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THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs H Matthews	**v**	**Bircham Dyson Bell LLP**

Heard at: London Central

On: 13 – 20 March and 10 and 11 July 2017

Before: Employment Judge Auerbach

Members: Ms L Chung
Mr S Soskin

Representation:

Claimant: In person

Respondent: Ms H Winstone, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The contractual damages claim in respect of bonus is dismissed upon withdrawal.

2. The claims of direct sex discrimination, direct age discrimination and discrimination arising from disability fail and are dismissed.

3. The Claimant was unfairly dismissed.

4. For the reasons set out in the Tribunal's reasons, below, any basic award will fall to be reduced to zero and any compensatory award will fall to be reduced to zero.

REASONS

Introduction

1. The Claim Form was presented on 11 October 2016. The Claimant has throughout been a litigant in person. A Response was entered resisting all the claims on their merits. The Respondent is a limited liability partnership in business as a firm of solicitors. It represented itself in this litigation and at hearings was represented by Ms Winstone of Counsel.

2. There was a preliminary case management hearing before Employment Judge Grewal on 1 December 2016 at which the claims, and the issues to which they gave rise, were, in summary form, identified.

3. At the start of the full merits hearing time was spent discussing and clarifying the claims and the issues and how the hearing would be conducted, bearing in mind that the Claimant is a litigant in person. It was agreed that the list of issues that had been discussed at the PH in December 2016 needed some refinement. In summary, the claims, and issues, are as follows.

4. There is a claim of unfair dismissal. There is no dispute that the Claimant was dismissed. The Respondent's case is that this was a fair dismissal by reason of conduct. The Claimant puts the Respondent to proof as to the reason. She also advances a case that several other reasons were at work. If the Respondent can satisfy the Tribunal that the reason or principal reason was related to conduct, the Claimant says that this was not a fair dismissal in all the circumstances of the case. She identified several particular grounds of unfairness relied upon in relation to process; and it is also her case that in any event dismissal as a sanction was not within the band of reasonable responses in respect of the conduct relied upon. We will return to this in more detail later.

5. Next, the Claimant claims that her dismissal was an act of unlawful discrimination because of something arising in consequence of disability. The earlier list of issues had not accurately captured the issues to which this complaint gave rise. It was agreed that they are as follows.

6. First, there is an issue as to whether the Claimant was, in fact and law, a disabled person at any relevant time. The disability relied upon was described as severe anxiety disorder. In opening discussions Ms Winstone accepted that it would be sufficient to enable the Claimant to surmount this hurdle, were the Tribunal to be satisfied that she was a disabled person at the time of the conduct for which the Respondent says it dismissed her, even if the Tribunal thought that by the time of the dismissal she was no longer disabled. She also acknowledged that an impairment can be treated as long term if it has recurrent effects of the requisite kind, even if those effects are not constantly present.

7. However, the Respondent's case is that the Claimant was not in any event a disabled person at the time of the conduct or the time of dismissal.

8. Secondly, if the Tribunal finds that the Claimant *was* a disabled person at the relevant time, there is then an issue as to whether the Respondent knew or reasonably ought to have known that, at the time of the dismissal.

9. Thirdly, if the Tribunal is also satisfied of that, there is an issue as to whether the conduct for which the Respondent says it dismissed the Claimant arose in consequence of her disability.

10. Finally, if the Tribunal decides all three of the foregoing matters in the Claimant's favour, the Respondent says that the decision to dismiss her was a proportionate means of achieving a legitimate aim. The aim relied upon is, in summary, securing that solicitors employed by the firm conduct themselves in accordance with relevant professional standards.

11. Next, the Claimant also claims that her dismissal was an act of both direct sex discrimination and direct age discrimination. She clarified during the course of the hearing that her case is that the discrimination by reference to sex and age was on the part of Mr Langley, the dismissing officer. She does not contend that the decision taken by Mr Smith, who heard her appeal against dismissal, was influenced by either her sex or her age. When we reconvened on 10 July to hear oral closing submissions the Claimant indicated that she did not recall having stated that position at our earlier hearing in March. However, she also indicated that she did not seek to change her stance, and it remained her position that the complaints of sex and age discrimination were not directed at Mr Smith.

12. In relation to the sex discrimination claim the Claimant relied on two male comparators, as we will describe. In relation to the age discrimination claim she relied only on a hypothetical comparator. However, as we will describe, she also relied upon an earlier episode involving her line manager, Mr Painter, about which there was a factual dispute, as providing circumstantial support for that claim.

13. As at the start of our hearing there was also a live claim that, in breach of contract, the Respondent had failed to pay the Claimant a bonus payment. As a distinct proposition, it was also her case that, should she succeed in one or more of her unfair dismissal and discriminatory dismissal claims, then, in determining any award to compensate her for loss of remuneration, the Tribunal should consider whether, had she *not* been unlawfully dismissed, she would, or might, have gone on to be paid a bonus, and assess the likely amount.

14. The Respondent accepted that, should the Claimant succeed in one or more of the unfair dismissal and discriminatory dismissal claims, this was an exercise in relation to which the Tribunal would potentially then need to engage – although its case as to what the conclusion should be was different from the Claimant's. However, the Respondent maintained that the distinct claim that the

Claimant, having in fact been dismissed, was nevertheless still entitled *contractually* to receive a bonus, was misconceived and should be withdrawn.

15. In fairness to the Claimant as a litigant in person, some time was spent on the first day discussing these points, and the difference between (a) a contractual damages claim in respect of bonus, and (b) arguments about the impact of the possibility that she might have received a bonus, had she not been dismissed, on compensation for unfair and/or discriminatory dismissal. Ms Winstone also indicated that, should the Claimant withdraw the contract claim, the Respondent would not seek its costs in respect of that claim. The Tribunal made clear that it was a matter for the Claimant whether she wished to withdraw or not. The Claimant indicated that she wanted to consider her position overnight. Having done so, on the morning of day two she indicated that, in reliance on Ms Winstone's assurance on the question of costs, she withdrew the contractual bonus claim. That claim was then dismissed upon withdrawal.

16. Finally, in the run up to the hearing, the Claimant had made an application to amend, to add a distinct breach of contract damages complaint in respect of expenses, in the amount, she estimated, of £300. Ms Winstone opposed that application. After hearing argument, and consideration, and for reasons we gave orally, the Tribunal refused the application to amend.

17. It was agreed that we would hear evidence and argument, and then come to a decision, in relation to liability on all the live claims, including the disabled status issue. Depending on our decisions on liability, we would, as part of the same decision, as appropriate, also determine the issue of whether there was contributory conduct on the part of the Claimant. We might also as part of the same decision determine any *Polkey* issues arising (a term that was explained to the Claimant) unless we considered that we should, in fairness, allow an opportunity for further submissions before doing so.

18. However, any remedy issues relating to loss of remuneration (including in relation to the possibility of bonus, had the Claimant been kept on), and as to mitigation, would not be decided at this initial stage. If necessary, a further remedy hearing would have to be convened.

19. We heard live evidence from the Claimant and, for the Respondent, from Janine Biggs, Simon Painter, Richard Langley, Andrew Smith and Ben Saunders. All had produced witness statements (the Claimant had two statements) and were cross-examined. We had a two-volume bundle of documents and opening written submissions from both sides as well as a short chronology and cast list from Ms Winstone. We completed our reading of witness statements and documents on day one and live evidence was completed before lunchtime on day four. Further time was then allowed for the parties to complete preparation of their written closing submissions.

20. When we convened on the morning of day five, unfortunately the Claimant had received serious personal news, in light of which we agreed (without

opposition) to adjourn. Before doing so, written submissions were exchanged, and it was agreed that there should be a further hearing convened to enable oral submissions (including in response to the written submissions) to be made, though it was recognised that, unfortunately, there might be a significant delay.

21. The hearing reconvened on 10 July 2017 when we received oral closing submissions. During the course of that hearing, further time was spent by the Tribunal, reminding the parties of the issues that we would be considering, and taking time to explain matters, bearing in mind that the Claimant is a litigant in person. During the course of submissions, Ms Winstone also made an oral submission about contributory conduct, and the Tribunal took time to explain to the Claimant the nature of the issue, how it might potentially impact on remedies, and that we would potentially, as appropriate, consider it as part of our decision at this stage (as with *Polkey* issues), so that she had the opportunity to make any submissions she wished about it.

22. When tabling her written closing submission at our hearing on 17 March 2017, the Claimant had also attached a letter from her GP, who she had seen on 16 March. Ms Winstone opposed us considering that letter, on the basis that it had been put in too late, but submitted that, if we did, it did not, in substance, add anything to the medical records and evidence from the Claimant that we had already received. She also indicated that she did not wish to cross-examine the Claimant further on it, as the ground had been covered. The Claimant for her part in fact agreed that the content did not take matters much further.

23. We gave the letter consideration, as the Respondent was not prejudiced in any way by our doing so; though we agreed with both parties that it did not materially add to the evidence that we already had.

24. In both written and oral closing submissions reference was made on both sides to a number of authorities, in various ways. Oral closing submissions were completed at lunchtime on 10 July. We reserved our decision, which we deliberated in chambers and now provide.

The Facts

25. The Respondent runs a solicitors' practice based in London. Although these numbers plainly fluctuate, at the relevant time it had a turnover of around £34m per annum. The Respondent is a Limited Liability Partnership (LLP). In common with many LLPs that run solicitors' firms, it identifies members who have an equity stake in the business as partners. There are no salaried partners. At the relevant time, it had around 47 partners, of whom 9 were in the litigation department, and around 228 other employees.

26. The Claimant qualified as a solicitor on 1 December 1992. She joined the Respondent on 14 April 2009. At her immediately previous firm she had been a partner, but she joined the Respondent in the capacity of a professional support lawyer (PSL) in the litigation department working 21 hours per week.

27. From around June 2012 the Claimant was given the title of Consultant. From the end of that year she began working full time. At the time of the events with which we were concerned, she was devoting approximately three-fifths of her time to property litigation, with a live case load at any one time of around 30 – 35 matters. The remaining roughly two-fifths of her time was devoted to professional support and business development work.

28. Until the events which led to her dismissal, the Claimant's career at the Respondent was proving a great success. She was well regarded as a good senior experienced litigator. There had been no performance or disciplinary issues. Her appraisals had been good. She had received pay rises and bonuses. She had her own following, including introducing work to other parts of the firm.

29. On 23 May 2016 a firm called Richard Pearlman LLP (RP) wrote by email and post to the Respondent's Chief Operating Officer, Mark Jones. They did so on the mistaken understanding that he was the Respondent's Compliance Officer for Law and Practice. In fact that role was held by a partner, Andrew Smith, who was just at that time taking it over from another partner, Jesper Christensen. RP enclosed correspondence in respect of a matter on which they had been dealing with the Claimant. They wrote that this disclosed strong evidence of serious misconduct on her part, though they recognised that there might be a wholly innocent explanation. They referred to obligations to report concerns to the Solicitors Regulation Authority (SRA) and sought an urgent response.

30. In summary, the matter concerned a property of which the Respondent's client was the freehold owner. A substantial money judgment had been obtained against the long lessee of a flat in the building. This was unsatisfied. The statutory notice which must precede any proceedings for forfeiture – a section 146 notice – had been served and such proceedings had then been commenced. RP represented one of the mortgagees of the property in question and had applied for relief from forfeiture. At a hearing on 20 April 2016 directions had been made including that the Respondent serve an amended claim form by 4pm on 12 May 2016. On 16 May 2016 RP had written to the Respondent asserting that it had failed to comply with that order. They subsequently received a letter and enclosure (from the Claimant on behalf of the Respondent) dated 11 May, in purported compliance; but RP had then questioned in further correspondence whether these had in fact been created and sent on that date. The 23 May letter exhibited the ensuing correspondence. RP stated that they considered that they had not yet received a satisfactory answer to their concerns.

31. Mr Jones brought RP's letter and enclosures to the attention of relevant partners and the Respondent's Head of Risk and Professional Standards, Janine Biggs. The Respondent's HR Manager, Ben Saunders, was also involved from the outset.

32. On 24 May 2016, the Claimant's immediate line manager, the partner Simon Painter, met with her and gave her copies of RP's letter and enclosures for her to take away and consider. He then met with her again, later on that same day, to discuss them. Mr Painter met for a third time with the Claimant on the

morning of 25 May. On 31 May Mr Painter typed up notes of these various meetings. We also heard live evidence from both him and the Claimant about them. We were satisfied that the notes were a fair, albeit plainly not fully verbatim, record. We made the following findings as to what occurred.

33. The initial meeting on 24 May 2016 was brief. Mr Painter indicated that he needed the Claimant to read RP's letter and enclosures, and then he wanted to discuss it with her as soon as possible. She took it away.

34. When they reconvened, later that day, the Claimant admitted that her letter to RP dated 11 May 2016 had in fact been created by her and sent out on 16 May, but backdated by her. She told Mr Painter that she had made a "stupid mistake" in missing the Court directions deadline and had become "very riled by RP in the proceedings and had made an error of judgment." She said that the late service had not caused RP's client any prejudice. Mr Painter said this was not the point, as the allegation was one of professional misconduct, and he would need to report what the Claimant had said to Mr Christensen. Before doing so he needed the Claimant to tell him about any other issues, including in relation to any other cases. The Claimant replied that there were no other issues. In further discussion, the Claimant said that she had not been feeling well in the last few weeks and had been to the doctor about an ongoing kidney problem that appeared to have worsened. She said that she had also had a lot of pressure at work recently, which may have contributed. She said she had done nothing like this before, and it was a complete aberration.

35. Mr Painter then drafted an email to Mr Christensen. He discussed the draft with the Claimant when they met again on the morning of 25 May. She read the draft email over. Mr Painter asked if they were any other points in mitigation which she wished to raise, not already covered in the draft. The Claimant said that she "felt persecuted by RP". Mr Painter asked if she wished him to add this to the email, but she said not, and confirmed that it was accurate and could be sent.

36. They discussed the underlying litigation. Mr Painter had noted that another issue that had been raised by RP concerned the validity of the section 146 Notice and whether it had been validly served. The Claimant had asserted that, in addition to other service, she had personally delivered notices to two addresses. Mr Painter asked whether there was an independent record of her personal delivery, such as an attendance note or time record. The Claimant said there was not, because she had delivered the notices in her spare time, for which she did not feel able to charge the client, to one address at lunchtime on the day in question, and to another on her way home that day. She said that she had done this for belt and braces and had also consulted counsel over "the time record issue".

37. Mr Painter recorded that at the end of this meeting the Claimant broke down in tears and said that she was very sorry about what had happened and extremely worried that she would never be able to work again.

38. Mr Painter also recorded that on 25 May the Claimant gave him some "medical documents" which she said confirmed her condition, but told him that she had not emailed them because she did not want them "plastered around the place." Though the Claimant was, in evidence before us, not sure, we were satisfied, having also heard his evidence, that what she gave him were copies of two letters in our bundle at pages 326 and 327 (we were referred also to 328 but that was a further copy of 327). These letters concerned referrals to a Consultant Radiologist and a Consultant Nephrologist in May 2016 in relation to the Claimant's suspected kidney problem. One of the letters also listed her current medications including "propranalol (only episodically)". Because of the Claimant's concerns about the letters' sensitivity, Mr Painter took a view that it was best not to read them or copy them to anyone, and he simply put them to one side.

39. We heard evidence from both the Claimant and Mr Painter as to the Claimant's demeanour and general emotional state during these three meetings. Having considered that evidence, and Mr Painter's note, our conclusions about that were as follows.

40. We had no doubt that the Claimant was extremely distraught from the first moment that Mr Painter brought RP's letter to her attention, and that she was visibly upset during all three of these meetings. However, we did not find that she was so distraught and upset as to be out of control or, as she put it to Mr Painter at one point in cross-examination, "hysterical" during either of the meetings on 24 May. We found that she was more distraught and upset during the meeting on 25 May, as the potential full implications of the situation were beginning to sink in, and that she became more upset during the course of that meeting, and, as Mr Painter indeed recorded, broke down in tears at the end of it.

41. Having discussed the draft with the Claimant, Mr Painter then sent his email to Mr Christensen on 25 May 2016. He copied in Ms Biggs and the partner heading litigation, Richard Langley, and another colleague. He set out a summary of the underlying litigation and recorded that the Claimant had admitted that her letter bearing the date of 11 May was in fact created on 16 May and backdated. He recorded that she had said this was a complete aberration and lapse of judgment on her part, and that she felt that her judgment may have been affected by illness in relation to the kidney problem and pressure at work. He recorded that she said she had never done anything like this before and was extremely sorry.

42. Later that same day, 25 May 2016, Mr Langley, accompanied by Mr Saunders, met with the Claimant and she was suspended on full pay. Mr Saunders made a note of the discussion. In the course of this Mr Langley told her that Mr Christensen intended to notify the SRA of the matter that day, that she would probably be suspended until the middle of the following week, and that an investigation needed to be conducted covering all electronic as well as paper files. Mr Langley asked the Claimant if there was anything else the firm should know, given that it was commencing an investigation, and she said not, whether in relation to the case in question or any other case. The Claimant said her action was a "one-off mistake" and a "stupid one-off incident". She said that the opposing solicitor had been horrible to her, though she had had no previous

involvement with him and could not understand why. She said that if she were to lose her job, it would, in her opinion, be a disproportionate punishment. She referred to her 24-year career. She said she had not been well and had been busy continuously, both of which may have affected her judgment. She referred to her kidney problem and said that Mr Painter had seen the referral letter. She referred to menopausal symptoms and having previously been on HRT, but having had to stop because of an episode of DVT. She said that these conditions may have affected her judgment and she often found it hard to concentrate and was tired at the end of the day. She often came in around 7.30 or 8. She said she had made a dreadful mistake and had confessed immediately and was not trying to hide anything. She apologised, as she felt that she was rambling.

43. There was further discussion of the protocol surrounding the suspension. The Claimant asked Mr Langley if it was his wish that she stay with the firm. He said that as Head of Department he would be responsible for making that decision but could not prejudge the investigation at this stage. Further on in the discussion she reiterated that she was sorry and had not tried to cover the matter up. Further on she indicated that she was going to have to cycle home and Mr Langley offered to arrange a taxi. She reiterated that she had made a dreadful mistake and should not in her opinion lose her job. Mr Langley reiterated that that was a decision to be taken at the end of the process.

44. The suspension was confirmed in a letter, which also recorded that the allegation was sufficiently serious to amount to gross misconduct, which was why she was being suspended, but suspension was not a disciplinary penalty. The letter confirmed that the firm would be reviewing the files that she had worked on or currently had open. It enclosed a copy of the firm's disciplinary procedure.

45. That same day, 25 May 2016, Mr Smith, the partner who had taken over as compliance partner, emailed a report about the matter to the SRA. On 27 May 2016 the firm's professional indemnity insurers were notified.

46. On 1 June 2016, Mr Langley emailed the Claimant indicating that the investigation was nearly complete and the likely timetable, should it be followed by a disciplinary hearing. The Claimant replied that day in a long email. She opened by saying that she was in "absolute turmoil" and "going through hell". Further on she wrote: "Stressed, anxious and under pressure from prolonged bullying by an opponent, I panicked and made a bad judgment call. To say that I regret this is a vast understatement. However, having had time to reflect on how my momentary aberration has been dealt with so far, I am shocked at how I have been treated. Surely someone in this situation should be offered support, not ordered to clear their desk in front of their colleagues and leave the building? I am in a very bad place at present and beyond stress with this uncertainty hanging over my future."

47. The Claimant went on, in this email, to give an account of her youth and previous career. Under the heading: "Health and Wellbeing" she described how she worked hard to stay fit and healthy. She referred, however, to her health problems starting with the onset of menopause 8½ years before, and beginning HRT, but then stopping following developing a DVT. She listed various problems

that she had suffered from since 2010, including a variety of symptoms, among which was "extreme anxiety". She listed medications currently prescribed, including "Propranolol for anxiety". She wrote that a recent medical review had brought to light the potential kidney function problem.

48. After referring to various difficult family episodes and circumstances, she wrote: "Last year I had CBT, cognitive behaviour therapy, in the hope that this would help with my anxiety, but it did not and I gave it up. Generally speaking, despite suffering from severe anxiety I cope well with the cut and thrust of litigation but a history of bullying leaves me vulnerable to this when under pressure. Notwithstanding my ongoing problems I have an exemplary health record at work. I cannot remember the last time I was off sick."

49. She set out her case as to why she was an asset to the firm, financially and otherwise. She wrote that she was planning on working for another seven years or so, and referred to what she would lose if dismissed. She concluded: "I am just a hard-working, stressed middle aged woman, who made one stupid mistake under pressure from a bully. I am not a murderer, rapist, paedophile or thief. I do not think that I deserve to lose my job. This would be a wholly disproportionate punishment for what is in relative terms a minor error of judgment."

50. On 2 June 2016 the Respondent notified the client in the matter concerned that it could no longer act for it, explaining the situation in appropriate terms, and referring the client elsewhere.

51. An investigation was conducted by Ms Biggs. In the course of examining the file for the matter in question, it became apparent to her that there were other matters of concern apart from the specific one raised in RP's 23 May letter. She realised that she would have to devote considerable time to fully investigating and collating the evidence in relation to all of these aspects. She concluded that she would not be able also to conduct a review of the Claimant's other files. She therefore instructed external specialists, who she had used before for such exercises, to carry out that general file review. In exchanges with them on 2 June, they identified when they would be able to set aside time for that task.

52. On 3 June 2016 Ms Biggs completed her investigation report.

53. Solicitors are governed by principles adopted by the SRA. Ms Biggs identified in her report that there was evidence of breaches of the following principles:

1. To uphold the rule of law and the proper administration of justice.

2. To act with integrity.

4. To act in the best interests of each client.

5. To provide a proper standard of service to your clients; and

6. To behave in a way that maintains the trust the public places in you and in the provision of legal services.

54. The report identified that the breaches, on the part of the Claimant, of which there was evidence were: fabricating time ledger entries in witness statements, and instructions to counsel and obtaining a court order on the basis of the same, backdating letters to the other side, counsel and the Court, providing inaccurate and misleading statements in correspondence with the other side, the Court, witness statements and pleadings, and obtaining counsel's advice on whether her time ledger records were privileged in an attempt to prevent their disclosure. The remainder of Ms Biggs' report gave her chronological analysis of the evidence relating to these matters. The report attached numerous exhibits drawing on the material that she had found on the paper and electronic files relating to the case.

55. In summary, the wider allegations, in addition to those concerning the backdating of the 11 May letter in fact created on 16 May, related to the following.

56. The file records showed that, on beginning the forfeiture proceedings, in November 2015, the Claimant had written to RL's client, including informing them that section 146 notices had been served on 16 October. On 1 December RL wrote, explaining they had been instructed, and asserting that service on that date was invalid, because it was one day early. The Claimant replied on 10 December, disagreeing, but stating that in any case personal service had been effected on 19 October, of which evidence could be produced. There then followed extensive exchanges, running through to February, in which RP maintained that service on 16 October was invalid, and asked for further evidence of personal service on 19 October. The Claimant produced a witness statement in that regard. RP applied for the issue to be adjudicated, and also said it required her to attend the hearing of the dispute, to be cross-examined on her statement. They also asked for voluntary disclosure of the Respondent's time records of her attendance to effect personal service.

57. Then, on 18 February 2016, the Claimant sent counsel copies of what she said were the Respondent's time records of that attendance, and asked for his advice as to whether they were privileged from disclosure. He advised that they were not. Then, in April, the Claimant re-served the section 146 notice, while maintaining that there had already been prior valid service. Then, on 8 April 2016, she applied to amend her client's pleading to refer to service on 19 October and in April (the original particulars of claim having referred only to service on 16 October); and in support of that application she filed a witness statement with a statement of truth, exhibiting what were described as the time ledger records of personal service on 19 October, and served it on RP and the Court.

58. That application was heard on 20 April 2017. Counsel attended on the Claimant's instructions. Permission was given to serve the amended particulars of claim by 12 May 2017. RP wrote on 16 May saying that this had not been received. On 17 May they received the particulars, and a covering letter, both

dated 11 May, and then wrote asserting that these had been backdated and seeking an explanation. After they chased for a response, on 19 May, the Claimant wrote, stating: "We apologise if our letter of 11 May 2016 was delayed in its despatch from our offices." After seeking a further explanation by a deadline, and receiving none, RP then wrote to Mr Jones on 23 May.

59. On 3 June 2016 Mr Saunders emailed the Claimant a letter of that date from Mr Langley, a further copy of the Respondent's disciplinary procedure, a copy of Mr Painter's notes of his meetings with her, and a copy of Ms Biggs' report. All of that material was also sent to the Claimant in hard copy by recorded delivery, together with the annexes to Ms Biggs' report. In evidence before us the Claimant said she was not entirely sure she had received all the annexes, but accepted she had received all those that were material. Having regard to the documentary evidence, we conclude that she did in fact receive it all.

60. Mr Langley's letter invited the Claimant to a disciplinary meeting on 13 June 2016. The letter set out the disciplinary allegations against the Claimant. There were 13 of these. In summary, the allegations were that: she had falsely claimed to have served the section 146 notices personally; the purported time ledger record was falsified, and false representations had been made to counsel, RP and a witness statement about that record; the amended particulars of claim, dated 11 May, and associated letters to RP and the Court, had all been created on 16 May; the 19 May letter made a further false assertion about that; the Claimant had failed to notify Mr Painter or anyone else of the complaints and concerns raised by RP; that, when asked by Mr Painter on 24 May, she had falsely stated that there were no instances of dishonesty other than the back-dating of the material dated 11 May; and a similar false statement to Mr Langley on 25 May.

61. The letter identified what were said to be relevant examples of gross misconduct in the firm's disciplinary procedure, being:

- Serious breach of the firm's procedures and regulations or those of any relevant professional body
- Serious errors of judgment or wilful acts or omissions which result in loss or injury to any person, whether a member of the firm or a third party
- Inappropriate conduct which we believe is in serious breach of the firm's standards
- Making false statements about one's own or a colleague's work, the falsification of working papers or the making of any statements likely to be detrimental to the goodwill or reputation of the firm
- Any action likely to bring the firm into disrepute

62. The letter also said that the alleged conduct amounted to a breach of the duty of trust and confidence. The letter told the Claimant that at the disciplinary meeting she would have "every opportunity to comment on the enclosed

documents and raise anything you wish to say in your defence or in mitigation in relation to the allegations. At this stage we have taken no decision on the outcome." The letter stated that if found guilty of gross misconduct the disciplinary sanction could be up to and including termination. The Claimant was told that Mr Langley would conduct the meeting, with Mr Saunders and a note taker in attendance, and she was informed of her right to be accompanied. She was encouraged to prepare thoroughly and to take professional advice.

63. On 6 June 2016 the Claimant emailed seeking a postponement of the hearing, including to enable her to have more time to seek legal advice and because of projected annual leave. Mr Saunders took soundings on this, including from Mr Smith in his capacity as compliance partner. He was concerned that the SRA would expect the firm to deal with the matter expeditiously. Having taken soundings, Mr Saunders emailed the Claimant that her application was refused and it was considered that she had sufficient time to prepare. He noted that she was not required to respond to the disciplinary charges in writing.

64. On 10 June 2016 the Claimant emailed confirming that she would attend the disciplinary hearing. She also set out in an email that day, at some length, a written response to the allegations. This opened with a section headed: "Putting this in Context", repeating points she had made earlier about her wider professional record and career, the absence of any other questionable conduct on any of her other cases or any other matter over her career, and referring again to the "highly unpleasant bullying tactics" of her opponent.

65. Then, the email responded to the allegations in turn. The Claimant denied those relating to falsely stating that she had personally served the 146 notices – which she said *had* been carried out – but admitted all of the other allegations. On the question of seeking advice from counsel, she commented: "I can see how this looks but my motivation was not to protect myself but only to move the case on for the client's benefit." However, she accepted that it was "an ill-judged thing to do". She gave some more context for how the deadline for compliance with the Court's Order had been overlooked. She only realised this had happened when she received RP's letter. "This is when I panicked and made the most stupid decision in my entire career. I therefore backdated the amendment and the covering letters to RP and the Court."

66. Regarding the letter she subsequently wrote, describing the 11 May letter as having been "delayed in its dispatch", she commented that she used those words "because they could describe a situation whereby a letter created earlier had not actually been dispatched until a later date. I appreciate that this compounded my stupidity in my reaction to the distressing letters sent by RP." She commented that she "genuinely believed that this would blow over" as the late compliance with the Court's order "had no implications in the case". In relation to the other conduct she maintained that "my only dishonest acts stemmed from the actions I took in extreme panic and with my judgment clouded when I learnt from RP's letter that I had missed a Court deadline. Taken in context (as set out above) this really was a one off silly mistake and an aberration on my part." She continued that she regretted most of all having misled Mr Painter, who had

"always been very supportive of me and I feel truly awful about the trouble I have caused him." She conveyed her apologies and begged his forgiveness.

67. There was then a section headed: "My mitigation". The Claimant expressed how "very, very sorry" she was, and asserted that there was never an intention to mislead anyone internally, that she readily admitted the error when challenged, that there was no element of personal gain or financial aspect, that she had made no "similar errors of judgment either in this case or any other" and that to say she was remorseful was a "vast understatement."

68. She continued that something clearly clouded her judgment and referred to a history of vulnerability to bullying from childhood onwards "and my recent state of high anxiety and extreme stress clearly clouded my judgment in dealing with this aspect of the case". She wrote that "whether right or wrong I felt that RP's relentless attack was personal" and she had not previously experienced such a thing. Despite suffering from severe anxiety she coped well with the cut and thrust of litigation, but a history of bullying left her vulnerable when under pressure. There were then sections concerning the Claimant's health, wellbeing, and making her case from a financial point of view as to why she would stay with the Respondent, which largely covered the same ground as her email of 1 June. She also set out how very much she stood to lose if dismissed and her case that an appropriate and proportionate sanction would be a warning. She wrote that she was in an awful state and had been feeling suicidal and that this, combined with a warning, would be more than sufficient punishment. She gave her "wholehearted, 100% guarantee that nothing of this sort will ever happen again."

69. On the morning of 13 June 2016, shortly before the disciplinary hearing, Mr Langley forwarded that email to Mr Painter, asking him to read it and to be ready to discuss it with him after that meeting.

70. The disciplinary hearing indeed went ahead on the morning of 13 June 2016. The Claimant was accompanied by a friend, Michael Magarian QC. He is a criminal barrister. She asked to have him there for moral support, not as her advocate, which was granted on that basis. Mr Langley chaired the meeting and was accompanied by Mr Saunders and a note taker. A typed note was produced which we accepted was a fair record.

71. After introductions Mr Langley asked the Claimant some questions about a witness statement she had produced on 8 April 2016, falsely describing documents exhibited to it as extracts from the firm's time ledgers (in relation to personal service of the notices). The Claimant said she had explained this, and that she could have recorded the time but had not done so. She accepted that this conduct was "stupid and dishonest". She accepted that she should have said in the statement that she had *not* recorded her time, and said this was a "stupid mistake". Asked how she thought doing this would advance the client's interests, she said: "I thought this would get this man off my back."

72. The Claimant confirmed in further discussion that she had indeed *not* made entries in the time record, but had created a separate document purporting to be a time record, and presented it to counsel as though it was the time record. She accepted that it was therefore a false document. She was asked if there was ever an acceptable reason to make a false statement, and replied: "No, it was stupid". She was asked when she realised it was wrong. She replied "I don't know, probably at the time". She was asked whether she thought it was a false statement at the time, as she had said there was nothing else when asked by Mr Painter. She said: "At the time I didn't think about it, but obviously I have done so since then". She commented that the matter had "just really snowballed. I panicked and it just snowballed." Further on she was asked why she had not mentioned the witness statement to Mr Langley or to Mr Painter. She said that she had been confused and thought that she was being asked about other cases. She reiterated that she accepted that her conduct had been dishonest.

73. Further on, Mr Langley reminded the Claimant that there had been an occasion the previous year where she had missed a deadline, she had told Mr Painter, and the matter had been sorted out. She was asked why she had not sought help this time. She replied: "I don't know". He asked whether it was because she did not want people to find out about the false witness statement, and she thought she could sort it out herself. She replied: "I did want to sort it out myself. I am not sure why I didn't tell anyone. It hasn't happened on any of my other cases."

74. Further on Mr Langley referred to the Claimant having been frank about her anxiety and previous experience with bullying. He asked if that was what happened with the solicitor concerned. The Claimant replied: "I have written about that in the letter, I want to work out for myself why this happened." She said she had worked with difficult opponents before, including the tenant in the same case, and was not sure what had happened here. She was asked whether the bullying in her past had made her vulnerable in this area, Mr Langley commenting: "as a solicitor we have to withstand that". The Claimant said that in other cases she could deal with it and it was just this solicitor. However, she said, "it's not an excuse. I was dishonest. I just want to explain what happened."

75. They then talked through the Claimant's account of events relating to the original service of the section 146 notice and why and how she said she had also then served the copy notices personally. Mr Langley put it to her that she had not given her opponent the same detailed account in correspondence that she had now given him. The Claimant agreed.

76. Mr Langley then summed up as follows:

I think I have asked all the questions I wanted. I have read and reread everything and taken on board your past medical and present medical issues. I have taken on board your background and current struggles and what you bring to the department and your contribution as a whole; this includes the BD and PSL Sites. You are a person who brings things to the business and you are someone who is considered as a partner who requires no supervision. Now I have to consider the admitted dishonesty and consider the

information. Let's say the notices were served on the Monday. For reasons you can't explain I need to think about you providing a false document to [counsel], asking [counsel] about privilege, and still providing the witness statement. I have to take on board the premeditated nature of the witness statement and then I have to think about the backdated letters.

77. The Claimant responded: "Richard I have to apologise. I panicked. I said something and it snowballed. I don't know what to say, I feel awful. The damage to the firm's reputation, I feel awful. If there is anything I can do I would."

78. Further on, Mr Langley said he had to take everything into account. He wanted to speak to Mr Painter and Mr Christensen (in respect of the compliance aspect, so as to keep Mr Smith out of it). Mr Magarian then said a few words, as he put it, as a character witness, although in the course of doing so he also made a submission that this was "the low end of dishonesty", and that the Claimant had admitted to being dishonest and that this should not damage her career.

79. This meeting lasted about one hour and ten minutes. In evidence the Claimant told us that, during it, she had been unnecessarily, unpleasantly and aggressively cross-examined by Mr Langley, and she did not understand why she had been questioned to this degree, given that she had admitted the conduct in question. Mr Langley, in his evidence, denied being aggressive or inappropriate in his conduct of the meeting. He said that he had asked pertinent questions in order to try to understand better what had happened and why.

80. Having heard the evidence of them both, and having regard to the contents of the transcript, our further findings on that aspect were these. We had no doubt that the meeting was unpleasant and distressing for the Claimant, and that she also felt that what she had set out in her detailed email of 10 June should have been sufficient. However, we accepted that Mr Langley asked appropriate questions to try to better understand what the Claimant had done, and to give her a further opportunity to put her case in mitigation. We found that, whilst she no doubt was distressed, she was still able to, and did, put her case in response to his questions. We also saw force in Ms Winstone's submission, that though he was not permitted to act as her representative, had Mr Magarian considered that Mr Langley was becoming aggressive or otherwise acting inappropriately, he would surely have attempted in some way to intervene. Nor was there any sign in the evidence that the Claimant indicated that she needed a break at any point, or that the meeting overall was unduly prolonged.

81. Following the disciplinary hearing, Mr Langley went for lunch with Mr Painter. We found that at this point Mr Langley had not finally decided what to do. He was clear in his mind that the conduct would warrant dismissal. But he wanted to talk things through with Mr Painter, before coming to his decision. In particular, they discussed whether it might be a viable option for the Claimant to remain employed by the firm, but not conducting any litigation, and with her role confined to purely that of professional support lawyer (PSL).

82. On that point, when the litigation partners had, at some point, met and discussed the ongoing situation, another partner, James Freemantle, who specialised in professional disciplinary work, had expressed the view that the Claimant would, in due course, be struck off the roll of solicitors. Mr Langley wanted to know whether, if that did indeed happen, she would be able to continue working with the Respondent as a PSL. Following the lunch with Mr Painter, Mr Langley had a further discussion with Mr Saunders, Mr Christensen and Ms Biggs about his options. Ms Biggs then specifically researched the point and emailed later that day that if the Claimant was struck off then she could not be described as a lawyer, and therefore could not carry on working as a PSL.

83. On 15 June 2016 Mr Langley had a further discussion with Mr Painter and with Sian Jones (the Deputy Head of Litigation), Mr Christensen and Mr Saunders, to share what was in his mind, and canvas the options one more time. Thereafter Mr Langley came to his decision, which was to dismiss the Claimant. We were satisfied that, whilst he had taken soundings from his colleagues, and explored the options with them, this was indeed his decision alone.

84. On 21 June 2016 the Claimant met Mr Langley, who had Mr Painter with him. She was given a letter from Mr Langley, dated 21 June, informing her of his decision to dismiss her summarily. Mr Langley did not rely on the allegations that she had lied about personally serving the section 146 notices, nor that she had not been sufficiently forthcoming with Mr Painter and himself on 24 and 25 May. However, his letter set out that she was being dismissed because of her conduct, which she had factually admitted, and admitted was dishonest, by way of: seeking advice from counsel relying on a document purporting to be an extract from the time ledger, when no such entries existed; making false statements in a witness statement about the existence of such entries; backdating a statement of truth on the amended Claim Form, and two letters relating to it, to 11 May, which were in all cases created on 16 May; and writing a letter of 19 May falsely implying that those materials had been dispatched on 11 May.

85. Mr Langley's letter continued that each of these actions were examples of gross misconduct. The firm had been obliged to report to the SRA, to cease acting for the client and to notify their insurers. The actions were likely to be detrimental to the firm's reputation with, amongst others, the Court, Counsel, the SRA, insurers and the client. He added that such conduct fell far short of the firm's standards and the example the Claimant would be expected to set as a senior lawyer, and, in particular, someone with responsibilities for training and professional support. It was also considered to be a breach of the duty of trust and confidence. He concluded that the conduct amounted to "a serious breach of your obligations such as to warrant dismissal without notice and without any warnings." The Claimant was informed of how to exercise her right of appeal and of the practical implications of the dismissal. Mr Langley concluded expressing his deep sorrow to have to make this decision and write in such terms.

86. Shortly after that meeting ended, Mr Langley made a fairly detailed manuscript note of the discussion that had taken place at it. He wrote this out on

a second print of the dismissal letter. We accepted that it was a fair note. We found that the following happened at the meeting.

87. Mr Langley took the Claimant through the letter, explaining the decision to dismiss. The Claimant then asked whether she could appeal, saying that she had received informal advice that the appropriate sanction was a warning. Mr Langley, as he recorded, "said I would not seek to discourage her from appealing but I cautioned her that anything she said in her appeal would be disclosed to the SRA and it was important that she took proper advice about that. The focus should be on how to preserve her practising certificate. JEF [i.e. Mr Freemantle] thought she would be struck off." The Claimant then repeated her sorrow for the trouble she had caused but said that it was an isolated case, that the opponent had got to her somehow and it was a silly mistake. Mr Langley told her she should stop thinking like that and it was not a silly mistake. It was a false witness statement which was a deliberate and planned deception. It was baffling why she had dared take such a risk with nothing to gain. "Unless/until Helen understood what caused her to do such a thing and had insight into the consequences she would never be able to persuade the SDT it would never happen again."

88. The Claimant then raised whether she could return in the capacity purely of a PSL. Mr Langley responded that this had been considered, but it had been concluded it was not possible for reputational reasons. "If Helen got through the SDT, it was possible she could be rehabilitated. She could stay in touch. Simon was receptive to her coming back." There was some further discussion of how matters would be handled internally, pending the outcome of any appeal.

89. In her evidence the Claimant told the Tribunal that Mr Langley specifically warned her off appealing against her dismissal, including indicating that there were certain partners who would not entertain the idea of her remaining employed. The Claimant said that she believed that the outcome of any appeal was therefore already a foregone conclusion. Mr Langley denied saying that there were other partners who would not entertain her remaining employed. We were not persuaded that he did say that. We accepted that his contemporaneous note was a fair record of what he did say.

90. Specifically, we found that Mr Langley accepted that the Claimant was entitled to appeal, and that any appeal would be dealt with by Mr Smith and be a matter for him. Mr Langley's own view, however, was that she would be ill advised to appeal, because the prospects of an appeal succeeding were very poor, and it might further prejudice her position with the SRA if she continued to take the approach that she had done, in the disciplinary process so far. We found that, in his remarks, Mr Langley was seeking genuinely to give the Claimant what he believed was good advice, because of his belief that there was a high risk that she would lose her practising certificate, and that she needed to take a different approach to her conduct with the SRA than she had in the internal disciplinary process, and now to concentrate on that fight.

91. Mr Smith, because he was dealing with the compliance aspect, was updated on the fact that the Claimant had been dismissed, and on 22 June 2016

he emailed the SRA with relevant materials to update them. In his email to the SRA he noted that the Claimant had assured the firm that there were no conduct issues on any of her other files; but that an external review was also taking place.

92. On 28 June 2016 the Claimant emailed Mr Smith appealing her dismissal. She wrote: "[i]n retrospect I realise that my judgment was clouded because of the extreme provocation, stress, anxiety and pressure which I was under and had suffered from for some time." She set out a number of mitigating factors, covering similar ground to previous communications. These included that she had been "under severe stress during late 2015 and into 2016 due to overwork, personal, family and medical reasons which I have set out in detail in my letter to Richard of 10 June 2016." She expressed her surprise that no medical evidence was sought as part of the investigation. She had brought her long standing anxiety condition, for which she had been prescribed both medication and talking therapy, and other medical issues, to Mr Langley's attention at the time of her suspension. She referred to the need to put the incident into context and the catastrophic consequences for her and her family of her losing her job. She observed that there was no mention of any of these mitigating factors in Mr Langley's letter of 21 June 2016. She submitted that dismissal was not a fair or reasonable sanction and that a proportionate sanction would be a formal warning. She believed this would also best serve the Respondent's reputation, and if she was still there they could support her through the SRA process. She concluded that there was a strong business and reputational case for letting her stay and asked Mr Smith to show some compassion, humanity and support.

93. Mr Smith wrote to the Claimant on 29 June 2016 inviting her to an appeal hearing. In the course of this letter he wrote: "You have asked that your medical issues be taken into consideration. If you have any additional information or reports regarding these medical issues that you would like to provide to me please send these to me in advance of the meeting." He explained how the meeting would be conducted and informed the Claimant of her right to be accompanied.

94. The appeal hearing took place on 5 July 2016. The Claimant attended unaccompanied. Mr Smith had Mr Saunders with him and a note taker. A typed minute was produced which we accepted was a fair record.

95. The issue of hand delivery of the section 146 notices and the failure of the Claimant to create a time record was discussed. She said she did not want it thought that she was eccentric, getting on her bike to deliver notices by hand.

96. Mr Smith turned to severity of the sanction and mitigating factors. He commented that the correspondence from the Claimant's opponent in the property litigation looked to him to be normal litigation letters. He therefore asked whether she had any other contact with her opponent, such as by phone, but the Claimant said not. She added: "I'm not a psychiatrist and I have been trying to work out why I acted this way with him. I would quake when I received his letters, it would affect me. I didn't get to speak to him." She said she felt like she was dealing with a bully. In hindsight, she should have gone to Mr Painter: she recalled the occasion where she had missed a time limit and had done so.

97. The Claimant reiterated that there had been nothing on any of her other cases. She did not know why it happened "a couple of times in this part of the case". Mr Smith commented that it was "not just a one off aberration but a chain of events." The Claimant replied: "Yes. I think I forgot what had happened before. It was a course of actions which led to this conduct and now looking back on this I accept it and I should have dealt with it differently. I hold my hands up to this."

98. Mr Smith noted he had written asking whether the Claimant had any medical evidence. She replied that she did not know whether she was expected to go for a medical. Mr Smith explained he was wondering whether she had any past evidence to show this. The Claimant replied:

I do, for the anxiety. I was diagnosed in 2010, which I can get evidence from here. I'm just getting my home computer working, I used to deal with personal matters on the computers here. I cannot print or scan anything at the moment. I also had the works biennial medical and this was brought up at the time and discussed. They referred me for cognitive behavioural therapy. I didn't go through them but did have this on the NHS. I did go through that last year. I can send it to you if I can access a computer. So I was being treated since 2010.

99. Mr Smith asked whether Mr Langley or Mr Painter was aware of this. The Claimant said not, as she did not want people to know in case it was regarded as a sign of weakness. She referred to someone else's case having been handled insensitively. Mr Smith commented: "So this was something happening in the background."

100. The Claimant complained that the decision to dismiss had not taken on board her mitigating factors. She said that she had expected there to be a full investigation into all her active cases to put the matter into perspective. Mr Smith explained that the wider investigation was ongoing.

101. Returning to the question of severity of sanction, Mr Smith said: "… I think it's the question of misleading the Court. One backdated letter is one thing. You admitted now it is the course of your actions over time and I need to consider that and all the evidence I have been through. Is there anything I have missed?" The Claimant said not, and reiterated again that she was deeply sorry, and spoke again of her background and career. Mr Smith confirmed that the decision on the appeal would be his. The meeting finished at about 11.35 that day.

102. At 3.41 that afternoon, Mr Smith emailed the Claimant a letter informing her that he did not uphold her appeal. He identified the admitted dishonest conduct. He wrote that it was his opinion that these actions amounted to gross misconduct, fell far short of the firm's standards, brought the firm into disrepute and were likely to be detrimental to its reputation with various third parties.

103. Mr Smith wrote that he was satisfied that the decision to dismiss was not taken lightly and consideration was given to the Claimant's performance over the years, the fact that she had no prior disciplinary record, the remorse shown and her standing with the firm. The full range of sanctions available had been

considered as well as mitigating factors. He continued: "Regretfully in light of your actions as a solicitor and representative of BDB in this matter, namely the falsification of statements of truth and witness statements and the fact that you only admitted your actions once the complaint was received from RP & Co, it is my opinion that your conduct in this matter amounts to a breach of your obligations such as to warrant dismissal without notice and without any warnings. In particular, as you acknowledged in the appeal meeting today, this was not a one off aberration but a course of conduct carried out over many months."

104. He went on to address mitigating factors and noted that the Claimant considered that these had been overlooked: "… for example your reference to severe stress during late 2015 and 2016." The Claimant had confirmed in the appeal meeting that she had not spoken about medical issues to Mr Langley or Mr Painter or HR prior to this incident. He noted that HR had reviewed return to work notifications following any absences but none identified an absence because of stress, nor any information about incidents of bullying and intimidation by another employee mentioned in the Claimant's email of 28 June. Mr Smith had spoken to Mr Langley and Mr Painter, none of whom reported any recollection of bullying or intimidation by a former employee nor the Claimant having raised any difficulties with RP & Co at any time prior to the firm receiving RP & Co's complaint.

105. Mr Smith concluded: "It is my opinion that the mitigating factors you mention cannot detract from the serious nature of your actions, especially as you mentioned that you were able to carry out your duties effectively and efficiently on all your other 30-35 active cases during the same period. In addition, you did not any stage seek help or advice from any of your colleagues nor bring to their attention your concerns regarding the solicitor from RP & Co." He said that the Claimant's previous clear disciplinary record and the consequences which would follow from her dismissal had also been considered.

106. Mr Smith went on to say that he was satisfied that the investigation process was independent and unbiased and had not looked solely for blame. He was satisfied that the Claimant had been given a sufficient opportunity to explain her side of events. Having considered all the circumstances, he could see no justification to overturn the original decision.

107. The external review of all the Claimant's other live files was completed, and a report was produced, on 15 July 2016. This confirmed that no matters of concern had been found on any of those other files.

The Law

108. The protected characteristics identified in section 4 Equality Act 2010 include age, sex and disability. Section 4 defines age by reference to being of a particular age group.

109. Section 6(1) provides that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse

effect on their ability to carry out normal day-to-day activities. The section also provides that references to having a disability include having had a disability.

110. Schedule 1 makes further provision as to the definition of disability, including the following. Paragraph 2(1) makes provision that the effect of an impairment is long term if it has lasted for at least twelve months, is likely to do so, or is likely to last of the rest of the person's life. Paragraph 2(2) makes provision that an effect which has ceased is to be treated as continuing if it is likely to recur. Paragraph 5 makes provision that the effects of a condition should be judged by reference to what they would be likely to be in the absence of measures to treat it. We note also that section 212(1) defines "substantial" as "more than minor or trivial".

111. Section 6(5) provides for the making of Ministerial guidance, which is to be taken into account when applying the definition of disability. Such guidance was issued in 2011. A section concerning the meaning of "substantial adverse effect" includes the statement that this requirement "reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people."

112. Section 13 defines the concept of direct discrimination, including that "a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others." Section 23 includes provision that on a comparison of cases for these purposes there must be no material difference between the circumstances relating to each case.

113. Section 15 defines the concept of discrimination arising from disability, as follows:

> (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.

114. Section 39 includes provision making it unlawful for an employer to discriminate against an employee, including by dismissing her or subjecting her to any other detriment.

115. Section 136 makes provision, including in relation to claims of the foregoing types, that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned,

the Tribunal must hold that the contravention occurred. But this does not apply if A shows that they did not contravene the provision.

116. Section 98(1) **Employment Rights Act 1996** provides, in relation to an unfair dismissal claim, that it is for the employer to show the reason or principal reason for dismissal and that it falls within section 98(2) or is some other substantial and potentially fair reason. A reason falls within section 98(2) if, among other possibilities, it relates to the conduct of the employee. Section 98(4) provides that where the employer has fulfilled the requirements of sub-section (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.

117. Where the employer has shown that the dismissal was for conduct, then, in considering whether it was fair pursuant to section 98(4) **British Home Stores v Burchell** [1978] IRLR 379 indicates that the Tribunal should consider whether the employer had a genuine belief that the employee had committed the misconduct, whether there was a reasonable investigation, and whether, in light of the fruits of that investigation, that belief was reasonably held. The Tribunal must also consider whether the sanction of dismissal for the conduct found to have occurred was a reasonable one.

118. In approaching all of the foregoing questions the Tribunal applies a "band of reasonable responses" test. That is to say, the Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's approach to all of these matters fell within the band of responses or approaches that it was reasonably open to it to take, even if some employers might reasonably have taken a different approach. See **Post Office v Foley** [2000] ICR 1283 and **Sainsbury's Supermarkets Limited v Hitt** [2003] IRLR 23. There may also be other issues said to be relevant to the fairness of the particular dismissal in the given case. Ultimately, the fairness of the dismissal must be judged by applying the words of the statute to the overall end to end process, including the appeal stage. See **Taylor v OCS Group Limited** [2006] ICR 1602.

The Tribunal's Further Findings and Conclusions

Disabled Status

119. We consider, first, the question of whether the Claimant was, at any relevant time, a disabled person in law. This was, of course, an essential element of her claim of discrimination because of something arising in consequence of

disability within section 15 of the 2010 Act (which we henceforth refer to simply as the disability discrimination claim). The disability relied upon by the Claimant was a mental impairment described by her as being "severe anxiety disorder".

120. Various documentary evidence in our bundle was said to touch on this question.

121. The records of the Claimant's GP's practice show that in November 2010 the problem of "essential hypertension" – that is to say, high blood pressure – was discussed. She had been seen privately for this and was currently on propranolol.

122. The next mention of that condition was at a GP's consultation in June 2013. The notes record that she had stopped her blood pressure medication two years ago, as she felt better and wanted to bring it down naturally. They also include the entry: "feeling anxious – takes propranolol for this."

123. Then, in July 2013, the Claimant had a routine periodic health assessment with Nuffield Health, the Respondent's health care provider. Their report included the comments: "you have a previous history of depression at the age of 35 and you are currently suffering from anxiety" and that current medications included "Propanolol for generalised anxiety" and that "you rate your psychological stress score as 6/10. Your sleep is disturbed with frequent waking during the night and early morning waking." The Claimant would be referred for CBT for "further management of your generalised anxiety disorder"; and it suggested that her current caffeine intake was contributing to this and that she should try substitutes.

124. Emails reflect that the Claimant was indeed contacted with a view to arranging CBT, but declined, indicating that she could not consider emails or make calls confidentially at work. There is then a GP's entry for a telephone consultation in September 2013, including that the Claimant had recently restarted her blood pressure medication and medication for stress, and "would like to continue with propranolol to help with the stress." A prescription was provided.

125. She then made contact again with the CBT providers in October 2013, using her private email address, indicating that she wanted to pursue the matter; but she then did not follow up on the reply.

126. The Claimant requested further propranolol from the GP again in April and May 2014. She then discussed "anxiety states" at a consultation in July 2014. The notes recorded that she used propranolol, but not daily and "never more than OD" (which we take to mean: never more than once a day). She identified the stress as being caused by her daughter's particular personal circumstances (which were described) but: "says has been improving". The notes record that she had been referred to CBT through work, but did not go and would be happy to try. She was then referred to NHS CBT providers, iCope.

127. Emails then show that, after some delay, the Claimant attended four sessions with iCope during the second half of 2014 and January 2015. She then

emailed the provider on 19 January 2015 that, as a result of the help so far, she was "sleeping much better and not needing to take any medication for my anxiety. I am sure that if I continue to work on it I can make even more progress." In view of that, she cancelled the next session, adding: "It is really hard for me to get away from work early but in any case, as I say, you have already helped me a lot already so I would like to see how I get on by myself from here."

128. There is then a GP consultation referring to a review of "essential hypertension" in March 2015 and then other consultations at intervals for various other conditions during the remainder of 2015. The Claimant also had a further biennial routine health check with Nuffield Health in the summer of 2015. This includes the observation that "[y]our other medical history includes you have had high blood pressure and also some anxiety" and that "your medications include … propranolol for anxiety."

129. There is then a GP's record of the Claimant being seen for a general medication review on 25 April 2016. Various conditions were discussed. This includes the entry: "The use of propranolol is only occasional when she feels stressed." There are then a series of entries for the remainder of 2016, concerned principally with the suspected kidney disease and the progress of investigations in relation to that.

130. The GP's letter of 16 March 2017, refers to matters reflected in the notes, and to the Claimant having told the GP that she was privately diagnosed with anxiety disorder in 2010.

131. In addition to this documentary evidence from medical records, we had the evidence of the Claimant herself, in a witness statement specifically addressed to this question. In that statement, she stated that she was first prescribed propranolol for anxiety following the serious DVT for which she was hospitalised in 2010. She went on to describe how her condition manifested itself in panic attacks, obsessive compulsive behaviour, obsessive overworking, a consistently poor sleep pattern, and inability to relax, and she said that the symptoms were exacerbated by things such as bullying and an unpleasant working environment.

132. The broad thrust of Ms Winstone's cross-examination of the Claimant on this topic, and in due course of her submissions, was that the Claimant's witness statement over-stated and exaggerated the impact of her anxiety, and that this conclusion was supported by the consideration that her descriptions were at odds with the picture that emerged from the medical records, and from her behaviour at work, other than in relation to the matter at the heart of this case. Ms Winstone said she did not claim that there was no underlying mental impairment: the issue was as to the impact (or not) on normal day to day activities.

133. Assessing the totality of the evidence available to us, and the overall picture emerging, our conclusions were these.

134. First, the documentary evidence suggested that the Claimant had been prescribed propranolol in 2010 not for anxiety but for high blood pressure. However, by 2013 she was reporting generalised anxiety, and using Propranolol as a way to manage episodes of it. She reported this again at intervals in 2014, was twice recommended to try CBT, and briefly tried it at the end of 2015. We accepted that there was some underlying impairment here, which meant that she was vulnerable to experience episodes of anxiety, on occasion.

135. However, we did not find that the Claimant generally experienced high levels of anxiety, such as to have a substantial adverse impact on normal day to day activities, all the time, or most of the time; but, rather, there were episodes from time to time, on occasion triggered by extreme dramatic events in her personal and family life. On those occasions the Claimant generally sought to manage the episode herself, by using Propranolol (of which she ensured she maintained an available supply) and by displacement activity.

136. The matter which we found to be finely balanced was whether, on those occasions when she did have a serious episode of anxiety, it had a substantial effect on normal day to activities. We saw force in Ms Winstone's submissions up to a point: had the Claimant persistently experienced the range of symptoms that she described, and to the degree that she described, in her witness statement, she would surely have raised these matters more extensively with her GP than the records suggested she in fact did; and it seems unlikely that this would not have had some spill-over into her performance at work, and, indeed, sickness record. But a certain amount of that discrepancy could be accounted for, potentially, by the manifestations being periodic, and, to a degree, managed by use of the Propranolol and/or coping strategies.

137. That said, we were not persuaded, having heard the Claimant cross-examined on it, that the account she gave in her witness statement was entirely reliable, as to extent and degree – but we did accept that all of the behaviours and symptoms that she described were things that she did experience when her anxiety manifested itself periodically, to a degree, or on occasion, even if not as intensely, or as frequently, as she suggested. The threshold of substantial impact on normal day to day activities is, ultimately, not a high one; and we were prepared to accept that episodes of anxiety-triggered panic attacks, obsessive tidying behaviour and/or compulsion to engage in distracting activity of one sort or another, could, in her case, be sufficient to cross the threshold. We also accepted that, in between episodes, the persistence of the underlying condition meant that recurrence of such effects was likely, in the legal sense of "could well happen."

138. Though this case was close to the margin, the Tribunal ultimately concluded, therefore, that the Claimant was, at all relevant times, a disabled person in law. However, we note the following points. First, the Claimant did not experience anxiety manifesting itself in symptoms all the time. Secondly, on her own account, anxiety was not generally triggered by the stresses and demands of work. Her evidence (supported by that of Mr Painter) was that she was generally well able to cope with the various pressures, and intrinsically combative nature, of litigation, and indeed enjoyed it. Further, in relation specifically to the property

matter in which RP became in due course involved, the Claimant's own evidence was that the tenant, and the representative who he had used at one point, had both been particularly challenging opponents, but this had not ruffled her.

Actual or Constructive Knowledge of Disability

139. While the Respondent did not admit the Claimant's disabled status, Ms Winstone, in her written submission, acknowledged that the Claimant raised the assertion that she had a health problem of anxiety in her email of 1 June 2016 and subsequently. In oral submissions Ms Winstone conceded that if, contrary to her submission, we found (as we indeed have) that the Claimant was a disabled person, then the requirement that the Respondent at least *ought* to have known that was met as of 1 June 2016; and, hence, it was was met when the decisions to dismiss, and in relation to the appeal against dismissal, were taken.

140. That concession was, in light of our findings, rightly made, and accordingly the knowledge requirement of section 15 of the 2010 Act was met at the relevant time.

141. It is convenient to turn next to the reason or reasons for dismissal.

Reasons for Dismissal

142. The question of the reason(s) for dismissal was pertinent to all of the claims, though different legal tests applied in relation to each. In relation to unfair dismissal, it was for the Respondent to show that the reason or principal reason was related to conduct, as claimed. In relation to direct sex and direct age discrimination, the issues were whether the Claimant's sex, or her age, was a material contributing reason for the decision to dismiss. In neither case did it have to be the sole or principal reason. In relation to the claim of discrimination arising from disability, the issue was whether the dismissal was because of something that arose in consequence of the disability, with the test, again, being whether this "something" was a material contributing reason. It is also recognised in the discrimination-law authorities that a contributing reason may be a conscious or a sub-conscious influence on the mind of the decision-maker. Further, in relation to the discrimination claims, the burden of proof started with the Claimant, but could, potentially, shift to the Respondent under section 136 of the 2010 Act.

143. So far as the age and sex discrimination claims were concerned, the Claimant's case, as already noted, was that it was solely the decision of Mr Langley to dismiss her that was tainted. She did not claim that Mr Smith's decision on the appeal was (consciously or not) influenced by her age or sex.

144. The Respondent's case on all of this, in short, was that the reasons why Mr Langley dismissed the Claimant, and why Mr Smith rejected her appeal, were truly, and wholly, set out in their respective letters, and that neither her age nor her sex played any part, consciously or sub-consciously. In short, the Respondent's case was that both of them simply decided that her admitted dishonest

misconduct was so serious that it warranted dismissal, and, indeed, that there was no other viable option; and that considerations of age or sex in no way influenced them. They both gave evidence to the Tribunal to that same effect. Ms Winstone also submitted that, even if we found that the Claimant was a disabled person, if we also found that she was dismissed for a reason relating to her conduct (as claimed by the Respondent), then there was no evidence that such conduct arose in consequence of that disability.

145. For the purposes of the unfair dismissal claim, the onus was on the Respondent to satisfy the Tribunal of the reason or principal reason which it relied upon. The Claimant did not need to advance an alternative case. However, as well as arguing that both her sex and her age had been factors influencing the decision (of Mr Langley) she also put forward, in her particulars of claim, other factors which she suggested had been reasons, or contributing reasons, for her dismissal. These were all to the effect that it was to the commercial advantage of the Respondent to dismiss her: because it would save on the cost of her remuneration package and/or be able to redistribute her case load to colleagues who were not fully occupied and/or be able to retain the valuable clients who she had introduced, notwithstanding her departure. During Mr Smith's evidence, she indicated that she did not allege that this had influenced him, as opposed to Mr Langley. Mr Langley denied that any such considerations had influenced him.

146. Our conclusions were as follows.

147. Firstly, as we have recorded, we were satisfied by the Respondent's witnesses' evidence that, though he took soundings before coming to his decision, the decision to dismiss was that of Mr Langley alone. Similarly, though Mr Smith also received support in particular from Mr Saunders, who, along with Mr Christensen, saw his letter before it went to the Claimant, we were satisfied that the decision on the outcome of the appeal was that of Mr Smith alone.

148. The reasons which each of them gave at the time, all related to conduct which the Claimant had, as such, admitted, which was documented, and which she agreed was dishonest. Messrs Langley and Smith gave, on the face of it, cogent reasons in their respective letters as to why they regarded the matter was one of serious misconduct warranting dismissal; and they cogently defended and articulated their respective decisions under cross-examination before us. In summary, both of them considered the conduct to be dishonest, not one-off in nature, conscious and thought out; and to have caused, or risked, serious harm to the firm's relationships and reputation, with clients, counsel, opponents, insurers and/or the regulator, as well as having irreparably harmed the necessary relationship of trust with the Respondent as her employer.

149. In light of all the evidence before us, and our findings of fact, we were entirely satisfied that the view that each of them took of the Claimant's conduct was as claimed by the Respondent, and that this was at least the principal, if not the whole, reason, why the Claimant was dismissed and why the appeal failed.

150. What of the allegation that Mr Langley was (also) influenced by considerations of commercial advantage (it being further suggested that he may, in that regard, have also been influenced by discussions about such aspects with Mr Painter or other partners)?

151. Messrs Langley and Painter both gave evidence to the effect that the Claimant was a highly-valued member of the team. As we have recorded, she was regarded as a very able senior and experienced litigator, and she brought in clients. Her career hitherto at the Respondent had been without blemish. Mr Painter also denied in cross-examination that there was a shortage of work for other team members. He agreed that they had discussed that a colleague returning from maternity leave might be able to share some of the load, but the context, he said, was a concern to ensure that the Claimant was able to maintain the right balance between time spent by her on fee-earning and non-fee-earning work. Mr Langley, in cross-examination, said that the idea that dismissing the Claimant would be attractive, because her work could be readily absorbed by under-occupied colleagues, never came up in any discussion – and he described the suggestion as absurd. He agreed that she had brought in clients, and not just to the litigation department, but said that this was precisely one of the reasons why losing her had been a disaster, because of the risk of losing the clients too.

152. In light of all the evidence touching on this aspect, we were quite satisfied that the notion that the departure of the Claimant might be to the commercial advantage to the Respondent played no part at all in her dismissal. No such advantage was even contemplated. The opposite was the case.

Sex and Age Discrimination

153. In support of her complaint that her dismissal was an act of sex discrimination, the Claimant relied on the treatment of two male colleagues, who, she said, had each been guilty of behaviour which was at least comparable in seriousness to hers, but who had not been punished at all. The colleagues and respective matters relied upon were, in summary, as follows.

154. Mr Braithwaite was a senior associate who was involved in the giving of some particular advice concerning the distribution of an estate and the treatment of certain pecuniary legacies. Following a complaint, it was accepted by the firm that the advice that he had given was wrong. The firm apologised, and refunded the fees charged. Mr Braithwaite was not disciplined.

155. Mr Parker was a partner who advised clients on a guarantee provided by them as part of a commercial property transaction. To the clients' disadvantage, he negligently allowed an "all monies clause" to remain in the final guarantee, which should have been removed. Negligence was admitted, but the question of what, if any, loss to the clients had resulted was contested at a High Court trial. That generated a reasoned decision, which included critical observations and findings about Mr Parker. While there were later changes within Mr Parker's department, no disciplinary action was taken in relation to him.

156. The Claimant's case, in short, was that the failure to take any disciplinary action against these two male lawyers, despite what each of them had done, contrasted starkly with her dismissal, called for an explanation to show that sex was not a factor, and/or supported a common-law inference that she would not have been treated as harshly as she was, had she been a man.

157. Ms Winstone submitted that consideration of what happened in these cases did not assist the Claimant. It is well established that the mere difference of characteristic (they are both men, she is a woman) coupled with the difference of treatment (she was dismissed, they were not dismissed or disciplined) would not by itself be sufficient facts to fulfil section 136(2) of the 2010 Act. Nor had any other reason been advanced for supposing that the sex of the individual might be a factor (consciously or not) in any of these cases. Further, the circumstances were materially different, so they were not valid comparators, and the non-discriminatory explanation for the difference in treatment was in any case apparent. In short, submitted Ms Winstone, what both Messrs Braithwaite and Parker had been guilty of was negligence. What the Claimant was found guilty of was dishonest conduct.

158. In relation to Mr Parker, the Claimant relied, in particular, on paragraph 43 of the High Court's judgment. This included the following:

> I was not impressed by the evidence either of Mr Parker or of the claimants. While I find Mr Parker to be on the whole an honest witness, he was ashamed of his mistake and thus sought to minimise it, and he plainly cut corners all the time in his practice. I suspect, although there was no evidence about this, that he regarded himself as a man of commerce rather than a typical solicitor. He did not take full notes of meetings. He was sloppy in dating documents … He saw nothing wrong in getting witnesses to sign only the signature page of documents, so that I can only assume this was habitual with him. He also saw nothing wrong in asking clients to sign documents subject to amendment. While this may be technically possible in circumstances where the solicitor has authority to amend the draft, it is obvious that such practice constitutes an accident waiting to happen and that the accident did in fact happen in this case.

159. The Claimant submitted that, on a fair comparison, Mr Parker's conduct was at least as serious as hers. Mr Winstone, however, submitted that what the High Court had *not* found was that Mr Parker had acted dishonestly.

160. In this regard, the Claimant referred to a particular allegation made against Mr Parker in the High Court litigation, that he had invited someone to append his signature to a document as a witness to certain parties' signatures, when that individual had not actually been present when the parties had themselves signed it. However, it is clear from paragraph 53 of the High Court judgment, that that particular allegation against Mr Parker was *not* accepted by the Court.

161. Our conclusion was that consideration of the cases of Messrs Braithwaite and Parker did not throw any light on the Claimant's dismissal. They were not materially comparable episodes. Though the High Court's verdict on Mr Parker

was heavily critical of him, these were, ultimately, both cases of negligence, and, in Mr Parker's case, poor or hazardous practices, not dishonest conduct. Whether or not either of them may be thought to have got off lightly, in terms of the aftermath within the firm, there was nothing in the material before us to suggest that, if so, that was because he was a man, nor that this in turn suggested that the Claimant was treated less sympathetically because she was a woman.

162. In relation to the age discrimination claim the Claimant did not rely on any actual comparator. However, she referred to an alleged remark by Mr Painter, which, she said, pointed to a culture that was antipathetic to lawyers in her age group prolonging their careers (she was born in 1956). Specifically, her evidence was that, in a conversation in 2014 (or possibly 2015) he told her that it was expected that someone of her age should be thinking about managing her exit to retirement, not of partnership or other advancement.

163. Mr Painter's account was this. Every year the litigation partners considered which names from their department to put forward for consideration for partnership. In that context, he approached the Claimant and asked if she wanted to be put forward. She then asked him about the commercial structure of partnership in terms of risk and reward, and he explained it. She then told him that, as she was contemplating retiring in possibly as soon as seven years' time, the switch would be financially unattractive for her, so, though she would wish in principle to become a partner, in view of the financial implications, she did not wish her name to go forward. He acknowledged in oral evidence that he may have responded that he understood her commercial point, given her thinking about retirement, but the suggestion did not come from him. That would also have made no sense, he said, given the context in which the discussion arose.

164. The Claimant, in her account, denied having intimated any thoughts of retirement, and said the context for the discussion was the annual review of hourly rates, and the limits of what could be charged for her as a non-partner or as a partner. Mr Painter agreed with her that such discussions regularly took place as well, but was adamant that they were distinct from this specific discussion.

165. Mr Painter's account hung together, and was consistent with all the evidence we had about the high esteem in which the Claimant, and her contribution, were held. It was also supported by Mr Langley's recollection. Mr Parker's account was also consistent with a passage in her 2015 appraisal form, where she indicated that she would like to be a partner, but found the commercial terms highly unattractive for someone in her position, and commented that she was "unlikely to retire for another 7 [years] or so." We accepted Mr Painter's account, and were not persuaded that he had said anything either to convey his own, or a general, view that she should be thinking of planning her departure because of her age. Nor did we find any basis here to infer that Mr Langley may have been influenced against her by her age, in his decision to dismiss her.

166. More generally in support of the age and sex discrimination claims, the Claimant referred to statistics in relation to the partnership gender and age profile and suggested that it was an "old boys' club". However, she relied on no other

matters to support the suggestion that there was an ageist or sexist culture in this firm or within the partnership, and this indirect material was not sufficient to support such a finding, or these claims of direct discrimination.

167. For all the foregoing reasons, we concluded that the conduct-related matters which the Respondent relied upon, were not merely the principal reason for the Claimant's dismissal (including the failure of her appeal) but they were the whole of the reasons. Commercial advantage, age and sex played no part in any away.

168. The Respondent had therefore established the fair reason relied upon by it for the purposes of the unfair dismissal claim; and the sex and age discrimination claims both failed, and we dismiss them.

169. It is convenient, at this point, to resume our examination of the disability discrimination claim.

170. Before doing so, we note that, as we will explain, it was necessary to our consideration of the further aspects of this claim that the Tribunal come to various objective conclusions, on the evidence available to it, for itself. When we return, later in this decision, to the unfair dismissal claim, at the liability stage, the approach that the Tribunal must, and did, take to that, is different.

Disability Discrimination Claim – Causation

171. Having found that the Claimant had what amounted to a disability, and that there was constructive knowledge of her condition at the time of the dismissal, the next issue in relation to her disability discrimination claim was whether the dismissal was because of something which arose in consequence of her disability. The "something", in light of our findings, was the Claimant's conduct, as found in the disciplinary process.

172. The authorities establish that the "in consequence" test will be satisfied if the disability is a material contributing cause of the "something" – here, the conduct in question. It does not need to be the main cause, and there may be more than one link in the chain of causation, but it does need to be a contributing cause in some material way. If that link is established before the Tribunal, however, it does not matter whether this was appreciated by the employer, or established on the evidence available to it at the time. This is a matter on which the Tribunal must come to its own objective view, on the evidence that is available to it.[1]

173. In coming to our conclusion on this question in the present case, the following features seemed to us to be particularly relevant.

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[1] See, in particular, **Pnaiser v NHS England** [2016] IRLR 170 and **City of York Council v Grosset**, UKEAT/0015/16, both EAT. We were informed that **Grosset** is under appeal, but these are the current authorities that bind us.

174. First, as we have recorded, the nature of the Claimant's disability, is that it does not manifest itself in significant symptoms or levels of anxiety all the time, but in periodic episodes, typically triggered by certain situations and stressors. The general stresses of the Claimant's job, and the conduct of litigation, are not among them. Nor had the conduct of this litigation triggered any symptoms of anxiety in the Claimant, during the period when she had been dealing with the tenant and/or his lay representative, both of whom were, on her account, challenging and demanding opponents.

175. Secondly, the conduct for which the Claimant was dismissed did not, on any view, involve a one-off, or immediate panic reaction to an unexpected stress-causing development. This was not a case where, for example, the discovery that she had missed a deadline triggered an immediate, hasty panic reaction in the heat of which a single document was created and dispatched before the Claimant had taken time to reflect calmly on the wisdom of her actions. The conduct in this case involved the Claimant taking a series of steps, each of which will have taken some time, and which occurred on a number of distinct occasions, spread out over a number of weeks.

176. The Claimant, at various points in her evidence, indicated that there was something about the correspondence from the solicitor at RP that had a peculiar effect on her – causing her to believe that it was aggressive and bullying (though she now accepted that was not a justified view) and to dread the arrival of the next communication from him. Certainly, it did appear to us that the Claimant, despite her extensive experience of litigation in this area, had not come across a case before where the mortgagee's solicitors took issue in relation to points concerning service of the section 146 notice, and contested the forfeiture proceedings in the way that this firm did. Indeed, it appears that her experience was more commonly of mortgagees going to the other extreme, of discharging the debt in order to preserve their security, and then adding it to their own claim against the tenant.

177. Having regard to all of that, we were prepared to accept that the initial communications from RP, towards the end of 2015, unsettled the Claimant and took her, as it were, out of her usual comfort zone in relation to such matters, and that this contributed to the discomfiting effect which she said RP's communications had on her. We could also contemplate that her initial reaction to their first communications may have been tinged with an element of anxiety that owed something to her disability.

178. However, what then followed was a long chain of back and forth communications, extending on into the new year and into February 2016. It was clear from all the evidence we had, that, at the start of this chain, the Claimant assumed that her responses to RP would be sufficient to persuade them to abandon their challenge in relation to service of the section 146 notices – but this was not what then happened. It was then only after this chain had gone a number of rounds, and after some weeks had passed, that she committed the first act of misconduct for which she was dismissed – the creation of the false time records which were then sent to counsel – and further acts then followed only in April and in May.

179. Further, it was difficult to see how an anxiety reaction triggered by the Claimant's disability would have caused her to engage in this particular form of behaviour – the considered and deliberate production of false documents and the presentation of them as something they were not. We could envisage that in a moment of panic a hasty and poor judgment call might be made. In the present case, conceivably an initial panic reaction might explain the poor decision to seek to rely on personal service, when this had not been properly documented or recorded, rather than just serving again. But that could not explain the conduct in February, April and May for which the Claimant was in fact disciplined. Nor did anything in the Claimant's own examples, in her evidence, of the sort of behaviour that this condition caused her to engage in, support such a conclusion. As Ms Winstone somewhat bluntly put it in submissions – there was no basis to find that this condition was one which caused the Claimant to behave dishonestly in the way that she had.

180. In conclusion, at best for the Claimant, her anxiety disorder may have contributed to, or enhanced, an initial adverse reaction to the first communications from RP, in light of their unexpected and, in her experience, unprecedented stance. That may, in turn, have contributed to her early reaction to that initial correspondence. But there was no sufficient basis to conclude that it was a meaningful contributing cause of the conduct for which the Claimant was in fact disciplined. There was no causative contribution at all, or, if we were wrong about that, at best it was so attenuated through so many links in the chain, over such a period, that it was not sufficient to cross the threshold for section 15 purposes.

181. We therefore concluded that the something – the conduct for which the Claimant was dismissed (and in respect of which her appeal failed) – was not something arising in consequence of her disability. For this reason, her disability discrimination claim under section 15 of the 2010 Act failed.

182. However, as we heard the point argued, we considered whether, had we found otherwise, the Respondent would have succeeded in its justification defence.

Disability Discrimination Claim – Justification Defence

183. We turn, then, to the Respondent's defence to the disability discrimination claim, on the assumption that, as well as the Claimant being disabled, and the Respondent having constructive notice of it, the conduct in question fell (contrary to our view) to be treated as arising in consequence of that disability.

184. The defence in section 15(1)(b) can be considered in the following stages, though we can take the first two fairly shortly.

185. First, what was the aim? The Respondent's case was that the aim of treating conduct of the sort that the Claimant was found to have committed, as a disciplinary matter, for which an employee might be, and she was, dismissed, was to ensure that its practice was run in accordance with proper professional

principles and that there was adherence to professional standards of compliance – in particular those laid down by the SRA. In light of all our findings, we were entirely satisfied that this was, indeed, the aim. Secondly, was this a legitimate aim? Again, we were satisfied that it was. It is self-evidently legitimate for a solicitors' practice to want to conduct itself in accordance with the professional standards and codes which apply to it and its lawyers.

186. The real battle-ground in this case came at the next stage: the question of whether dismissing the Claimant was, in all the circumstances, a proportionate means of achieving that legitimate aim.

187. The language of the justification test under section 15 is the same as that which applies to a claim of indirect discrimination under section 19, and the authorities indicate that it is to be approached in the same way. The test is an objective one to be applied by the Tribunal, taking a critical approach to the competing arguments, looking at the application of the treatment in this particular case. Relevant considerations may include the Tribunal's appreciation of the importance of the aim to the employer's business, the impact of the treatment on the employee, and whether other methods of achieving the aim equally effectively for the employer, but with less adverse impact on the employee, were available.

188. In this case the aim was of the first rank of importance to the Respondent and its business. It is fundamental to a solicitors' practice that it, and its lawyers, conduct themselves in accordance with professional standards – nor could it be assumed that the conduct in question was liable to be regarded as a minor or trivial breach of those standards by the regulator. Further, it was objectively reasonable to regard the conduct as having caused serious harm, or at least posed a serious risk of harm, to the Respondent's business, because of the effect on its reputation with the client and counsel, and others.

189. For the Claimant, of course, the implications of the treatment were also very serious: she lost her job, with all that that entails.

190. The focus of argument was on whether, instead of dismissing the Claimant, it would have been sufficient to the Respondent's aim, in this case, instead to keep her on, not engaged in the conduct of litigation, but purely working as a professional support lawyer. The Respondent argued that it was not, for essentially three reasons, though they overlap to some degree. Firstly, it was considered highly likely that she would, in due course, be struck off the roll as a result of professional disciplinary action, and, if that happened, then she could not be described as lawyer, even as a PSL. Secondly, they were concerned that to retain the Claimant in employment in any capacity would, in view of what the Claimant had done, risk further reputational and business damage. Thirdly, the damage done by the Claimant's conduct to the relationship of trust was simply too great for her continued employment in any capacity to be viable.

191. The matter turns, of course, not on whether these were the genuine views of Mr Langley (we accepted they were) but on the Tribunal's objective assessment

of whether they are sufficiently compelling in the context of the proportionality test – but it was the Respondent's case that they indeed are. Our conclusion was that, objectively, keeping the Claimant on as a PSL did not provide a sufficiently viable alternative route to dismissal, of achieving the Respondent's aim. What the Claimant did struck at one of the fundamentals of her role as a solicitor, being dishonest conduct, in relation to the production of legal documentation, including documentation presented to the Court in litigation and with a statement of truth attached. It was reasonable to take a view, in light of this, that the ongoing risk of damage to the Respondent's business, of keeping the Claimant on in any capacity, was too great, that this severely undermined trust, and that keeping her on pending the outcome of the SRA's consideration of the matter, and any disciplinary ruling, was not a viable alternative.

192. In conclusion, whether by reference to the alternative scenario of keeping the Claimant on as a PSL, or more generally, and taking due account of the very serious consequences for the Claimant of losing her job, even had we found the conduct in question to have arisen in consequence of her disability, we would have concluded that dismissal was a proportionate means of achieving the Respondent's aim, and the disability discrimination claim pursuant to section 15 of the 2010 Act would still have failed.

Fairness of Dismissal

193. In light of our foregoing findings, we were satisfied that the reason for dismissal was the view formed of the Claimant's conduct in question, including the view that she had knowingly acted dishonestly, and the various serious implications of that conduct. This was a reason which related to conduct, and therefore fell within section 98(2)(b) of the 1996 Act.

194. We turn, therefore, to apply the test in section 98(4), and, first, to the particular matters relied upon by the Claimant as having a bearing on the fairness of the dismissal at this stage.

195. The first was that the Respondent did not, before dismissing, properly check whether the alleged conduct was purely confined to the particular matter on which she was dealing with RP, or was, alternatively, as she put it, "systemic". Specifically, the Claimant was told, when she was first suspended, that all her other case files would be reviewed; but that task was then only in fact completed after her dismissal, and indeed after her appeal was heard and decided. The Claimant's argument was that fairness required that this process should have been completed before any disciplinary decision was taken; and if it had been, it would have confirmed that she had not engaged in any similar conduct on any other of her files, and that her conduct in relation to this matter was unique.

196. We did not agree that the handling of this aspect was unfair. Given the nature of the matters raised by RP, it was not surprising that the Respondent wished to carry out a review of all the Claimant's files to see if there was anything on any of them that might give further cause for concern. But the disciplinary

charges which the Claimant faced were solely confined to the matters unearthed on this one file, and the decision to dismiss her was solely based on her conduct on that one file. The decision to dismiss was plainly taken on the basis that – as she indeed asserted – there was no other misconduct on any other matter.

197. Secondly, the Claimant complained that she was shut out from the investigation and had no access to mitigation evidence, as she could not access her work computer. The specific complaint here was that Ms Biggs reviewed the hard copy and electronic files for the matter in question, and produced her investigation report, entirely on her own. She did not involve the Claimant in her work, so there was no opportunity for the Claimant to give Ms Biggs any thoughts or comments on what she found on the files, or otherwise to assist her in trawling through the material.

198. As to that, principles of fairness dictate that the employee should have a sufficient opportunity to know the nature of the evidence on which the disciplinary charges are based, and to put her case, before any decision about her alleged conduct, or the sanction that may attach to it, is taken. In this case, what Ms Biggs was engaged in was, essentially, an evidence-gathering exercise. She took no such decisions. Further, when her report was completed, a copy was provided to the Claimant. Had the Claimant considered that it was in any way erroneous, or contained unfair or false statements or assumptions, she had the opportunity to make her points in the next stages of the process that followed.

199. Further, while the Claimant did not, in fact, have access to her work computer while she was suspended, there was no suggestion at any point from her (either in the internal process or before us) that she believed that the Biggs report was in any way incomplete – that it had, for example, missed out any important correspondence on the case or anything of that sort. Nor did she ask for access to enable her to look out materials relating to the case itself. In all the circumstances, we did not consider the handling of this aspect of matters, prior to the appeal stage, to have been unfair.

200. The Claimant did, at the appeal hearing, refer to medical evidence, which she said she could produce if given access to her work computer. We will return to that aspect shortly.

201. Thirdly, the Claimant argued that it was unfair that the Respondent failed to carry out a medical examination of her, to confirm “multiple medical problems”. The Claimant’s case, more specifically, was that, once it was on notice of her anxiety disorder, the Respondent should have proactively commissioned a medical report about that, and its potential impact on her conduct, at least from a provider of Occupational Health services, if not from some other clinical source.

202. The Respondent’s case was that it had not handled this aspect unfairly, having regard, in particular, to the following. Firstly, they said, Mr Langley and Mr Smith took at face value, and accepted, the Claimant’s assertion that she had a severe anxiety disorder. Secondly, it was open to the Claimant, at any point in the

process, if she wished, to table medical records: she did not need to procure a new medical report – she could have put in copies of her GP's records, or other existing records. Thirdly, when inviting her to the appeal hearing, Mr Smith specifically wrote that if the Claimant had any medical information or reports on which she wished to rely, she should provide them to him. Further, Mr Smith had explored the issue with the Claimant in the course of the appeal hearing.

203. In cross-examination, the Claimant put it to Mr Smith that it should not have been left to her to produce medical evidence: once the issue was in play, it was incumbent on the Respondent, as the employer and in overall charge of the process, at least to refer the issue to Occupational Health. Mr Smith's stance in response was that it was incumbent on the Claimant, in the first instance, to table some form of GP's or psychiatric report, or other basic medical evidence, to substantiate the existence of the condition. Had she done so, he might then have referred to Occupational Health for further guidance.

204. We have to apply a "band of reasonable responses" approach to this question. Ms Winstone's submission was that, even if some employers in this position might have chosen to be proactive in getting medical advice, this employer's approach was, in all the circumstances, within the band of reasonable approaches to this aspect that were open to it to take.

205. On this point, of particular significance, in our view, was the discussion which took place at the appeal hearing. As we have recorded, Mr Smith noted that he had asked the Claimant for any medical evidence. She replied that she did not know whether she was expected to go for a medical, and he explained that he was wondering whether she had any "past" evidence – by which he meant any existing evidence. She then replied that she did, gave a summary of the various treatment that she had had since 2010, and said that she could provide the evidence if given access to a work computer to print it out. Mr Smith, however, did not pursue that, but went on to ask about whether Messrs Langley or Painter had known of these matters at the time.

206. This was a material exchange. The Claimant was saying, taking her remarks at face value, that she had not hitherto appreciated that it was an option for her to produce existing medical records, and, now that she understood that it was, she was giving a description of what existed and how it could be produced for Mr Smith's consideration. It was not suggested, whether at the time or before us, that Mr Smith thought the Claimant was being disingenuous about having misunderstood the position, nor that there was any practical reason why arrangements could not have been made for her to access and print the material, nor that the delay in the appeal process which this would have entailed, was so great as to make it not a reasonable option.

207. We considered that, while *some* employers might, in all the circumstances, have gone further and proactively commissioned a report from Occupational Health providers, this was not something that *no* reasonable employer would have failed to do. But we also concluded that, in light of this exchange during the course of the appeal hearing, *any* employer acting reasonably, would, at least,

have given the Claimant the opportunity to access and table the existing records to which she was referring, and then considered them before coming to a decision in relation to her appeal. The failure to take *that* step was outside of the band of reasonable responses, and, for this reason, the dismissal was unfair.

208. However, for the purposes of remedy, the Tribunal concluded that, had this been done, the outcome of the appeal would still have been the same. In particular, all of these records were available and included in our hearing bundle, and it was clear from Mr Smith's evidence before us, that he remained of the view that there was no sufficient basis to conclude that her anxiety disorder had influenced her conduct in a way that would sufficiently mitigate or excuse it, such that she ought not to have been dismissed.

209. As the question of whether the dismissal was, in any other respect, unfair, may also have a bearing on remedy, we continue with our consideration of other particular issues of alleged unfairness that were raised by the Claimant.

210. The Claimant submitted that the investigation presented what she described as an exaggerated and one-sided picture. This was a very generalised assertion, and we are not sure what it added to the Claimant's other, more specific points. If this was simply a compendious way of referring to the Claimant's contentions that the Respondent's view of the *seriousness* of her conduct was exaggerated, and/or that insufficient consideration or weight was given to her points of mitigation, we will come to these later in this decision. However, if this was intended as a comment on Ms Biggs' report, we do not agree. In light of the evidence before us, we considered that Ms Biggs conducted a highly professional and meticulous review of the contents of the files relating to this matter, and presented a fair and objective analysis of what they showed had happened, and the potential conduct issues to which the evidence she found gave rise.

211. Next, the Claimant also invited us to find that both the initial decision to dismiss and the appeal decision were prejudged and were foregone conclusions. As to that, our conclusions were these.

212. As we have recorded, by the time of the disciplinary hearing before Mr Langley, the conduct for which the Claimant was ultimately dismissed had been fully identified and documented, and, as such, admitted by her. The Claimant's case was, that, once Mr Langley knew what she had, factually, done, and did not dispute doing, then, in his mind, that meant that he was going to dismiss her – "end of" – and that he was not interested in what she might have to say about why she had done it, or any other mitigating factors.

213. In light of all the evidence, and our findings, we did not accept that characterisation of his mind-set and approach. It *was* clear that, once he understood what she had done, he considered the matter to be very serious, her conduct to be very surprising and hard to understand, and that it called for some explanation. His candid answers in cross-examination reflected the fact that he did not find it easy to envisage what possible explanation might have sufficiently

excused such conduct. But, realistically, all of that flowed unsurprisingly from the fact of the conduct itself. That is not the same as saying that he therefore had already decided what the outcome would be.

214. Further, while the Claimant, as we have noted, complained that, given her admission, Mr Langley had unnecessarily questioned her at the disciplinary hearing, we considered that his approach to that hearing precisely reflected his keenness to try and understand why she had done these things, not only because the acts themselves were so surprising and shocking to him, but also so that he could take what she had to say about it into account when deciding what to do. The questions that he asked, and the way that he asked them, plainly reflected this. We accepted that, through this process, he also had a genuine concern for her, and to treat her fairly, as well as a wish to turn over every stone before reaching his decision, given the potential ramifications for the Respondent's business, both of the Claimant's conduct itself, but also of losing her.

215. That Mr Langley gave genuine and anxious consideration to the outcome was also reflected in the way that he took further soundings from colleagues after the disciplinary hearing, particularly in relation to the viability of the PSL option.

216. In light of all the foregoing, we did not find there to have been any unfair prejudgment or closed mind on the part of Mr Langley.

217. Turning to Mr Smith, one particular feature to which the Claimant pointed, was the rapidity with which his decision was issued: the appeal meeting ended at around 11.35 on 5 July 2016 and the decision was emailed to her at 15.41 that same day. She suggested that it must be inferred that it had been largely if not wholly drafted before the hearing, that in turn reflecting that he had already made up his mind.

218. Mr Smith denied having reached a decision in advance of that hearing. In cross-examination, he noted that the conduct, as such, had been admitted. He also had the benefit of having considered all the materials relating to the disciplinary process before, including what the Claimant had said in writing and at the disciplinary hearing, and the basis for Mr Langley's decision, and her grounds of appeal. The focus was on what, if anything, the Claimant had to say that was new, and/or on whether there were any grounds to overturn the dismissal.

219. Mr Smith also said that he had promised to get his decision out quickly and thought it fair to the Claimant to do so. Mr Saunders, the Head of HR, also gave evidence that he provided Mr Smith with a basic template for an outcome letter, but with no substantive outcome. Mr Smith then completed this, once he had made his decision. The letter was then run past Mr Saunders and Mr Christensen before being sent to the Claimant.

220. Our conclusions were these.

221. As we have noted, although Mr Christensen also retained some involvement, Mr Smith did, as the compliance partner, have some involvement in notifying the SRA of the position at each stage of the case; and he was also consulted in relation to the Claimant's application to postpone the disciplinary hearing. However, he was not involved in any substantive deliberation or decision-making, such as would render it unfair for him to consider the appeal.

222. As with Mr Langley, it was not realistic to suppose that, prior to the hearing before him, what Mr Smith had read and learned up to that point, caused Mr Smith to have no preliminary views or reactions at all. He may well have gone into the appeal hearing finding it hard to envisage what the Claimant might be able to say to persuade him to rescind her dismissal. But, once again, that is not, by itself, to be equated with the proposition that he had already decided the outcome, or that he had no interest in what she might say at the appeal hearing itself.

223. The appeal decision *was* produced swiftly. It may be that this was in part influenced by a concern that, for the firm's own reputational reasons, the matter should not be allowed to drift. But even if such concerns fuelled Mr Smith's efforts to turn around the production of the decision promptly, that is still not the same as prejudgment. We add that, while we have found the handling by Mr Smith of one particular aspect to be unfair, we did not think we could extrapolate from that, to the conclusion that the appeal process as a whole was, in effect, a sham. Taking account of all of the evidence and our findings, we were not persuaded that Mr Smith prejudged the outcome of the appeal as a whole in a way that was unfair.

224. Although she mainly sought to rely on the matters concerning Messrs Parker and Braithwaite as throwing light on the discrimination claims, the Claimant also suggested that the disparity between how she, and they, had been treated, was a further consideration supporting the conclusion that her dismissal was unfair. However, for such a disparity argument to succeed, the circumstances of the case relied upon, must, on a consideration of their facts, be sufficiently similar to be truly comparable. For reasons we have already set out, there were material differences between the facts of those cases, and those of hers; and there was no unfair disparate treatment in this regard.

225. Pausing there, the Tribunal concluded that, subject to the one point of unfairness that we have identified, there was, in **Burchell** terms, a reasonably sufficient investigation before the decision to dismiss, and then the decision on the appeal, were taken, and both Messrs Langley and Smith were – particularly given the Claimant's admissions – reasonably entitled to come to the views that they did as to the factual conduct that had occurred.

226. We turn, then, to whether the sanction of dismissal for the conduct found was within the band of reasonable responses. The Claimant raised a number of particular matters in this context.

227. The Claimant referred in submissions to the criminal law test of dishonesty – which requires a consideration both of whether the conduct in question was

objectively dishonest, by the ordinary standards of reasonable people, and whether, if so, the individual subjectively appreciated that it would be regarded that way. The Claimant, as we have noted, sometimes qualified her admissions of dishonesty in language which echoed that test, referring to her agreement that her conduct was "objectively dishonest".

228. We observe that, although one authority suggests the criminal two-part test as a benchmark for unfair dismissal cases concerned with dishonesty, other authority suggests that this is not a necessary approach (compare **John Lewis plc v Coyne** [2001] IRLR 139 and **Gondalia v Tesco Stores**, EAT/0320/14). But in any event, it is clear that the managers in this case were of the view both that the Claimant's conduct was objectively dishonest, *and* that she must have appreciated that it would be viewed that way; and given the nature of the conduct, we have no doubt that was a conclusion that was reasonably open to them.

229. The Claimant relied upon her length of service with the Respondent and that there had been no disciplinary issues, and she generally had an unblemished record, prior to this conduct, indeed not only with the Respondent but generally in her career. The Claimant's case, at its highest, was that no regard had been given at all to these features. As authorities cited by the Claimant to us show, it would, indeed, have been unfair, if no *regard* had been paid to these features at all. But we did not find that to be factually the case. Both Mr Langley and Mr Smith were plainly aware of the position, and the Claimant indeed canvassed and highlighted these points in considerable detail during the disciplinary process. Both of them gave evidence that they considered these aspects – indeed the very positive record of the Claimant's work and contribution – but did not find them to afford sufficient mitigation for the gravity of this conduct.

230. There can be *some* conduct which an employer is entitled to view as so serious, that it may warrant dismissal even of an employee who has long service and no prior disciplinary record. The Tribunal had no doubt that the conduct found in this case fell into this category. We could not say that, having regard to these features, no reasonable employer would have dismissed for this conduct.

231. The Claimant said that it was significant mitigation that she had admitted the conduct itself, and she had shown extreme remorse. It was wholly out of character. Given all of that, it should not have been viewed as harshly as Messrs Langley and Smith apparently did. Once again, it was clear to us that both of them were fully aware of what admissions she had made and when, and everything she had said about her behaviour, in her various written communications and the hearings before them. It was clear that they were both perplexed by her behaviour, which was so unheralded and unprecedented.

232. Once again, the Claimant was right to say that it would have been unfair if these mitigating factors had received no consideration, and authority supported her on that point of law. But in light of all our findings, it was clear to us that these features plainly *were* considered by them both. Indeed it is clear that they gave the ways in which the Claimant herself explained or described her conduct close consideration. In particular both of them considered, having reviewed, and

listened to, what she had said, that she was not fully prepared to acknowledge just how serious her conduct was. Their views in this regard drew directly on her own language and statements, and were expressed in careful and measured terms in their written decisions and evidence before us. We could not say that no reasonable employer would have taken the views that they did.

233. The Claimant submitted that insufficient account had been taken of her explanation that she perceived at the time that RP had been behaving in a bullying fashion or was pursuing some sort of personal vendetta against her. But, again, it is clear that this was considered: the correspondence was read, and it was verified in the course of the process that the Claimant had not in fact had any other communication with the lawyer at RP other than by way of that correspondence. The conclusion reached was that there was nothing in the correspondence from RP that could reasonably be perceived as bullying or otherwise unprofessional, and that it was not accepted that any such perception on the Claimant's part sufficiently excused or explained her conduct.

234. We add that the Claimant also raised in the disciplinary process that there were employees of the Respondent who had, on occasion, been bullied or poorly treated by certain partners in the past, and some such matters were also raised by her in evidence and cross-examination at our hearing. These matters were disputed, the evidence we had about them was limited and peripheral, and their relevance to the issues we had to decide, not wholly clear. Mr Painter, in particular, was cross-examined to the effect that there were episodes of bullying of which he must have been aware, but did not take seriously (which he disputed). But, as we have found, we did not agree that the specific issue of bullying which the Claimant raised in this case, relating to RP, was not fairly considered.

235. The Claimant argued in the internal process that the conduct had not benefited her in any way. Once again, it seemed to us clear, that this argument was understood, and considered, but found not to provide sufficient mitigation. Further, while it was plainly understood that this was not a case of conduct pursued for personal financial benefit, this *was* a matter in which her conduct was in reaction to it being alleged that notices had not been properly served, and a court deadline missed, in litigation which she was responsible for conducting.

236. The Claimant argued that no proper consideration was given to the potentially very serious consequences of dismissal for her, given the various factors affecting her prospects of finding another similar job, and other matters referred to in her emailed submissions and at the hearings during the disciplinary process. But once again, these matters were indeed extensively canvassed by her in those emails and at the hearings, and plainly Messrs Langley and Smith were fully aware of, and considered them. The substance of the complaint was that they did not attach sufficient weight to these aspects. But, once again, we considered that it was reasonably open to them to conclude that, serious though the consequences of dismissal would be for her, the gravity of her conduct, and its effects, warranted the sanction.

237. The specific alternative to dismissal, which the Claimant postulated should have been adopted in this case, was, as we have discussed, to keep her on purely in the role of a PSL (at least pending the outcome of the SRA's consideration and processes and presumably, we add, with some other sanction, in the form of a warning attaching). However, we considered that it was reasonably open to the Respondent, as they did, to reject that option as not viable. Although the legal test is not the same, essentially the same considerations are pertinent here as we have referred to in our discussion of the justification test in relation to the section 15 discrimination claim.

238. Drawing all the threads together, Mr Langley, and Mr Smith, were reasonably entitled to take the view, as they plainly both did, that this was conduct which was dishonest, which the Claimant must have appreciated was dishonest, was not a one-off or single panic reaction, but involved more than one, deliberate act, spread over a period of time, was particularly serious because it involved false statements being made by a solicitor to the Court and third parties in litigation, and had caused, or risked, serious reputational damage to the firm with various third parties. They did, we were satisfied, consider the range of points in mitigation that the Claimant put forward, but were reasonably entitled to conclude that none of them, separately or together, provided sufficient mitigation; and they were reasonably entitled to conclude that, despite her admissions and expressions of remorse, the Claimant still lacked insight into, or was not fully reconciled to, the gravity of what she had done. They were also reasonably entitled to reject the PSL option as not a viable alternative to dismissal, and to conclude that this conduct had seriously damaged the relationship of trust and confidence.

239. We have found that the dismissal was unfair, because of the failure to allow the Claimant to table the medical information that she referred to at the appeal hearing. But we have also found that, had this been permitted, it would not have affected the outcome of the appeal. Having regard to all our other foregoing findings and conclusions, we also conclude that this dismissal was not, and, on that scenario, would not have been, unfair in any other respect.

240. We therefore conclude that, had the one matter that was not handled fairly, been handled in a fair way, the Claimant would still have been dismissed when she was, her appeal would still have failed, and the dismissal would then have been a fair dismissal. Accordingly, no loss has been caused by the unfairness and any compensatory award will be in a zero amount.

Contributory Conduct

241. Where a dismissal is found to be unfair, section 122(2) of the 1996 Act makes provision that where the Tribunal finds that there was conduct on the part of the employee such as would it make it just and equitable to reduce a basic award, the Tribunal may reduce it accordingly. Section 123(6) provides that where the Tribunal finds that action of the employee caused or contributed to the dismissal, it may reduce the compensatory award, by such amount as it finds just and equitable. Where the employee is found to have caused or contributed to the

dismissal, section 116 provides for this to be taken into account in deciding whether, or on what terms, to grant an order for reinstatement or re-engagement.

242. Conduct falling within these provisions is compendiously referred to by employment lawyers as "contributory conduct" (though causation or contribution to the dismissal is not required to trigger a reduction to a basic award). The authorities establish that, for conduct to fall within scope of these provisions, it must be found by the Tribunal to be in some way culpable or blameworthy. Whereas, when deciding liability for unfair dismissal, the Tribunal must not substitute its own views for those of the employer, the Tribunal must make its own findings about contributory conduct on the basis of the evidence before it.

243. Where the Tribunal finds that there has been contributory conduct falling within these provisions, it may make such reduction to the basic and compensatory awards as it considers just and equitable, and this is usually expressed as a percentage reduction. The authorities establish that, potentially, in an appropriate case, the reduction can be 100%, if that is properly supported by the particular findings in that case.[2]

244. Ms Winstone submitted that there was such conduct on the part of the Claimant in this case, being the same conduct for which the Respondent dismissed the Claimant. To recap, that was (a) creating a document falsely purporting to be a time record and holding it out to counsel as such on 18 February 2016; (b) making a witness statement exhibiting the false time record and serving the same on RP and the Court on 8 April 2016; (c) on 16 May sending backdated amended particulars of claim and covering letters to RP and the Court; and (d) on 19 May writing a misleading letter to RP concerning the date of despatch of the letter sent on 16 May.

245. Ms Winstone submitted that, in this case, a reduction of any basic or compensatory awards by 100%, would be just and equitable.

246. There was no dispute in this case that the Claimant did do the things for which the Respondent dismissed her, and we so found. It is also clear that that conduct on her part caused and contributed to her dismissal: that conduct, and its actual and potential impacts, were the whole reason why she was dismissed.

247. We had to decide, then, how serious in our view it was, and what reduction to any basic or compensatory awards on account of it would be just and equitable, having regard to justice and equity to both parties.

248. We considered the following features of this conduct to be particularly relevant. First, this was not a one-off act, done in haste or by way of a panic reaction with no thought. There were a number of acts, done at intervals. Further,

[2] Some authorities suggest that such reductions are rare. We are not aware of any hard statistics, but in any event, that appears simply to be another way of saying that such a reduction must be fully warranted on the facts of the case.

the first act in the sequence – the creation of the false time records – occurred only after some weeks of correspondence between the Claimant and RP about the issue of service of the section 146 notices. Secondly, these were all deliberate acts, and not in any way accidental or inadvertent. The creation of the false records, and the preparation of the witness statement plainly required some thought and preparation. The backdated letters were not sent on the spur of the moment. On the Claimant's own evidence, the phrasing of the subsequent letter was the product of deliberate reflection. Thirdly, all of this conduct was deliberately dishonest, and the Claimant must plainly have appreciated that. Fourthly, the context was that the Claimant was acting as a solicitor conducting litigation, and having duties not only to the Respondent, but also to the Court on its behalf (as well as to others). To deliberately mislead the Court in correspondence and a witness statement tabled in litigation was very serious, and a very serious breach of her obligations to the Respondent.

249. We have considered justice and equity to both sides. In the context of our consideration of the disability discrimination claim, we have already set out our conclusion that we do not find this conduct to have arisen in consequence of the Claimant's anxiety disorder. That finding is also relevant to our consideration of the matter of contributory conduct. We have also considered all of the mitigating circumstances and arguments raised by the Claimant both during the internal disciplinary process and at the hearing before us. We recognise that the Claimant had a hitherto successful career as a solicitor, and with the Respondent, and that she had never before engaged in conduct of this sort.

250. However, having regard to the features we have described, this conduct is highly culpable and blameworthy. As we have recorded, in all respects save one, she was treated fairly; and, had that aspect been handled fairly, she would still have been dismissed, and her appeal would still have failed, and the dismissal would then have been fair. We have already indicated that, in view of that, any compensatory award should be reduced to zero; but in any event, on account of the contributory conduct, it is also just and equitable that any such award be reduced by 100% to zero. In addition, having regard to all our foregoing findings, we have concluded that any basic award should be reduced by 100% to zero as well.

Next Steps

251. As the Tribunal has found that the Claimant was unfairly dismissed, she will now be asked whether she is seeking re-instatement and/or re-engagement, and, as appropriate, further directions may thereafter be given.

Employment Judge Auerbach
29 August 2017