EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs Lynne Pitchford	**AND**	**Care Quality Commission**

JUDGMENT OF THE TRIBUNAL

Heard at: **North Shields** **On:** 26, 27, 30 and 31 July 2018
Deliberations: 16 August 2018

Before: **Employment Judge A M Buchanan**
Non Legal Members: Mrs A Tarn and Mr P Curtis

Appearances

For the Claimant: **Mr D Robinson-Young of Counsel**
For the Respondent: **Mr S Redpath of Counsel**

JUDGMENT

It is the unanimous Judgment of the Tribunal that:

1. The claim of failure to make reasonable adjustments is well-founded and the claimant is entitled to a remedy.
2. The claim of indirect discrimination is not well-founded and is dismissed.
3. The claim of unfair dismissal for the purposes of sections 94/98 of the Employment Rights Act 1996 is well-founded and the claimant is entitled to a remedy.
4. The claim of wrongful dismissal is well-founded and the claimant is entitled to a remedy.
5. The Remedy Hearing will take place on Monday 29 October 2018.

REASONS

Preliminary matters

1. The claimant instituted proceedings on 6 February 2018 relying on an early conciliation certificate on which Day A was shown as 19 December 2017 and Day B shown as 8 January 2018. A response was filed on 6 March 2018. At a private

Preliminary Hearing on 3 April 2018 the issues in the various claims were defined. The Orders made on 3 April 2018 were subsequently amended at a hearing on 30 April 2018.

The claims

2 The claimant advances the following claims to the Tribunal:-

2.1 A claim of ordinary unfair dismissal relying on the provisions of sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act").

2.2 A claim of wrongful dismissal relying on the provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

2.3 A claim of disability discrimination by an alleged failure to make reasonable adjustments relying on the provisions of sections 6, 20/21, 39 and Schedule 8 of the Equality Act 2010 ("the 2010 Act").

2.4 A claim of indirect disability discrimination relying on the provisions of sections 6, 19 and 39 of the 2010 Act.

The Tribunal reserved its Judgment at the conclusion of the evidence. This Judgment is issued with full reasons in order to comply with the provisions of Rule 62(2) of Schedule I to the Employment Tribunals Rules of Procedure 2013.

3 The Issues

The issues in the various claims advanced to the Tribunal are:

Unfair dismissal claim

3.1 Does the respondent prove that the reason for the dismissal of the claimant was related to her conduct and thus a potentially fair reason by reference to section 98(2) of the 1996 Act?

3.2 Did the respondent through the dismissing officer genuinely believe that the claimant was guilty of the gross misconduct alleged?

3.3 If so, did the respondent have reasonable grounds for that belief?

3.4 If so, at the time the respondent formed that belief had the respondent carried out an investigation into the matter that was reasonable in all the circumstances? The claimant asserts that the investigation was not reasonable by reason of the matters set out at paragraph 17(a)-(i) (inclusive) of the particulars of claim annexed to the claim form.

3.5 If so, did the respondent follow a reasonable procedure in moving to dismiss the claimant? In particular, did the respondent follow the provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code")?

3.6 If so, did the decision to dismiss the claimant fall within the band of a reasonable response open to a reasonable employer?

3.7 If so, and the dismissal was for a fair reason but was unfair by reason of the procedure adopted, what would have been the outcome if a fair procedure had been adopted? Would the claimant have faced a fair dismissal and if so when? – the questions arising from the decision in **Polkey -v- A E Dayton Services Limited [1988] ICR 148**?

3.8 If the decision to dismiss the claimant was unfair, did the claimant contribute to the dismissal by her culpable or blameworthy conduct and if so to what extent?

Wrongful dismissal

3.9 Does the respondent prove that the claimant was guilty of gross misconduct and thus the respondent had the right to dismiss the claimant summarily without notice or pay in lieu of notice?

3.10 If not, what is the appropriate award of damages for breach of contract?

3.11 Should any award be made to the claimant for wrongful dismissal or has any award been compensated pursuant to the remedy awarded for unfair dismissal?

Discrimination by failure to make reasonable adjustments

3.12 Was the claimant a disabled person by virtue of the impairment known as Crohn's Disease at the material time pursuant to section 6 of the 2010 Act? It is **noted and recorded** that the material time for the purposes of the discrimination claims is October and November 2017.

3.13 If the claimant was a disabled person did the respondent know or ought it reasonably to have known that the claimant was a disabled person and if so from what date?

3.14 Did the respondent impose a requirement that the claimant attend a disciplinary appeal hearing in Leeds? If so, did that constitute a provision, criterion or practice ("PCP") for the purpose of section 20(3) of the 2010 Act?

3.15 Did the PCP put the claimant at a substantial disadvantage because she found travelling to Leeds difficult because of her health issues?

3.16 If so, did the respondent fail to make reasonable adjustments to avoid putting the claimant at a disadvantage? It is **noted and recorded** that the claimant will assert that a reasonable adjustment would have been to hold the hearing in Newcastle. The respondent will contend that it made reasonable adjustments by organising and meeting the cost of the claimant's travel to and from home to the train station, delaying the start time of the disciplinary hearing and allowing short breaks throughout the process.

Indirect disability discrimination

3.17 Was the claimant a disabled person – see above?

3.18 Did the respondent impose a requirement that the claimant attend a disciplinary appeal hearing in Leeds? If so, did that constitute a PCP for the purposes of section 19 of the 2010 Act? Alternatively did the respondent make an arrangement that the claimant attend a disciplinary hearing in Leeds?

3.19 Did the respondent apply or would the respondent have applied the PCP to persons with whom the claimant does not share the protected characteristic of disability by reason of Crohn's Disease?

3.20 Did the PCP put the claimant at that disadvantage at the relevant time|?

3.21 If so, was the respondent's requirement that the claimant attend a disciplinary hearing in Leeds a proportionate means of achieving a legitimate aim? What was that legitimate aim?

4 Witnesses

Claimant

4.1 The claimant gave evidence and called no other witnesses.

Respondent

For the respondent evidence was heard from:

4.2 Sarah Bickerstaffe "SB" who dealt with the claimant's appeal hearing. This witness gave evidence by video link.

4.3 Tracey Forester "TF" – the claimant's line manager

4.4 Mark Edmonds "ME" – the investigation manager

4.5 Deborah Westhead "DW" – the Dismissing Officer.

Documents

5. We had an agreed bundle before us running to 997 pages. Some pages were added during the hearing. Any reference to a page number in this Judgment is a reference to the corresponding page in the agreed trial bundle.

Anonymisation Issue

6. An issue arose as to whether or not employees of the respondent who had spoken about the alleged behaviour of the claimant, but not formally complained, should be identified in the Judgment. The parties had agreed between themselves that the names of those individuals should be redacted from the trial bundle and

replaced by initials. The Tribunal invited written representations before it met in Chambers on 16 August 2018 and representations were received from the respondent but none from the claimant. Having taken account of those representations, the Tribunal decided that anonymisation is appropriate and this Judgment is prepared accordingly. An Order is made separately under Rule 50 of Schedule 1 of the 2013 Rules of Procedure not to disclose the identity of any employee of the respondent who raised concerns about the conduct of the claimant but who did not give evidence before this Tribunal. The Order is made to preserve the right to privacy of those individuals and after weighing the principle of open justice. The Order does not extend to any person who attended before the Tribunal and gave evidence. The identity of those witnesses is referred to above and whilst they are referred to in our findings by their initials, that is for administrative convenience only.

Findings of Fact

7. Having considered the evidence called before us and having considered the way in which that evidence was given, on the balance of probabilities, we make the following findings of fact:

7.1. The policies of the respondent set out its core values. These are “excellence”-doing the right thing at the right time: “caring”-caring about each and every person and being thoughtful about the impact made as individuals and treating everyone with dignity and respect: “integrity” - demonstrating the highest ethical and moral standards: “teamwork”-working collaboratively with the aim of benefiting the people who use our services and understanding the impact our behaviour has on others and that behaviour which falls below our standards can have an adverse impact on colleagues and the people who use our services.

7.2 The disciplinary policy of the respondent states that no employee will be dismissed for a first breach of expected standards except in the case of gross misconduct when the outcome may be dismissal (page 925). Gross misconduct is defined (page 926) as covering any deliberate or negligent act which is or has the potential to be severely detrimental to the respondent or harmful to the employee other employees or stakeholders or which constitutes a serious breach of the rules and/or the contract of employment. At section 12 (page 934) there is provision for any grievance be dealt with at the same time as the disciplinary proceedings if it is more suitably heard with it or relates to the matters of the alleged misconduct. In appendix A (page 936) examples of gross misconduct include serious breaches of the code of conduct.

7.3 Management guidelines to the disciplinary procedure (page 939) speak of minor breaches of standards, conduct or behaviour being tackled in an informal meeting. Handwritten notes should be taken. If formal action is required an investigator is to be appointed who is to evaluate the matter objectively and take account of all the evidence. If the investigator considers the matter can be resolved informally that should be done. If formal action is necessary (page 943), the employee must be informed of the nature of the allegations in writing. At the hearing an employee is to be allowed to present evidence and call witnesses. In coming to a decision, a manager should consider amongst other factors the employee’s position in the organisation and whether they have responsibility for setting standards for others.

7.4 The respondent has a code of conduct (page 953) ("the Code") which again sets out the core values set out in paragraph 7.1 which are said to have been chosen and developed with the staff. The values are stated to be important in all day-to-day work and in interactions with others and the Code continues "*we are all expected to live up to our values in practice and to support each other in trying to build a positive and inclusive working environment driven by common behaviours".* At page 956 an employee is told s/he has a right to be treated with dignity and respect at work and *"you should always treat your colleagues and anyone you come into contact with during your work with courtesy and respect*".

7.5 The respondent has a bullying and harassment procedure (page 983) which speaks of zero tolerance of bullying and harassment. Under the value "excellence" the policy states that high values are set and that the contribution of others is valued and the respondent aims to have a safe, healthy and positive working environment that is free from bullying and harassment. The key principle is to treat colleagues with dignity and respect and always to consider whether words and actions could be offensive to others and it continues "*the way that your words or actions are received by the other person is most important and even unintentional bullying and harassment is unacceptable".* In this matter, no complaint was made by any employee against the claimant under the terms of the bullying and harassment policy and so it was not invoked at any time.

7.6 The claimant was born on 8 June 1977. She started work for the respondent on 16 February 2015 on a 12 month fixed term contract until March 2016 as a Delivery Lead (A grade) within the National Customer Service Centre (NCSC) of the respondent in Newcastle.

7.7 The claimant was interviewed at the end of April 2015 and gained a secondment to Head of Customer Contact of the NCSC. In that role she reported to TF. The NCSC underwent a modernisation programme during 2016 and 2017. The claimant oversaw the customer contact centre areas of NCSC and the remainder of the Centre was managed by Sandra Gooding "SG". SG was away from May 2016 and as a result the claimant managed approximately 300 front line employees as opposed to 150 in her substantive role. In October 2016 following interview, the claimant secured the Head of Customer Contact role on a permanent basis.

7.8 The claimant had positive feedback on her performance until November 2016. At that time the work of the claimant was deemed to be excellent as it was throughout her time with the respondent: however, issues began to emerge about the relationship of the claimant with her senior colleagues and in particular their reported struggles to work with the claimant because of the feelings they had that the claimant did not perceive their work to be good enough. This was not the perception of those whom the claimant managed but rather her colleagues in the senior management team.

7.9 The NCSC underwent a significant period of change in 2016 and 2017 and the claimant was responsible with others to deliver revised structures, job descriptions, operating processes as well as training and transition elements of moving to a new operating model. As a result, the claimant and her senior colleagues worked under considerable pressure.

7.10 In August 2016 an anonymous letter was received by the Executive Director of the respondent concerning the claimant. TF assured the claimant the letter was not being taken seriously and that there was nothing untoward in the claimant's behaviour. The claimant was not allowed to sit on the appointment panel for A grade roles until formally appointed in October 2016 on a permanent basis. An error occurred which meant the claimant did not sit on the interviews which took place on 3 October 2016. Other issues in relation to the claimant sitting on interview panels arose on 11 October 2016 and as a result some tension arose between the claimant and TF. On 11 October 2016 FT asked the claimant to step down from interview panels that day because JD had felt it necessary to raise concerns with the claimant's inclusion on the panel.TF was asked and she agreed to the claimant stepping down in order to maintain the integrity of the process. The claimant was upset and told TF and FT. TF considered the reaction of the claimant to these events to be astounding as the claimant spent a number of weeks in a state of high emotion and upset.

7.11 On 26 October 2016 the claimant was told that the interviews for capacity planning analyst had been stopped mid interview. It was suggested by JD that the claimant had shared questions for that interview with one of the candidates who was known to the claimant and her husband. There was no truth in that allegation.

7.12 In October 2016 TF was made aware that a relatively senior member of staff managed by the claimant namely LG was feeling bullied, unfairly treated and undermined by the claimant. TF attempted to meet with LG and the claimant in order to improve their working relationship but the meeting was not successful. TF decided to take over the line management of LG herself from that point in time. Over time she saw a gradual improvement in the relationship between the claimant and LG.

7.13 On 14 November 2017 TF was made aware that another anonymous complaint had been received from "NCSC staff" which made complaints about the claimant and others and complained of bullying and aggressive behaviour by the claimant and of her use of inappropriate language in the workplace. TF met with the claimant for a midyear review on 22 November 2017 (page 140). TF raised questions informally about the claimant's relationship with others - in particular her senior colleagues. The resulting note includes the lines: *"We also discussed the issue of colleagues who are struggling to work with you because of their feeling of their work or interaction is not good enough".* TF left the claimant to reflect for herself on how she could improve her relationships with senior colleagues. TF did not make the claimant aware of the second anonymous letter.

7.14 A new colleague JG joined the respondent on 3 January 2017 and the claimant told TF after meeting her that she found JG condescending and not complimentary about the respondent and that she would not be able to get along with her. Some time later both the claimant and JG attended a residential course at Ashbridge and it was reported to TF by those who attended that it was clear that the claimant and JG were not getting along well. JG reported to TF that she found the claimant aggressive and unwilling to engage with her and the claimant told TF that she saw JG as the problem. At a one to one meeting on 18 January 2017 (page 141), TF again raised with the claimant issues about her working relationship with colleagues and it was agreed the claimant should focus on improving over the

next three months her use of inappropriate negative language in the workplace, collaborative working and working with and respect for other members of the senior team.

7.15 A meeting of the senior leadership team took place on 31 January 2017 and TF saw for herself the poor relationship between the claimant and JG. The claimant made statements at that meeting which did not find favour with TF namely that she (the claimant) did not like working in teams and that acting "*professionally corporate*" was not important to her. TF raised these issues with the claimant and encouraged the claimant again to concentrate on improving her relationships with her senior colleagues. On 3 March 2017 TF instructed both the claimant and JG to improve their collaborative working. TF considered that JG accepted that instruction whilst the claimant did not – preferring to blame JG for the difficulties.

7.16 TF arranged for the claimant to have one to one coaching sessions to help improve the areas of her performance where concerns had arisen and at a meeting on 3 March 2017 between TF and the claimant (page 167), it was noted that the claimant was keen to try to reset her relationship with JG. Improvements in the three areas of concern were noted.

7.17 On 5 May 2017 a meeting of the senior management team was held attended by the claimant and TF together with JG and PM. PM sought the go-ahead for her team to put in place matters which had been developed. This was agreed by TF and JG but not by the claimant who stated she would read it later to see if it was accurate. The exchanges in the meeting deteriorated and TF felt PM shaking next to her and so called a halt to the meeting and when she did so the claimant left to attend another meeting. PM spoke to TF and became very upset and explained a pattern of working with the claimant where she thought she had agreed things and then found the matters not agreed in further meetings with the claimant: PM described feelings of uselessness and upset.

7.18 TF was concerned that the claimant's previous behaviour which she characterised as aggressive and inappropriate was being repeated. TF held a meeting with the claimant on 8 May 2017. The contents of the meeting were recorded in an email of 8 May 2017 (page 174). It was noted that since January 2017 the claimant had been working to improve her use of negative language and working with and respecting others in the senior leadership team and collaborative working. The email ends: "*my offer of reflection to you is this-that the tone and style of questioning I observed to PM (our newest member of SLT) was inappropriate and we need to consider and reflect on what our next steps are".*

7.19 TF reflected and noted that PM was the latest in a growing line of senior staff who had been upset by the claimant's attitude following on from JG and LG. TF had in mind the two anonymous complaints which had been received about the claimant and the time she had spent trying to make the claimant aware of the impact her behaviour was having on others. She sought advice from the head of HR Ruth Bailey and she was advised to consider formal action. She concluded that the claimant's inability to improve her behaviour potentially amounted to a serious failure to meet the values of the respondent and that a formal investigation should be commissioned. She also concluded that it was appropriate to suspend the claimant while that investigation took place.

7.20 On 10 May 2017 TF met with the claimant and suspended her. She wrote a letter (page 182) that day confirming the suspension and also confirming that an investigation under the disciplinary procedure would take place to consider the following allegations:

"1. Your behaviour towards colleagues is reported and witnessed as inappropriate humiliating and of a bullying nature. This includes undermining and intimidating colleagues and acting in an aggressive manner.

2. Over the last three months you have been made aware of the impact your behaviour was having on colleagues however the behaviours are still continuing and negatively impacting colleagues".

7.21 The claimant had not expected to be suspended but did wonder if she was to be subjected to performance management procedures.

7.22 The claimant contacted Rachel Chadwick senior HR adviser and asked for a copy of the complaint (page 355) raised by PM and this was sent to her. The claimant responded asking for an explanation as to why the disciplinary procedure was being used and for details of all the allegations against her.

7.23 The respondent appointed ME to carry out the investigation into the claimant's behaviour supported by Richard Patterson of HR. ME did not previously know the claimant but did have some acquaintance with TF. ME was provided with a note from TF and also the note from PM of 9 May 2017 (page 355). TF produced a detailed note for the investigating officer (page 223 – 240) which included correspondence of relevance. ME wrote to the claimant on 16 May 2017 (page 242) explaining the allegation and the procedure he would follow. An interview took place with the claimant by Skype on 16 May 2017 (pages 356 – 359).

7.24 The meeting with the claimant was used by ME to inform his choice of other people to interview and between 1 June 2017 and 6 June 2017 he interviewed 10 further witnesses (pages 380 – 430). Having obtained evidence, ME saw the claimant again at the Royal Station Hotel Newcastle on 19 June 2017. The claimant was accompanied by David Hodgson a colleague. The notes of the meeting are at pages 431 – 441. The claimant asked ME to speak to SH who had provided coaching to the claimant and ME did so on 30 June 2017. A further interview took place with TF to clarify a number of points which had arisen (pages 445 – 452).

7.25 ME prepared a detailed report (pages 334 – 452). The report itself falls into seven sections. At section 2, the background to the investigation was summarised. It was noted that over a significant period preceding 5 May 2017, TF had been discussing with the claimant her behaviour in particular concerning her relationship with five or six members of the senior leadership team since autumn 2016. It was noted the claimant had been offered and had accepted coaching.

7.26 At section 3 of the report the terms of reference were set out together with details of those who had been interviewed. Section 4 set out the process of the investigation and section 5 set out a summary of what the various people had said in their interviews. This was the longest section of the report extending from pages 340 – 350. At section 6 of the report, the findings were set out and in section 7 the

conclusions. It was concluded that the claimant was not a team player in terms of her approach to working collaboratively. It was noted the claimant was someone who expected others to take her lead but that her behaviour indicated something beyond an acceptable assertive management style and instead appeared to be bullying in nature. Such behaviour included ignoring people, undermining people in public settings and using forceful language. A number of those interviewed were said to be fearful of attending meetings where the claimant would be present and one had described the experience as "*almost like a public flogging".* It was noted discussions had taken place between the claimant and her line manager but it was concluded that the degree of seriousness attributed by the line manager was not clear to the claimant and it was accepted that it was a genuine shock for the claimant when concerns about her behaviour had moved from informal discussions to suspension. It was concluded that the meeting on 5 May 2017 was the tipping point. It was concluded that there were concerns about how the claimant related to and worked particularly with people new to the senior management team. It was noted that a complaint from PM was not being treated as a grievance because PM did not wish to take it forward as a grievance and in any event the investigation was wider than the behaviour evidenced towards PM. It was concluded that the coaching undertaken by the claimant did not appear to have resulted in a sustained positive improvement of her behaviour and that the coach had recommended further coaching be put in place. It was noted the quality of the claimant's work was excellent but her delivery had been at the cost of a negative impact on others with whom it was necessary to work collaboratively. It was concluded the claimant saw herself as different to others in terms of her pace of ensuring efficient and timely delivered work and that she held excellence above all other values. Her approach and behaviour when required to work in collaboration had resulted in a number of colleagues being left in tears, fearful and lacking confidence and that that was not what was expected at any level in the respondent organisation. It was recommended that there was a case for a disciplinary hearing for failure to act in accordance with the values of the respondent in not being disciplined in the application of managerial best practice, in not caring for others, in not demonstrating the highest ethical and moral standards and in not demonstrating a sustained ability to work collaboratively. Potential breaches of the bullying and harassment procedure, the code of conduct and the disciplinary procedure were evidenced and it was recommended that a hearing should be convened to consider whether those matters constituted gross misconduct due to serious variations from acceptable standards of conduct.

7.27 The commissioning manager TF received a copy of the final report (pages 333 – 452) in July 2017 and discussed the recommendations with HR and concluded that a disciplinary hearing was appropriate as recommended in the report.

7.28 By letter dated 13 July 2017 (page 474) the claimant was told by DW that there would be a disciplinary hearing to answer the following allegations:

"1. Your behaviour towards colleagues is reported and witnessed as inappropriate humiliating and bullying in nature. This includes undermining and intimidating colleagues and acting in an aggressive manner.

2. Over the last 3 months you have been made aware of the impact your behaviour was having on colleagues however the behaviours are still continuing and negatively impacting colleagues".

The claimant was advised that this could amount to gross misconduct as being deliberate or negligent acts potentially severely detrimental to the respondent or other employees. A hearing in Leeds was set for the 25 July 2017. A full copy of the report of ME was sent to the claimant by letter dated 11 July 2017 (page 454).

7.29 The claimant was told by email on 19 July 2017 (page 478) how to contact some of the people she wished to interview two of whom had declined to be interviewed. The claimant asked for TF to attend the disciplinary hearing in order that she could ask questions of her. An issue arose about the date of the disciplinary hearing. The claimant was told that the venue had been moved to Newcastle at her request as she was unfit to travel to Leeds. The date of the disciplinary hearing was not changed as the claimant had requested.

7.30 By letter dated 19 July 2017 (page 497) the claimant raised a formal grievance which related to the role of TF in the investigation process, the fact that TF knew the witnesses the claimant wished to interview, the fact that the claimant did not know who was managing the disciplinary process in HR, that witnesses had not been interviewed appropriately by the investigating officer, that she had not known the details of the allegations against her and the first time she became aware was when she received the report on 11 July 2017, that the claimant had previously raised complaints against GG in HR and so GG should not be a member of the disciplinary hearing panel, that the hearing had not been adjourned or moved from Leeds, that TF was on leave and could not attend the disciplinary hearing, that the claimant had not been referred to occupational health and that her own concerns about the conduct of colleagues towards her had not been properly investigated.

7.31 By letter dated 20 July 2017 (page 499) the Head of HR decided that the disciplinary hearing manager DW would also hear the claimant's grievance at the same time. It was confirmed that the hearing on 25 July 2017 would be adjourned. A referral of the claimant to Occupational Health ("OH") was made on 25 July 2017

7.32 The disciplinary hearing was rearranged for 22 August 2017 in Newcastle and the grievance hearing was to be on the same day. The claimant was asked to provide the details of the questions she wish to ask TF in advance of the hearings (page 507).

7.33 On 18 August 2017 the claimant wrote to the respondent to say that she was suffering with stress and anxiety and had been signed off work and had started to take antidepressants. She had since found out that she was pregnant and had had to stop taking the medication. She did not therefore feel able to attend the hearing on 22 August 2017. The hearing was rearranged for 1 September 2017 and in the meantime the claimant had been seen by OH on 3 August 2017 who confirmed on 10 August 2017 that the claimant would be fit to attend a disciplinary hearing. It was indicated by the claimant on 15 August 2017 (page 524) that she was not able to cope mentally or emotionally with the hearing on the 22 August 2017 and asked for it to be postponed. The request was refused. The respondent asked for any papers

that the claimant wished to be considered by the panel. The claimant responded (page 518) she was just not well enough to produce any.

7.34 On 25 August 2017 the claimant sent to the respondent the questions she wished to raise with TF at the disciplinary hearing and these were forwarded to TF for her consideration.

7.35 On 29 August 2017 the claimant advised the respondent that she was suffering an inevitable miscarriage and could not attend the hearing on 1 September 2017. HR requested this be confirmed by the claimant's GP. The position was confirmed on 29 August 2017 and the meetings on the 1 September 2017 were therefore adjourned to 15 September 2017 when they went ahead at the Royal Station Hotel in Newcastle. The claimant suffered the miscarriage.

7.36 The grievance was dealt with at the first meeting held with the claimant supported by David Hodgson. GG attended to give advice to DW and a note taker attended (page 590 – 594). The claimant outlined her grievances and in particular that she was only asked five questions in the investigation meeting and had never been told who had complained about her and what the complaints were. The claimant had raised her own concerns with TF about the behaviour of others but nothing had been done about it. The claimant was given a further five days to provide any additional evidence she wished. DW then spoke separately to ME (page 574) and with TF (page 577). ME confirmed he had deliberately tried not to give out names at the investigation stage in case the matter did not go any further but details were provided in the report. The meeting with TF concentrated on the way she had dealt with the behavioural issues of the claimant. The claimant produced a large amount of additional evidence (pages 738 – 914) which related both to the grievance and the disciplinary case.

7.37 On 26 September 2017 DW issued the grievance outcome (page 598). This dismissed all 13 grievances and the claimant was advised of her right of appeal.

7.38 The disciplinary hearing followed the grievance hearing and was minuted (page 561 – 569). ME gave evidence and stated that the terms used to describe the claimant's behaviour ranged from difficult and unfriendly to antagonistic hostile and bullying. All members of staff concerned were senior members of staff. ME had not spoken to the claimant's team because there was no need to do so. The claimant stated the allegations had knocked her sideways because nothing had been discussed with her previously. The claimant stated that the members of the senior leadership team did not like her and it was not right that TF had been allowed to be involved in the process. It had been a quick decision to suspend her and then to put the pieces together to form a case. The claimant had not been told of the real reason for her receiving coaching. The claimant asked if matters had been going on for two years why had there not been a formal plan put in place – she did not take anything away from the complaint of PM but mediation could have resolved it.

7.39 TF joined the meeting and was asked questions by the claimant. She confirmed senior managers had raised issues about the claimant with her and she had been able to rationalise the claimant's behaviour with LG JG and RH but not with PM. She had to look at the pattern of behaviour and the impact it had on PM. The claimant felt things were always aimed at her. TF left the meeting. ME made a

closing statement saying that there had been a number of people left without confidence, fearful about attending meetings with the claimant, in tears and wanting to leave the respondent organisation. Those people deserved better treatment than they had received to date particularly when viewed against the policies. The claimant considered she could mediate with PM. She had not been made aware of all the complaints made against her and did not understand how she ended up at a disciplinary hearing. She had not meant to be hostile towards TF in her questioning but over the last six months there had been allegations that she had behaved inappropriately and TF had not helped.

7.40 After the hearing DW asked a series of questions to TF (page 544 – 547). These were sent to the claimant for her comments which she added at length (pages 547-552).

7.41 DW concluded that the claimant should be dismissed with immediate effect and summarily. She based her decision on her assessment of the claimant's perceived lack of professional judgement and her inability to manage her behaviour in line with the values of the respondent. She concluded that the claimant had had ample opportunity to address the allegations set out in the report, that the claimant had had her behaviour pointed out to her by TF who had set objectives for that to be done, that as a senior manager she should lead by example, that the behaviour had been repeated and there was no acknowledgement from the claimant that her behaviour was inappropriate or required improvement. DW concluded the relationship of trust and confidence had broken down. Despite guidance the claimant had failed to alter her behaviour and management style. The claimant's behaviour amounted to bullying and a serious failure to adhere to the values of the respondent and that she should be dismissed.

7.42 By letter dated 26 September 2017 (page 595) the claimant was told of the decision and of her right to appeal.

7.43 By letter of 6 October 2017 the claimant appealed (page 608). The grounds of appeal were that the sanction was unfair and the disciplinary process had not been followed or applied correctly. The claimant acknowledged there were difficulties in her relationship with LG in October and November 2016 but these issues were resolved.

7.44 The claimant also appealed the outcome of the grievance (page 610) and in particular the claimant stated that she did not have a clear idea of the allegations against her.

7.45 On 1 November 2017 the respondent confirmed that the appeal hearings would be held in Leeds on 10 November 2017.

7.46 The report from OH arising from the referral in July 2017 (page 738) was prepared on 3 August 2017 although is erroneously dated 3 July 2017. The report refers to the stress from which the claimant was suffering "*also had an impact upon a long standing underlying bowel condition she has. She has had to commence medication for this underlying condition due to an exacerbation of her symptoms….In my opinion … the underlying bowel condition is likely to be covered by disability legislation as the condition has been present for more than 12 months*

and without the benefit of treatment her activities of daily living would be affected". It was recommended that any meeting take place at a neutral venue to minimise stress.

7.47 The claimant asked for the appeal hearings to take place in Newcastle just as the disciplinary hearing had taken place there. The respondent refused to move the venue from Leeds but agreed to pay the claimant's travel to Leeds. The respondent would not organise a neutral venue as consideration had to be given to the cost to the public purse. At the appeal hearing SB made it plain that she would have been happy to travel from London (where she is based) to Newcastle to conduct the appeal and that she had not been made aware of the claimant's request to move the hearing. We infer the decision to keep the hearing in Leeds was made by an officer of the respondent in HR for their own convenience and without regard to the disability or state of health of the claimant.

7.48 The claimant travelled to Leeds by train on 10 November 2017 for the appeal hearings. She was offered the use of a taxi from her home in Newcastle to the station there but not from Leeds station to the respondent's office there. The claimant had a 10 minute walk in Leeds from the station. The trains on which the claimant travelled were very busy and she suffered increased levels of stress by reason of difficulty of access to the toilet facilities on the trains she had to use.

7.49 The appeal hearings were conducted by SB in Leeds. The hearings took the form of the claimant setting out her grounds of appeal and DW attended to speak to her decisions. The meetings were minuted (pages 661-675-disciplinary and 676-688 – grievance).

7.50 By letters dated 22 November 2017 (pages 691-694) SB dismissed both appeals in their entirety. With that, the internal process of the respondent concluded.

Submissions

Claimant

8. It was submitted that:

8.1 The condition of Crohn's disease is a terrible condition with embarrassing results: it is a physical impairment with long lasting substantial adverse effects on day-to-day activities.

8.2 There was a requirement made on the claimant for her to go to Leeds. There was a recommendation in the OH report which the respondent failed to act upon. The PCP was the requirement to travel to Leeds to attend the appeal meeting without justification. The respondent has not shown any reason why the meeting should have been held in Leeds. If the claimant wanted to be present as she did then she had to go to Leeds.

8.3 The substantial disadvantage to the claimant of the PCP is made out.

8.4 The behaviour of the claimant has to be reasonably categorised as gross misconduct. This matter could have been dealt with under the bullying and harassment policy and not as a disciplinary matter at all.

8.5 In terms of the test for unfair dismissal the investigation was not fair and balanced. The investigating officer did not look for exculpatory evidence. There was a duty on him to do so because this was a career changing allegation and the burden therefore on an employer to act reasonably is a higher one than in a non-career ending case. The investigating officer did not look for anything other than evidence supportive of the management case. The disciplinary officer saw no necessity for Jill Gray to be re-interviewed when it was clearly necessary for her to be so.

8.6 The dismissing officer based her decision blindly on a flawed investigation and the decision she reached to summarily dismiss the claimant fell outside the band of a reasonable response.

8.7 The ACAS code in respect of investigations was breached. The claimant had no previous disciplinary warnings of any nature against her and whilst an allegation of serious misconduct could have been potentially made, this was not gross misconduct and does not fit into the respondent's definition of gross misconduct. A lack of professional judgement is not gross misconduct.

8.8 The respondent failed to follow its own procedures particularly in the way the claimant was managed prior to 5 May 2017. No proper minutes were kept of any previous discussion, the claimant was not aware of the matters now levelled against her and was denied the opportunity to change her behaviour in the absence of a formal performance management plan. Relationships in the team had improved. The allegations of breach of the ACAS code are set out at page 49.

8.9 The claimant did not contribute to her dismissal if it is found to be unfair. She was a brilliant manager and there should be no deduction for contribution.

8.10 The claimant was not guilty of gross misconduct and the claim for wrongful dismissal should succeed.

Respondent

9. It was submitted that:

9.1 Gross misconduct is defined in the respondent's policies. It is clear that the environment in specific circumstances of the case must be considered. This is a public sector employer where core values are of paramount importance and there are high standards of conduct expected. The policies of the respondent comply with the ACAS code.

9.2 There were grounds on which to suspend the claimant and the disciplinary hearing procedure was a fair one. The allegations against the claimant in respect of her behaviour go to the root of the employment relationship. The allegations fundamentally undermined that relationship.

9.3 In terms of the wrongful dismissal claim, the Tribunal should look at all evidence available and reach a decision on the balance of probabilities. in this case the contract was breached and the claimant was guilty of gross misconduct.

9.4 The events of 5 May 2017 were the tipping point in respect of matters which had been ongoing from August 2016. It cannot reasonably be said that the claimant did not understand or know the ongoing problems in respect of the impact of her behaviour on others. The investigation report did properly inform the claimant. It summarised the evidence of the witnesses, it annexed the notes of those interviews and it is clear the claimant did know the allegations because she took steps to defend itself by submitting further documentation.

9.5 It is clear that the events at the Ashbridge training centre and the anonymous letters themselves had no importance and were not referred to in any meaningful way by the dismissing officer. The claimant did have the opportunity to call witnesses and did call TF as her witness. The statements of the witnesses do not demonstrate exaggeration. It would not have been reasonable to interview members of the claimant's own team for there was no allegation that she behaved inappropriately towards. The burden of proof is on balance of probabilities and the decision to dismiss summarily is one which did fall within the band of a reasonable response. The respondent was concerned about the way in which the behaviour of the claimant was perceived and a central value is that she should act respectfully to others and be mindful of the impact of her behaviour on others. The interviews reveal that the claimant did not do this and as a result she was summarily dismissed.

9.6 If the dismissal is unfair then given a break down in the working relationships the respondent could surely have dismissed in any event for some other substantial reason and therefore a fair dismissal would have followed very shortly after the actual dismissal for that reason. The Tribunal should take this into account in respect of any Polkey deduction. There is no evidence that the claimant could or would have modified her behaviour given the history of this matter. The claimant has acted in a culpable and blameworthy way and if her contribution is to be assessed, it should be accessed in excess of 75%.

9.7 In respect of the disability claims, the real issue turns on travel arrangements and does not bear on the dismissal. The burden is on the claimant to establish that she was disabled at the material time. The claimant made no reference to any disability before the referral to occupational health and the resulting report of 3 August 2017. The respondent did not have knowledge of the disability. There is no record of any medication being taken by the claimant in respect of her alleged impairment and the respondent is entitled on the evidence available to doubt the claimant's evidence.

9.8 There was an arrangement made for the claimant to go to Leeds. It is a balancing exercise for the Tribunal. It was not ideal for the claimant to go to Leeds but in all the circumstances the respondent says it was a reasonable arrangement and other management measures were put in place to deal with the circumstances of the disability. The claims for disability discrimination should be dismissed.

The Law

Failure to make Reasonable Adjustment Claim: sections 20/21 of the 2010 Act

10.1 The Tribunal has reminded itself of the relevant provisions of section 20 and 21 and Schedule 8 of the 2010 Act which read:

Section 20:

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

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

Section 21

(1) A failure to comply with the first second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person
(3) A provision of an applicable Schedule w)hich imposes a duty to comply with the first, second or third requirement applies only for the purposes of establishing whether A has contravened this Act by virtue of subsection(2): a failure to comply is , accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8

The Tribunal has had regard to the relevant provisions of Schedule 8 of the 2010 Act and in particular paragraph 20 which reads:
" (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know...
(b)….that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement".

10.2 The Tribunal reminded itself of the authority of **The Environment Agency v Rowan [2008] IRLR20** and the words of Judge Serota QC, namely:

"An Employment Tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the 1995 Act by failure to comply with section 4A duty must identify –

(a) the provision, criterion or practice applied by or on behalf of an employer;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate);

(d) the nature and extent of the substantial disadvantage suffered by the claimant.
It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by and on behalf of an employer" and the 'physical feature of the premises', so it would be necessary to look at the overall picture.

In our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice or feature placing the disabled person concerned at a substantial disadvantage".

The Tribunal notes this guidance was delivered in the context of the 1995 Act but considers it equally applicable to the provisions of the 2010 Act.

10.3 The Tribunal has reminded itself of the guidance in respect of the burden of proof in claims relating to an alleged breach of the duty to make reasonable adjustments in the decision in **Project Management Institute -v- Latif 2007 IRLR 579** where Elias P states:

"It seems to us that by the time the case is heard before a Tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative……that is why the burden is reversed once a potentially reasonable adjustment has been identified…..the key point…is that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made……we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

10.4 The Tribunal has had regard to the EHRC Code of Practice on Employment 2011 ("the Code") and in particular paragraph 6.28 and the factors which might be taken into account when deciding what was a reasonable step for an employer to have to take namely:-

"(1) Whether taking any particular step would be effective in preventing the substantial disadvantage.

(2) The practicability of the step.

(3) The financial and other costs of making the adjustment and the extent of any disruption caused.

(4) The extent of the employer's financial or other resources.

(5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice from Access to Work).

(6) The type and size of the employer. "

10.5 We have reminded ourselves of the words of Simler J in the decision in **Lamb -v- the Business Academy Bexley UKEAT/0226/15:**

*"The phrase "PCP" is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions. In **Nottingham City Transport Ltd v Harvey** UKEAT/0032/12 Langstaff J said it had:*
"18. … something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustments, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."

Indirect Discrimination

10.6 The provisions of section 19 of the 2010 Act provided:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if--
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) the relevant protected characteristics are …disability…marriage and civil partnership ….sex;

10.7 We have reminded ourselves that in considering a claim of indirect discrimination it is necessary to consider the matter in stages. First has the

respondent applied the PCP contended for by the claimant to the workforce or a part of it. Secondly, if so, to consider if there is particular disadvantage to those with the relevant protected characteristic under consideration. To undertake this exercise, we must identify the pool of people to be considered and in considering the pool we must not overlook the provisions of section 23 of the 2010 Act. Thirdly, if group disadvantage can be established we must consider whether the claimant has shown that she suffers particular disadvantage by reason of that PCP. If all those matters are satisfied then we must consider whether the respondent has shown that the application of the PCP is a proportionate means of achieving a legitimate aim.

Unfair Dismissal– Section 98 Employment Rights Act 1996 (the 1996 Act)

10.8 The Tribunal has reminded itself of the provisions of section 98 of the 1996 Act which read:

"*98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –*
(a) the reason (or if more than one the principal reason) for the dismissal, and
(b) that it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) The reason falls within this subsection if it –
(a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed to do;
(b) relates to the conduct of the employee …

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
(b) shall be determined in accordance with equity and the substantial merits of the case".

10.9 The Tribunal has reminded itself of the decision of **British Home Stores Limited v Burchell [1978] IRLR379** and notes that it is for the respondent to establish that it had a genuine belief in the lack of capability of the claimant at the time of the dismissal and that that belief was based upon reasonable grounds and the dismissal followed a reasonable investigation and a reasonable procedure. We remind ourselves that in the context of a dismissal for reasons related to capability, a reasonable employer will generally consider such matters as redeployment of the employee to another role and allowing an employee the opportunity to improve before moving to dismiss. We remind ourselves that other considerations (such as patient safety) may well trump matters which might ordinarily be considered.

10.10 We remind ourselves that in considering the questions posed by section 98(4) of the 1996 Act, we must not substitute our view for what the respondent should or should not have done. We remind ourselves that there is no burden of proof resting on either party in respect of the matters to be considered pursuant to section 98(4) of the 1996 Act. Those matters must be judged from the standpoint of the objective reasonable employer and we must consider whether what the respondent did fell within the band of a reasonable response and only if it did not, can we strike down the dismissal as unfair. We have reminded ourselves of the guidance of Aitkens LJ in **Orr –v- Milton Keynes 2011 ICR 704** in respect of the matters for us to consider pursuant to section 98(4) of the 1996 Act. Whilst that was a case in respect of a misconduct dismissal, the guidance on the approach to the questions in section 98(4) of the 1996 Act holds good.

"…..the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.[7] (7) The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted".[8] (8) A particular application of (6) and (7) is that an ET may not substitute its own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances. [9] (9) An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process[10]) and not on whether in fact the employee has suffered an injustice.[11]

10.11 We have reminded ourselves that the Court of Appeal in **Whitbread plc –v- Hall 2001 ICR 699** confirmed that the band of reasonable responses test applied not only when considering the substantive decision to dismiss but also when considering the procedural steps taken by an employer.

10.12 The Tribunal has reminded itself of the decision of **South West Trains v McDonnell [2003] EAT/0052/03/RN** and in particular has noted the words of HHJ Burke at paragraph 36:

"Whilst not only unfair it is incumbent on an employer conducting an investigation followed by a disciplinary hearing both to seek out and take into account information which is exculpatory as well as information which points towards guilt, it does not follow that an investigation is unfair overall because individual components of an investigation might have been dealt with differently, or were arguably unfair. Whilst, of course, an individual component on the facts of a particular case may vitiate the whole process the question which the Tribunal hearing a claim for unfair dismissal has to ask itself is: in all the circumstances was the investigation as a whole fair?"

10.13 The Tribunal has reminded itself of the decision of **Taylor v OCS Group Limited [2006] IRLR613**. The Tribunal has particularly noted the words of Smith L.J. at paragraph 47:

"The error is avoided if ETs realise that their task is to apply the statutory test. In doing that they should consider the fairness of the whole of the disciplinary process. If they found that an early stage of the process was defective and unfair in some way they will want to examine any subsequent proceedings with particular care. Their purpose in so doing will not be to determine whether it amounted to a re-hearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker the overall process was fair, notwithstanding any deficiencies at the early stage".

10.14 In the employment context "gross misconduct" is used as convenient shorthand for conduct which amounts to a repudiatory breach of the contract of employment entitling the employer to terminate it without notice. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances. Exactly what type of conduct amounts to gross misconduct will depend on the facts of the individual case. Generally to be gross misconduct, the misconduct should so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment. Thus in the context of section 98(4) of the 1996 Act it is for the Tribunal to consider:

(a) was the employer acting within the band of a reasonable response in choosing to categorise the misconduct as gross misconduct and

(b) was the employer acting within the band of a reasonable response in deciding that the appropriate sanction for that gross misconduct was dismissal. In answering that second question, the employee's length of service and disciplinary record are relevant as is his attitude towards his conduct.

10.15 We have reminded ourselves of the provisions of section 207A of the 1992 Act which provides that any Code of Practice issued by ACAS shall be admissible in evidence and that a Tribunal shall take account of any provision of such code as appears relevant. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2009 contained the following provision:

"9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct ….and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. …".

10.16 We reminded ourselves of the provisions of Section 123(6) of the 1996 Act – *'Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the compensatory award by such proportionate as it considers just and equitable having regard to that finding'.* We

note that for a reduction from the compensatory award on account of contributory conduct to be appropriate, then three factors must be satisfied namely that the relevant action must be culpable or blameworthy, that it must have actually caused or contributed to the dismissal and it must be just and equitable to reduce the award by the proportion specified. The Tribunal must concentrate on the action of the claimant before dismissal because post dismissal conduct is irrelevant. We have noted the provisions of Section 122(2) of the 1996 Act and the basis for making deductions from the basic award. We have noted the guidance of Brandon LJ in **Nelson –v- BBC (No 2) 1980 ICR 110**:

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved".

10.17 We have reminded myself of the provisions of Section 123 of the 1996 Act in relation to the fact that compensation must be 'just and equitable' and have reminded myself of the decision of **Polkey –v – A E Dayton Service Limited 1988 ICR142**. We note that the Polkey principle applies not only to cases where there is a clear procedural unfairness but what used to be called a substantive unfairness also. However whilst a Tribunal may well be able to speculate as to what would have happened had a mere procedural lapse or omission taken place, it becomes more difficult and therefore less likely that the Tribunal can do so if what went wrong was more fundamental and went to the heart of the process followed by the respondent. We have noted the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT.** We recognise that this guidance is outdated so far as reference to section 98A(2) is concerned but otherwise holds good. We note that in cases involving allegations of misconduct a **Polkey** assessment is likely to be more difficult than in a redundancy dismissal case and that a misconduct case will likely involve a greater degree of speculation which might mean the exercise is just too speculative. We note that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions the fact that a Polkey deduction has already been made or will be made under one heading may well affect the amount of deduction to be applied for contributory fault.

10.18 We have reminded ourselves of the more recent guidance from Langstaff P in **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274** and as to the correct approach to the Polkey issue.

*"A "**Polkey** deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer **would** have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is*

to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand".

Wrongful Dismissal Claim

10.19 The test of the band of reasonable responses has no application to this claim. The issue here is for us to determine whether the respondent has shown on the balance of probabilities on the evidence before us that the claimant was guilty of gross misconduct. It is for us to make our own decision on that and not to evaluate the reasonableness of the respondent's decision.

The meaning of Disability within section 6 of the 2010 Act

10.20 The Tribunal reminded itself of the meaning of disability and in particular Section 6 of the 2010 Act which provides:

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

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability--
(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)--
(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

10.21 We have also referred to Schedule I to the 2010 Act and in particular the following paragraph 2:

2. Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

10.22 The Tribunal has reminded itself of the decision in **Goodwin –v- The Patent Office 1999 ICR 302 EAT** and the guidance in that decision to the effect that in answering the question whether a person is disabled for the purposes of what is now section 6 of the 2010 Act, a Tribunal should consider the evidence by reference to four questions namely:
1. did the claimant have a mental and/or physical impairment?
2. did the impairment adversely affect the claimant's ability to carry out normal day to day activities?
3. was the adverse effect substantial?
4. was the adverse effect long term?
We note that the four questions should be posed sequentially and not cumulatively. We note it is for us to assess such medical and other evidence as we have before us and then to conclude for ourselves whether the claimant was a disabled person at the relevant time. For the purposes of this claim the relevant time began in 2013 and lasted until October 2015.

10.23 The Tribunal reminded itself that the meaning of the word "*likely*" referred to at paragraph 9.2 above is "*could well happen*" as determined by Lady Hale in **SCA Packaging Limited –v- Boyle 2009 ICR 1056**.

Conclusions and Discussion

11. We propose to deal with the claims of discrimination and then the unfair dismissal claim and then the wrongful dismissal claim.

The question of disability

11.1 We have considered whether the claimant suffered from an impairment within section 6 of the 2010 Act. We have considered the evidence of the claimant and we have also considered a brief medical report from the claimant's GP dated 17 May 2018 (page 696) which confirms the claimant suffers from Crohn's disease. We have also considered the 0H report obtained by the respondent in August 2017 which refers to a long-standing bowel condition. We are satisfied that the claimant suffered from Crohn's Disease at the material time and that this is a physical impairment. We are satisfied the claimant has suffered with this condition since she was aged 15 and that in 1997 when she was aged 20, she underwent a right hemicolectomy in an attempt to treat the condition.

11.2 We have considered if the impairment adversely affected the claimant's ability to carry out normal day-to-day activities at the material time. We have given careful attention to the claimant's disability impact statement (page 51). We have to consider the adverse effects on the claimant's ability to carry out normal day-to-day activities as they would be if the claimant did not take medication or adopt measures to treat or correct the impairment. We are satisfied that the claimant is cautious at all times about what she eats and drinks and if she is to travel to important meetings or events, she restricts what she eats in order to minimise or remove the necessity to use toilet facilities. In addition, we are satisfied that in June 2017 the claimant was prescribed (not for the first time) an anti-inflammatory drug called mesalazine to try and reduce the risk of a flare-up of her condition. We discount the ameliorating results of that medication and those measures.

11.3 We have considered whether there was an adverse effect on the normal day-to-day activities of the claimant by reason of the impairment at the material time which was in October and November 2017. We note that in this context adverse means something more than minor or trivial. We are satisfied that the claimant has established on the balance of probabilities that the effect on her normal day-to-day activities of walking and travelling on public transport and of eating and drinking were adversely affected at the material time or would have been so but for the medication taken at that time and the measures adopted by the claimant to control such adverse effects. We accept that the claimant was not able to use public transport as any non-disabled person would and was not able to eat and drink without giving thought to where she was to go in the course of the day and whether she would have easy access to toilet facilities. Those effects on those normal day to day activities are more than minor and trivial.

11.4 We are satisfied that since 1997 the adverse effects which we have identified have been present and thus they are long-term for the purposes of the 2010 Act.

11.5 Accordingly we conclude that the claimant was a disabled person for the purposes of section 6 on the 2010 Act at the material time namely when the appeal hearing was being organised in October and November 2017.

Knowledge of the respondent

11.6 We have considered the question of knowledge of that disability and conclude that the respondent and its officers did know of the claimant's disability by reason of the contents of the OH medical report dated 3 August 2017. That report made clear reference to a long-standing bowel condition of the claimant which in the opinion of the OH Advisor was likely to be a disability for the purposes of the 2010 Act. Furthermore, the claimant had herself made the respondent aware of the condition by her correspondence with them and we conclude that the respondent therefore did have knowledge of the disability of the claimant at the material time.

11.7 For the purposes of the adjustment claim, the respondent must be aware not only of the disability but also that the claimant was likely to be placed at the substantial disadvantage referred to in section 20(3) of the 2010 Act: this requirement comes from the provisions of paragraph 20(1)(b) of Schedule 8 of the 2010 Act. We have considered whether the respondent knew or could reasonably have been expected to know of the disadvantage. In this regard we have taken full

account of a document produced in the course of the hearing (page 51A) which records the journeys, numbering almost 30, taken by the claimant on public transport in 2016/2017 during her employment. The respondent preys that document in aid to show that it did not know or could not reasonably have been expected to know of the disadvantage to the claimant caused by the PCP (if such it is). We do not agree with that submission. The respondent knew that the claimant suffered from a severe bowel complaint and she had made the respondent aware that stress increased the adverse effects of that complaint. The respondent had an OH report clearly suggesting adjustments to alleviate the stress from which the claimant was suffering. We conclude that the respondent knowing both of the serious bowel complaint and the stress from which the claimant suffered could reasonably have been expected to know that the effect of the disability in those circumstances was likely to be more than minor or trivial. We conclude therefore that the respondent did have the requisite knowledge both of the claimant's disability and of the likelihood of substantial disadvantage at the material time.

The claim of failure to make reasonable adjustments: sections 20/21 and schedule 8 of the 2010 Act

11.8 We have considered whether the PCP contended for by the claimant was applied by the respondent. In this case the respondent required the claimant to travel from Newcastle to Leeds in order to attend an appeal hearing and that is said by the claimant to be a PCP. We do not accept that that requirement was a one-off decision. There is evidence before us that the respondent did require employees (and former employees) based in Newcastle to travel from Newcastle to Leeds for the purposes of disciplinary hearings if that meant the hearing could be dealt with more expeditiously. We find confirmatory evidence in the claimant's own case. The respondent initially required the claimant to travel to Leeds for the disciplinary hearing and set a date for the hearing there on 25 July 2018. We can and do infer that such was the practice of the respondent generally. That practice amounted to a PCP which was applied by the respondent to the claimant twice. First for the disciplinary hearing when it was adjusted to move the hearing to Newcastle and secondly for the appeal hearing when it was not adjusted.

11.9 If that conclusion should be wrong, then we find that the decision to hold the appeal hearing in Leeds was a one-off provision which relying on the decision in **Business Academy Bexley (above)** does amount to a PCP and which falls to be scrutinised under the provisions of section 20 of the 2010 Act as well as section 19 of the 2010 Act. We conclude there was a PCP applied to the claimant of requiring the appeal hearing to take place in Leeds and thus we can consider the claim of failure to make reasonable adjustments advanced relying on section 20(3) of the 2010 Act.

11.10 We have considered whether the PCP placed the claimant at substantial disadvantage compared to a non-disabled employee who was required to travel to Leeds from Newcastle. We are satisfied that it did place the claimant at a substantial disadvantage. We accept the claimant's evidence that being required to travel by public transport to Leeds increased the stress from which she suffered and meant that she endured two rail journeys with increased anxiety which would not have been the case with employees not suffering from the disability. The claimant had to take steps to restrict her diet and fluid intake prior to the journeys

and this would not have been the case with non-disabled employees. There was substantial disadvantage to the claimant.

11.11 We have considered whether the adjustment of moving the hearing to Newcastle would have been reasonable. We have no hesitation in deciding that it would. The same adjustment had been made in relation to the disciplinary hearing. The appeal officer herself indicated that she would have had no difficulty at all in travelling to Newcastle and the decision to continue to hold the appeal in Leeds was one which we infer was made for the convenience of the HR officers of the respondent. The cost of the adjustment would have been minimal in the context of the size and resources of the respondent. For the disciplinary hearing and indeed the investigatory meeting, the respondent had hired rooms at a central Newcastle hotel and there was surely no reason why that could not also have been the case in relation to the appeal.

11.12 An adjustment of moving the appeal hearing to Newcastle would have been reasonable. It was not made and it was an act of disability discrimination by a failure to make a reasonable adjustment.

11.13 We have considered the time issues in relation to this claim. The claim is clearly in time. Therefore, the claim is well-founded and the claimant is entitled to a remedy.

The claim of indirect disability discrimination: section 19 of the 2010 Act

11.14 We repeat our finding in respect of the PCP engaged in this matter as set out at paragraphs 11.8 and 11.9 above.

11.15 This particular claim, whilst not withdrawn, was not pursued before us with any conviction. It is not for the Tribunal to make a claim out which was not fully addressed. No evidence was called before us and no submissions were made about the identity of the group to which particular disadvantage must be shown if this particular head of claim was to succeed. There is no pleading on the point to assist us. This head of claim fails for want of evidence on the issue of group disadvantage which is a requirement to be shown before other matters can be considered. In any event this claim was effectively advanced as an alternative to the reasonable adjustment claim which has succeeded.

Unfair dismissal: section 94/98 of the 1996 Act

The reason for dismissal

11.16 We have considered whether the respondent has proved the reason for the dismissal of the claimant as being related to her conduct. We have considered in particular the evidence of the dismissing officer. We are satisfied that the reason for the dismissal of the claimant was that the dismissing officer genuinely believed that the claimant acted in a way which was contrary to the core values of the respondent and she categorised and genuinely believed that conduct by the claimant to be gross misconduct. We are satisfied that the dismissing officer genuinely believed the behaviour of the claimant was related to her conduct rather than to her capability. No other reason was suggested as being the reason for this

dismissal. We are satisfied on the balance of probabilities that the reason for the dismissal of the claimant was related to the conduct of the claimant. Accordingly, the respondent has proved the reason for the dismissal of the claimant. It is a potentially fair reason within section 98 (2) of the 1996 Act and so we move on to consider the questions posed by section 98 (4) of the 1996 Act.

The questions posed by section 98(4) of the 1996 Act

11.17 In moving on to consider the section 98(4) questions, we remind ourselves again that there is no burden on either party in these matters but the burden of proof lies neutrally between them. It is not for this Tribunal to impose its view as to what should or should not have happened to the claimant but each question has to be considered from the standpoint of the reasonable employer and this applies as much to procedural matters as it does to so-called substantive matters.

11.18 We have considered whether at the point of dismissal the respondent had carried out as much investigation into the allegations against the claimant as was reasonable. We have considered the investigation carried out by ME. We refer to our findings of fact in relation to the investigation and we are satisfied that investigation was thorough and detailed as Mr Redpath for the respondent described it.

11.19 We have considered each of the matters raised by the claimant in her pleadings as evidencing an unreasonable investigation or procedure employed by the respondent. We have first considered whether at the point when disciplinary proceedings were instituted against her, the claimant had sufficient information about the allegations levelled against her. We had a concern that the reasons given to the claimant first for her suspension and then secondly as matters to be investigated by ME were of a general nature. At that stage of the procedure allegations of a general nature are not unreasonable. However, the allegations were repeated in the same format when disciplinary charges were levelled against the claimant as our findings at paragraph 7.28 make clear. By that time, the matters alleged against the claimant were clear but that clarity is not reflected in the framing of the allegations themselves for the same wording is repeated. However, the matter is rescued because the respondent sent to the claimant the full report of ME which clearly set out for the claimant the matters related to her behaviour which were levelled against her. It would have been better in our judgment for those matters to have been clearly expressed in the letter to the claimant of 13 July 2018n (paragraph 7.28 above) but the way the respondent dealt with the matter was not unreasonable. We are supported in that conclusion by the fact that the claimant clearly did know and understand the matters alleged against her by the time of the disciplinary hearing for she was able to respond to them in detail.

11.20 We have considered whether the claimant was told all the matters alleged against her during the investigation process of ME. We accept that the claimant had little information and was asked few questions at her first meeting with ME on 16 May 20127 (paragraph 7.23) but we are satisfied that at the meeting in person in Newcastle on 19 June 2017 (paragraph 7.24) reasonable information as to the allegations against her was given to the claimant and she was reasonably able to respond at that time. We do not accept that the investigation report was biased or provided purely negative views of the claimant.

11.21 We reject the criticism of the investigation report that it contained few tangible examples of alleged misconduct. We are satisfied that the report reasonably set out the matters which led to the claimant being brought to a disciplinary hearing. We have considered whether there is evidence of inconsistency in bringing the claimant to a disciplinary hearing in respect of her conduct whilst others were not treated in that way. We are satisfied that the decision so to do in the case of the claimant was reasonably influenced by the number of senior colleagues who had raised issues about the claimant's conduct, by the period of time over which those concerns had been raised, by consideration of the necessity to provide the claimant with formal counselling in respect of her behaviour and by reason of what TF had seen with their own eyes on 5 May 2017. We are satisfied that that level of concern was not present for any other employee of the respondent and that the decision to take matters further in the case of the claimant was reasonable.

11.22 We have considered whether the role of TF as commissioning manager for the investigation report resulted in a situation of conflict. TF was the line manager of the claimant and the appropriate person to commission the investigation report into her behaviour. The fact that she had witnessed some of the behaviour which led to the commissioning of the report does not in our judgement mean that the process followed became unreasonable. There was clear separation of the investigation from the subsequent disciplinary hearing and we conclude that the role of TF in that process did not render it unreasonable. In particular, we have considered whether the actions of TF in advising members of the senior leadership team that the claimant was unavailable after her suspension meant that the process was thereby rendered unreasonable. It was not. The claimant was a senior member of staff and her absence clearly needed to be referred to and we are satisfied that in acting as she did, TF acted reasonably and the process was not thereby rendered unreasonable or unfair.

11.23 We have addressed the question of the use by the respondent of its disciplinary policy rather than the bullying and harassment policy. In this case no one individual member of staff made a formal complaint of bullying or harassment against the claimant and thus we conclude that it was reasonable for the bullying and harassment policy not to be invoked. Instead the respondent invoked its disciplinary procedure and we conclude that that was a reasonable decision to adopt. We have engaged with the criticism that the matters alleged against the claimant related to her capability rather than to her conduct. We conclude that the dismissing and appeal officers reasonably concluded that the matters related to conduct. There was evidence available that the claimant did not agree with or fully accept the core values which underpinned the operations of the respondent. The claimant had received counselling to help her appreciate the effect her behaviour had on others. The conclusion of the investigation and disciplinary officers that the allegations against the claimant related to her conduct rather than her capability was not unreasonable.

11.24 We have considered the criticism made by the claimant that the investigation of the respondent did not comply with paragraph 3.3 of the Management Guidelines to the Disciplinary Procedure in that it did not gather all relevant facts. We have considered the report of ME and conclude that it did reasonably gather all relevant facts for the consideration of the disciplinary officer. We reject the criticisms of the claimant levelled against the process followed by ME and in particular the witnesses

seen by ME. Whilst it is always possible to see further avenues which could be explored, we have to assess whether the investigation was reasonable and we conclude that it was.

11.25 Having considered all matters raised by the claimant in respect of the investigation process followed in this matter, we conclude that the investigation process and resulting report fell within the band of a reasonable response.

11.26 We have considered whether the decision of the dismissing officer to categorise the claimant's behaviour as gross misconduct was reasonable. We note that the dismissing officer reached that conclusion because the claimant was a very senior member of the organisation and because she concluded that the claimant had time and again breached the core values and principles of the respondent organisation and that her behaviour had adversely affected other senior colleagues. We are satisfied that the conclusion reached by DW in this regard was one which fell within the band of a reasonable response albeit that it is not a decision which the Tribunal itself would have reached. At this stage of our enquiry, the subjective views of the Tribunal have no relevance.

11.27 We have considered the procedure adopted by the respondent. We have considered the point that at the end of the disciplinary hearing with the claimant, DM raised questions in writing with TF and then sent the replies of TF to the claimant for her comments. It was suggested that that step amounted to an unreasonable procedure given that DM did not reconvene the disciplinary hearing. We have asked ourselves whether the procedure was thereby rendered unreasonable but we conclude that it was not. If the claimant had not seen or had the opportunity to see the replies of TF then it would have been a different matter, but we conclude that whilst DM could have reconvened, her decision not to do so was reasonable.

11.28 We have considered whether the decision by the dismissing officer or the appeal officer was predetermined at the claimant asserts There is no such evidence. We have considered the matters set out in paragraph 55 (a-c) and d (i-xv) of the particulars of claim. We conclude that the decision to deal with the claimant's grievance at the same time as her disciplinary hearing was not unreasonable particularly as the matters grieved were so closely related to the subject matter of the disciplinary hearing. We find nothing raised there by the claimant to be evidence of the respondent having acted outwith the band of a reasonable response in the procedure which it adopted.

11.29 We have considered the procedure adopted by the respondent in relation to the venue for the appeal hearing. We have concluded that in acting as it did in insisting on having the appeal heard in Leeds, the respondent has committed an act of disability discrimination. No reasonable employer would act in a discriminatory way in convening an appeal hearing and that in our judgment renders the dismissal of the claimant unreasonable and unfair. Even leaving aside any question of disability discrimination, the point is that the respondent had in the claimant a former employee who had clearly been very ill and who had relatively recently suffered a miscarriage with her first child at a relatively mature age for a first pregnancy. In addition, the claimant had provided evidence of her suffering from stress and a long-term bowel condition. The respondent has vast administrative resources. The respondent had

moved the disciplinary hearing from Leeds to Newcastle. There was no reason whatever why the appeal hearing could not also have moved from Leeds to Newcastle. The decision not to do so was one which no reasonable employer in those circumstances would have taken. The fact that the decision to convene the appeal in Leeds was also an act of disability discrimination makes that decision all the more incomprehensible and one which no reasonable employer would have taken. Whoever the decision maker was in the respondent organisation acted in a discriminatory and thoroughly unreasonable way and reached a decision which this Tribunal finds falls wholly outside the band of a reasonable response. The dismissal of the claimant was unfair by reason of the insistence on the appeal hearing being in Leeds. No reasonable employer would have so acted.

11.30 We have considered the matters set out by the claimant as evidencing breach of the ACAS Code (pages 49 – 50). We refer to our findings above. We are satisfied that the respondent did carry out a reasonable investigation and did establish the facts reasonably and we are satisfied that the claimant did have reasonable information of the allegations against her and did have a reasonable opportunity to answer those allegations both at the disciplinary hearing and the appeal hearing. We have noted the necessity for the claimant to raise a grievance in order to have her areas of concern considered by the respondent. We have noted the evidence of a wish to have matters dealt with speedily. We do not categorise those actions of the respondent as unreasonable in themselves. The decision to have the claimant's grievance dealt with at the same time as the disciplinary hearing was not unreasonable particularly at the grievance related to the way the disciplinary process itself was being carried out. We have concluded that the decision to categorise the claimant's behaviour as gross misconduct was not unreasonable. We consider the reasonableness of the sanction below. We do not categorise as unreasonable the dealing with the grievance and disciplinary matters together.

11.31 The claimant did not assert a breach of the ACAS Code by reason of the venue for the appeal hearing. We conclude that she was right not to do so. The ACAS Code requires that the venue should "ideally" be agreed. In this case clearly the venue was not agreed by the claimant but the ACAS Code is aspirational in that regard and not prescriptive. However, we conclude the decision to hold the appeal in Leeds was unreasonable under the terms of section 98(4) of the 1996 Act without reliance on the ACAS Code.

11.32 We have considered whether the penalty of summary dismissal fell within the band of a reasonable response and we conclude that it was. It was not a penalty which any member of this Tribunal would have imposed but that is an irrelevant consideration. The question to be asked is whether the penalty fell within the band of a reasonable response. Given the senior position of the claimant within the respondent organisation, given the length of time over which concerns about the claimant's behaviour had been expressed and given the serious matters involved and given the importance attached by the respondent to the core value which the claimant breached, we are satisfied that the decision to dismiss fell within the band of a reasonable response.

11.33 It follows that the claimant was unfairly dismissed by the respondent only by reason of the procedural failure in respect of the venue for the appeal hearing.

The Polkey Question

11.34 We have considered whether the procedural unfairness which we have found in this case in respect of the appeal hearing venue made any difference to the outcome. This is the so-called Polkey question. We have considered whether holding the appeal in Leeds meant that the claimant did not say all that she would have said at the appeal if it had been held in Newcastle. We have no evidence from her that that was so. We are satisfied that the claimant was able, despite the stress from which she suffered, to conduct the appeal hearing and say all she wished to say. We are satisfied that in fact the unfairness in holding the hearing in Leeds made no difference at all to the outcome. Accordingly, it would not be just and equitable for there to be any compensatory award paid to the claimant by reason of the procedural failure which we have identified

11.35 We have considered whether there could have been a hearing convened in Newcastle as quickly as that convened in Leeds. We think that it would have taken a further two weeks to arrange a hearing in Newcastle. However, by that point the claimant was not being paid by the respondent and thus there is no loss arising even for that short period.

11.36 Accordingly we conclude that it would not be just and equitable to award the claimant compensation under section 123 of the 1996 Act in respect of the unfair dismissal.

Contribution

11.37 We have considered whether the claimant contributed to her dismissal by any culpable or blameworthy conduct. Our focus now changes to what we conclude the claimant did or did not do in terms of her conduct and whether what she did was culpable and blameworthy and contributed in any way to her dismissal.

11.38 We are satisfied that the claimant did act towards her senior colleagues in a way which breached the core values set out in the Code of the respondent. The claimant was a senior manager in an organisation where those values were central to its operation and as a senior manager she had a duty to lead by example. It is clear that the claimant had some difficulty in adopting the collaborative way of working with her senior colleagues which the respondent required. Whether she liked it or not, and we conclude that she did not, the respondent had a set way of working exemplified by its core values and the claimant was expected to lead by example in following those core values. In cross examination, the claimant denied that her behaviour had been intimidating or offensive in any way. She did accept she used offensive language in the workplace but she stated she had received feedback about that and was addressing it. She accepted that LG was a grade below her. She could not understand what problems LG was having with her. She did try to improve her relationship with LG. She did not believe she was confrontational to colleagues. The claimant’s attitude was that work had to be delivered: they were behind and had to get things done. The claimant stated she was not aware of the impact her behaviour towards her colleagues was having and it had not been drawn to her attention. She felt very challenged and confronted by JG. The coaching she received was not around bullying and harassment but was in respect of not making decisions too

quickly and allowing others their say. She saw the action of PM as trying to undo what had been agreed. The claimant accepted she found it difficult to work in committee.

11.39 Against that we heard from TF who we found to be a straight forward witness. We accept her evidence as to the effect of the claimant's behaviour on PM on 5 May 2017. TF told us that the note from PM accurately reflected the events of 5 May 2017 and we accept that evidence.

11.40 We accept that the perceived shortcomings in the claimant's behaviour had never been raised formally with her. TF preferred a gentle style of management and had at no time made clear to the claimant how serious a view was taken by her and others as to the claimant's behaviour. We accept that the claimant was genuinely shocked when she was suspended on 10 May 2017. The claimant was told time and again that she was doing an excellent job technically and she was working under extreme pressure to achieve the results the respondent required. In so doing we accept that the claimant did not treat her senior colleagues on the senior leadership team in a positive and inclusive way as the Code required and did not treat them with courtesy and respect at all times as the Code required. That behaviour was particularly stark in respect of LG JG and PM and we conclude that the claimant's behaviour was culpable and blameworthy and did contribute to her dismissal. We place the level of that behaviour at 60%.

The claim of wrongful dismissal.

11.41 We have considered the claim for wrongful dismissal. We have considered whether the respondent has proved on the balance of probabilities that the claimant was guilty of gross misconduct. We did not hear from any witnesses who had directly experienced the conduct of the claimant except TF. We heard the evidence from the claimant that she did not by her conduct intend to breach her contract of employment nor was she grossly negligent in that regard. We are not satisfied that the respondent has proved to us that the claimant was guilty of gross misconduct nor that it had the right therefore to dismiss the claimant without notice.

11.42 We have concluded above that the claimant was guilty of blameworthy and culpable conduct. She did not follow the Code of the respondent in the way she conducted herself toward her senior colleagues. The claimant was working in a public authority where certain standards of behaviour were expected and the claimant did not meet those standards in the way she related to her senior colleagues. It is clear the claimant had some difficulty in working as the Code required.

11.43 However, we note that the claimant was a relatively newly appointed senior manager, she was not formally told at any time of how seriously her shortcomings in behaviour were viewed, she was told frequently that she was doing an excellent job in respect of her technical duties, her line manager failed her in not making clear the gravity of her position, the coaching put in place for her again did not directly address the perceived behavioural shortcomings but addressed peripheral matters. Furthermore, the claimant and her colleagues were working under extreme stress given the reorganisation which was ongoing and the claimant had not had any opportunity to seek to repair the relationships with her colleagues after being made

aware of the seriousness of her position. The claimant worked for the respondent for over two years without any disciplinary action having been taken against her. In short there was considerable mitigation available to the claimant which served to lessen the seriousness of her behaviour.

11.44 We are not satisfied that by her behaviour the claimant intended to breach the implied term of her contract of trust and confidence or indeed any other terms of her contract and we are not satisfied that the respondent has shown the claimant was grossly negligent in that regard. Whilst we are satisfied that the claimant was guilty of misconduct, we are not satisfied that she was guilty of gross misconduct.

11.45 It follows that in dismissing the claimant without notice the respondent acted in breach of contract. The claim for wrongful dis missal is well-founded and the claimant is entitled to a remedy.

Remedy hearing.

11.46 The remedy hearing will take place as set out above.

11.47 The parties now have a detailed judgement which gives them the opportunity to resolve this matter between themselves and in accordance with the overriding objective we urge them so to do. In case it assists the parties, we express our preliminary views in respect of remedy. We make it plain that these are our preliminary views only on what we have heard from the parties to date. Our views are not in any way binding on us or on the parties.

11.48 The finding of unfair dismissal results in the payment of a basic award only. The dismissal of the claimant was unfair. The basic award will be modest given her short service. It must reflect the seriousness of an unfair dismissal. We consider it would not be appropriate to reduce any such award for contributory fault. There will be no compensatory award for unfair dismissal.

11.49 The claim of wrongful dismissal will result in a payment to the claimant of her notice pay. We were not shown her contract but understand that will amount to 12 weeks' net pay subject to any mitigation.

11.50 it seems to us that the finding in respect of discrimination will result in an award for injury to feeling only. We consider the appropriate level of any such award on current information to be towards the top of the lower Vento band as adjusted.

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Employment Judge A M Buchanan

Date: 26 September 2018

Sent to the parties on:

1 October 2018
For the Tribunal:

G Palmer