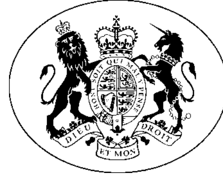
Case Number: 2500655/2018



EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Dargon	**v**	**Newcastle City Council**

Heard at: North Shields Hearing Centre
On: 10, 11, 12, 13 and 14 September 2018
Deliberations heard on 18 October 2018

Before: Employment Judge Tynan

Members: Ms Emma Wiles
Ms Elizabeth Jennings

Appearances
For the Claimant: Mr J Stephenson, Solicitor
For the Respondent: Mr Crammond, Counsel

JUDGMENT

1. The claimant's claims against the respondent that she was discriminated against pursuant to section 21 of the Equality Act 2010 and, further, that she was unfairly dismissed are not well founded and are dismissed.

REASONS

Background

1. The claimant was employed by the respondent from 10 October 1988 until 7 December 2017 when she was summarily dismissed for gross misconduct. Her dismissal was confirmed in an 11-page letter dated 7 December 2017 from Kevin Riley of the respondent. At the conclusion of a disciplinary process Mr Riley had found that on Tuesday 18 July 2017 the claimant had removed a blue ring binder folder containing 15 high value passes from the respondent's offices at Westgate Community College in Newcastle without permission; that this was considered to be

theft of Council property; and that the claimant was thereby in breach of the respondent's code of conduct, namely the Section 1 Standards, which provides:

"*We expect you to give the highest possible standard of service to the people of Newcastle upon Tyne and to carry out your duties honestly and fairly".*

2. Regardless of the respondent's code of conduct, it is an implied term of all employment relationships that neither party will conduct themselves in a manner calculated or likely to destroy the essential trust and confidence of the relationship. Employees are also subject to an implied duty of loyalty and fidelity.

3. The claimant presented a Claim to the Employment Tribunals on 26 March 2018. She claims that she was unfairly dismissed and further that she was discriminated against on the grounds of disability by virtue of the respondent's failure to make reasonable adjustments to its disciplinary process, specifically that it should have permitted the claimant to be accompanied at her appeal hearing by her nephew and permitted him to act as her advocate at that hearing.

4. Detailed Particulars of Claim were appended to the claimant's Claim (pages 15 to 28 of the hearing bundle). The Claim is resisted in its entirety by the respondent.

5. The Tribunal made an Order on 10 May 2018 for the claimant to provide further information regarding her complaints. The Order was in respect of the complaint that the claimant had been discriminated against and included an Order that she provide information to show she met the statutory definition of disability at the relevant time. That information was provided on 21 May 2018.

6. Further Orders were made at a Preliminary Hearing on 23 May 2018 following which the claimant filed a disability impact statement (the copy at pages 59(n) – 59(p) of the hearing bundle is undated).

The Hearing

7. The Tribunal heard evidence and submissions over 4 days. The hearing on 13 September 2018 could not proceed as Mr Stephenson was involved in a road traffic accident on the evening of 12 September which left him shaken, though thankfully otherwise uninjured. Given the break in the proceedings, the Tribunal took the opportunity on 13 September to review the entire file of documents in the case.

8. At the outset of the hearing on 10 September the Tribunal was invited by the parties' representatives to view CCTV footage relating to the alleged incident. The footage had featured significantly in the claimant's dismissal, particularly in the early days of the disciplinary investigation process. We

agreed to do so having first made clear that in determining whether or not the claimant had been unfairly dismissed it would not be the function of the Tribunal to substitute its own view as to what had or had not happened on 18 to 20 July 2017.

9. In the course of the hearing the Tribunal heard evidence from:

- the claimant;

- Helen Richardson, an Admin Team Manager at the respondent who was appointed as the investigating officer;

- Nicky Baillie, an HR Advisor at the respondent who provided HR support during the early stages of the investigation and in particular oversaw the arrangements whereby CCTV footage was examined, and who continued to provide HR support to Ms Richardson during her investigation. Miss Baillie did not attend various interviews which Ms Richardson conducted with witnesses on 31 July 2017, referred to in this Judgment;

- Kevin Riley, Head of Business Management at the Respondent who chaired the disciplinary hearings and determined that the claimant should be dismissed following his finding that she was guilty of gross misconduct;

- Angela Russell, an Operational HR Lead Specialist with the respondent who provided HR advice to Mr Riley and kept notes at the disciplinary hearings. Ms Russell was also present when Mr Riley interviewed Paula Logan and Andrea Marshall following an initial disciplinary hearing on 20 October 2017, and she also reviewed the CCTV footage with Mr Riley and was on hand to provide HR advice when he was reviewing the evidence and considering his decision. Ms Russell attended the disciplinary appeal hearing with Mr Riley on 5 February 2017 when her role was to provide HR support to Mr Riley, the appeal panel having access to its own separate HR support and advice.

- Tony Kirkham, Director of Resources at the respondent who sat on the appeal panel that heard the claimant's appeal against her dismissal on 5 February 2018. The other panel members were Councillors Jacqui Robinson and David Cook, neither of whom gave evidence to the Tribunal. The appeal against dismissal was not upheld and this was confirmed in a letter to the claimant dated 19 February 2017.

- Kate Watson, Operational HR Lead Specialist at the respondent who advised the appeal panel and who kept a note of the appeal hearing. Ms Watson was present when the appeal panel discussed the appeal and came to its decision not to uphold the appeal. She

telephoned the claimant on 5 February 2018 to inform her of the panel's decision which was subsequently confirmed in writing.

10. The Tribunal was provided with two bundles of documents. The first contained the various witness statements, the second the documentary evidence to which we were referred in the course of the hearing and on which the witnesses were cross-examined. The second bundle initially comprised 359 numbered pages. However in the course of the hearing pages 360 to 370 were added and the Tribunal was also provided with clearer copies of the letter suspending the claimant from her employment as well as colour copies of various photographs of two blue ring binder folders that feature prominently in the case; the first being the folder that was alleged to have been removed by the claimant from the respondent's premises and the second being a folder that the claimant claimed was a personal folder she had brought to work on 18 July 2017.

Findings

The claimant's health and claimed disability

11. The claimant has type 2 diabetes. Her stated case is that she was first diagnosed with diabetes in or around 2008, although the available medical evidence in fact indicates to the Tribunal an earlier diagnosis in 2001 (see page 57 of hearing bundle). Type 2 diabetes is a life-long condition. At paragraph 5 of the Further Information dated 21 May 2018 it was stated that the claimant had been prescribed six forms of medication, Metformin, Gliclazide, Lisinopril, Amlodipine, Sitagliptin and Atorvastatin. However, her disability impact statement clarifies that the Metformin, Gliclazide and Sitagliptin are for her diabetes. Metformin and Sitagliptin are prescribed to manage blood glucose levels and Gliclazide is prescribed to help the pancreas to produce more insulin. The other three medications are for high blood pressure and to reduce the risk of future heart disease, heart attack and stroke. In the case of the Lisinopril this is said by the claimant to also slow down diabetic kidney disease. In her evidence at Tribunal and in her disability impact statement the claimant said that she additionally manages her diabetes through diet, in particular that she eats regularly and carries snacks with her so that she can regulate her blood glucose levels.

12. The Tribunal notes that arrangements had been made for the claimant to have a key to the lift at her place of work as she was prone to become breathless when she climbed the stairs. The lift was not generally available for use by the respondent's staff and the Tribunal concludes that this adjustment in her workplace arrangements was on account of her high blood pressure.

13. Notwithstanding a Case Management Order on 23 May 2018 in standard terms that medical notes, reports, occupational health assessments and any other evidence relevant to the issue of whether the claimant is disabled, were to be disclosed, there is very limited medical evidence

available to the Tribunal regarding the claimant's diabetes. With the exception of four Fit Notes (Pages 70a to 70h of the hearing bundle) the only available medical evidence is a short letter from the claimant's GP, Dr Snowdon dated 24 May 2018 (page 57 of the hearing bundle). The date of the letter suggests to the Tribunal that it was written for these proceedings. Dr Snowdon's letter confirms that the claimant has type 2 diabetes and also confirms the medication prescribed to manage her diabetes but otherwise Dr Snowdon provides no further information as to the claimant's current state of health or how the condition has progressed, if at all, in the 17 years since she was first diagnosed as having type 2 diabetes. Dr Snowdon's letter does not include any prognosis, nor does it address the likely consequences, either in the short or longer term, if the claimant's condition went untreated. Furthermore, her letter does not address the impact/likely impact of the claimant's diabetes upon her day to day activities nor assist the Tribunal in coming to any view as to whether, and if so how, the condition might place the claimant at a disadvantage relative to those without the condition.

14. Dr Snowdon's letter confirms that blood sugar readings taken from the claimant on 3 January 2018 and in October 2017 were "acceptable". However, the claimant's evidence was that her condition can fluctuate daily and that stress can aggravate the condition. At paragraph 6 of her disability impact statement she states:

    "*If I cannot regulate my blood glucose levels I cannot function properly. As a result of my diabetes I can become fatigued very quickly. My symptoms are usually manageable with medication and careful diet on a normal day basis but it is more difficult in stressful situations. During times of stress and anxiety I have more difficulty controlling my blood glucose and my energy levels will be depleted more rapidly. If I am fatigued I cannot think straight, lose concentration and it is difficult to process information.*" (page 59 of the hearing bundle)

15. In the course of her evidence at Tribunal the claimant acknowledged that the October 2017 reading would have coincided with a particularly stressful period, namely when she was either preparing for the disciplinary hearing on 20 October 2017 or shortly after the hearing had been adjourned to enable further enquiries by Mr Riley. In which case the blood sugar readings above do not necessarily support that stress impacts the claimant as she suggests, alternatively to the extent she suggests.

16. At paragraph 7 of her disability impact statement the claimant details the potential consequences if she were to stop taking her medication or fail to adhere to the required diet. This appears to be a generic list of some of the most severe long-term impacts of diabetes, namely kidney failure, stroke and amputation. It does not particularly assist the Tribunal in coming to an informed view as to the effects of treatment in the claimant's case or as to the possible consequences for her if she stopped taking her medication and/or stopped adhering to dietary advice. We have no medical evidence available to us in this regard. In her evidence at

Tribunal the claimant said that if she forgot to take her medication for even a day she would become tired, confused and lose concentration. She also said she might suffer similar effects if she went without something to eat. She told the Tribunal that she had taken her medication throughout the week commencing 17 July 2017.

17. As to the respondent's knowledge or otherwise of the claimant's diabetes the claimant's evidence was that the respondent was aware that she was diabetic. Mr Crammond challenged her on this but, other than reiterating that the respondent had been told of her diabetes, she provided no further information as to when this may have been or who she may have told. The Tribunal found it surprising that the claimant could not recount any specific conversation during her employment with the respondent during which she may have discussed her diabetes with anyone at the respondent and made them aware of the condition or the impact upon her. By contrast she would appear to have shared with the respondent the fact that she has high blood pressure and experiences shortage of breath when climbing stairs, and to have been given a lift key as a result.

18. The claimant did not refer to her diabetes during an initial informal fact-finding meeting on 21 July 2017 or in a written statement she prepared for and relied upon at a formal investigation meeting with Ms Richardson on 9 August 2017. She had assistance in drafting the statement from her nephew, a former serving officer with the Northumbria Constabulary. Whilst she referred in the statement to feeling embarrassed and anxious, physically sick and nervous, there was no specific mention of her diabetes or to any loss of concentration, her inability to process information, or poor memory. She expressed concern in the statement that she may be unable to account for herself "whilst under such massive amounts of pressure". We do not consider that these comments did or should have, put the respondent on notice of a specific health issue.

19. Likewise, the claimant did not inform the respondent of any specific health issues in the meeting of 9 August 2017. The claimant's nephew attended at the beginning of the meeting though was asked to leave the meeting. He said his aunt's "*nerves were a mess*". The meeting notes evidence that the claimant made no reference to her health during the meeting and that when Ms Richardson offered her occupational health support the claimant responded that she didn't know if she wanted that. It seems to the Tribunal that was a natural opportunity for the claimant to share with Ms Richardson that she had diabetes if she believed it had some bearing on the situation or that Ms Richardson ought to be aware of it and to make adjustments for it.

20. The disciplinary investigation meeting reconvened on 29 August 2017. Again, the meeting notes evidence that the claimant did not mention her diabetes to Ms Richardson in the course of that meeting, though she did disclose that she became very breathless when using the stairs at work. The Tribunal notes that twice in that meeting the claimant stated that she did not have a good memory (pages 173 and 175 of the hearing bundle).

Whilst that goes some small way to addressing Mr Crammond's criticisms in cross-examination that the Further Information document of 21 May 2018 made no reference to memory loss (or to the loss of concentration), there was no suggestion by the claimant that her memory was impacted by her diabetes or the medication prescribed for it.

21. The hearing bundle includes copy Fit Notes from 2011 and 2012 – two relate to cellulitis, which the claimant told the Tribunal was directly linked to her diabetes. She also had surgery in 2011 but the Fit Notes indicate no connection to diabetes. The Tribunal does not consider that any of the Fit Notes would have placed the respondent on notice of the claimant's diabetes or any other condition that might reasonably have indicated that she had a disability.

22. The first documented reference to the claimant’s diabetes is in the notes of an adjourned disciplinary hearing on 14 November 2017. The claimant told Mr Riley that she had been confused about certain dates, in response to which he asked her if she was on any medication. The claimant disclosed that she was a type 2 diabetic and had high blood pressure. Mr Riley asked her if these affected her memory, to which the documented response was “Diabetes”. It is not apparent to the Tribunal whether any distinction was then being drawn by her between the condition and the medication to treat it.

23. On 19 December 2017 the claimant submitted her appeal against dismissal. In her letter to Mr Kirkham she asked to be permitted to bring a family member to act as her advocate and “that the hearing is conducted in such a way so that I am not disadvantaged”. Her letter does not identify the nature of her disability or the disadvantage which she claimed to be faced with in comparison to those who are not disabled. She merely asserted, without providing any further details, that she was disabled and that she was at an unspecified disadvantage.

24. Mr Kirkham emailed the claimant on 21 December 2017 requesting that she confirm the nature of the disability and why the requested adjustment was necessary given her right under the respondent’s policy and procedure to be accompanied by a trade union official or workplace companion. The claimant replied later that day, stating:

    “*My specific disability is difficulty in concentrating for long periods and issues with both short and long term memory which makes it difficult to participate effectively in hearings of this nature. I believe the cause is medication I take for the condition of Type 2 Diabetes and symptoms of same.*” (page 258 of the hearing bundle)

25. The claimant went on to state that the presence of a family member would provide her with assistance in terms of effective recall and interaction. She did not, however, suggest that a workplace companion was incapable of providing such support. Instead, her stated reason for not arranging a workplace companion was “the nature of the allegation”. In her evidence

at Tribunal she confirmed that she was deeply embarrassed by the allegation and did not wish colleagues to be aware of it.

26. Mr Kirkham forwarded the claimant's email on to Amanda Scott, an Occupational Health Nurse Lead at the respondent. She advised Mr Kirkham by email on 22 December 2017 that none of the medications prescribed to the claimant (whether or not for diabetes) have listed adverse side-effects that cause memory loss (page 256 of the hearing bundle). Neither Mr Kirkham or Ms Scott appreciated that the claimant might be attributing her claimed difficulties with concentration and memory to her underlying condition rather than just to the medication to treat it. That is understandable, since "the same" may in this context be understood to be a reference to the medication rather than to the underlying condition. In any event it is not clear to the Tribunal that the claimant was attributing her claimed difficulties with concentration and memory to her underlying condition; in a later detailed written submission in support of her appeal against dismissal the claimant's focus once again was on her medication being associated with memory loss and confusion.

27. On the basis the respondent believed the claimant's medication was not associated with memory loss, it declined her request to be accompanied by a family member at the appeal hearing.

28. With assistance from another nephew, the claimant prepared and submitted a written submission to the appeal panel. It is dated 19 January 2018 and runs to 14 pages (pages 323 to 338 of the hearing bundle). At pages 326 to 328 the claimant refers to the discrimination which she considers she had suffered. In the final paragraph of page 326 she refers to her medication being associated with memory loss and confusion. She then refers to the condition itself exacerbating difficulties in concentration, but seemingly only if her blood sugar levels fall as result of a failure to maintain the correct level of food intake.

29. In the absence of any medical evidence to the contrary the Tribunal concludes that none of the medications prescribed to the claimant for her diabetes impact her concentration or cause her memory loss.

30. The Tribunal does find that the claimant's diabetes impacts her energy levels even when the condition is managed with medication and through diet, and, further, that the claimant can become fatigued at times. It seems obvious to the Tribunal that a person who is fatigued may have reduced concentration and may process information more slowly. However, save in so far as she may process information more slowly when fatigued, it is less apparent to the Tribunal why or how the claimant's memory might otherwise be impacted by her diabetes. There is no medical evidence available to the Tribunal to support such conclusion.

The Claimant's Dismissal

The respondent’s disciplinary policy and procedure

31. The respondent's disciplinary policy and procedure is at pages 60-65 of the hearing bundle. Examples of gross misconduct and serious misconduct are at pages 66 and 67 of the hearing bundle, and they include theft. It is not clear to the Tribunal whether the Examples form part of the policy and procedure and, if they do not, whether they are available to the respondent’s employees. For the reasons below we do not think in this case that anything turns on whether or not the Examples were available to the claimant, or whether she was familiar with the respondent's code of conduct. However, the respondent may wish to consider for the future whether its expectations of its staff, in terms of their conduct, are sufficiently clearly documented and communicated.

32. The Tribunal also had a copy of a short guidance for those chairing disciplinary hearings (pages 68 to 70 of the hearing bundle), though we were told by Ms Baillie that there was also a guidance for investigating officers available on the respondent's intranet.

The claimant’s suspension

33. On the afternoon of 21 July 2017 the claimant was suspended from work by Ms Richardson. Her suspension came at the conclusion of what has been described as an informal fact-finding meeting with the claimant. This first step is recognised in the respondent's disciplinary policy and procedure. Suspension is identified as a potential action "to enable investigation to be made where the possibility of serious disciplinary action arises". The policy and procedure says nothing further as to the circumstances in which an employee may be suspended. Mr Baillie's evidence at Tribunal was that there needed to be an unimpeded investigation, but in any event that suspension would always be a consideration in cases of suspected gross misconduct. The Tribunal is satisfied that active thought was given to whether or not the claimant should be suspended albeit this seems to have been informed by a presumption in favour of suspension given the potentially serious nature of the allegation.

34. As of the afternoon of 21 July 2017 there was a suspicion at the respondent that the claimant may have removed the respondent's blue ring binder folder containing parking permits from Westgate Community College and that she had subsequently returned the file, leaving it in one of the ladies’ toilets.

35. On 24 July 2017 Ms Richardson wrote to the claimant to confirm her suspension from work. Ms Richardson’s evidence was that she crafted the suspension letter herself with assistance from Ms Baillie. Ms Baillie told the Tribunal that there isn’t a standard form suspension letter, albeit certain elements of the letter suggest that it was taken from a template

rather than entirely Ms Richardson's own work. Nothing turns on this. Ms Baillie believed she would have seen the letter before it was sent to the claimant, albeit she could not categorically recollect that she had seen the letter on this occasion. Ms Richardson's evidence was that she had enclosed a copy of the respondent's disciplinary policy and procedure with the letter. However, the claimant was adamant that she was not provided with a copy. The suspension letter itself does not refer to the respondent's disciplinary policy and procedure being enclosed with the letter, whereas it does refer to the notes of the discussion on 21 July being enclosed. The Tribunal concludes that the respondent's disciplinary policy and procedure was not provided to the claimant at this stage, though it does accept that Ms Richardson sought to explain the policy and procedure to her on 21 July, albeit in fairly general terms and without a hard copy to hand. The Tribunal further notes that when that discussion took place the claimant had just been informed that she was being suspended, effectively on suspicion of theft, and accordingly considers that she would not have fully taken on board what she was then been told about the policy and procedure. Following her suspension the claimant had no ability to locate a copy of the disciplinary policy and procedure for herself as her work IT access was immediately withdrawn.

Initial provision of misinformation

36. The letter of suspension of 24 July 2017 referred to events on 19 and 20 July 2017, including that Ms Richardson had received reports that on Wednesday 19 July 2017 the claimant had removed the respondent's blue ring binder folder. The "reports" that she was referring to were reports from other employees who had viewed CCTV footage (extracts of which Ms Richardson had been able to view on the morning of 21 July). The CCTV footage was believed to show the claimant leaving her place of work on the evening of Tuesday 18 July 2017 with a blue ring binder folder in her handbag. Ms Richardson had also provided this incorrect date of 19 July 2017 to the claimant during their fact-finding meeting on 21 July 2017. The CCTV footage that the Tribunal was able to view, and which was the same footage that Ms Richardson had viewed on 21 July 2017, has the date and time marked on it. The Tribunal accepts that this was a genuine error on Ms Richardson's part. It seems to have come about because the file was first identified as having gone missing on 19 July 2017. That date appears to have been communicated to both Ms Richardson and Ms Baillie with the result that they mistakenly believed they were watching CCTV footage from Wednesday 19 July 2017. Nevertheless, in circumstances where the claimant was under suspicion of theft, the provision of incorrect information at the outset of the investigation as to the date the claimant was said to have been observed removing the file would inevitably have impacted her ability to provide an account of her movements. The Tribunal finds that it would have caused anyone in her situation confusion. At that early stage in the respondent's enquiries it was incumbent upon Ms Richardson and Ms Baillie to get the basic facts right, particularly as they were seeking an account from the claimant of her movements.

<u>The events leading to the claimant's suspension</u>

37. The events leading up to the claimant's suspension were as follows. The blue ring binder folder was identified as potentially missing on the morning of 19 July 2017. It is first documented in an email from Eleanor Musham (nee Bramble), Senior Administration Support Officer, to Julie Hickin who was operating the respondent's CCTV systems for the dates in question. Ms Bramble was very clear in her email to Ms Hickin that she believed the folder to have been taken rather than simply mislaid. She identified the folder as having been taken between 9.45pm on Tuesday 18 July 2017 and 7.15am on Wednesday 19 July 2017. Ms Bramble did not give evidence at Tribunal so we were unable to clarify why she initially identified these as the relevant timings. Ms Bramble asked Ms Hickin to view the CCTV footage of the second floor (where the folder was kept) to identify who was on the floor during that time. Moments later Ms Bramble emailed Gill Shafto, Admin Team Manager to advise her of the steps she was taking.

38. At 13.39 on 19 July 2017 Ms Bramble sent an email more widely. The Tribunal was not told who was on the distribution list. The email said:

 "*We have lost a blue A4 ring binder cleared marked with Parking Permits last seen in the Care at Home Duty room yesterday. …This file was last seen yesterday afternoon and not in its normal place this morning.*" (page 138 of the hearing bundle)

39. By 13.39 therefore Ms Bramble had instead identified that the file had last been seen during the afternoon of 18 July 2017. Staff were asked to check their desks, lockers and cabinets to "see if this file has picked up by accident and placed elsewhere".

40. The emails above were copied to Ms Richardson on the morning of Friday 21 July 2017.

41. It seems that over the course of 19 July 2017 the CCTV footage may have been viewed by five staff within the Administration Team. We pause to observe that at this point any one or more of them was a potential suspect. However, no-one seems to have given particular thought to this or to the risk that any investigation might be compromised as a result.

42. The various statements taken by Ms Richardson in the course of her investigation evidence that it was only on 20 July 2017 that the claimant was identified as being potentially of interest. The CCTV footage of 18 and 19 July 2017 was initially thought to be inconclusive (see for example, the third page of the notes of Andrew Marshall's interview on 31 July 2017 and first page of the notes of Zabean Aslam's interview on the same day). When the missing folder was discovered in one of the ladies' toilets on 20 July 2017 there was a further review of CCTV footage. This time the respondent was able to narrow its focus to a 15-25 minute window on 20

July 2017, namely between 8.30-8.40am when the paper towel dispenser in the toilets had been re-stocked (and the folder had not been sighted) and approximately 9am when Ms Marshall discovered the folder. The claimant was identified as someone who may have visited the ladies' toilets during this time and her appearance on CCTV, as well as the fact that she was believed to be carrying a different handbag to usual, aroused suspicion. As Ms Shafto's interview notes document, this then prompted a re-examination of the earlier CCTV footage of the claimant, at which point it was identified that she may have left the building at the end of the day on 18 July 2017 with a folder in her handbag. The notes of Ms Bramble's interview on 31 July 2017 record that "we were asked not to discuss what we had seen on CCTV" (page 159 of the hearing bundle). It is unclear who gave that instruction or to whom it was given, other than Ms Bramble.

Ms Richardson's appointment as Investigating Officer

43. Ms Richardson is an Admin Team Manager. She performs the same role as Gill Shafto, but manages a different team. She was appointed as the Investigating Officer as she was suitably senior and it was felt that she was independent of the claimant and her team. Given the initial lack of controls in relation to the CCTV footage it seems to the Tribunal that was a sensible decision on the part of the respondent.

44. Ms Richardson told the Tribunal that she has undertaken fact-finding meetings before but that this was the first formal disciplinary investigation she has undertaken. She had HR support throughout from Ms Baillie. In the course of her cross-examination Ms Richardson stated that she had viewed a large amount of CCTV footage at the early stage of the fact-finding process. The available footage would have covered a period of approximately 16 hours, assuming the respondent was concerned with a period between the afternoon of 18 July 2017 and 7.45am on 19 July 2017, albeit overnight there may have been (though we were not told) limited staff presence in the building. However, there were a number of CCTV cameras – the Tribunal was shown footage from at least four different angles – thereby multiplying the total number of hours of footage to be reviewed. In contrast to what she said at Tribunal, in her witness statement Ms Richardson stated that she had viewed the CCTV footage during the morning of 21 July 2017 before meeting with the claimant that afternoon. Accordingly, the Tribunal wanted to understand what Ms Richardson meant when she said she had viewed a "large amount" of CCTV footage. Ms Richardson then clarified that she had in fact viewed more limited footage of the claimant moving around the building on 18 and 20 July 2017 and that this was in fact the same footage that had been shown to the Tribunal on the first day of the hearing.

45. Ms Richardson's further evidence was that, "*On the information provided at that time I was to specifically look at the claimant*". She was not invited to, nor did she, take it upon herself to undertake a more wide-ranging investigation to establish whether others may be of interest, whether by reference to the available CCTV footage or by speaking to witnesses to

establish people's movements on the days in question and whether they had cause to be suspicious in relation to any of their colleagues.

46. A number of times in the course of her evidence Ms Richardson referred to fact-finding “in relation to the claimant” and an investigation “into the claimant”.

47. Questioned by Mr Stephenson, Ms Richardson accepted that by the time of her appointment as Investigating Officer at least some of the respondent's staff (she did not say who) had already made their minds up that the claimant was responsible for removing the blue ring binder folder.

48. Ms Richardson seemingly did not speak to Eleanor Bramble, Andrea Marshall, Mark Orrick, Gill Shafto, Zabean Aslam, Julie Hickin or any of the Respondent's other staff on 21 July 2017 to remind them of the need for confidentiality, nor did she issue any request or instruction that the matter was not to be discussed whilst it was under investigation. As noted already, the notes of her subsequent interview with Ms Bramble on 31 July 2017 record that a request was made not to discuss what had been seen on the CCTV, but it is unclear who made that request or to whom it was directed. Ms Richardson’s evidence was that as Council officers she would have expected them to understand the need for confidentiality. However she acknowledged that she could not say if the matter had been discussed amongst them and indeed observed that this was something she could not prevent. However, she had not sought to prevent it and the notes of the ten interviews conducted by her between 31 July and 9 October 2017 do not document that any instruction was given to the effect that confidentiality was to be maintained. In contrast, the claimant was instructed at the outset that the matter was confidential and that she must not contact her colleagues or otherwise discuss it.

<u>Initial fact-finding meeting on 21 July 2017</u>

49. Ms Richardson met with the claimant on the afternoon of 21 July 2017. It was an informal fact-finding meeting and as such the claimant was not offered the opportunity to bring a work place companion or trade union representative. The notes of the meeting are at pages 142 to 146 of the hearing bundle and were signed by the claimant on 9 August 2017 as confirmation that they were an accurate record. The notes document the following:

- the claimant was familiar with the respondent’s blue ring binder folder though she did not use it herself as part of her job;
- the claimant stated that staff were told the file was missing the day after it went missing, though initially incorrectly identified this as being on Thursday 20 July 2017;
- when Ms Richardson pointed out to the claimant that Eleanor Brambles' email was sent on Wednesday 19 July 2017 the claimant replied, "Was it not sent on the Thursday?"

- the claimant stated that she first became aware there was CCTV in the Westgate Community College building on Thursday 20 July 2017;
- having asked the claimant what time she had left work on Tuesday 18 July 2017 Ms Richardson then proceeded to ask the claimant about Wednesday 19 July 2017, specifically what she had taken home with her that evening;
- the claimant was asked to described her usual route into the building; and
- the claimant was then asked about events on the morning of 20 July 2017 and she confirmed that she had visited the ladies' toilets where the missing file had been discovered.

50. Ms Richardson then returned to the matter of the CCTV footage and informed the claimant, "What can be seen on Wednesday evening is you leaving the building with a blue file in the top of your handbag". As noted already, Ms Richardson provided an incorrect date for when the claimant was said to have been observed in possession of a blue folder.

51. At this point in the meeting the claimant confirmed that she had been in possession of a blue folder and offered what was to be her explanation for this over the course of the following four months. She said: "*That's my file, it has my car insurance documents in it. I had to bring my car insurance documents in to work as I had received a Notice of Intended Prosecution for a car I didn't own*". (page144 of the hearing bundle)

52. Throughout the remainder of this judgment the Notice of Intended Prosecution will be referred to as the "Notice".

53. The claimant told Ms Richardson on 21 July 2017 that she needed to speak with her insurance company about the Notice. When asked what time she had managed to speak with her insurers she said, "about 11.05am yesterday [i.e. Thursday 20 July 2017] before immediately correcting herself and stating that it was Wednesday 19 July 2017. In correcting herself, her account in relation to the Notice potentially addressed Ms Richardson's stated concern that the claimant had been observed on CCTV on Wednesday 19 July 2017 to be in possession of a blue folder.

54. The claimant asked to view the CCTV footage but apparently this could not be arranged as the necessary equipment was not to hand. That was highly unfortunate as it was a potential missed opportunity early on for the error in the date to have been picked up and rectified. Ms Richardson confirmed that the footage would be available to view on the next time they met.

55. Asked again by Ms Richardson, the claimant confirmed that she had brought a blue folder into work on 19 July 2017 and taken it home that evening. Asked whether she had brought the blue folder back in on 20

July 2017, the claimant stated that she just had a white envelope with her the following day.

56. The meeting was adjourned and Ms Richardson conferred with Ms Baillie for perhaps ten minutes, during which Ms Richardson decided to suspend the claimant. When the meeting reconvened, Ms Richardson first asked the claimant if they could go to the claimant's home so that they could collect the folder for the claimant to show this to Ms Richardson. The notes record that the claimant responded, "*No not now, I don't have any house keys and I'm going out straight from work and there will be no one in. I am on leave next week too*".

57. Ms Richardson returned to the subject a few moments later and asked, "*Is there no way we can look at that file today?*" The claimant replied, "*No unfortunately not.*" In the course of being cross-examined the claimant disclosed that her sister, who was present at Tribunal throughout the 4-day hearing, held a key to her house. Indeed the claimant confirmed that she went to her sister's house following her suspension. In which case there was an opportunity for her to go home and retrieve the folder in question. It is unclear why she did not do so as there was an obvious opportunity for her to address the respondent's concerns that had led to her being suspended. In the course of her evidence the claimant also told the Tribunal, for the first time, that her house key was defective, something the Tribunal accepts that she had not told the respondent at any time during the disciplinary proceedings.

58. Having informed the claimant that she was being suspended, Ms Richardson asked the claimant if she would like to be referred to Occupational Health for support. The claimant asked why. She did not volunteer that she had diabetes or that this may be impacting her concentration or memory.

59. When reminded of her right to be accompanied at any further investigatory meeting, the claimant observed that she was not in a union and that she would not want anyone to know. There was then further discussion of Stewart Brown being available as a point of contact; that Occupational Health Support was available to the claimant; and details for talking therapies were also provided. Finally, the disciplinary process was talked through. Questioned by the Tribunal Ms Richardson thought it unlikely she had a hard copy of the policy and procedure with her (and Ms Baillie concurred with her). We have already confirmed our finding that the claimant was not sent a copy of the policy and procedure.

<u>Witness statements and evidence gathered in the course of the investigation</u>

60. Over the course of Monday 31 July 2017 Ms Richardson interviewed Andrea Marshall, Mark Orrick, Gill Shafto, Eleanor Bramble, Diane Daglish, Lawrence Ogle and Zabean Aslam. Their statements are at pages 147 to 162 of the hearing bundle. The statements are thorough and focus upon the relevant events and issues. The Tribunal reviewed them

again in the course of its deliberations and is satisfied that they explore all relevant aspects of the case. Mr Stephenson was critical of the statements, including that Andrea Marshall and Gill Shafto had been allowed to provide potentially prejudicial information about other items of property that were believed to have gone missing over a period of time. The Tribunal is satisfied that they were each wanting to provide context and explain why the loss of the blue folder was viewed seriously. We think it would have been remiss of them not to let Ms Richardson know that other items had gone missing and that this may be related. Be that as it may, Ms Richardson took what we consider to be the reasonable decision to confine her enquiries to the missing blue folder. The Tribunal saw no evidence that this information had prejudiced Ms Richardson's investigation or the disciplinary process, or that it had somehow weighed in the decision to dismiss the claimant.

61. Another criticism by Mr Stephenson was that Ms Marshall gave evidence that she had seen Diane Daglish, one of the respondent's domestic staff, coming out of the ladies' toilets at about 7.40am, but that a signing-in sheet for 20 July 2017 (page 70i of the hearing bundle) records that Ms Marshall signed in at 8.00am. We do not criticise Ms Richardson for failing to identify this. It was not highlighted as an issue by the claimant or anyone else in the course of the disciplinary proceedings.

62. Mr Stephenson also highlighted a potential inconsistency in Andrea Marshall and Mark Orrick's evidence. They each told Ms Richardson that they had gone to wash their hands following a search of the external bins. Mr Orrick's evidence was that he heard shouting and went to the ladies' toilet where he saw the missing folder. By contrast Andrea Marshall's evidence was that she went to the gentlemen's toilets to let Mr Orrick know that she had found the folder. She did not say whether Mr Oreck had then followed her back to the ladies' toilet. It does not alter the substance of their evidence, but in any event we could not identify that the point was taken by the claimant in the course of the disciplinary proceedings.

63. Mr Stephenson also pointed out that Diane Daglish's evidence was potentially confusing as she described the events leading up to the discovery of the folder as taking place on 19 July 2017. However, it is clear to the Tribunal (and would have been clear to the claimant and others) that she intended to refer to 20 July 2017. Ms Richardson might have cleared this up with Ms Daglish before Ms Daglish signed the notes of her interview but it is a very minor criticism. It is clear on reading the notes what Ms Daglish's evidence was, and in particular that she was of the view that the file was likely to have been placed in the toilets during a 15-25 minute window before it was discovered by Ms Marshall at around 9am on 20 July 2017.

64. Again, there was a reasonable opportunity for the claimant to raise these and any other discrepancies in the course of the disciplinary hearings on 20 October and 14 November 2017. She had been provided with copies

of the various interview notes/statements under cover of a letter dated 10 October 2017 from Mr Riley.

Investigation meeting on 9 August 2017

65. On 9 August 2017 the claimant attended a formal investigation meeting. As noted already, with assistance from her nephew, the claimant had prepared a written statement for the meeting (pages 164-165 of the hearing bundle). She was aware that her nephew would not be permitted to act as her companion at the meeting but nevertheless he accompanied her to the meeting and she repeated her request that he be permitted to "attend". Her written statement referred to him attending in order to offer her support.

66. In her written statement the claimant again set out her position regarding the blue folder (see the fifth paragraph of page 164 of the hearing bundle). She added some further detail to her account, namely that "*Colleagues within my office were aware of this document* [the Notice] *as I had discussed it with them throughout the course of the day.*"

67. The claimant was evidently describing these events as having taken place on Wednesday 19 July 2017, as she went on to say that later that day an email was issued regarding the missing folder. The email she was referring to was Andrea Marshall's email timed at 13.39 on 19 July 2017. The claimant went on to say that she was almost certain that a senior care worker, Lorna Graham, had mentioned that she had returned the folder to the cabinet at 10.00pm the previous night. As we set below, Lorna Graham was subsequently interviewed by Ms Richardson on 21 August 2017.

68. The meeting on 9 August 2017 did not go well. Having confirmed that the claimant's nephew would not be permitted to remain at the meeting, Ms Richardson stated that she had further questions for the claimant. However, the claimant responded that she did not wish to answer any questions. Instead she provided a signed copy of the 21 July 2017 discussion notes as well as her prepared statement.

69. Ms Richardson encouraged the claimant to view the CCTV footage. It was in the course of viewing the footage on 9 August 2017 that the error in dates was identified for the first time. This was therefore 19 days after the claimant had first been misled as to the date she was said to have been observed on CCTV carrying a blue folder. The meeting notes record the claimant stating a number of times that she had been led to believe the file had gone missing on Wednesday 19 July 2017. The CCTV footage was viewed again and the meeting notes document that it was paused on a still showing a blue file in the claimant's bag. Once again the claimant said she thought Ms Richardson had been talking about the Wednesday not the Tuesday. She then said, "*It's my bag and my folder and I stand by my account given*". She reiterated that she was relying upon her prepared written statement. The meeting notes record that at one point she said,

"*I've done nothing wrong and can't cope with this*". The discussion did not move on and eventually the meeting was brought to a conclusion. The claimant was informed that she may be invited in for a further meeting with Ms Richardson.

70. A subsequent meeting was indeed arranged for 29 August 2017 and at that meeting the claimant signed the meeting record of 9 August 2017 as confirmation that it was an accurate record of the discussion.

71. After the claimant left the meeting on 9 August 2017 she realised that she had not produced her folder and handbag for Ms Richardson to inspect, although she had brought these to the meeting and had included in her statement that they would be available and that Ms Richardson could photograph them if she wished.

<u>Further enquiries following the meeting on 9 August 2017</u>

72. As noted already, Ms Richardson interviewed Lorna Graham on 21 August 2017. She also secured a copy of the signing-out sheet for the permit that had been used by Ms Graham. The sheet confirms that the permit was signed out by Ms Graham on 17 July 2017 (page 169 of the hearing bundle) and that on 18 July 2017 an employee, Steve Wilkinson, signed the permit back in to the blue folder. The sheet records the signing-out time on 17 July 2017 (10.35am) but unhelpfully there is no documented record as to its signing-in time. Ms Richardson might have spoken with Mr Wilkinson to see if he could recall when this was. If the permit had been signed in after the claimant was known to have finished work and to have left the building, it would provide evidence that the claimant was not involved in the removal of the blue ring binder folder, or at least that the folder observed on the CCTV footage was unlikely to be the respondent's blue folder. Instead Ms Richardson limited herself to speaking with Lorna Graham. In our view was this not unreasonable. She was the obvious person to speak to. We accept Ms Richardson's evidence at Tribunal that Ms Graham was emphatic the permit had been returned before 5.00pm on 18 July 2017.

73. Having reviewed the 9 August 2017 meeting notes the Tribunal is satisfied that there were no other lines of enquiry for Ms Richardson to follow up at that stage, though there was a missed opportunity to inspect the claimant's folder and keep a photographic record of it. This would later assume significance when a dispute arose as to the appearance of the claimant's folder.

<u>Investigation meeting on 29 August 2017</u>

74. At the meeting on 29 August 2017 the claimant was interviewed at some length (pages 172 to 177 of the hearing bundle). Twice in the course of that interview she stated that she did not have a good memory. Although additional details were provided by her, the claimant's account was essentially unchanged from 21 July 2017 and from her prepared written

statement, except that she stated she had brought in her blue insurance folder on Tuesday 18 July 2017. She continued to maintain that she had brought the blue folder into work to enable her to deal with the Notice. In the course of the meeting the claimant was asked about the Notice. She said she did not have a copy of the Notice as she had been asked to return it to the Essex Police once the matter had been resolved.

75. In her prepared statement the claimant asserted that Ms Richardson had asked on 21 July 2017 to search her home. The notes of the 21 July 2017 meeting, which were signed by the claimant as confirmation that they were an accurate record of the meeting, do not support this. Moreover, it is not what the claimant said on 29 August 2017. Ms Richardson referred on 29 August to the fact the claimant had declined the opportunity to go home and get the file, in response to which the claimant reiterated that she did not have the keys to her home.

76. There followed a lengthy exchange between Ms Richardson and the claimant about events on 20 July 2017, including why the claimant had taken the route she had to her office, whether she was in a hurry when she climbed the stairs at work and in particular why she had seemingly headed in the opposite direction to her office to use a toilet that she did not usually use, when there was a toilet immediately next to her office. The claimant was also asked to clarify who had suggested that Lorna Graham had returned the permit late evening on 18 July 2017. However, the claimant could not identify the source of this particular information. The CCTV footage was viewed again, and the meeting notes record that Ms Richardson's final question to the claimant was:

"*Can you provide me with any further information that would point my investigation elsewhere*"

The claimant answered, "*No*".

77. Asked by Mr Crammond at Tribunal whether any lines of enquiry had not been followed up by Ms Richardson, the claimant stated, "*Not that I was aware of.*"

<u>Further enquiries following the meeting on 29 August 2017</u>

78. Ms Richardson interviewed Dawn Buglass and Kath Fell on 9 October 2017. They are Admin Support Officers and worked alongside the claimant. They were each asked about events during the week in question, specifically whether they could recall seeing the claimant with a blue folder on 18 July 2017 and the Notice being discussed. Ms Buglass recalled the claimant producing the Notice from a white envelope in her large black handbag. She went on to say that the claimant had spoken about the Notice on one day and then brought the Notice into work the following day when the claimant had made a telephone call to try to sort the matter out. Ms Fell was less specific as to the timings, though recalled the Notice being discussed in the office and that it had caused a degree of

amusement. Neither Ms Buglass or Ms Fell had any recollection of having seen the claimant in possession of a blue folder. Ms Fell believed that the claimant was in the office earlier than normal on the day the respondent's missing file was found, but otherwise did not believe there was anything different about the claimant that day.

79. Having reviewed the 29 August 2017 meeting notes the Tribunal is again satisfied that there were no other lines of enquiry for Ms Richardson to follow up at that stage.

The Investigation Report

80. Ms Richardson's investigation report (or more correctly, "Management Statement of Case for Disciplinary Hearing") runs to 13 pages. The 'Background' and 'Investigation' sections of the report are a thorough and balanced summary of the evidence presented to Ms Richardson in the course of her investigation. There was some suggestion by Mr Stephenson that Ms Richardson had misrepresented the evidence in the case but having read the report and the evidence carefully the Tribunal does not agree. In any event, as we set out below, the claimant had a reasonable opportunity during the disciplinary hearing to challenge the report if she felt it was inaccurate or biased.

81. The Tribunal is critical of the 'Conclusion' section of Ms Richardson's report, in which she goes beyond the normal remit of an investigating officer and seeks to draw conclusions from the evidence, when this is properly the function of the chair of the disciplinary hearing. Indeed, Ms Richardson goes yet further in her report and states:

"*From the evidence in this report I can reach no other conclusion other than Sandra stole the blue ring binder containing 15 parking permits from the Care at Home team (monetary value £1,200) with the intention of either gifting or selling the parking permits. …*

"Therefore, Sandra has destroyed any trust in her as a City Council employee."

The Tribunal is firmly of the view that she should not have expressed herself on such matters or in such terms and that she was trespassing into the disciplinary hearing.

The disciplinary hearing and outcome

82. The disciplinary hearing took place over two days on 20 October and 27 November 2017.

83. In the course of the hearing on 20 October 2017 the claimant maintained that a white card or white sticker seemingly visible on the spine of the blue folder on the CCTV footage was in fact a white envelope in her handbag that contained the Notice. She was very clear in her evidence in this

regard, and reiterated her account when Mr Riley returned to this issue later in the hearing. She said the Notice was not in her blue file and so she didn't need to take it out of her bag.

84. There is no record of the hearing timings, but the notes evidence that the events of 18 and 20 July 2017 were explored at some length. The hearing on 20 October 2017 was adjourned to enable Mr Riley to undertake further enquiries. He wished to visit Westgate Community College as it was a building he was not familiar with, and he also wished to examine the respondent's blue folder. He also took the opportunity to interview Andrea Marshall and the Admin Team Manager, Paula Logan in order to try to resolve a disagreement which had arisen as between the claimant and Ms Richardson as to whether the blue folder which the claimant had shown to Ms Richardson on 29 August 2017 was the same blue folder, or at least in the same condition, as the blue folder that the claimant brought with her to the hearing on 20 October 2017.

85. In the event, Ms Logan was unable to help further in terms of the folder's appearance on 29 August 2017.

86. Ms Marshall provided additional background information to Mr Riley and told him about events on the morning the missing file was discovered including that a plastic pocket folder (referred to by everyone as a 'poly pocket'), which had been attached to the front of the blue folder, had been removed or become detached from the folder by the time it was discovered in the ladies' toilets.

87. The disciplinary hearing reconvened on 27 November 2017. Once again, the claimant was asked about events in some detail. Her account was unchanged, including that she had brought in the Notice on 18 July 2017. In preparing for the disciplinary hearings she had Ms Buglass' statement which suggested a different date for this.

88. In the course of the reconvened hearing there was further discussion as to whether the appearance of the claimant's folder had changed since it was first shown to Ms Richardson, specifically whether a poly pocket had been attached to the front of the blue folder. The claimant had the folder with her and the poly pocket was noted to contain papers which Ms Richardson did not recollect as having previously seen on the front of the folder. In response to a request from Mr Riley, the claimant showed him the documents in question, and it was discovered that these included a letter from the claimant to Essex Police dated 20 July 2017 in which she referred both to the Notice and to the fact she had telephoned Essex Police on 20 July 2017 at 11.05am (page 305 of the hearing bundle). The timing was consistent with her initial, albeit immediately corrected, statement to Ms Richardson on 21 July 2017 that she had called the Police on 20 July 2017 (see paragraph 53 above). Mr Riley was immediately alive to the potential significance of the date of this call and asked the claimant to explain therefore her repeated account that she had brought a blue folder into work on 18 July 2017 in order to deal with the Notice. The claimant

responded that she was confused with the dates and went on to say that she had received other insurance documents at the beginning of the week of 17 July 2017, as a result of which she had been obliged to make a number of phone calls to insurance companies. She stated that she had made these calls on her mobile phone. Mr Riley returned to this issue again in the course of the hearing. The claimant told him that she had not kept the letters in question as she had been asked by the relevant insurance companies to destroy them. That seems unusual, though the Tribunal notes that the claimant gave a similar explanation for why she did not have a copy of the Notice.

89. Mr Riley noted that the claimant had not spoken to Ms Richardson about these alleged new matters. The claimant initially replied that she believed she had done so, however her statement of 9 August 2017 and the various meeting notes were read through and Mr Riley confirmed that this was in fact the first time she had claimed to have been dealing with other correspondence. Pressed by Mr Riley to explain why she had brought in her folder on Tuesday 18 July 2017 to deal with a matter which it was now clear she had dealt with on 20 July 2017 the claimant stated that she had got the dates mixed up and was not in a good place. She has not provided any further or clearer explanation than that.

90. Mr Riley wrote to the claimant on 7 December 2017. It is an 11-page letter. Having set out the evidence and summarised the claimant's case, he proceeds in the last four pages of his letter to set out his findings and conclusions. He considered that the claimant's statements were "littered with inaccuracies and discrepancies". He decided that the claimant should be summarily dismissed. His letter confirms the claimant's right to appeal against her dismissal.

91. <u>The claimant's appeal</u>

92. On 19 December 2017 the claimant emailed Mr Kirkham notifying him of her intention to appeal against her dismissal. Attached to her email was a letter of appeal dated 19 December 2017. The letter was effectively a holding letter as the claimant confirmed that she intended to provide further information in due course. Her stated grounds for appeal were as follows:

- The decision to terminate her contract was unfair:
- The procedure she was subjected to was unfair;
- The procedure was discriminatory and the termination of her employment was discriminatory.

93. The claimant asked in her letter to be allowed to bring a family member to act as an advocate at the appeal hearing and further that the hearing be conducted in such a way so that she would not be disadvantaged. She

stated that her request was a request for a reasonable adjustment under the Equality Act 2010.

94. An appeal hearing pack of documents was prepared by the respondent for use at the appeal hearing. The pack is at pages 262 to 321 of the hearing bundle. It includes a 14-page management report by Mr Riley in which he sets out the background to the matter, describes the investigation, summarises the evidence in the case, including the case put forward by the claimant, details the steps taken by himself and then explains why he came to the conclusions and decision which he did. His report goes on to address the claimant's three stated grounds of appeal before setting out his conclusions and recommendations. It is a detailed and balanced report.

95. The claimant made a detailed written submission in support of her appeal (pages 323 to 338 of the hearing bundle). In a short undated covering note she repeated her request to be accompanied "due to my disability and other personal circumstances … so I am able to participate to the best of my abilities.

96. The written submission, which is dated 19 January 2018, is a thorough and well-drafted document. A Table of Contents arranges the issues under the following headings: "Discrimination", "Unfair process" (comprising "Undue Burden", "Undue Focus", "Impartiality"), "Procedural mistakes" (comprising "Record keeping" and "Evidence handling") and "Unfair decision" (comprising "Failure to consider inconvenient evidence" and "Failure to construct a coherent narrative"). It also includes an Introduction and Conclusion.

97. The appeal hearing itself took place on 5 February 2018. The hearing lasted one hour and 45 minutes, following which the appeal panel considered its decision. There is no evidence as to how long those deliberations continued for. The tribunal is satisfied that the claimant had a reasonable opportunity to present her case at the appeal hearing. The hearing notes evidence that the panel understood the case and asked relevant questions of Mr Riley and the claimant to further their understanding and enable them to reach a decision. Ms Watson, who kept the notes of the panel's deliberations, could not recall how long these continued. Her evidence was that the deliberations would not have continued beyond 1pm which was the time when the room was booked until. The handwritten notes of the deliberations are brief, extending to a single sheet of A4 paper.

98. The appeal hearing did not proceed by way of a rehearing. Instead, it is clear to the Tribunal that the panel mainly focused on whether Mr Riley had fallen into error. There is some evidence of the panel examining the substantive merits, but not in such a way that the appeal could be said to have been by way of a re-hearing.

99. On 19 February 2018 Councillor Jacqui Robinson wrote to the claimant confirming the outcome of her appeal, namely that her appeal had been dismissed. The appeal panel's conclusions are set out at page 3 of her letter (page 352 of the hearing bundle) and reflect the handwritten notes referred to above.

Law and Conclusions

Disability Discrimination

100. Section 6(1) of the Equality Act 2010 (EqA) provides:

"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.

101. "Schedule 1 of EqA contains supplemental provisions in relation to disability, including in Part 1 of Schedule 1 various paragraphs in relation to the determination of disability. Paragraph 5 provides:

"Effect of medical treatment

5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect."

102. Statutory guidance on matters to be taken into account in determining questions relating to the definition of disability includes the following guidance concerning the effects of treatment:

"Effects of treatment

B12. **The Act provides** that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (**Sch1, Para 5(1)**). **The Act states** that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (**Sch1, Para 5(2)**). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (**See also paragraphs B7 and B16.**)

B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1.

B14. For example, if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. Similarly, in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet."

103. As regards individuals whose diabetes is controlled by diet, the statutory guidance is to be considered in conjunction with the Judgment of the Employment Appeal Tribunal in ***Metroline travel Limited v Stoute UKEAT/0302/14/JOJ***. His Honour Judge Serota QC accepted that type 2 diabetes does not per se amount to a disability and highlighted the provisions of paragraph B7 of the statutory guidance, namely to what extent a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. He went on to say that abstention from sugary drinks did not in his view amount to treatment or correction. ***Metroline*** is a helpful reminder to this Tribunal that type 2 diabetes does not per se amount to a disability, but otherwise the decision turns upon its particular facts. In this case the claimant does not control her diabetes simply by abstaining from sugary drinks.

104. The other reported case to which our attention was drawn was **Taylor v Ladbrokes Betting and Gaming Limited** UKEAT/0353/15/DA. This was another Judgment of the Employment Appeal Tribunal. The case was remitted to the Employment Tribunal. The claim had been pursued on the basis that the claimant had a progressive condition within the ambit of paragraph 8 of Schedule 1, something that was not advanced by Mr Stephenson in his submissions on behalf of the claimant. Paragraph 8 is in effect a deeming provision, namely that a progressive condition may be deemed to have a substantial adverse effect on a person's ability to carry out day to day activities, even if it does not currently have that effect, if the condition is likely to result in such an impairment. **Taylor** was a case in which there was an eight-page medical report and two-page letter from a consultant physician Dr Hurel, in which he had answered questions about the future. Even then the Employment Judge fell into error. The

Employment Appeal Tribunal considered that the Employment Judge required a clearer view as to the progression of type 2 diabetes, and that Dr Hurel had either not been asked the right questions or the process would have benefited from Dr Hurel being present to answer the questions that might have arisen. We have not been provided with a copy of the Employment Tribunal's decision, but the Judgment of the Employment Appeal Tribunal confirms that Mr Taylor had been found not to be disabled. His condition was said to be controlled by medication, but there is otherwise insufficient information available to this Tribunal to be able to understand why the Employment Tribunal had concluded nevertheless that he was not disabled (putting aside any consideration of whether he met the test of disability under the deeming provisions of paragraph 8 of Schedule 1 to EqA). As with **Metroline**, the **Taylor** judgment reinforces that type 2 diabetes does not per se amount to a disability, even where as in the Taylor case and in this case it is controlled with medication.

105. The burden of proof is upon the claimant, on the balance of probabilities, to establish that she is disabled within the meaning of section 6 of EqA. In the view of the Tribunal she has failed to discharge the burden of proof upon her. She has a physical impairment, namely type 2 diabetes, and it is a long-term condition. However, we are not satisfied that it has a substantial adverse effect on her day to day activities. 'Substantial' in this respect means more than minor or trivial – section 212(1) EqA). Whilst we recognise that concentration and memory are relevant to a wide range of day to day activities, including conversation, social interaction and even basic daily tasks, the claimant has not satisfied the Tribunal, on the balance of probabilities, that her diabetes has more than a minor effect on her energy levels or that it makes her materially more fatigued than she might otherwise be if she did not have diabetes. To the extent that she does become fatigued and this impacts her concentration or her memory we are not satisfied that the impact is 'substantial'.

106. There is no medical evidence available to the Tribunal as to the effects of the medication prescribed for the claimant's condition. All we have in this regard is the limited information in the claimant's disability impact statement. Likewise, we have no medical evidence to inform our decision as to whether, but for that medication, her type 2 diabetes would be likely to have a substantial adverse effect on her ability to carry out day to day activities. Of course, a Tribunal is not limited in its decision making by the availability or otherwise of medical evidence and may equally decline to accept medical evidence that is adduced by a party. However, we do not accept the claimant's evidence at paragraph 7 of her disability impact statement, notwithstanding the House of Lords' acceptance in **Boyle v SCA Packaging Ltd** [2009] ICR 1056 that "it could well happen" is in this respect synonymous with the word "likely". The most we can conclude on the evidence available to us is that without her medication the claimant could well become fatigued and that this might impact her concentration and memory. However, that takes her no further in terms of her claim to be disabled as we do not believe that her level of fatigue in such circumstances would be likely to increase to such a level that any resulting

impairment to concentration and memory would give rise to a 'substantial' adverse effect on her day to day activities.

107. The Tribunal has noted already that the claimant was provided with a key to the lift at her place of work. The fact that the claimant did not, as we find, inform the respondent over a period of 17 years that she has type 2 diabetes, strongly suggests to the Tribunal that she did not consider it was having any or any 'substantial' adverse effect on her day to day activities.

108. In the circumstances we conclude that the claimant was not a disabled person for the purposes of EqA.

109. We add for completeness that we do not in any event consider that the claimant was at a disadvantage in comparison with her work colleagues who did not have type 2 diabetes in terms of the application of the respondent's policy only to allow staff to be accompanied at disciplinary hearings by a trade union representative or work colleague. To the extent that the claimant's concentration and memory were affected by her condition, it is not apparent to the Tribunal how these placed her at a particular disadvantage in terms of this aspect of the policy. Instead, any disadvantage, and resulting duty to make reasonable adjustments, would be in respect of the claimant's ability to address the respondent's concerns and state her case, regardless of who her companion was. As our findings above demonstrate, any potential disadvantage arising from impaired concentration and memory was more than sufficiently addressed by the claimant's ability to provide an account of her actions to the respondent over the course of three fact-finding and investigation meetings, two disciplinary hearings and one appeal meeting taking place over a period of more than six months. The meeting and hearing notes evidence that the issues were explored in considerable detail with the claimant and that she had every opportunity to confer with her family and to correct her account. She was also able to make a 14-page written submission in support of her appeal. Even disregarding her appeal against dismissal, the claimant was dismissed some four months after she was first suspended to enable a disciplinary investigation. Either way, she had every reasonable opportunity to confer with her family and provide an account of herself. Her account remained unchanged at Tribunal. If she experienced any disadvantage at the appeal hearing (or indeed at the earlier meetings and hearings) it was not by reason of impaired concentration and memory, rather it was because over a number of months she provided an account of her actions on 18 July 2018 that simply did not hold up under scrutiny.

110. Further, even once it received the claimant's written submissions in support of her appeal, we do not consider that the respondent knew or ought reasonably to have known that the claimant was at the disadvantage she claims in comparison to others, in particular it did not know, nor could it reasonably be expected to know, that her diabetes meant that she was disadvantaged in terms of the respondent's policy on staff being accompanied to meetings and hearings by a trade union representative or workplace companion.

Unfair Dismissal

111. An employee with at least two years' continuous service has the right not to be unfairly dismissed by her employer. The claimant had 29 years' service when she was dismissed.

112. Fairness falls to be determined under section 98 of the Employment Rights Act 1996. It is a two-stage process. At the first stage employers have the burden of showing that the employee has been dismissed for a reason within section 98(2) of the Act or for some other substantial reason of a kind justifying dismissal. Conduct is a potentially fair reason for dismissing an employee. In this case the claimant does not dispute that she was dismissed for alleged misconduct, albeit misconduct which she vehemently denies she is guilty of. The Tribunal is satisfied that she was dismissed by the respondent for misconduct, rather than some other undisclosed reason. That being the case the matter falls to be determined under section 98(4) of the Act, which provides:

"…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

(a) depends on whether in the circumstances (including the size and 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."

113. It is now 40 years since the Employment Appeal Tribunal gave its judgment in the case of **BHS v Burchell** [1980] ICR 303. The following passage from the judgment has been cited extensively in the intervening years, but is worth setting out here:

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think,

that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

114. It will be apparent from our findings set out above that the Tribunal does have concerns about certain aspects of the investigation, in particular that no one person seems to have assumed responsibility for managing the situation once theft was suspected. This was perhaps understandable in the first few hours after the folder was identified as missing when the focus was on locating it. However, it is regrettable that a number of the respondent's staff were permitted to view covert CCTV footage regardless of the data privacy implications and without appropriate safeguards being put in place to ensure the integrity of any footage that might subsequently be relied upon or to protect the rights of all those whose movements were captured on CCTV. It was only after the CCTV footage had been examined and re-examined on 20 July 2017 that an instruction seems to have been given that the matter was not to be discussed. Whether the claimant's data privacy rights were infringed it is not for this Tribunal to say, however we are satisfied that the claimant was not materially prejudiced by this initial lack of oversight. The claimant was not dismissed on the strength of the CCTV footage. On the contrary, as soon as the claimant was spoken to on 21 July 2017 she admitted to having been in possession of a blue folder when she left work on 18 July 2017 (19 July initially) and further admitted that she had visited the ladies' toilets where the file had been discovered on 20 July 2017. That was relevant circumstantial evidence. In the Tribunal's view the respondent acted reasonably, that is to say in accordance with the band of reasonable responses, in narrowing the focus of its enquiries to the claimant in the light of the evidence and admissions that emerged at this early stage in its enquiries.

115. We are also satisfied that the respondent acted reasonably in deciding to suspend the claimant. We note that Ms Richardson only informed the claimant that she was to be suspended after she had tried, but failed, to secure the claimant's agreement to go to her home so that the claimant could retrieve the blue folder which she claimed to have brought into work on 18 July 2017. Whilst Ms Richardson might, with the benefit of hindsight, have sensibly confirmed in writing her request to see the folder, we are in no doubt that the claimant fully understood that if she could produce the folder this might address the claimant's concerns, yet on her own evidence she did not do so until 9 August 2017. The Tribunal notes

that following her suspension the claimant went to her sister's house, who it was revealed at Tribunal holds a key to the claimant's house, yet the claimant still did not take the opportunity that afternoon to return home to retrieve her folder and take it in to Ms Richardson.

116. In spite of our comments above regarding the 'Conclusion' section of her report, we are satisfied that Ms Richardson embarked upon her investigation with an open mind and with a view to securing all relevant evidence that might assist in an understanding as to what had happened. She did not simply set out to find evidence that would support a case against the claimant. On the contrary she spoke to three further witnesses following her two formal meetings with the claimant in order to establish whether they could corroborate the claimant's account. In any event her notes of her interviews with various witnesses on 31 July 2018 do not indicate a closed mind or any bias. As noted above, the Background' and 'Investigation' sections of the report are a thorough and balanced summary of the evidence presented to Ms Richardson in the course of her investigation.

117. The impact of the 'Conclusion' section to Ms Richardson's report has to be considered in the light of the disciplinary hearings. In that regard, the Tribunal was particularly impressed by the way in which Mr Riley gave his evidence at Tribunal. He was measured and thoughtful in his approach and his evidence reinforces what is evident from the hearing notes and from his letter of 7 December 2017, namely that he came to his task with an open and enquiring mind and that he gave very careful thought to all of the evidence before formulating his thoughts and coming to a conclusion. His letter of 7 December 2017 is detailed, analytical and logical in its conclusions. It is irrelevant whether the Tribunal would or might have come to the same or a different conclusion. We cannot identify any error in his approach. He evidently copied significant passages from the 'Investigation' section of Ms Richardson's report, but we are satisfied this was merely in order to record what evidence was before him. He did not simply adopt Ms Richardson's conclusions. Instead, over the course of four pages (pages 244 to 247 of the hearing bundle) he set out why he had come to the conclusions which he had. They are not Ms Richardson's conclusions, they are his own. It is apparent to anyone reading the letter why he reached the decision he did. In the Tribunal's view there can be no criticism of him. He did not accept Ms Richardson's report without question. On the contrary he went to the Westgate Community College building to better appreciate the layout of the building, he sought to secure enhanced CCTV images (though this proved not possible) and he interviewed Andrea Marshall and Paula Logan. He was also able to examine the claimant's blue folder and the respondent's blue folder. Crucially, it seems to the Tribunal that he came to a conclusion that it was entirely reasonable for him to reach on the evidence available to him. Over the course of two lengthy hearings he explored the entirety of the evidence with the claimant. In arriving at his decision he did not simply rely upon the CCTV footage; again, on the question of whether the claimant was in possession of a blue folder on 18 July 2017, there was no

need for him to do so as the claimant herself admitted that she was in possession of a blue folder. Instead, it is clear that he considered and weighed all of the evidence including: the discrepancies in the claimant's account regarding the Notice; the lack of evidence to substantiate the account belatedly put forward by her on 27 November 2017; that she had taken a different route to her office on the morning of 20 July 2017 and had failed to clock in; that she appeared from CCTV footage to be hurrying and had visited the toilets where the folder had been discovered perhaps 20 minutes prior to its discovery; that the toilets were used less frequently than other toilets in the building and were slightly out of the claimant's way; the claimant's failure to produce the folder when first given the opportunity to do so by Ms Richardson and what he clearly regarded as an unsatisfactory account in respect of her house keys. Even that is a brief overview of the matters which the letter of dismissal confirms he considered. His letter sets out clearly and comprehensively why he concluded, on the balance of probabilities, that the allegations against the claimant should be upheld. In the language of **Burchell** he genuinely believed the claimant was guilty of misconduct and did so on reasonable grounds. In the Tribunal's view this was following a reasonable investigation, including detailed further enquiries by Mr Riley himself, and that he came to a decision independently of Ms Richardson and independently of the 'Conclusion' section in her report.

118. Having made the findings which he did and notwithstanding the claimant's long service, the Tribunal is satisfied that dismissal was within the band of reasonable responses available to the respondent. Indeed this was accepted by the claimant herself. Questioned by Mr Crammond she accepted that such conduct would amount to gross misconduct and would go to the heart of an employer's continued trust in their employee.

119. Had there been errors in Mr Riley's approach it is not certain that the appeal hearing would have corrected these in circumstances where it did not proceed by way of a re-hearing. However, such considerations do not arise. The claimant had a reasonable opportunity to put her case on appeal and she received a fair hearing. Even if the notes of the panel's deliberations are fairly brief, the Tribunal is satisfied that the panel engaged with the appeal and retained an open mind before deciding that it would not uphold the appeal. Pragmatically, the panel might have permitted the claimant to be accompanied by her nephew but we cannot conclude that it acted unreasonably, or outside the band of reasonable responses, in declining her request. We have already set out why we find that the claimant was not disabled, alternatively why she was not at a disadvantage in terms of the respondent's policy on employee's being accompanied at disciplinary hearings.

120. In all the circumstances the Tribunal concludes that the respondent acted reasonably in treating the claimant's misconduct, as found by it, as sufficient reason for terminating the claimant's employment and accordingly her claim that she was unfairly dismissed fails.

Employment Judge Tynan

Date: 29 October 2018

Sent to the parties on: 6 November 2018

Miss K Featherstone
For the Tribunal Office