimant's handwriting.

259. The petals were disclosed at the disciplinary hearing but were not put to the claimant at the investigative interview.

260. The tribunal is not satisfied, in the particular circumstances of the case, that even though the petals were disclosed to the claimant at the disciplinary hearing the respondent could reasonably rely upon them.

261. Further reasonable enquiries could have been undertaken to ascertain that it was definitely the claimant's handwriting on the petals, for example speaking to the residents, who were named, and asking them who wrote out their wish. Whilst it may have been that none of the residents could have recalled, it was a reasonable line of enquiry that a reasonable employer would have undertaken.

262. However even discounting the petal evidence the tribunal was satisfied that the Mr Nurse, was entitled to conclude that the remaining handwriting was sufficiently similar to the claimants, whilst accepting he was not handwriting expert, was one that a reasonable employer could have reached. A reasonable employer was entitled to rely on the similarity as a reason to determine the evidence should be tested at a disciplinary hearing

263. At the disciplinary hearing it was suggested for the first time that the respondent should have instructed a handwriting expert. The tribunal is satisfied that neither in the investigation nor at the disciplinary hearing was it unreasonable not to instruct a handwriting expert. An employer is not required to carry out the investigation to the same standards as a law enforcement agency.

Other challenges

264. Whilst it was suggested at the disciplinary hearing that the respondent could have undertaken lie detector tests of staff the tribunal considered the respondent was entitled to reject that suggestion.

265. A respondent is only required to carry out a reasonable investigation and even the police do not use such tests as part of a criminal investigation. Thus the tribunal concluded that the failure to undertake lie detector tests was not an unreasonable decision of the respondent.

266. Similarly the tribunal considered that it would not have been reasonable enquiry to carry out fingerprint tests. Even if fingerprints did exist on some of the items it was highly likely that evidence would have been degraded given the passage of time whilst they were handed amongst management. Further the

respondent did not have the necessary facilities or expertise. In the tribunal's judgement the failure to undertake the print testing was not an unreasonable decision of the respondents .

267. At the disciplinary hearing reference was made to the installation of CCTV cameras. With respect that was not a reasonable line of enquiry as it would not have assisted in identifying the perpetrator or perpetrators of the incidents. The tribunal may well have reached a different conclusion if there was existing CCTV footage that covered all part of the premises where the incidents took place and the respondents had not viewed them but that was not the case put before this tribunal. In the circumstances the tribunal did not find this assertion of unreasonableness to be well founded.

268. In the claimant's evidence in chief, she suggested, for the first time, that she was not on duty when some of the incidents occurred. The tribunal was satisfied that by reference to the signing in and signing out logs the respondents carried out a reasonable investigation and ascertained the claimant was present at Compton House when the incidents took place.. The claimant confused the window of opportunity in respect of the incidents with the time they were respectively discovered. By way of illustration, whilst it was true the claimant was not on duty on Christmas Day, the respondent did satisfy itself of the time when everything was in order and then the time when the relevant concern was discovered. That was the window of opportunity which was then analysed against the staff signing in and signing out sheets by both Mr Nurse and the disciplinary panel.

269. In the circumstances the tribunal was satisfied that the respondent carried out a reasonable investigation in this regard.

270. It was put to Mr Nurse, for the first time before the tribunal, that he had been wrong to make an assumption that Ms Sparks was telling the truth as to when she discovered an item on 01 February 2019. This was not a matter that was raised by or on the claimant's behalf at the disciplinary hearing.

271. Mr Kohanzad suggested that if her evidence was wrong then the window of opportunity widened. The tribunal was satisfied with the reasons given by Mr Nurse for accepting Ms Spark's evidence namely she made a contemporaneous note in the management log. However even if Ms Sparks was wrong about the time, at its highest, it would simply widened the window of opportunity from two

people, one of whom was the claimant to five, again one of whom was the claimant. None of the others in the widened window featured in every incident.

Adjournment

272. The claimant contended the proceedings should have been adjourned whilst she was absent from work, as she was unfit to attend the disciplinary hearing.

The tribunal rejected that contention. On two separate occasions before the final disciplinary hearing the claimant was given the opportunity to produce medical evidence that she was unfit to attend a disciplinary hearing, along with an estimate of when she would be fit. The clear inference was that the respondent would then consider an adjournment

273. The claimant's explanation for not pursuing these opportunities was she did not understand what the letters meant. The tribunal considered that given the claimant had a husband and two people assisting her in the disciplinary proceedings it was inconceivable that they would not appreciate what the respondent had requested in order to consider a further adjournment.

274. The respondent had no reason to consider the claimant was unfit to attend the disciplinary hearing firstly because she specifically requested the hearing to take place accompanied by two representatives and secondly she confirmed at the start of the hearing that she was fit to attend.

275. In the serves as the tribunal concluded it was not unreasonable for the respondent to proceed with the disciplinary hearing when it did.

What did the panel believe

276. The tribunal did not accept that Mr Nurse could reasonably rely on the claimant's demeanour at her investigative interview to support, in part, his recommendation for disciplinary proceedings. However that error did not infect the disciplinary hearing because Mr Nurse's report was not simply rubberstamped. The panel applied its own judgement and rejected some of the matters pursued by Mr Nurse. The contemporaneous documents setting out what was in the panel's mind, the dismissal letter, make no reference to the claimant's demeanour having any bearing whatsoever on the panel's determination.

277. Nor did the claimant's demeanour at the disciplinary hearing have any influence on the disciplinary panel.

278. It is for the tribunal to determine, without substituting its own view and having respect for the decision of the employer, whether the investigation was reasonable and whether the decision-maker reasonably believed on reasonable grounds that the claimant was guilty of misconduct and that the penalty was within the band of responses of a reasonable employer.

279. The tribunal is so persuaded. The tribunal noted in particular that the claimant was the only person who had the opportunity to commit the offences.

280. Of those in the window of opportunity it was only the claimant who had very similar handwriting to the two control items. The claimant's behaviour when her own poster was defaced was a matter the respondent was entitled to take into account in looking at matters in the round. The Respondent was entitled to stand back and look at the evidence in the round which is precisely what it did.

281. The methodology of Mr Nurse in a grouping incidents together was not unreasonable.

282. The incidents undoubtedly occurred and the claimant raised nothing either at the investigative or disciplinary meeting to point to another person who had the opportunity to commit the offences found proven.

283. Whilst it is true the claimant did say that Ms Thomas had a grudge against her (who gave evidence in respect of the claimant's own picture being defaced) looking at the signing in and signing out sheets she could not have been responsible for the other matters. In any event the disciplinary panel were entitled to take account of the fact that Ms Thomas raised concerns with management about the claimant's behaviour. Although the claimant said she did the same none of the respondent's witnesses recalled any such mention and it is not referred to in the claimant's voluminous "contemporaneous" notes.. At its highest the claimant said the following day 19 February 2019 she asked why her photo had been removed (624).

284. It was suggested that the penalty imposed by the disciplinary panel was outside the band of responses of a reasonable employer.

285. Although this was one of the issues relied upon by the claimant, Mr Johnson was not meaningfully challenged, in respect of the decision taken by the panel to dismiss the claimant for gross misconduct.

286. In the circumstances the tribunal can deal with the matter shortly.

287. The panel were well aware of the claimant's length of service and clean disciplinary record as they made express reference to it in the disciplinary outcome letter (342).

288. The panel explained why they considered gross misconduct was the appropriate penalty and explained, in short terms, that other sanctions had been considered but rejected. Whilst some of the incidents in isolation were petty the respondent was entitled to draw the conclusion that there was a course of conduct designed to harass management and disrupt the smooth running of Compton House.

289. Once the disciplinary panel had found the allegations that it did proven, the tribunal did not consider that, even having regard to the claimant's clean disciplinary record and length of service, that dismissal was out with the band of responses of a reasonable employer. The tribunal reached this conclusion having particular regard to the fact that it was satisfied that both the manager and deputy manager were badly affected by the incidents and that all trust between management and the claimant had broken down. The tribunal also noted the evidence before the disciplinary panel as to the impact of the incidents on members of staff.

290. The procedure adopted by the respondent was reasonable. The claimant knew of the case she had to meet. She did not adduce any cogent evidence to suggest she unfit to participate in the disciplinary hearing. She was allowed to be represented by two people chosen by herself. She was given a right of appeal.

291. The claimant did not appeal.

Reasonable adjustments

292. The tribunal applied the following legal principles in reaching its conclusions.

293. Section 20 of the EQA 10 imposes a requirement on an employer, where a provision criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is appropriate to have to take to avoid the disadvantage.

294. The tribunal reminded itself it had an obligation to make explicit factual findings identifying the relevant PCP, the persons who were not disabled with whom comparison should be made, the nature and extent of any substantial

disadvantage suffered by the claimant and any step or steps it would have been reasonable for the employer to take, see **Secretary of State for Work and Pensions (Job Centre Plus) versus Higgins [2014] ICR 341**.

295.The EHRC code makes it clear that a PCP should be interpreted broadly and would include “*any formal or informal policies, rules, practices, arrangements or qualifications including one of decision and actions*” (paragraph 6.10).

296.The claimant must establish a substantial disadvantage and the word substantial means “*more than minor or trivial*”. The disadvantage is comparative so it is no answer to a claim to show that persons who are not disabled would also be disadvantaged by the PCP if the claimant’s disadvantage was greater.

297.The respondent is only subject to a duty to make reasonable adjustments if it knows not just that the claimant is disabled but also that her disability was likely to put her at a substantial disadvantage in comparison with non-disabled persons. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge. In view of this, the EAT in **Secretary of State for Work and Pensions v Alam 2010 ICR 665**, held that a tribunal should approach this aspect of a reasonable adjustments claim by asking whether the employer knew that both that the employee was disabled and then that her disability was likely to disadvantage her substantially.

298.The adjustment must have a real prospect of having made a difference but this must be read with care as in **Noor -v- Foreign & Commonwealth Office [2011] ICR 695** the EAT held the mere fact that an adjustment to an interview process would still not have resulted in the employee having been appointed did not mean there was no breach of the duty. In that case there were steps the employer might have taken which would have reduced the specific disadvantage, even if no step would have resulted in the employee getting the job that she had applied for.

299.Whether an adjustment is reasonable is a question for the tribunal to determine objectively, **Morse -v- Wiltshire County Council [1998] IRLR 352**.

300.The tribunal firstly had to consider whether the purported PCPs were in fact PCPs in law.

301. The tribunal can deal with this matter shortly given Mr Starcevic did not seek to argue the point on behalf the respondent..

302. A PCP must be construed widely (EHRC Code, paragraph 6.10) What is required is there is an element of a general or habitual approach.

303. The tribunal is satisfied that all three PCPs contended by the claimant fulfil this definition. Where there were concerns as to a disciplinary matter the respondents would conduct a disciplinary investigation and depending upon the result of that investigation it could lead to a disciplinary hearing. During the course of such proceedings an employee would receive correspondence in connection with that matter.

304. The persons with whom a comparison should in law be properly made, would be another employee suspected of misconduct who was not disabled.

305. Did the claimant suffer a substantial disadvantage, that being a disadvantage that was more than minor or trivial?

• **Adjustment 1** *The claimant should have been made aware of the substance of potential allegations in writing in advance of the investigation meeting, rather than face them for the first time during the investigation meeting;*

306. The tribunal is satisfied the claimant would be particularly nervous and stressed as regards the interview. She knew from the announcement of the trustees that there was an investigation into inappropriate conduct within Compton House.

307. Given the respondent knew that sometimes when under pressure the claimant tended to be short in her answers, and stressed, the tribunal considered that the claimant would have been put at a substantial disadvantage compared with a none disabled person. Whilst a none disabled person would also have likely been stressed by being asked to attend an investigation the tribunal considered the stress upon the claimant would have been considerably greater.

308. Having knowledge of the topics had the possibility of making a difference in respect of the quality of the answers. It may even have been that the claimant could have provided a written statement before the meeting setting out her account, reducing the amount of questioning that was then necessary.

309. The fact that the claimant was able to fully engage at the disciplinary hearing when she had knowledge of the allegations further supports the tribunal's conclusion upon this matter.

310. The respondent had knowledge of the claimant's disability and from its previous dealings with her knew that she had on occasions behaved in a similar manner when she considered she was being challenged. The respondent therefore had both actual knowledge and knowledge of the disadvantage potentially caused to the claimant.

311. The mere fact the adjustment was not requested by the claimant is no defence.

312. The Tribunal considered objectively the adjustment was reasonable even though it was satisfied the case would still have been referred to a disciplinary panel on other grounds. On the basis of **Noor** this was not a reason to reject the claimant's complaint on this ground.

313. In the circumstances the respondent failed to make a reasonable adjustment.

Adjustment 2 *The claimant should have been allowed to bring a companion to the investigation meeting and the respondent should have informed her of that right before the meeting;*

314. The claimant when stressed had a tendency in meetings to say relatively little unless she felt supported. She was particularly sensitive to any form of criticism. Being called to an investigative meeting without support was likely to place the claimant at a substantial disadvantage compared with a non-disabled person as it would impact on the fullness of any explanation she wished to put forward. In the circumstances looking at matters objectively it was a reasonable adjustment to allow the claimant to be accompanied to an investigative meeting. The adjustment was likely to have made a difference given at the disciplinary hearing, when the claimant was accompanied, she was loquacious.

315. The respondent had knowledge of the claimant's disability and from its previous dealings with her knew that she had on occasion behaved in a similar manner when she considered she was being challenged. The respondent

therefore had both actual knowledge and knowledge of the disadvantage potentially caused to the claimant

316. In the circumstances the respondent failed to make a reasonable adjustment.

Adjustment three *The respondent should have postponed (or temporarily suspended) its disciplinary process until receipt of medical advice;*

317. The claimant was advised twice in writing that if she was unfit to participate in the disciplinary process she should provide a medical note to that effect. She did not.

318. Whilst the claimant was absent due to ill-health a none-disabled employee also absent from ill-health facing disciplinary proceedings would have been treated in the same manner. The claimant was not put at a substantial disadvantage.

319. There is no cogent evidence that such an adjustment if made would have had a real prospect of improving the quality or nature of the claimant's evidence. There was nothing to suggest that by delaying matters the claimant's health would improve. Delay may have even worsened her condition given the continued uncertainty. The claimant was asked at the start of the disciplinary hearing if she was fit to participate in which she answered in the affirmative.

320. Neither of the claimant's representative suggested her evidence was in any way affected by proceeding. The claimant accepted, at the conclusion, that she received a fair hearing.

321. If the tribunal was wrong on that matter the respondent did not know the claimant was placed at a substantial disadvantage. It did not know because the claimant did not produce any medical evidence indicating she was unfit to participate in a disciplinary hearing and she herself had told the respondents in writing that she would attend the adjourned disciplinary hearing.

The tribunal is not satisfied that objectively this was a reasonable adjustment.

322. In the circumstances this claim of a failure to make a reasonable adjustment must be dismissed.

Adjustment four. *The respondent should not have delivered post by hand, including delivery being accompanied by a knock on the door.*

323. The claimant had never previously raised any concerns as regards the receipt of correspondence from the respondent.

324. The respondent hand-delivered correspondence, and in particular the disciplinary pack to the claimant in respect of the disciplinary process so there was no delay to the claimant.

325. The respondent would have acted in the same manner in respect of a none disabled employee absence from work facing disciplinary proceedings.

326. The tribunal was not satisfied on the evidence before it that the claimant was placed at a substantial disadvantage compared with a none disabled person by the receipt of correspondence personally. It does not follow that simply because a person is absent from work due to mental ill-health they are placed at a substantial disadvantage if correspondence is delivered personally. Whilst it is true the claimant notified the respondent by letter dated 20 March 2019 (330) she did not wish to receive correspondence by personal delivery thereafter the respondent ceased to utilise that method.

327. The tribunal is not satisfied that the claimant suffered a substantial disadvantage. Neither is it satisfied that if the adjustment was made it would have had reduced any disadvantage, the tribunal finding there was none.

328. If the tribunal was wrong on that point it found that the respondent did not reasonably know that the claimant would suffer a substantial disadvantage. The claimant had been absent from work before, including for a period of 10 weeks for what she described as a mental breakdown. She was contacted during that period by post . While it may not have been hand-delivered she was still contacted by post and accepted such correspondence without demur, one example being the letter from Mrs Craen dated 15 June 2017, which the claimant responded to, by telephone, thanking her for the letter. In the tribunal's view, there is a significant difference between the respondent being aware that the claimant was ill, even suffering from a mental illness and being aware of the specific effect that that had on her in relation to mail delivery and therefore the disadvantage that she was placed at as a result of the PCP being applied.

329. It follows this complaint of failure to make a reasoned adjustment must be dismissed.

• **Adjustment five** *The respondent should have given the claimant sufficient time to recover so that she could meaningfully participate in the disciplinary process and properly put forward her case.*

330. Requiring an employee to attend a disciplinary hearing who is absent due to ill-health would place an employee at a substantial disadvantage if the effect of that health was such that they could not properly put forward their defence. However in this case the claimant was expressly told that if she produced a medical note confirming that she was unfit to attend, as opposed to the fact she was unfit for work, there was a clear inference the disciplinary hearing would be adjourned. The claimant was advised of this on two separate occasions. A non-disabled employee facing disciplinary proceedings absent through ill-health would have been treated in exactly the same manner. There was nothing to suggest that by delayed matters the claimant's health would improve or that she would be better able to cope.

331. At no stage at the disciplinary hearing did the claimant or her two representatives suggest the claimant was unfit to take part in the proceedings.

332. The notes of the disciplinary hearing made it clear the claimant meaningfully participated in the proceedings. It was never suggested either by the claimant or her representatives that she was in any way disadvantaged in putting forward her case.

333. The tribunal concluded there was no substantial disadvantage.

334. If the tribunal was wrong on that point tribunal was not satisfied on the evidence before it how delaying matters for an indefinite period would assist in the claimant putting forward her case. The claimant was not able to say in cross examination what she would have said differently, had there been a postponement.

335. Whilst the respondent was aware of the claimant's disability it was not aware that proceeding with the disciplinary hearing in the above particular circumstances placed the claimant at a substantial disadvantage.

336. In the circumstances this claim of a failure to make a reasonable adjustment must be dismissed.

Section 15, discrimination arising from disability.

337. The tribunal applied the following legal principles in reaching its conclusions.

Section 15 of the Equality Act 2010 provides: –

“(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”.

338. Section 15(1) (a) contains a double causation test. Firstly the unfavourable treatment must be “*because of*” the relevant “*something*” and secondly that “*something*” must itself arise *in consequence*” of the disability, see **Basildon and Thurrock NHS Foundation Trust -v- Weerasinghe [2016] ICR 305**. The same case stressed it was not simply a question of whether the claimant was treated less favourably because of their disability.

339. Starting with the first element namely the “*because of*” issue, the focus is on the alleged discriminator’s reasons for the action and therefore the tribunal must consider the decision-maker’s conscious and subconscious thought process, see **Robinson -v- Department for Work and Pensions [2020] IRLR 884**.

340. The “*something*” must more than trivially influence the treatment; it does not have to be the sole or principal cause. There is no requirement that the alleged discriminator should have known that the relevant something arose from the claimant’s disability, see **City of York Council -v- Grosset [2018] EWCA Civ 1105**.

341. The second element, the “*in consequence*” issue, there is no need to look at what was in the mind of the alleged discriminator and it is a matter of objective fact decided in the light of all the evidence. There may be a number of links in the chain and more than one relevant consequence of the disability may require consideration.

342. The approach a tribunal is required to take was helpfully summarised in **Pnasier -v- NHS England [2016] IRLR170** in which the following steps were suggested:

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial influence on the unfavourable treatment), and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.

(d) The Tribunal must determine whether the reason/cause or, if more than one, a reason or cause is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regard to the legislative history of section 15 of the act..., the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it may be a question of fact arising robustly in each case where something can properly be said to arise in consequence of disability.

(e)...the more links in the chain there are between disability and the reason for the impugned treatment, the harder it is likely to establish the requisite connection as matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

...(i)...it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal may ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that causes the unfavourable treatment".

343. Turning to knowledge HHJ Eady QC in **A Ltd v Z [2020] ICR 199**, EAT, summarised the authorities as follows [23]:

*"(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see **City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA** at para 39.*

*(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see **Donelien v Liberata UK Ltd (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec)** at para 5, per Langstaff P, and also see **Pnaiser v NHS England (2016) UKEAT/0137/15/LA, [2016] IRLR 170 EAT** at para 69 per Simler J.*

*(3) The question of reasonableness is one of fact and evaluation, see **Donelien v Liberata UK Ltd [2018] EWCA Civ 129, [2018] IRLR 535 CA** at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.*

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can

be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see **Herry v Dudley Metropolitan Council (2016) UKEAT/0100/16, [2017] ICR 610**, per His Honour Judge Richardson, citing **J v DLA Piper UK LLP (2010) UKEAT/0263/09, [2010] IRLR 936, [2010] ICR 1052**), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]" [sic], per Langstaff P in **Donelien EAT** at para 31.

(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it.

Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (**Ridout v T C Group (1998) EAT/137/97, [1998] IRLR 628; Alam v Secretary of State for the Department for Work and Pensions (2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665**).

(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

344. Finally it is open to an employer to show that its acts were a proportionate means of achieving a legitimate aim.

345. To be proportionate the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so. In particular a Tribunal will consider whether a lesser measure would be a proportionate means of achieving the employers' legitimate aim, see **Naeem –v- Secretary of State for Justice 2017 UKSC 27**.

346. The tribunal is satisfied that subjecting a person to a disciplinary process and dismissing an employee of both capable of amounting to unfavourable treatment.

347. It was Mr Nurse who decided the claimant was to be the subject of a disciplinary process after he had completed his investigation and interviewed staff, including the claimant, and the decision to dismiss was taken by Mr Johnson and his fellow trustee.

348. The something relied upon is the manner in which the claimant answered questions at the investigative meeting. The tribunal is satisfied that, that something arose in consequence of the claimant's disability. Mr Nurse was on notice that the claimant might have a health problem given the inappropriate laughing and smiling when answering questions.

349. In the conclusion section to Mr Nurse 's report he concentrated upon handwriting and opportunity coupled also with the fact the claimant was seen acting suspiciously in the vicinity where her photo was vandalised . He also however, in his observation section, recorded the claimant answered questions very briefly was somewhat evasively .

350. The tribunal considered therefore the claimant's demeanour was a factor that he took into account in determining to refer the matter to a disciplinary hearing but it was not a substantial matter. It was trivial. It was not the effective cause. The other factors were the most important.

351. The tribunal then turned to the disciplinary hearing itself.

352. The tribunal is satisfied that the manner in which the claimant answered questions at the investigative meeting did not play any significant part in the decision to dismiss, or put differently, its influence was less than trivial on the decision makers.

353. Mr Kohanzad suggested that Mr Johnson having heard the cross-examination of Mr Nurse played down this factor having a significant influence on the panel's decision.

354. The tribunal rejected that argument for the following reasons.

355. Firstly in the disciplinary invitation letter it does not form a reason for taking action against the claimant (256 to 257).

356. Secondly in the lengthy letter of dismissal the presentation of the claimant at the investigative meeting is not mentioned at all. This was a contemporaneous document and the tribunal considered it was entitled to give it considerable weight as to what was in the mind of the decision makers.

357. Thirdly in the statement of Mr Johnson dated 22 October 2020, written more than a year before the tribunal hearing, he clearly set out the principal reasons as to why the panel decided to dismiss the claimant (paragraph 22) and said "*the chronology of the timings and the handwriting were the two main pieces of evidence...*"

358. For these reasons the demeanour of the claimant at the investigative interview had no significant, that is more than trivial, influence on the decision of the panel to dismiss the claimant. To the extent part of the list of issues made reference to the claimant's demeanour at the disciplinary hearing this was not a matter pursued with Mr Johnson and there was scant evidence of any issues as to the claimant's demeanour at the hearing. To the extent there was any such evidence it had no influence what so ever on the decision to dismiss.

359. The tribunal then looked at the defences deployed by the respondent, if it was wrong on its primary finding.

360. Starting with knowledge the tribunal has reminded itself that the defence available to an employer in respect of lack of knowledge is different from that available to employer facing a complaint of failure to make reasonable adjustments, as in the latter case there is an additional element that the respondent must know that the claimant was placed at a substantial disadvantage.

361. The tribunal is satisfied that the respondent had the requisite statutory knowledge.

362. In reaching that conclusion the tribunal relies upon its previous enumerated findings of fact. The mere fact they have not been repeated fully did not mean the tribunal did not take them into account in reaching this conclusion. The respondent had knowledge that the claimant suffered with her mental health because from 2015 Mrs Craen had reason to discuss with the claimant her health and offered a number of methods of support. At the end of that year the claimant contended that she was "*emotionally overwhelmed*". The claimant was absent in 2017 for some 10 weeks with mental health issues which she considered to be a breakdown. On 12 May 2017 the respondent knew, evidenced by its letter to the claimant GP that they knew the claimant had been treated for depression for the last year. Even when the claimant returned to work a phased return was considered necessary due to the claimant's health. In February 2018 the claimant said she wasn't unhappy but she was ill and the respondent was aware the claimant was receiving counselling. The claimant's unusual behaviour at the Christmas party in 2018 was noted which in turn led to Mrs Craen asking her husband to take the claimant home. The claimant inappropriately laughed on at least two occasions at the investigative meeting. The respondents knew prior to the disciplinary hearing the claimant had been signed off as being unfit for work. The respondents knew by the production of medication and the comments made by the claimant at the disciplinary hearing that she had mental health issues. The respondent knew the claimant had at least three periods of mental ill health between 2015 to 2018 including suffering a mental breakdown.

363. It follows that if the tribunal was wrong on its primary finding it would have rejected the respondent's defence in respect of knowledge.

364. The tribunal then turned to the justification defence.

365. The tribunal was satisfied that the maintenance of disciplinary standards was a legitimate aim.

366. The tribunal considered that having regard to the nature of the allegations, which cumulatively were serious, it was proportionate to utilise a disciplinary process and refer those allegations to a disciplinary panel given Mrs Craen, the

registered manager who obtained an outstanding grade from CQC was so affected that she was considering resigning and the fact that other staff were affected by the atmosphere caused by the allegations such that it was said they were walking “*on egg shells*”. It was reasonably necessary to determine those serious allegations by means of a disciplinary hearing to test the truth or falsity of the allegations. It was not in the interests of the smooth running of Compton House and the continued staff unease to postpone the resolution of the disciplinary proceedings for indefinite period.

367. Given the total breakdown of trust and confidence no lesser measure would have achieved the respondent’s legitimate aim.

Direct discrimination/ Harassment

For both direct discrimination and harassment the requirement on a claimant is for the claimant to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the tribunal could infer an unlawful act of discrimination, see **Royal Mail Group Ltd -v-Efobi 2021 UKSC 33**.

The tribunal has reminded itself that discrimination is rarely admitted

The claimant however has not discharged the burden of proof upon her to establish the primary facts which she relies upon in respect of the alleged comments on 27 February and 01 March 2019 for the reasons the tribunal has already given.

In the circumstances the claimant’s complaints of direct discrimination or in the alternative harassment must be dismissed.

Direct discrimination, dismissal.

The tribunal applied the following legal principles in reaching its decision on this complaint.

The tribunal again reminded itself of the burden of proof is set out in section 136 of the Equality Act 2010.

Direct discrimination is defined in section 13 (1) EQA 10 as follows:

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

The legislative test is therefore broken down into two elements namely less favourable treatment and the reason for that treatment. In some cases, however, it may be appropriate to ask the latter question first, see, **Shamoon -v-The Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** as explained in **Stockton-on-Tees Borough Council -v-Aylott [2010] IRLR 994**.

The test of what amounts to less favourable treatment is an objective one. The fact that a complainant believes they have been treated less favourably than a comparator does not of itself establish that there has been less favourable treatment: **Burrett v West Birmingham Health Authority [1994] IRLR 7**.

As the statutory definition requires less favourable treatment that in turn requires a comparison to be made..

Section 23 EQA10 states :

“(1) On a comparison of cases for the purposes of section 13... there must be no material difference between the circumstances relating to each case.

Where the protected characteristic is disability section 23 (2) EQA 10 requires that the circumstances must not materially differ between the complainant and comparator specifically includes a person’s disabilities. In other words the complainant and comparator must have the same abilities and this may mean that the appropriate comparator is also a disabled person.

The second element is the treatment must be because of the protected characteristic.or characteristics.

The tribunal can deal with the issue of whether the dismissal of the claimant was direct discrimination because of either of the claimants protected characteristics relatively shortly, particularly given Mr Kohanzab did not to make any submissions on the point, although declined to withdraw the complaint.

There was no named comparator and therefore the tribunal had to construct hypothetical comparators in respect of both race and disability.

The tribunal had little hesitation in concluding that dismissal was less favourable treatment but concluded it had nothing whatsoever to do with either of the claimants protected characteristics.

The claimant's case did not even start to raise any form of inference that her race had anything to do with her dismissal and nor was the tribunal satisfied, for the reasons already given, that Mrs Craen wanted the claimant dismissed due to her disability.

The tribunal was satisfied that hypothetical comparator who did not share the claimants' protected characteristics, facing the same allegations, would have been treated in exactly the same way by the respondent. The reason the claimant was dismissed was because of her conduct and neither her disability or race had anything whatsoever to do with that decision.

In the circumstances therefore the tribunal dismissed the complaint of direct discrimination.

Wrongful dismissal

The tribunal has reminded itself that it is perfectly possible to find that a dismissal was fair but wrongful. The test between a fair dismissal and the wrongful dismissal is different. For an employer to avoid a finding of wrongful dismissal it must establish on the balance of probabilities that the claimant committed the alleged act or acts of misconduct and they were such as to amount to a fundamental breach of the contract of employment, such that the employer was entitled to consider it was no longer bound by the contract.

The tribunal was satisfied the respondent had established firstly, a fundamental breach of contract for the reasons already outlined by the tribunal. Secondly the tribunal was satisfied that the respondent has demonstrated on the balance of probabilities that the claimant committed the acts of alleged misconduct found proven.

It was a reasonable to conclude on the balance of probabilities that the reed oil diffuser incidents were linked and, on balance, the evidence pointed to the claimant being the likely perpetrator.

Similarly the defacing of the Christmas gift poster and the comments on the paper towel were written by a person whose handwriting was similar to that of the claimant and having regard to the window of opportunity only the claimants handwriting had any similarity with the documents in dispute. On the balance of probabilities the claimant wrote the messages.

On the balance of probabilities the claimant defaced her own photograph. It was therefore likely that she defaced the other two photographs. Her actions appeared to be a deliberate attempt to draw attention away from the claimant, which pointed towards guilt.

No unusual or unexpected incidents occurred after the claimant was suspended. In the tribunal's judgement, looked at in totality, it was satisfied the respondent had demonstrated, on the balance of probabilities, that the claimant has committed an act of gross misconduct.

It follows the complaint of wrongful dismissal must be dismissed.

Employment Judge Smith

08 December 2021

