



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Ferguson

**Respondent:** National Oceanography Centre

**Heard at:** Southampton

**On:** 27, 28, 29 and 30 June,  
Reserved Judgment Discussion  
1 July, 17 and 19 August 2016

**Before:** Employment Judge M Kolanko

**Members:** Ms A Sinclair  
Mr R Spry-Shute

**Representation:**

**Claimant:** Miss S Bowen (of Counsel)

**Respondent:** Mr J French-Williams (Solicitor)

## RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The claimant was unfairly dismissed, the claimant's complaint of unfair dismissal succeeds.
2. The complaint of unlawful disability discrimination pursuant to Section 15 of the Equality Act 2010 succeeds.
3. The complaint of unlawful disability discrimination pursuant to Sections 20 and 21 of the Equality Act 2010 fails.
4. The claimant's complaint of wrongful dismissal succeeds.
5. In the absence of the parties reaching agreement on issues relating to remedy, there will be a remedy hearing on 14 October 2016 (with a time estimate of one day).

# REASONS

## Nature of Claims and Issues

1. At an earlier Case Management Preliminary Hearing on 27 January 2016 it was established that the claimant makes complaints of:
  - Wrongful dismissal
  - Unfair dismissal
  - Unlawful disability on the grounds of the protected characteristic of disability pursuant to Section 15 and Sections 20 and 21 of the Equality Act 2010.
2. The following issues were to be determined by the Tribunal:

### Wrongful Dismissal

- 2.1 Did the claimant commit a repudiatory breach of contract?
- 2.2 Was the respondent entitled to terminate the claimant's contract of employment without notice?

### Unfair Dismissal

- 2.3 Did the respondent have a genuine belief that the claimant had committed gross misconduct?
- 2.4 Did the respondent act reasonably in treating the claimant's conduct as a sufficient reason for dismissing the claimant.
- 2.5 Did the respondent follow a fair procedure in relation to the claimant's dismissal?

### Disability Discrimination

- 2.6 Was the claimant, at the material time a disabled person within the meaning of the Equality Act 2010?
- 2.7 If so, did the respondent know, or ought the respondent reasonably to have known that the claimant was disabled?
- 2.8 Did the claimant's actions in creating and keeping the note book arise out of the claimant's disability?
- 2.9 If so, did the respondent discriminate against the claimant because of that?
- 2.10 If so, can the respondent establish that such treatment of the claimant was a proportionate means of achieving a legitimate aim?

- 2.11 Did the respondent operate a provision, criterion or practice (PCP)?
- 2.12 If so, did such PCP place the claimant at a substantial disadvantage?
- 2.13 Did the respondent know, or ought the respondent to have known, that the claimant was placed at a substantial disadvantage?
- 2.14 Did the respondent fail to make reasonable adjustments?
3. At the outset of this hearing it was clarified that the respondent accepts that the claimant was disabled within the meaning of Section 6 of the 2010 Act by reason of depression as at 1 December 2013, but contends that it did not know and could not reasonably be expected to know, that the claimant was disabled at the relevant period of these proceedings.

**Evidence and Basic Facts found by the Tribunal**

4. The Tribunal heard evidence from:
- Mr Kevin Ferguson, the claimant
  - Mr David Larkman, friend of the claimant who attended the appeal hearing
  - Miss Bernie Hibberd, the respondent's People and Skills Manager
  - Ms Julie Pringle-Stuart, Director of Finance and Operations who chaired the claimant's disciplinary hearing
  - Professor Ed Hill, Executive Director of the respondent, Appeal Officer
5. The Tribunal was assisted by having a substantial bundle of documents in two lever arch files containing 828 pages. Although the Tribunal's attention was drawn to a substantial number of documents in the bundle, some documents were not drawn to the Tribunal's attention.
6. Having heard the evidence of the witnesses and having looked at documents introduced into evidence, the Tribunal finds the following basic outline facts in relation to the period of the claimant's employment which is the subject of these proceedings. In respect of the individual complaints the Tribunal finds further facts as set out in its conclusions:
- 6.1 The claimant commenced employment with the respondent as a Tidal Data Analyst on 1 June 1996 based in its office in Liverpool. At the relevant time the claimant was one of four people in the team working in the Liverpool office, the others being Colin Bell, Line Manager, Jill Burgess and Lisa Eastwood. It is proper to record for the purposes of this case that the claimant had been working alongside Lisa Eastwood since his commencement of employment and they were considered to be good friends, indeed Miss Eastwood had been a bride's maid at the claimant's wedding. Miss Burgess had been working with the claimant

for a number of years.

- 6.2 An employee within a Government Agency had regular dealings with the respondent Organisation that person is referred to within these proceedings as X. It is common ground that X had dealings with the claimant as well as others within the Department on the phone and at meetings. We were informed that X was promoted in 2012 and ceased to have regular contact with the respondent, although we understand X oversaw those who did. Ms Pringle-Stuart, the respondent's Director of Finance and Operations, indicated that it was possible thereafter that if X were to have a query concerning tides she may have contacted the claimant and others in the office in Liverpool for assistance.
- 6.3 It is common ground that the claimant had considerable time off work during 2012/2013 for various ailments, which was being monitored by the respondent (bundle page 39).
- 6.4 In April 2013 the claimant's wife (who was employed as Head of HR until 2010 before taking up a different role within the department) was diagnosed with cancer. On 26 July 2013 the claimant's absence was first noted as being for anxiety/stress.
- 6.5 As recited earlier on 1 December 2013 the respondent in these proceedings has accepted that the claimant was disabled within the meaning of the Equality Act 2010 by reason of suffering from depression, although within these proceedings contends that it did not know and could not reasonably be expected to know that the claimant was disabled at this time, or indeed thereafter.
- 6.6 Sarah Buckley (Deputy Head of People and Skills) emailed Bernie Hibberd (Senior People and Skills Manager) indicating that she had spoken to Julie Ledder (Business Support Liverpool site) and was in complete agreement that the claimant's absence needed to be reviewed. (Bundle page 53).
- 6.7 From 2013 – May 2014 the claimant had 19 Absences (24 days) associated with anxiety and stress and dependent leave absence to care for his wife (bundle pages 39 and 41).
- 6.8 On 24 July 2014 Julie Ledder and Colin Bell the claimant's Line Manager at Liverpool had a meeting with the claimant. The notes of the meeting records (bundle page 65) "*we know that the last twelve months have been very difficult for him due to personal circumstances. However his level of absence and the unpredictability of his attendance were impacting on the team and we needed to address it. I had an additional concern that he was not contacting us to advise us of his absence, that as employers we had a duty of care, we needed to know he was ok*". The note records that the claimant explained that he had been unable to sleep properly for months, but that in the last week he had been given sleeping tablets by his GP, which made him hallucinate. He indicated that he had a meeting the following week with his GP to discuss alternatives but felt that sleeping tablets were not the answer to feeling depressed. "*He said he felt that he had*

*manic depression he expressed it as he felt as if his head was about to explode and he just wanted to hit it with a hammer to make it stop".* The note indicated that Ms Ledder wanted to help support him and to get him back into working well and therefore wished to refer him to Occupational Health *"Kevin said that it was not work that was making him feel this way. Kevin was very accepting about the referral".*

- 6.9 The note recorded that he was considered to be a valued member of the staff providing valuable work on an important contract. The claimant agreed that he would contact Mr Bell if he was going to be absent and in his absence contacting Ms Ledder. The note records:

"After the meeting I met briefly with Colin Bell and advised him that if on any day Kevin did not turn up at work he was to phone him or text him to make sure he was ok and find out what was going on. If Colin was unable to do that I would do it but we will make sure there was contact made".

- 6.10 Following the meeting Ms Ledder prepared an Occupational Health referral (bundle page 68) under a Performa question enquiring as to whether the person was covered by the Equality Act she indicated No.

- 6.11 An Occupational Health report dated 8 August 2014(bundle page 69) indicated that the claimant had noted the onset predominantly of anxiety symptoms for which he had not been prescribed medication by his GP. It noted that *"clinical examination today using a structured questionnaire indicates high levels of anxiety and worry symptoms. Therefore I have written to his GP in order to support his health care further"*. In response to specific questions he indicated that he believed that the elevated levels of symptoms were inadequately treated at the present time and therefore proposing a referral back to his GP. In respect of the application of the Equality Act 2010 the doctor stated *"it may be likely that with this condition of longstanding duration (over twelve months) and the associated impact, they may meet with the disability provisions of the Equality Act 2010 due to either the relapsing and remitting nature of this condition which may in future impact on day-to-day activities"*.

- 6.12 In October 2014 the claimant moved out of the family home, believing that he could not continue for the sake of his own mental wellbeing. It is proper to record that the claimant was to say subsequently that despite his wife's very poor health he felt he was the victim of an abusive relationship.

- 6.13 On 17 November 2014 Ms Hibberd had a meeting with the claimant. In a subsequent email to the claimant (bundle page 74) it was noted that he appeared to be better than previously, and was getting better sleep, and was continuing to see his GP on a regular basis and *"certainly when you need a new prescription"*. The note records that the claimant would contact counselling services for an appointment, also referencing Greg Pirt the respondent's Welfare Officer. It concluded that an Occupational Health review needed to be arranged as things were getting better from a health point of view.

- 6.14 The claimant continued to have intermittent periods of absence. On 5

December 2014 his absence was given for the first time as depression (bundle page 81). It is common ground that the claimant's absence without reporting in, had increased by this time. Similarly, during this period it was noted that his working relationship with his colleagues at the Liverpool office was being strained by reason of the claimant's irritability and arguing with his colleagues.

- 6.15 On 12 December 2014 Ms Ledder held a catch up meeting with the claimant following his absence earlier that week. A note of the meeting (bundle page 82) records that he had changed his GP and was given medication on a monthly basis. It was noted that he had two counselling sessions with a third due on 16<sup>th</sup>, and a further three planned in January when a review would take place. Ms Ledder explained to the claimant the need to keep in contact to ensure that he was well and safe, and to enable Colin Bell to understand workloads and to the plan for work to be completed. She requested the claimant if he knew in advance that he would be absent to contact Colin Bell *"With the Christmas period upon us I wanted to understand what support Kevin had outside of work especially now that he lived on his own"*.
- 6.16 The note records that in the New Year he would be referred back to a different Occupational Health Company. Ms Hibberd in evidence before us indicated that by this time she had an inkling that the claimant was disabled and hence the need to refer to Occupational Health.
- 6.17 On 19 January 2015 the claimant had an unauthorised absence and appears to have been suspended on the grounds of not informing Colin Bell of such absence.
- 6.18 A letter from Bernie Hibberd to the claimant on 5 February 2015 confirmed that salary payments were being withheld with effect from 19 January. The note recorded that he had not attended a requested meeting on 4 February and that Ms Hibberd had failed to make contact on the phone on 5 February. She indicated *"Colin has confirmed he has not received any further updates from you and has therefore deemed your absence remains unauthorised as outlined in the Research Council Absence Management Policy"*. She indicated that they had been adopting a proactive approach to manage his absence but that he had not been responding. She stated that she appreciated a number of personal issues over the last year, but that his` continued absence and lack of notification, to be a breach of his contract and therefore unless he contacted her by 16 February, then she would have no option but to instigate the process.
- 6.19 On the following day the 6 February 2015 Ms Hibberd was able to speak to the claimant on the telephone, noting that he had arrived at work at 7.40 and had been advised to go home by Colin Bell and contact Ms Hibberd. A letter sent by Ms Hibberd later that day (bundle page 108) confirmed that the claimant indicated that he was not feeling great, that he was massively depressed and that his GP had doubled his prescription for the next four weeks. He indicated that he had not received the letter confirming suspension on full pay on 19

January due to unauthorised absence, (by reason of there being no fit note from his GP). Ms Hibberd indicated that in addition to the unauthorised absence there were issues concerning his work that needed to be investigated and may result in disciplinary/capability process being initiated. This was in relation to the claimant's working relationship at this stage within the Liverpool team. He was reminded that during his suspension he was not to report for duty and during suspension his pay would be reinstated.

- 6.20 On 9 February 2015 the claimant obtained a retrospective sickness note running from 19 January – 16 February 2015 (bundle page 116) due to anxiety state. We observe that from this date the claimant did not return to active work. We received no clear evidence but it appears in consequence of this retrospective sick note the suspension pending the process for unauthorised absence was abandoned by the respondent.
- 6.21 On 11 February 2015 Kevin Forshaw Head of Enterprise Research (Colin Bell's Line Manager) emailed Ms Hibberd detailing a report from Colin Bell regarding ongoing issues with the claimant noting that in relation to Jill Burgess *"I'm still worried about the impact on Jill"* of the claimant returning to work. Ms Hibberd in evidence indicated that the concerns related to alleged bullying and shouting from the claimant towards his colleagues at this time.
- 6.22 Following the referral to Occupational Health, Dr Clark the new Occupational Health Physician wrote a report on 11 February 2015 (bundle page 124) noting that the claimant had been feeling unwell for some months. He stated *"he has been particularly unwell for the last few weeks and had been absent from work because of his illness for the last four to five weeks. He has been certified as unfit for work by his doctor and his unfitness has been attributable to "anxiety"*. Dr Clark then addressed concern regarding the claimant being physically unwell principally due to severe pain and stiffness in his knees and pain in his heels which resulted in the claimant having considerable difficulty in walking up the stairs. He noted that the claimant informed him of domestic problems over the last few months which was causing stress, and admitted to having drunk excess alcohol as a consequence. It was noted that the claimant was taking 15mgs daily of Mirtazepine which Dr Clark stated *"this is an anti-depressant drug that is used particularly when anxiety is a major part of the medical condition"*. Dr Clark then appears to have concentrated on the fact that the claimant did not look well and had difficulty walking and that he was suffering from a physical illness at the time with symptoms of inflammatory arthritis. He then commented upon the fact that the claimant admitted that he used alcohol more than was advisable and had stopped drinking alcohol completely for the last four weeks. It appears that Dr Clark was unable to give any firm prognosis as he was not aware of the exact diagnosis, though expressed the view that it would not be possible for him to undertake alternative duties at the present time. He indicated it was not possible to answer as to whether the claimant was covered by the Equality Act 2010 as the exact nature of his condition was not yet known, but concluded by stating *"in my opinion Kevin is not fit to carry out his current duties at present but I*

*anticipate that he will be able to do so in the foreseeable future”.*

- 6.23 Events in or around March 2015 have taken prominence in this case, about which we have received confusing and inconsistent explanations given both before the eventual disciplinary and appeal panels and also before us. From the vague background evidence received it appears that in March a notebook came to light in the Liverpool office which included jottings relating to meetings and phone conversations and drawings and comments which appeared to be inappropriate and of a sexual nature (bundle pages 353 – 368). These were seen by Lisa Eastwood who took them to Colin Bell. The notebook appeared to be written in the hand of the claimant, and Mr Bell determined to lock it away and raise it with the claimant when he returned to work at his appraisal. It appears that sometime later Jill Burgess was appraised of the notebook and shown it by Lisa Eastwood. It appears that Ms Burgess and Ms Eastwood determined to escalate their concerns regarding the note book to Kevin Forshaw.
- 6.24 On 29 April 2015 the claimant emailed Ms Hibberd (bundle page 161-162) indicating that he had a doctor’s note that took him up to 5 May, but that he had no plans to ask for another note *“I think its time I started to get back to work. How do I go about this? Physically I am better than I was. That hasn’t really been the problem for the past month or so. I guess it all comes down to stress in the end....I am not quite sure how to describe what has been going on for the past few weeks. One day just bleeds into the next. I wake up every morning and feel like my head is going to explode”.*
- 6.25 On 6 May 2015 Ms Hibberd together with Colin Bell had another meeting with the claimant at his home where they discussed Dr Clark’s report of February 2015. A letter from Ms Hibberd to the claimant on 8 May (bundle page 176) recites the contents of the meeting. She noted that the claimant was keen to get back to work but that as he had been off since January 2015, Occupational Health would need to be arranged to consider a phased return to work prior to his return, and was informed that he was to remain at home on paid special leave, whilst this was being arranged. She referenced discussion when the claimant indicated having reservations about returning to work and that he had been advised that staff who worked with him also had reservations concerning his return. It appears the meeting addressed concerns over his behaviour towards fellow workers including some colleagues at a Christmas meal in 2014. They discussed that his flexi hours were not always correct and the fact that he had not advised managers or co workers in relation to his attendance *“you have admitted you have not always been co-operative with either management or your co workers and that you have got away with a lot”.* The meeting appears to have discussed the CBT sessions the claimant was having with his GP and that he was still taking medication for the depression. It appears that discussion took place as to whether or not depression was affecting his concentration levels. It was agreed that Ms Hibberd would contact him again once an Occupational Health appointment had been arranged. Ms Hibberd in evidence indicated that in relation to staff concerns regarding the staff party and behaviour generally she had decided at this stage that this



would be dealt with informally, which we judge was implicit in the content of her confirmatory letter of 8 May 2016.

- 6.26 It appears that following the meeting with the claimant Colin Bell and Ms Hibberd had discussions that if the claimant's return was to make Ms Burgess uncomfortable, they should rearrange the office putting the claimant next to Mr Bell and Ms Burgess next to Ms Eastwood, this is reflected in an email to Mr Bell sent to Mr Forshaw on 12 May 2015 (bundle page 181). This is consistent with Ms Hibberd's view that the problems that the claimant apparently had caused within the office could be dealt with in an informal manner.
- 6.27 By 14 May 2014 the notebook issue appears to have escalated to Mr Forshaw, Mr Bell's Line Manager (bundle page 182) who emailed Ms Pringle-Stuart Director of Finance and Operations indicating that he had just spoken to Ms Eastwood and Ms Burgess, and that in the course of reconfiguring the office to accommodate the claimant, a notebook had been found which he described as apparently containing "*sexually violent drawings*" which are "*degrading to women*" and negative comments about work colleagues. He indicated his understanding that this had been glossed over when it had been originally found in February/March 2014, presumably in relation to Mr Bell's plans to discuss the matter once the claimant had returned to work, but that he had formally requested the notebook be forwarded to him. He indicated the need to confirm that it was the claimant's notebook "*but this may be an indicator of wider mental health issues – my concern then being any potential threat this might present to other NOC staff*".
- 6.28 Ms Pringle-Stuart did not address Mr Forshaw's observation that the drawings may have some linkage with the claimant's mental health issues, explaining in evidence that following receipt of Dr Clark's Occupational Health report of 17 May indicating that the claimant was fit to return to work, and her personal knowledge of working with Dr Clark, she was satisfied that he would not have allowed a return to work of an employee if there were any mental health issues. This, we judge was to colour her view of the impact of the content of the notebook having no linkage with any mental health issue in subsequent disciplinary proceedings which we address later.
- 6.29 Dr Clark the Occupational Health Physician, met the claimant at his home on 17 May 2015, and the same day prepared a report (bundle page 186). It would be fair to say that the report concentrates primarily on the claimant's previously noted physical symptoms and the claimant's excess abuse of alcohol in the past. He referred to a recent consultant rheumatologist report that had examined the claimant and his earlier report indicating that the claimant was not fit for work "*because he was experiencing disabling knee and foot pain and had difficulty driving his car and climbing stairs. In addition at the time he recently withdrew from what I considered to be excessive use of alcohol*". He noted that the claimant's health had improved considerably and referred to the diagnosis of the rheumatologist and that the symptoms were being resolved. He opined that the claimant was fit to return to work on a phased basis and he concluded his

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report by indicating that his alcohol misuse needed to be addressed but that the claimant had addressed a number of the essential elements. Within the note is a short paragraph which touches upon mental health issues, which we record:

“Unfortunately, this is not a simple matter of just returning to work. It is clear that Kevin’s behaviour during his period of alcohol misuse has left a legacy in his workplace and this needs to be considered. Kevin is aware of this problem and is willing to make any and all necessary apologies to his work colleagues. I am confident that his behaviour in work up to January was the consequence of his anxiety, depression and alcohol misuse and this is not likely to recur.

In my view it will be advisable Kevin to obtain some support, particularly around his alcohol misuse problems, particularly as he is faced with some potential difficult issues in the future. Some programme involving the widely accepted twelve step approach would seem to be desirable. A summary of this programme, which is used by AA includes the following:

- Admitting that one cannot control ones alcoholism, addiction or compulsion;
- Recognising higher power that can restore sanity;
- Examining past errors with the help of a sponsor (experienced member):
- Making amends for these errors;
- Learning to live a new life with a new code of behaviour;
- Helping others who suffer from same alcoholism addiction or compulsions.

In my opinion Kevin has already achieved several of these essential elements but may well need further help and support, particularly making amends for his errors in the workplace. I think that it would be helpful for him to discuss these issues with his own doctor who I understand is also familiar with the wider family issues in Kevin’s case.

He may also need some assistance from the HR Department who may be able to facilitate Kevin’s communication with his work colleagues. I did not think there is a recognised procedure that will deal with this sort of issue but it may be necessary for Kevin to make his apologies individually with some help from a member of HR.

My personal view is that it is important for Kevin to return to a “normal” schedule including work not only for his own sake but also for his family”.

6.30 On 21 May 2015 Ms Hibberd wrote to the claimant (bundle page 189) referencing the meeting on 6 May and the claimant’s meeting with Dr Clark on 17 May. The claimant was informed that the notebook had been found “*the material has [sic] found to be offensive, degrading, sexual and violent*”. The claimant was informed therefore, that as a consequence he was suspended from duty as from 21 May pending investigations that was to be undertaken.

6.31 On 22 May 2015 a second suspension letter was sent by Ms Hibberd modifying the earlier comments regarding the content of the notebook from “*material has found to be offensive, degrading, sexual and violent*” to “*could be considered as offensive, degrading, sexual and violent*” (bundle page 194).

6.32 An independent investigator Mr R Somerville was appointed. We were shown terms of reference (bundle page 197) the terms of reference indicating that the claimant was alleged to have committed an act that could be regarded as gross misconduct and that the allegation was to be investigated in accordance with the respondent's disciplinary policy. Somewhat surprisingly under a heading of the purpose and background for the investigation it stated:

"NOC considers the content of the notebook is professionally causing the breakdown of trust in Mr Ferguson and potentially gross misconduct".

6.33 Mr Somerville set about interviewing members of staff, Kevin Forshaw, Jill Burgess and Colin Bell before then interviewing the claimant and then Ms Eastwood. Each interview was recorded and the recordings subsequently transcribed by Mr Somerville. They appear to have been lengthy interviews. We observe that in the transcript of the claimant's interview (bundle page 726) he indicated that the recordings would be provided to the claimant *"but at the very least with the transcript. If there is anything you disagree with you can then challenge that"*. It is common ground that the claimant was not provided with a recording or transcript at anytime prior to and during the disciplinary and appeal hearings, and only received them in the course of disclosure within these proceedings.

6.34 It is proper to record that one of the witnesses Jill Burgess following her interview with Mr Somerville emailed him the following day stating (bundle page 212) *"if possible I would like to change two things on my statement. Firstly I would like to remove the mention of my leaving should Kevin return. Secondly I would like to alter my assessment of the strength of the alcohol smell from 10 to 7 I think that is more realistic. If you need to contact me about this please feel free to do so"*. Mr Somerville's response (bundle page 212) stated *"I am afraid I can't remove your comments from the transcript, but what I can definitely do is reflect both of those points in your email in my report"*.

6.35 The report was prepared on 17 June 2015 (bundle page 252) in which Mr Somerville inserted selective extracts from the various transcripts relating to the claimant and the various witnesses interviewed. A table of appendices were attached (bundle page 296) to the report which purport to enclose in particular transcripts of the interviews of all witnesses including the claimant. This was not in fact the case. Instead were attached short statements prepared by Mr Somerville from the lengthy interviews which he submitted to witnesses who had the opportunity to amend and then sign such statements and return them to him. There is a reference at number 23 to an interview transcript of the claimant. No interview transcript or statement from the claimant was attached to the report that would have recited his general views and responses. A reading of the report relies solely upon extracts from the interviews which Mr Somerville judged to be relevant.

6.36 Mr Somerville recited at the outset of his report that there was a case to answer and that a disciplinary panel be convened to consider the

allegations on the basis of the nature and seriousness of the allegations and the respondent's duty of care to employees to take all steps to ensure their health, safety and wellbeing, as well as the potential risk to the Organisation's financial and reputational capital.

- 6.37 Mr Somerville in his report (bundle page 267) reminded himself that the disciplinary panel would have to make independent findings in relation to the witnesses and that he was not there to make findings of fact but then proceeded to indicate that all witnesses interviewed from the respondent appeared to be credible (bundle page 268) but that the claimant's answers *"did not appear genuine"*.
- 6.38 In respect of one extract from the notebook (bundle page 275) Mr Somerville indicated *"if this were before a disciplinary panel, the panel may feel it would need to test the account Kevin gave, make a finding about the attitudinal issues raised by Kevin's explanation"*. In respect of another extract (bundle page 275) he stated *"Kevin said that it didn't mean anything. If these issues were before a disciplinary panel the panel may feel it needed to make a finding about the reliability and credibility of this assertion"*.
- 6.39 In respect of matters relating to X (bundle page 279) he suggested that the matter that the panel might like to consider and make findings on was *"the general credibility of Kevin's version of events"*.
- 6.40 In his report Mr Somerville highlighted what he judged were aggravating factors namely the notebook being left in a general area, the serious nature and theme of the images, and the connected text and *"Kevin Ferguson's explanation for its contents"*. We have to say at this stage we have not understood how these matters go beyond original concerns that form the basis of his recommending a disciplinary panel be convened (bundle page 255).
- 6.41 Nearing the end of his report (bundle page 294) he records nine other issues (from their contents they were plainly not intended to be complimentary of the claimant), which he acknowledged had not formed part of his investigation but arose from interviews undertaken, which he observed *"the NOC may feel these issues should be included if matters proceed to a disciplinary panel"*. We find this to be somewhat surprising to have been included in a report as opposed to a secondary letter away from the report, bearing in mind Mr Somerville had been provided with detailed terms of reference.
- 6.42 We observe that in respect of links to colleagues and others, Mr Somerville concluded (bundle page 283) that save for the references in the notebook to X *"the investigating officer found no evidence that the content was linked to any of Kevin Ferguson's colleagues. None of the witnesses consider that there was any link. Kevin denied there was any"*.
- 6.43 Mr Somerville does record certain comments of the claimant, which is reflective of the claimant's attitude at the time, which conveys a degree of contrition felt at the time for his actions. In view of the comments made at subsequent proceedings especially at the appeal hearing

regarding the apparent lack of genuine contrition on the part of the claimant we judge it appropriate to recite it in full (bundle page 286):

“Kevin Ferguson said

“...they'd be extremely annoyed with me....Sick of me, embarrassed basically not want to have anything to do with me...I'd like the chance to apologise...

....so having stopped alcohol and stopped my self -abuse I would very much want to be given the opportunity to say I am sorry to anyone I might have upset, I know definitely to my three colleagues in our office, I have a lot of apologising to do to them. Probably for a lot of the behaviour that I wasn't aware I was doing at the time. I'm sure there are others in the organisation that I have annoyed or upset whoever they are I would like to apologise to those too. Because well particularly over the last 6 year, over the last year my, last two years I guess, my behaviour was out of control.

I'd like to you to know, sit down and say look I am sorry.

Yeah I had no excuses for my behaviour. I have reasons why I was behaving like that but that's not an excuse.

... I would very much like some kind of rehabilitation back into the workplace. I'd like the opportunity as I have said to apologise, to work colleagues, to just get back to normal. I just want everything... the effect I have had on people who, is ...is... the fact I let my home life get inside my head enough to piss everybody off so much I don't know. I honestly don't know. I can't see the future. I can't see anything beyond tomorrow at the moment”.

6.44 It is proper to record, as this formed a significant basis for the claimant's eventual dismissal that Mr Somerville recorded within his report the effect of the claimant's actions on colleagues (bundle page 284 -286). In respect of Jill Burgess he quoted extracts from his meeting with her when she indicated she was sickened by the events and it made her wonder what was in the claimant's mind that had come out in work time *“I'd be quite upset [about Kevin coming back] to be honest.... I feel quite disturbed about him coming back, I feel uncomfortable...I don't know whether it's manageable...I would not like to come in and be in the office on my own”*. Such sentiments are repeated in the statement prepared by Mr Somerville (bundle page 383 – 384). It is noteworthy that Mr Somerville does not convey Ms Burgess' earlier wish to retract a reference to her leaving should the claimant return, which we Judge is recited in Mr Somerville's comments above.

6.45 In respect of Mr Bell, Mr Somerville indicated he was shocked but indicated that his main worry was the risk of losing Jill Burgess *“I mean I can put up with it, I suppose as the boss I am paid to do that, I am more worried about Jill. Lisa and Jill both I think have been affected more by what's been discussed and I know Jill has come very close to leaving, I am very, very concerned that it would be too uncomfortable for Jill and she would just leave and she is a very valuable member of the team.”* These sentiments again are reflected in Mr Bell's statement (bundle page 389). Again Mr Somerville does not indicate Ms Burgess' wish to retract any suggestion that she would leave if the claimant were to return.

6.46 In respect of Lisa Eastwood Mr Somerville again recites extracts from

his interview with her (bundle page 285). She is noted as commenting on feeling stressed *"its like even though I have known Kevin for all these years I haven't got a clue what he is really like. And, you know, am I really that bad a judgment of character [sic] that I ca'tn figure out someone totally you know don't know..."*. In her statement prepared by Mr Somerville she as with the other witnesses spent a lot of time addressing events following the finding of the notebook but then expresses her views regarding the claimant (bundle page 393):

"Para 13 I'm not trying to get Kevin into trouble but I don't feel very comfortable working with him someone unpredictable like that. I was worried that I had been sitting next to him, chatting away now I wonder if I was oblivious to what might have been going through his mind all the time. I don't feel comfortable thinking that he might have been sitting there writing these things and drawing these pictures when I was in the room with him. That makes me feel horrified..."

Para 15 Although it sounds really contrary, he is my friend after all, as long as he comes back into work and isn't difficult with everyone and comes in and just does his job I don't have a problem with him coming back if he behaves in an appropriate manner.

Para 16 We all come to work to do our job. It's a really nice place to work. Other than these events its stress free. It's a really nice relaxing environment and a lovely place to work. The people are really nice and the work is relatively stress free".

- 6.47 On 6 July Ms Hibberd wrote to the claimant (bundle page 413 inviting him to a disciplinary hearing on 21 July 2015 to address the notebook which *"could be considered offensive, degrading, sexual and violent so therefore being a clear breach of the Research Council Code of Conduct"*. He was informed that the penalty for such misconduct may include his dismissal in the most serious cases. He was informed he would be given the opportunity to answer these allegations. She attached the Somerville report. She acknowledged that the process could be stressful and upsetting for him, therefore the Company's Welfare Officer was available to provide support and could be contacted on the phone.
- 6.48 After reading the Somerville report the claimant emailed Bernie Hibberd on 13 July (bundle page 432) indicating having read the report *"it is pretty clear that no one in the office is of the mind to have me back there under any circumstances. Under those conditions I think the only thing really left to discuss is the manner of my leaving. Could you let me have your thoughts on this please"*.
- 6.49 On 21 July 2015 the disciplinary hearing was convened. The panel comprised of Ms Julie Pringle-Stuart (Chair and Director of Finance and Operations) and panel members Kevin Horsburgh (Associate Head of Marine Physics and Ocean Climate) and Deborah Winter-Blaney (HR Manager). The claimant attended supported by Julie Ledder (Business Support Manager).
- 6.50 The note of the meeting (bundle page 440) records that Mr Somerville conducted the case for the respondent. Ms Pringle-Stuart explained the hearing was to address whether the claimant had brought the

institution into disrepute and risk of damaging the health and safety of other employees. These observations appear to be a change from the notice of hearing (bundle page 413) which stated that the disciplinary hearing was to address the contents of the notebook which could constitute gross misconduct under the respondent's policy.

- 6.51 Mr Somerville cautioned the panel from placing too much reliance on the statements of Lisa Eastwood and Jill Burgess as they were not being called as witnesses. Mr Somerville then called Mr Bell who was asked questions about his statement. There was soon an adjournment, as it became clear that the claimant had not read the statements appended to the Somerville report. Following an adjournment Mr Somerville asked questions relating to Mr Bell finding the notebook and recited to Mr Bell his understanding of the chronology of events which Mr Bell acknowledged. No questions appeared to have been asked by the claimant to Mr Bell other than when and where he found the notebook.
- 6.52 Kevin Forshaw Associate Director of Enterprise and Impact was then called. He confirmed his witness statement which noted the initial contact from Burgess and Eastwood regarding the notebook contents. He said his view was that the contents of the notebook were disturbing. He indicated that he was not aware of any link between the contents of the notebook and work colleagues which he considered could be a mitigating circumstance. He indicated that in view of the circumstances the matter should be investigated. The note records Ms Pringle-Stuart and Mr Somerville asking some questions, but no questions appear to have been asked by the claimant.
- 6.53 The claimant was then asked to put his case. The claimant indicated his wish to read an opening statement (bundle page 437). It soon became apparent that the claimant was sufficiently upset that he was unable to read it completely and after a brief adjournment, Julie Ledder read the remainder of the statement out. It is proper to record that it is a detailed statement that chronicles the claimant's wife's diagnosis of cancer two years earlier and that it was noted as terminal. The statement indicated that the claimant started to become paranoid not talking to anyone *"I was a zombie, irritated, irritable and depressed. The effects of this on everyone in the office must have been horrendous, but I hadn't the wits left to see it and for that I am truly sorry. The last thing I wanted was to burden people with my problems"*. The statement referred to his feeling suicidal, he indicated that he had very sketchy memory of writing the contents of the notebook but concluded that this must have been in the summer of 2014 a time when he had to move out of his house *"or I'd be dead"*. He then referred to the Occupational Health referral and his *"mental health was utterly shot to pieces, my physical health was going downhill fast"*. He indicated that he went to his GP and was immediately prescribed anti-depressants and referred to the Mental Health Services. He expressed the hope of continuing to recover and *"apologised to people I have made so mad and begin to rebuild my life"*. He indicated however that he received an email instead on 21 May from Ms Hibberd referencing his suspension because of the notebook with its questionable content. His statement concluded that

he had no idea what he had drawn and was convinced that they were drawn last summer. *“Finally I apologise to all present for any and all stress and distress I have caused due to my illness and my private life bleeding into my work life. I would also like to apologise to those not present who have been affected by this”.*

- 6.54 The notes of the meeting records Mr Somerville and Ms Pringle-Stuart and Mr Horsbough questioning the claimant regarding the various inserts in the notebook. The notes of the meeting record Ms Pringle-Stewart stating (bundle page 444 paragraph 19) *“The notebook seems to go chronologically through records of meetings or phone calls from 2009 to 2012 with the place and date of each meeting noted at the top of most pages”.* Ms Pringle-Stuart acknowledged in evidence that this was incorrect, but appears to be the basis for her subsequent conclusion that many of the offending inserts in the notebook occurred well before any illness/disability arose on the part of the claimant.
- 6.55 The note of the meeting records that the claimant in questioning from Mr Somerville stated that he would not have wanted work colleagues to see the contents and stated *“I want to say I am very sorry for all of this I was out of my mind”.*
- 6.56 The panel then retired, and at paragraph 24 of the note of the meeting (bundle page 445) records the panel’s conclusion:

“Panel found enough factual evidence that KF was guilty of gross misconduct on the basis that the employment relationship had broken down, insofar as on a risk basis there was a real possibility that his actions could bring the organisation into disrepute; as well as causing loss, damage and injury through serious negligence in his acts and the impact that these had on fellow team members.

The panel considered that the mitigation statement did not outweigh the seriousness of the offences and additionally felt there was enough doubt around the chronology of the notebook; it was felt that some of the drawings and texts were written prior to long-term sickness circumstances; this was then outside the period of the mitigating circumstances. In arriving at this conclusion the panel also noted that from sometime in 2012 onwards X was no longer a primary point of contact at EA for the Tide Gauge Contract; having moved onto another role certainly by 2013. This tended to point at a date around 2012 for that entry. It appeared from what KF had said that he doodled in notebooks during meetings or when on calls. These notebook could have been accidentally viewed by contacts if dropped or glanced at.

The panel considered the apology offered by KF around how his actions might have affected other team members but felt that this did not demonstrate insight or regard for how his actions may have impacted on the team”.

- 6.57 The panel then returned and informed the claimant that on the evidence presented there was enough evidence for gross misconduct *“as it was considered serious enough that the employment relationship is irretrievably damaged through two circumstances:*

“Firstly, the risk of bringing the Organisation into disrepute and

secondly through causing loss damage or injury through serious negligence (in so much as his actions might impact upon the mental health and emotional wellbeing of other members of his team)”.



- 6.58 He was informed that he was to be summarily dismissed and had a right of appeal.
- 6.59 Ms Pringle-Stuart in her oral evidence elaborated upon her thought processes. She stated to the Tribunal her view that the claimant's repeated references to his wife's illness and his own illness were not explanations for his conduct (regarding the notebook contents), further, that she did not believe that the claimant was advancing such a case for his actions before her, but rather as an explanation of the absence of recollection of such events and his upset during the course of the hearing, although she acknowledged that this was not based upon any medical assessment or opinion. It should be noted that Dr Clark was not appraised of the notebook entries or asked as to whether the claimant's health afforded an explanation for the inappropriate inserts in the notebook.
- 6.60 Ms Pringle-Stuart in evidence went further and expressed the view that the claimant's mental illness had no relevance to the issues, as Dr Clark had signed him fit to return to work and that if mental health concerns were apparent she felt certain that Dr Clark would have mentioned this in the report.
- 6.61 Of relevance to the panel's conclusions was an obscure entry in the notebook (bundle page 723W) relating to a lyric from a song which referred to X which concerned a reference at the top of the insert "*TETNEY Goxhil not looked at yet\_ Lymington sent datum problems sorted now.*" Ms Pringle-Stuart in evidence indicated that it appears that Mr Horsburgh believed the note related to a meeting in 2012 when he and the claimant had a meeting with X. This conclusion therefore supported the panel's view that the inappropriate entries preceded any element of illness or disability suffered by the claimant. This information is not noted in the note of the meeting. Ms Pringle-Stuart alleged that this telling piece of evidence is reflected in paragraphs 19 and 20 of the minutes (bundle page 444). We have read the contents of the minute, and it is clear general questions as to time were put to the claimant, but no definitive assertion is recorded that the note was made in 2012 beyond what we have already noted. We have noted Ms Pringle-Stuart erroneous observation that the notebook seemed to go chronologically through records of meetings or phone calls from 2009 – 2012. The note does not record as one might have expected such telling information from Mr Horsburgh. We are not satisfied that this allegedly crucial evidence was not brought to the attention of the claimant, affording him any opportunity to respond.
- 6.62 Ms Pringle-Stuart in evidence stated that the questioning of the claimant by Mr Somerville reached a state which appeared to be aggressive and making the claimant even more distressed to the extent that she had to intervene to stop further questioning. This surprisingly is not noted in the note of the meeting.
- 6.63 Following the meeting and on the same day, Ms Pringle-Stuart wrote to the claimant (bundle page 447) confirming his dismissal for gross misconduct which could not be overlooked, stating that the conduct

amounted to gross misconduct under the Research Council Disciplinary Policy Section 2.3 which states:

“Gross misconduct applies to those offences which have been considered serious enough that the employment relationship is irretrievably damaged making any further working relationship and/or trust between the employee and the Research Council impossible”.

- 6.64 She confirmed that he was summarily dismissed with effect from 21 July and informed him that he had a right to appeal the decision in writing within seven working days of receipt of the letter setting out the grounds for appeal. The letter did not recite the rationale behind the conclusion that the employment relationship had irretrievably broken down.
- 6.65 On 23 July 2015 the claimant wrote to Ms Pringle-Stuart (bundle page 458) indicating that he had been advised in order to prepare grounds of appeal that he needed a copy of the minutes of the disciplinary hearing and requested the same as well as a short extension in order to prepare for his appeal.
- 6.66 On 5 August 2015 Kevin Horsburgh, panel member emailed Ms Pringle-Stuart (bundle page 478) confirming the accuracy of the note of the disciplinary hearing and stated *“as a factual record they are complete. I suspect there is no place for opinion or subjectivity in this process, unless it be germane to any appeal I would have to add during the questions recorded by points 18, 19, 20 KF did not appear – to me – to be in a lucid state. However, conclusions reached by the panel would have been reached nonetheless on the facts and chronology alone.”*
- 6.67 It is proper to observe, although not noted in the note of the disciplinary hearing, that the claimant was showing signs of distress throughout the hearing. Ms Pringle-Stuart in evidence stated that the claimant was *“showing signs of difficulty in focussing, answering questions. I did ask a number of times if he understood what was said to him. Repeated things a number of times. He was upset I allowed a number of recesses I kept an eye on him throughout. I asked about his health and ability to continue throughout the hearing. He assured me though finding it difficult to talk wanted to continue therefore we buddied him with Julie Ledder”*. In relation to this latter point it appears that Ms Ledder was appointed the day before to support the claimant. It was at this stage as recited earlier that Ms Pringle-Stuart stopped Mr Somerville from continuing his questioning of the claimant.
- 6.68 On 15 August 2015 the claimant sent a notice of appeal to Professor Hill Executive Director of National Oceanography Centre (bundle page 510), which recited five grounds of appeal namely:

“The way the investigation proceeded was prosecutorial not investigative. As a consequence Research Council processes were not followed.

The evidence used during the process was not appropriately tested and as a consequence was incomplete, misleading and did not support the decision made.

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That the decision that was taken was not based on the principles of the Research Council Code of Conduct, or on reliable evidence, and the panel was misled by the investigation report.

That, in any event, the decision that was taken to summarily dismiss was too harsh.

That mitigating circumstances were not being appropriately taken into account”.

The claimant attached a statement reciting more details of each of the five areas of appeal together with additional evidence.

- 6.69 The claimant’s notice of appeal was acknowledged and arrangements were subsequently made for an appeal to be heard on 14 September 2015 before Professor Hill Executive Director.
- 6.70 The claimant was accompanied by an independent supporter and friend David Larkman. The management panel in attendance to respond to the appeal comprised of Ms Pringle-Stuart and Kevin Forshaw. In the course of the hearing evidence was received from Jill Burgess and Lisa Eastwood via video link.
- 6.71 The note of the hearing (bundle page 573 – 584) records that Professor Hill explained that he was there to investigate the outcome of the disciplinary hearing and to determine if the outcome was correct. The parties before the Tribunal acknowledged this in essence was an appeal by way of review rather than a rehearing. Mr Larkman then read out on behalf of the claimant the various appeal statements. Paragraph 9 of the note records Professor Hill asking the claimant to confirm that the doodles were drawn in the summer of 2014 which he duly did. Professor Hill then raised questions concerning the claimant contending that he was not responsible for the notebook getting into an open environment, and then spent sometime investigating with Mr Forshaw the timing of the finding of the notebook.
- 6.72 Professor Hill reviewed the management panel statement that the doodles posed a risk to the respondent in the event that they were viewed by others and asked the claimant if he accepted that there was a risk to which Mr Larkman stated that it was a hypothetical question as it never left the respondent.
- 6.73 The note reveals that Professor Hill questioned the management panel Ms Pringle-Stuart and Kevin Forshaw in particular in respect of the suggestion that the suspension letter of 21 May implied that the claimant had been found guilty of drawing offensive, degrading, sexual and violent contents before any process had been initiated. Ms Pringle-Stuart indicated that it was a communication/typographical error. Questions were then addressed as to when the notebook was found and how, and the timeline from Mr Forshaw receiving the notebook on 15 May to the claimant’s suspension on 21 May.
- 6.74 Professor Hill enquired about the appendices to the investigation pack, and Ms Pringle-Stuart indicated that the appendices containing the transcripts were removed because they were not deemed appropriate

and therefore neither the claimant or the disciplinary panel had the transcripts of the witness interviews conducted by Mr Somerville. Kevin Forshaw was asked about the motivation for disciplinary action from management and whether or not Ms Burgess and Ms Eastwood were motivated by the claimant's difficulties in the office rather than concerns regarding the notebook entries. Mr Forshaw indicated that he judged that these were separate issues.

- 6.75 Professor Hill then asked questions of the management panel concerning the allegations of misapplication of the Council's disciplinary policy and in particular how they addressed the other issues contained in the Somerville report. Ms Pringle-Stuart indicated that they had been steered away from considering these additional matters by Mr Somerville.
- 6.76 Professor Hill questioned the verdict of gross misconduct and the suggestion that the penalty had been too harsh. Ms Pringle-Stuart was asked about the evidence of who had been affected in terms of distress caused the note records "*JPS stated that the disciplinary panel asked KF many times during the disciplinary hearing regarding his understanding of how the images in the notebook could have impacted his colleagues*". We infer that Ms Pringle-Stuart was therefore merely recording the claimant's acknowledgement that they could well have been disturbed. The nature of the actual distress was not articulated.
- 6.77 Professor Hill asked Ms Pringle-Stuart of any risk of the notebook being seen by one of their clients, and she confirmed one contract could be affected which was worth a considerable sum of money to the respondent. He also asked what attention was paid to the mitigating circumstances and the fact that the claimant had eighteen years service with no disciplinary action or performance related issues levelled against him. Ms Pringle-Stuart confirmed that this was the case Ms Pringle-Stuart did not respond to the question regarding the application of mitigation.
- 6.78 Relevant to timing Professor Hill questioned the case made by the claimant that no timeline could be established from the doodles notwithstanding Mr Somerville trying to establish a timeline and motivation for the doodles with the claimant. In relation to the potential customer referenced X who had changed roles in 2012 the note records Professor Hill asking Ms Pringle-Stuart "*if it was possible as stated in the statement by KF that the doodles could have been drawn in the summer of 2014*". JPS stated even if it had been 2014 is would not have excused or explained the images drawn in the notebook.. We observe that Ms Pringle-Stuart did not inform Professor Hill of the apparent conclusive evidence proffered apparently by Mr Horsburgh to the effect that doodles were unequivocally linked to a meeting with X in 2012.
- 6.79 Professor Hill (paragraph 66) enquired how Ms Pringle-Stuart decided that the doodles were a tangible representation of what was in the claimant's head at the time and if they were qualified to make the statement, to which Ms Pringle-Stuart indicated that she had studied

psychology at University.

- 6.80 Ms Burgess was then called to give evidence via video link. Professor Hill asked her if the claimant were to return to work would she be able to rebuild the relationship and move on to which she stated that she didn't think she could, thinking about what was going through the claimant's head sitting next to him would upset her. Professor Hill indicated that the claimant had expressed some remorse and offered to make apologies and asked if it would make any difference to which Ms Burgess indicated it would not change how she felt the impact had on her.
- 6.81 Ms Eastwood was then called and after being asked how she made her witness statement was asked about her feelings towards the claimant. She indicated that she felt the claimant was unpredictable (paragraph 114) and the contents were nasty and violent. She was asked if he returned to work would she be able to build a relationship with him in due course and put matters behind her and move on. The note records "*she didn't know*". In a previous statement she had said "*yes but without KF in the office it is a nicer environment, got on with things much better since KF has been away*". She stated she would find it hard if he came back to the office and be on her own in the office with him. Professor Hill stated that the claimant had expressed some remorse and offered to apologise and asked Ms Eastwood if that would help. She stated that she did not know (paragraph 116). The appeal then ended with Professor Hill indicating he would make a decision within five days and inform the claimant accordingly.
- 6.82 By letter dated 21 September 2015 Professor Hill wrote to the claimant (bundle page 622) to inform him that having considered all representations he concluded that the decision to dismiss him on the grounds of gross misconduct was appropriate. He referred to an appendix (bundle page 611) which recited his reasoning. The note records material facts which were not in dispute namely that the claimant had created the material in question in the workplace using Research Council property and that it had been kept in the workplace. He referred to the fact that the material included inappropriate wording connected to X. Notwithstanding the lengthy enquiry during the appeal hearing he concluded that the precise means and timing by which the notebook moved from the claimant's desk drawer to a more public place was not relevant due to the very presence of the document in the workplace in the first place. There was the possibility that the material would eventually come to light. He indicated that the motivation of those who instigated the disciplinary process by escalating the matter to senior manager were not relevant and concluded that they had all acted appropriately and correctly. He concluded the fact that producing and keeping material in the workplace was negligent on the part of the claimant because of the inherent risk that material would come to light and there would be consequences. "*As a result of these actions the disciplinary panel judged that the employment relationship (trust confidence and working relationships) between the Research Council and the individual was irretrievably damaged due to the ongoing risk that had been posed to NOC's reputation, the impact on colleagues and the lack of respect*"

*demonstrated towards clients”.*

6.83 The note expressed concern that the claimant during the disciplinary and appeal had not demonstrated that he had taken full responsibility for the consequences of his actions. *“Despite offers of apology (eg letter of 31 August) he has continued to seek to limit the extent of his responsibility by citing his lack of intent and the keeping of the notebook in his desk (eg statement offered at appeal hearing). Instead he has sought to shift responsibility to others for the emergence of the material into a public place and the downstream consequences thereof. He has shown little insight or regard for the impact on colleagues. Instead he has questioned the true extent of the effect on female colleagues and of others to judge that impact; the motives for the disciplinary action. He has shown little appreciation of the ongoing risk posed to NOC, being content to claim no actual reputational financial damage to NOC has occurred”.* Whilst noting not all the mitigation had been considered by the disciplinary panel, he nonetheless concluded the finding of gross misconduct should be upheld.

6.84 Professor Hill in the course of his evidence to the Tribunal clarified his thought processes. He judged the evidence of chronology of events going back to 2012 to be unreliable, and was prepared to accept that they were drawn in 2014. He informed the Tribunal that he appreciated (unlike Ms Pringle-Stuart) that the claimant was alleging that his illness caused him to create the offending contents in a notebook. In response to a question as to why therefore, he did not obtain medical evidence before upholding the decision to dismiss his response was *“the reason for this was clear. The decision I made upholding the disciplinary was not contingent on medical evidence”.* He indicated that it was not necessary to seek medical evidence relating to the link between the claimant’s illness and the making of the drawings as it was accepted that his judgment may have been impaired by his illness in 2014, and accepted that the images were created at the time when *“I already knew the seriousness of the claimant’s condition”* although at this time it was not seen by the respondent as a disability. He therefore based his decision to dismiss the appeal on the basis of upset to colleagues and the fact that the claimant was not accepting ownership, or showing insight into the consequences of his action. We have to say that Professor Hill’s oral testimony recorded above bears no relationship to his statement or the content of the note attached to the appeal rejection letter.

### **Submissions**

7. Both representatives made written submissions. In view of the nature of the detailed submissions we judge it would be a disservice to attempt to precis their submissions but bear them fully in mind.

### **The Law**

8. The starting point in relation to a case of this nature are the statutory provisions. In relation to unfair dismissal they are contained within Section

98 of the Employment Rights Act 1996 which states:

“(1) in determining for the purpose 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.
- (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

- (a) ...
- (b) Relates to the conduct of the employee...

.....

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

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

9. When addressing Section 98 the Tribunal will always have regard to the well known authority of **British Home Stores Ltd v Burchell** [1978] IRLR 379 which indicates that in determining whether the dismissal of the an employee is fair or unfair a Tribunal must decide whether the employer who discharged the employee on the ground of misconduct entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. The case indicates that this involves three elements, firstly there must be established by the employer the fact of the belief; that the employer did believe it. Secondly, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief, and finally the employer at the stage at which he formed that belief on those grounds, he must have carried out as much investigation into the matters as was reasonable in all the circumstances of the case. Further helpful guidance is contained and set out in the judgment of Mr Justice Browne-Wilkinson in *Iceland Frozen Foods v James* [1983] ICR 17 at page 24 in respect of the predecessor to the 1996 Act in which he stated:

“We consider that the authority establishes that in law the correct approach for the industrial Tribunal to adopt in answering the question posed by Section 57(3) of the Act 1978 is as follows:

- (1) The starting point should always be the words of Section 57(3) themselves;
- (2) In applying the Section an industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial Tribunal) consider the dismissal to be fair;
- (3) In judging the reasonableness of the employer's conduct an industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

- (4) In many cases not all cases there is a band of reasonable responses to the employees conduct within which one employer might reasonably take one view, another quite reasonably take another;
- (5) The function of the industrial Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair, if the dismissal falls outside the band it is unfair”.

10. In relation to the issue of substitution recited in the Judgment of Brown-Wilkinson J above the Court of Appeal Authority of **New Bound v Thames Water Utilities** [2015] EWCA Civ 677 provides helpful guidance. In the judgment Bean LJ stated:

“60 The fairness of a dismissal falls to be judged on the basis of the facts known to the employer at the time of the decision to dismissal (*Devis v Atkins* [1977] ICR 662, HL). Hence Mummery LJ’s observation in *Small* about the claimant who comes to the Tribunal with more evidence in an attempt to clear his name. In the present case there was no material evidence placed before the Tribunal which has not been available to Thames Water Management at the time of the decision to dismiss.

61 The “band of reasonable responses” has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook Sections 98(4)(b) of the 1996 Act which directs Employment Tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss “in accordance with equity and the substantial merits of the case”.

62 This provision originally contained in Section 24(6) of the Industrial Relations Act 1971, indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend Tribunal’s consideration of a case of this kind to be a matter of procedural box ticking. As EJ Bedeau noted, “*an employment Tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer*”. The Authority recited as an example amongst decisions of this Court was *Bowater v North West London Hospital NHS Trust* [2011] IRLR where Stanley Burnton LJ said:

“The appellant’s conduct was rightly made the subject of disciplinary action. It is right that the ET, the EAT in this Court should respect the opinions of the experienced professionals who decided that summary dismissal was appropriate. However, having done so, it was for the ET to decide whether their views represented a reasonable response to the appellant’s conduct. It did so. In agreement with the majority of the ET I consider that summary dismissal was wholly unreasonable in the circumstances of this case”.

11. The relevant provisions regarding contributory fault are to be found in the following provisions of the Employment Rights Act 1996:

**Section 122 basic award reductions**

...

“(2) Where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly”.

**Section 123 Compensatory Award**

(1) subject to the provisions of this Section and Sections 124 [124a and 126], amount



of compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

.....

(6) Where the Tribunal finds that the dismissal was to an extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding”.

12. It has been acknowledged that the action of the complainant to justify reduction has to be “culpable” or “blameworthy” (see *Nelson v BBC* (2) [1980] ICR 110) and such conduct must be causative of the dismissal.
13. We also refer to **Laws v London Chronicle [Indicator Newspapers) Ltd** [1959] 1WLR 698 Court of Appeal Authority that to constitute gross misconduct amounting to repudiatory breach, the employee’s behaviour must disclose a deliberate intention or wilful contradiction of the contractual terms. A review of the case law in relation to gross misconduct is to be found in the EAT decision of **Burdette v Aviva Employment Services** 0439/13 where Her Honour Judge Eady QC recites the authorities relevant to this issue.
14. The relevant provisions of the Equality Act 2010 are recited in the following Sections:

**“15 Discrimination arising from disability**

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

- (a) A treats B unfavourably because of something arising in consequence of B’s disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

**20 Duty to make adjustments**

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this Section, Sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duties imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement where a provision, criterion or practice of (A’s) 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 reasonable to have to take to avoid the disadvantage.

**Schedule 8 Part 3 Limitations on the duty**

**20 Lack of knowledge of disability**

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know:

- (a) ...
- (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first ....requirement”.

## Conclusions

15. We first address the issue of disability. The respondent has conceded that the claimant was disabled within the meaning of Section 6 of the Equality Act 2010 from December 2013. The issue between the parties is as to when the respondent had knowledge or could have reasonably been expected to know that the claimant was disabled.
16. In our findings we have referred to the Occupational Health report of 8 August 2014 which indicated that the claimant had noticed the onset of predominantly anxiety symptoms over the last twelve months, and addressed concerns that the claimant’s elevated levels of symptoms had not been adequately treated at the present time and therefore was referring him back to his GP. In his report he indicated that it may be likely with this condition being of longstanding duration and the associated impact, that the claimant may meet the provisions of the Equality Act 2010 in respect of disability.
17. We have referred to the various meetings the claimant had with Ms Ledder, who was informed of various counselling sessions that were taking place and she recorded the need to support the claimant especially now that he was living on his own. We have referred to Dr Clark’s report on 11 February 2015 that the medication of Mirtazepine *“is an anti-depressant drug that is used particularly when anxiety is a major part of the medical condition”*. We have noted that the claimant had significant periods of absence from 2013 to May 2014 associated with anxiety and stress. We also recorded following, the meeting on 12 December 2014 that Ms Hibberd had an inkling that the claimant by then was disabled, and was the prompt to refer him to Occupational Health. On the above evidence we are satisfied that the respondent knew or ought reasonably to have known that the claimant was disabled as at December 2014.
18. We now address the complaint of unfair dismissal. We first address the investigation process. We have commented upon the content of the first letter of suspension which expressed the view that the contents of the notebook were offensive, degrading, sexual and violent, which was hurriedly amended in a subsequent letter of suspension. There is an prejudice that can be discerned from this letter as well as the referral to Mr Somerville, where the respondent stated that *“it considers the content of the notebook is professionally causing the breakdown of trust in Mr Ferguson and potentially gross misconduct”*.
19. Our findings reveal concerns about the Somerville report. The report expresses opinions and conclusions that the panel might wish to make. It expressed conclusions on the credibility of the witnesses: in respect of those that were likely to be called for the respondent that they were credible; and in relation to the claimant expressing the view that the claimant’s answers *“did not appear genuine”*. He used selective extracts

from the transcript in his report and the appendices to the report failed to enclose the transcriptions of lengthy interviews he held with witnesses, that would have afforded context in understanding the brief comments that he did include in his report and in his draft witness statements. Save for selected comments the transcript of the claimant's interview and his explanations for the contents of the notebook were not supplied or annexed to his report nor was any witness statement prepared to explain the claimant's position. Mr Somerville failed to record the claimant's case in its totality, and in his report indicated that he was preferring to offer a facility for a response only at the hearing when a panel would already have read and understood the case advanced against the claimant by the respondent.

20. In our findings paragraphs 6.33 – 6-46 we have recited, comments which reveal partiality and conclusions reached, or at best, conclusions that might be reached which were for the disciplinary panel and not the investigating officer to make, which we have found disturbing. We observe that the claimant and indeed the panel did not have sight of the transcripts of interviews of witnesses until the initiation of these proceedings, despite assurances from Mr Somerville to the claimant during the interview (bundle page 726) that he would be provided with the recordings but at the very least the claimant would receive the transcript of the recordings so that if there was anything he disagreed with he would be able to challenge it. We have also recorded that Ms Eastwood's retraction of her suggestion that if the claimant returned she would leave, was not referenced in Mr Somerville's report as had been promised by him.
21. We now turn to the disciplinary hearing. We have noted that the invitation to the hearing indicated that the issues of gross misconduct would be addressed in the context of the claimant's entries in the notebook. We have recorded that the Ms Pringle-Stuart at the outset of the disciplinary hearing indicated she was going to determine whether the claimant had brought the institution into disrepute and damaged or presented risk of damaging health and safety of other employers. This was contrary to what the claimant was informed in his letter of invitation to the disciplinary hearing. We are satisfied that it plainly took the claimant by surprise and is the more concerning bearing in mind the observations made by Ms Pringle-Stuart in her evidence to the Tribunal and from Mr Horsburgh in his email to Ms Pringle-Stuart that the claimant was distressed,, did not appear to be in a lucid state, showed signs of difficulty in focussing and answering questions and repeated things a number of times. We take into account the fact that Mr Somerville did express views on the wider matters beyond his remit but nonetheless the letter of invitation to the hearing limited the disciplinary hearing only to the contents of the notebook as constituting gross misconduct. This we judge, was a serious failing in the disciplinary process.
22. It is clear from the documentation provided by the claimant and on his behalf at the disciplinary hearing that he attributed the inappropriate inserts in the notebook to his poor mental state of health, and general personal circumstances. The panel were apprised of his absences through illness yet no medical reports occupational or otherwise were provided. This we find would be relevant to motive on the part of the claimant and an explanation of what appears to have been out of character actions on his part. We find it surprising that Ms Pringle-Stuart did not call for such documentation as was in the possession of the respondent, or alternatively

for independent medical evidence. Failure to do so may be explained by the fact that the note of the disciplinary hearing (bundle page 441) reveals that when matters moved to the claimant's sickness absence and home visits by managers, Mr Somerville explained that he did not want to stray away from the reasons for the disciplinary. This we judge should not have prevented the disciplinary panel from seeking out in the light of what the claimant was contending were medical issues affecting his actions/efficiency at the time. Further, the comments that we observed in relation to the Somerville report in general should have been realised by the panel when reading the report themselves.

23. We address the conclusions of the disciplinary panel. The dismissal letter articulates the reasoning behind the heading of gross misconduct by reference to Section 2.3 of the Gross Misconduct Policy which refers to matters considered serious enough for the employment relationship to have been irretrievably damaged and making any further working relationships impossible. Ms Pringle-Stuart in her evidence indicated that the decision was taken upon the basis that some of the images were not drawn in the summer of 2014, that the claimant had displayed a general lack of ownership in respect of the drawings, and also the impact of the claimants' actions on others.
24. We address those matters sequentially. We have to say that we have found Ms Pringle-Stuart's evidence confusing. In her evidence written and oral before the Tribunal she was at pains to conclude that the claimant was not suggesting that his health and personal circumstances caused him to create the entries in the notebook. However the relevance of seeking to establish that images were drawn before the summer of 2014 plainly was to show that they could not have been created when the claimant was in poor health, and therefore enabling the panel to discount that ill health/disability had a connection with the notebook inserts. We are satisfied that Ms Pringle-Stuart knew perfectly well that the claimant was alleging as is apparent from his various statements that his actions were referable to his ill health/disability. The central basis for the conclusion reached that these drawings must have been completed prior to any illness is based upon the entry (bundle page 723W), which our findings reveal was something never put to the claimant to comment upon. In view of the obscure nature of the insert, relying upon the conclusion of Mr Horsburgh concerning a meeting that went back to September 2012 without calling upon the claimant to comment, we judge to be seriously flawed. The matters was further compounded in the light of Ms Pringle-Stuart's erroneous comment that there was a date on most of the pages which prompted the conclusion that the drawings had been completed prior to any illness in 2014. The conclusions in relation to this part of the decision making we find, were flawed as was found to be the case by Professor Hill on appeal.
25. The second issue relied upon in the decision making was the "*general lack of ownership from Kevin*". In our findings we have inserted just a few of the instances when the claimant has expressed his regret and fulsome apologies to his colleagues and others for any upset that may have occurred on occasions. At no time did he deny that they were his drawings. What he did say was that he had no recollection of the circumstances which prompted him to make such drawings. The only basis upon which it had been articulated that the claimant was not taking responsibility for his

actions were the various attempts he made by way of mitigation to show that the damage may not have been as serious as might have been the case, namely; that this was not disclosed beyond the respondent, which was a fact; or that there may have been ulterior motives in others to bring this notebook to the attention of management, a fair comment given the unquestioned friction in the office prior to the notebook being found; the claimant's suggestion that the notebook should not have been shown to Jill Burgess in the first place; and that he had every reason to believe that save for possible improper action by others, the notebook would have remained at all times concealed within his drawer.

26. These comments/explanations address, we judge, mitigation in the context of what could have been serious consequences, but does not minimise his acknowledgement and acceptance and contrition for his actions and any effect his actions may have had on other parties. It is to be remembered that the claimant was after all fighting for his employment. We have to say that the panel's conclusions in this regard in the light of the multiple expressions of contrition we have looked at to be surprising.
27. The next limb of the decision relating to the impact on colleagues related to their health and wellbeing. There was no evidence at the time to suggest that other members of staff's health or wellbeing would be at risk, the more so as Mr Somerville in his report (bundle page 283) indicated that there was no evidence that the content was linked to any of the claimant's colleagues "*none of the witnesses consider that there was any link*". We have recited the comments made by Mr Bell, Ms Burgess and Ms Eastwood contained within the Somerville report. Whilst noting that Mr Somerville invited the panel to ignore their comments, they plainly did take them into account. We find however that the contents were not sufficient at that stage to reach a conclusion that there was an irretrievable breakdown in the working relationship in the Liverpool office that could not be changed or improved upon. Dr Clark raised this in his report of 17 May 2015, where he suggested assistance from HR to assist and facilitate the claimant's communication with his work colleagues. This was we judge especially so if they were acquainted with the opinion of Dr Clark that his inappropriate behaviour up to January 2015 was related to an illness which was unlikely to recur. We address this further in our conclusions relating to the disability issues. We also have regard to Miss Hibberd's opinion that the claimant's actions in the office at the time did not warrant anything more than informal action.
28. We have commented upon the absence of medical evidence for the disciplinary hearing and the fact that Ms Pringle-Stuart did not call for such medical information. Ms Pringle-Stuart in her evidence did not see the relevance for this as the claimant had been certified fit to return to work by Dr Clark a doctor she had previous professional dealings with on other occasions. She was confident that Dr Clark would not certify someone as fit to return if there were underlying mental health issues. This rationale however, misses the point that the state of health of the claimant at the time the disciplinary hearing was not the issue, but rather his state of health at the time the offensive drawings were made. The absence of any further medical enquiry in light of what the claimant was plainly telling the panel, we judge was a further flaw in the process.

29. In addition to the above matters it is clear from the powerful evidence of Ms Pringle-Stuart and Mr Horsburgh in his email to Ms Pringle-Stuart, that the claimant was not in a fit state to properly conduct his defence at the time. We judge in view of the seriousness of the hearing, that they should have taken action to adjourn the hearing, irrespective of any resistance that there may have been from the claimant.
30. What are the conclusion to be drawn from the above? We remind ourselves of the perils of substitution as recited in the authorities we have referred to. The question to be determined is as to whether the dismissal at first instance fell within the band of reasonable responses where one employer might reasonably take one view and another quite reasonably take another.
31. Having regard to the above matters, we judge that the investigation report and the decision making process fell outside the band of reasonable responses. In the context of an employee of senior standing with no previous disciplinary record against him, with a background of acknowledged illness (whether or not the respondent recognised it as a disability at the time), and the tragic personal circumstances at the time (the claimant's wife did in fact die in October 2015) we judge makes the panel's decision to dismiss plainly unfair.
32. We note that the appeal was by way of a review. We have found Professor Hill's evidence also confusing. We have recorded his oral evidence before the Tribunal which recites specific matters relating to his thought processes, that were not reflected in his statement. Professor Hill candidly acknowledged in questioning, that the drawings he concluded could well have been created in 2014 and that the claimant's judgment may have been impaired at the time by what he already knew was the seriousness of the claimant's condition. With such appreciation he confirmed that he based his conclusion on the basis of upset and effect upon colleagues, and the fact that the claimant had not accepted ownership or shown insight into the consequences of his action.
33. In respect of the latter point Professor Hill was adopting the same view as was taken by the disciplinary panel. For the same reasons recited in respect of the disciplinary panel's view, we judge that was unfair and not a realistic and proper assessment to make of what the claimant was saying.
34. In relation to the effect upon colleagues, this was based upon the contents of the Somerville report and the brief comments made by Ms Burgess and Ms Eastwood via video link as recited in our findings. Neither Ms Burgess or Ms Eastwood appear to have been acquainted with the fact the claimants' behaviour up to January 2015 were the consequence of anxiety, depression and alcohol misuse and not likely to recur, and that there may be scope for mediation with a view to improving the relationship as suggested by Dr Clark in May 2015. To reach conclusions of irretrievable breakdown in the absence of further information being imparted to Ms Burgess and Ms Eastwood regarding the claimant's health (with the claimant's permission) and the investigation into potential mediation, especially when no one had ever considered the drawings or comments within the notebook related to either Ms Burgess or Ms Eastwood, the Tribunal judges to be a wholly premature conclusion.

35. Professor Hill was alerted to the suggestion that Ms Burgess and Ms Eastwood may have had ulterior motives in not wishing the claimant to return, which may have related to the claimant's conduct generally in the office prior to January 2015. In evidence, he indicated that he did not consider this relevant, although on further reflection he acknowledged that it may have had some relevance. We judge this to be a matter that needed further investigation the more so as the claimant had indicated that following the claimant being suspended in January 2015 Ms Burgess and Ms Eastwood had enjoyed working in an office without him and therefore reasons unrelated to the notebook may well have been considerations affecting their responses.
36. Given that Professor Hill's acknowledgment that the creation of the images were potentially done at a period of stress/mental illness when the claimant's judgment may have been impaired we do not understand the basis upon which it was concluded that it was proper to summarily dismiss the claimant at that stage, when attempts to improve the relationship had not ever been considered.
37. We do not find that the appeal process remedied the defects noted in relation to the disciplinary process. Based solely upon the conclusions reached by Professor Hill alone, we judge the sanction of dismissal fell itself outside the band of reasonable responses of a reasonable employer. In the context of an employee of nineteen years service with no disciplinary record recorded against him, in respect of conduct which was believed to be the product of impaired judgment during a period of mental illness.
38. For all the above reasons we find the claimant was unfairly dismissed.
39. We now address the complaint of disability discrimination. We address firstly, the complaint under Section 15 of discrimination arising out of disability. There is an issue between the parties as to whether there is evidence of a causal link between the claimant's disability and the creation of the notebook entries. We have heard evidence from the claimant concerning his belief that these drawing were created in 2014 when it is acknowledged he was disabled by reason of suffering from depression. We are satisfied from the documentation and responses made by the claimant that he was indeed contending this inappropriate behaviour on his part was because of his poor state of health which is accepted to constitute a disability at the relevant time. We have received no proper evidence to contradict this. The claimant's case is in large measure supported by Dr Clark in his report in May 2015 when he commented that his behaviour and work up to January 2015 was the consequence of his anxiety, depression and alcohol misuse and is not likely to recur. The behaviour referred to was uncharacteristic disinhibited behaviour of irritability and difficulty with his work colleagues in the office, failing to report absences generally, failure to co-operate with the respondent. Mr French-Williams contended that there is no medical evidence to link the drawings with the claimant's disability. Given that the claimant had a history of doodles and drawings in notebooks we are satisfied on the balance of probabilities that the inappropriate inserts in the notebook was another manifestation of uncharacteristic disinhibited behaviour and conduct which Dr Clark observed were a consequence in essence of his depression. We have recorded that even Mr Forshaw at an

early stage was alert to the possibility that there could be a link between the notebook entries and the claimant's mental state at the time..

40. It necessarily follows that we are satisfied that the circumstances namely the inappropriate inserts in the notebook which resulted in his dismissal arose in consequence of the claimant's disability. We have already found that the respondent had the requisite knowledge of such disability at the time.
41. Does the respondent establish that this was a proportionate means of achieving a legitimate aim? The response alleged that the legitimate aim was the seeking to uphold its duty of care towards its employees, to provide a safe place of work where employers are free from harassment, discrimination and intimidation. We agree with Ms Bowen that we have received no evidence of the claimant was posing such a threat in the workplace. Indeed, even Mr Somerville in his report acknowledged that there was no evidence that the content of the notebook were ever directed to any of the staff in Liverpool, nor did the relevant women in the office think it was directed towards them. Assuming for a moment that the respondent was able to establish a legitimate aim there was no evidence to suggest that the sanction of dismissal was a proportionate means of addressing such concern the more so when their own Occupational Health was of the opinion that the claimant's behaviour up to January 2015 related in large measure to his depression and was unlikely to recur. It is proper to record that in relation to office problems Ms Hibberd judged that this could properly be addressed informally. The sanction, therefore, of dismissal when alternatives suggested by Dr Clark had not even been considered would have prompted the Tribunal to conclude that the sanction of dismissal was not proportionate. We therefore find the claimant establishes his complaint under Section 15.
42. We now turn to the complaint of discrimination pursuant to Sections 20 and 21 of the Equality Act 2010. We address this matter quite shortly. The PCPs relied upon are recited in paragraph 12 of the claimant's claim form:
  - (a) The criteria applied by the respondent when determining which matters are sufficiently grave to warrant dismissal.
  - (b) The practice of not obtaining medical advice in relation to disabled employees or, an employee who might be disabled in relation to mitigation or explanation.
  - (c) The PCP of treating as a disciplinary matter which is plainly one related to serious mental impairment thereby causing distress.
43. The Tribunal heard no direct evidence from the parties on this matter which was addressed only in closing written submissions. We found the evidence on this matter wholly unsatisfactory. We were not apprised of what criterion was alleged to have been applied which substantially disadvantaged the claimant. We could not see how the practice of not obtaining medical advice constitutes a step to avoid the disadvantage, nor do we see that treating as a disciplinary matter, matters which relate to serious mental impairment constitutes a provision, criterion or practice. In the absence of being presented with a proper articulation of how the case is put, we agree with Mr French-Williams that the claim under this cause of



action is not made out, and therefore we dismiss this complaint.

44. We now address the complaint of wrongful dismissal. In the context of gross misconduct justifying summary dismissal the authorities to which we have been referred to indicate that conduct must have been deliberate and wilful contradiction of the contractual terms or gross negligence. Our findings satisfy us that we do not find that it was wilful or deliberate or constituted gross negligence in the context of something which we find the claimant had no control over at the relevant time. We therefore find that the complaint of wrongful dismissal succeeds.
45. We now address the question of contributory fault. In relation to contributory fault the Nelson case identifies three factors that need to be found. Firstly was the relevant action culpable or blameworthy? Secondly, did it actually cause or contribute to the dismissal? Finally is it just and equitable to reduce the award by a specified amount?
46. Our findings satisfy us that the claimant's actions in respect of the inappropriate inserts in the notebook arose from the claimant's disability, it was as Professor Hill acknowledged occasioned whilst the Judgment of the claimant may have been impaired. In the context of notes recorded in his notebook we find ourselves unable to conclude that this constitutes the necessary ingredient of culpability or blameworthiness in respect of matters which we have already stated he had no control over.
47. We finally address the issue of Polkey. Had a fair process been undertaken would the claimant have been dismissed? We have found this issue quite challenging in view of the singular failure on the part of the respondent to properly undertake potential bridge building as proposed by Dr Clark. Was the failure sufficient for the tribunal to conclude that one cannot sensibly reconstruct the world as is might have been? This exercise requires a degree of speculation. We have indicated that further investigation should have taken place to ascertain as to whether relationships could have been rebuilt taking into account the necessity to acquaint Ms Burgess and Ms Eastwood with the claimant's mental health problems which had been causing difficulties which they had encountered. According to Dr Clark it was unlikely to be repeated in the future. Intervention of HR support and dialogue would doubtless play a part. We have come to the conclusion that it is impossible to say that there was no prospect of the claimant's employment coming to an end on the basis of the working relationship breaking down constituting some other substantial reason. Doing the best we can, we judge that there was a twenty percent chance that the claimant's employment would have ended for the potentially fair reason of some other substantial reason, and that any calculation of compensation should reflect this.
48. In the absence of the parties reaching agreement as to compensation, a remedy hearing has been arranged as recited above.

**Case Number: 1411682/2015**

Employment Judge Kolanko

Date 9 September 2016

RESERVED JUDGMENT & REASONS SENT TO THE  
PARTIES BY E-MAIL ONLY ON 19 September 2016

FOR THE TRIBUNAL OFFICE