Case No: 1801568/2016

EMPLOYMENT TRIBUNALS

Claimant: **A**

Respondent: **B**

Heard: **On: 19, 20, 21, 24, 25 & 26 July**
5 October
22, 24, 27 and 28 November 2017
6, 7, 8 and 9 March 2018
12, 13 and 16 December 2019 (in chambers)
4, 5, 6, 9, 10, 11 and 12 November 2020
23 March 2021
24, 25 and 26 March 2021 (in chambers)

Before: **Employment Judge Brain**
Members: **Mrs M J Cairns**
Mr D R Fields
Representation:
Claimant: **A lay representative**
Respondent: **Ms K Nowell of Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. Upon the claimant's complaints brought under the Equality Act 2010:
    a. The complaint of direct sex discrimination brought under sections 13 and 39(2)(d) fails and stands dismissed.
    b. The complaints referred to in paragraph 1(a) were presented to the Employment Tribunal within the limitation period provided for by section 123. In the alternative, it is just and equitable to extend

time to vest the Employment Tribunal with jurisdiction to consider them.

c. The claimant's complaint that she was subjected to harassment by reason of unwanted conduct of a sexual nature (which complaint is brought under sections 26(3) and 40) succeeds.

d. The claimant's complaint in sub-paragraph (c) was brought outside of the limitation period provided for by section 123. It is just and equitable to extend time to vest the Tribunal with jurisdiction to consider it.

e. The respondent's reliance upon the statutory defence in section 109(4) fails and stands dismissed.

f. Upon the complaint referred to in sub-paragraph (c) the respondent shall pay to the claimant the sum of £20,000 by way of injury to the claimant's feelings .

g. The respondent shall pay interest to the claimant upon the sum awarded in sub paragraph (e) at the rate provided for by the Employment Tribunal's (Interest on Awards in Discrimination Cases) Regulations 1996 from 15 July 2012 to 25 September 2021.

2. Upon the claimant's complaint of unfair dismissal brought under the Employment Rights Act 1996:

   a. The respondent unfairly dismissed the claimant.

   b. By way of remedy upon the unfair dismissal complaint:

   <u>Basic award</u>

   c. The respondent shall pay to the claimant the basic award calculated in accordance with section 119. It is just and equitable to reduce the amount of the basic award by 50% because of the claimant's conduct before the dismissal.

   <u>Compensatory award</u>

   d. The respondent would have fairly have dismissed the claimant by the end of February 2018.

   e. When calculating loss for the period between 14 June 2016 and 28 February 2018 the claimant shall bring into account by way of mitigation the earnings which she received from her employment with AAAA.

   f. It is not just and equitable to reduce the compensatory award by reason of the claimant's conduct.

3. Upon the claimant's complaint of wrongful dismissal:

   a. The claimant's complaint fails.

REASONS

Introduction

1 After hearing the evidence and receiving the parties' helpful submissions the Tribunal reserved judgment and deliberated in Chambers. We now set out our reasons for the judgment that we have reached.

2 This is a long-running matter. The Employment Tribunal hearing was adjourned for a period of around a year after 9 March 2018 because of the claimant's involvement in Crown Court proceedings which were related to some of the issues with which were have been concerned. Delays were also caused by illness impacting upon the claimant, the claimant's representative, one of the respondent's witnesses, one of the members of the Tribunal panel, a family member of one of the panel and the Covid-19 pandemic. The hearings in 2020 and 2021 were undertaken by CVP.

3 The case has benefited from a number of private preliminary hearings. The first of these was held on 24 November 2016 and came before Employment Judge Davies. The second was held on 11 January 2017 and came before the Employment Judge. There have been several after 11 January 2017 which need not concern us here.

4 Employment Judge Davies identified the issues in the case. We shall consider these in more detail in due course. Suffice it to say at this stage that the claimant complains of:

4.1 Unfair dismissal under the Employment Rights Act 1996.

4.2 Direct discrimination because of the protected characteristic of sex.

4.3 Harassment (by reason of unwanted conduct of a sexual nature).

4.4 Wrongful dismissal.

5 The wrongful dismissal claim is brought pursuant to the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. The complaints of direct sex discrimination and sexual harassment are brought under the Equality Act 2010.

6 At the private preliminary hearing that came before the Employment Judge on 11 January 2017 the Tribunal (acting pursuant to its powers under rule 50 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013) made orders with a view to preventing or restricting public disclosure of the identities of the parties to the proceedings, the individuals referred to in paragraphs 6 and 9 of the respondent's amended grounds of resistance. It was also ordered that the case be heard in private.

7 Accordingly, the respondent's witnesses shall be referred to by letter. The claimant and respondent shall be identified in those capacities. The individual referred to in paragraph 6 of the amended grounds of resistance we shall call S. The individual referred to in paragraph 9 we shall call R.

8 We shall firstly record our findings of fact. We shall then consider the issues in the case in much more detail before going on to recite the relevant law. We shall then record our conclusions.

9 The Tribunal heard evidence from the claimant. On behalf of the respondent we heard evidence from:

8.1 X. She was employed by the respondent as the Patient Safety Lead of Community Services Directorate. Prior to August 2016 she was employed as a Professional Lead Psychologist for the Community Services Directorate. She was one of the lead investigating officers in the disciplinary cases concerning the claimant and R. She is now retired.

8.2 Y. She is currently employed by the respondent as Director of Operations and Transformation. She was appointed to this post on 6 June 2017. Prior to that appointment she was employed as Director of Specialist Services in addition to an interim role as Director of Community Services and Interim Director of Transformation. She chaired the disciplinary hearings involving the claimant and R. She was also, as we shall see, involved in disciplinary proceedings involving others.

8.3 Z. He is employed by the respondent as Deputy Chief Executive & Chief Operating Officer. He is currently on secondment to another NHS organisation. He was the hearing manager for the disciplinary appeal brought by the claimant against the decision to dismiss her for gross misconduct.

8.4 Q. He was employed by the respondent as a Project Consultant. Sadly, he has passed away after giving evidence in the case.

8.5 R. He is a Registered Nurse in Mental Health and was employed by the respondent from April 1994. He worked as a Band 7 Cognitive Behavioural Psychotherapist from 8 September 2010 until his employment was terminated on 10 March 2016.

8.6 E. He was employed as a Director of Human Resources employed by the respondent. He now works for another NHS Foundation Trust.

8.7 JJ. He is a Local Counter Fraud Specialist at 360 Assurance.

9 The Tribunal was presented with a hearing bundle consisting of seven lever arch files. The bundle consisted of around 2900 pages in total. Additional documentation was introduced by each party as the matter progressed between 19 July 2017 and 9 March 2018. This material was consolidated into a supplemental bundle. Ahead of the resumption of the hearing on 12 December 2019, the Tribunal was presented with new materials consisting of an additional bundle of 515 pages. We shall refer to documents within the supplemental bundle as '*SB[x]'* and in the additional bundle as *'AB[x]'*. Upon the resumption of the hearing on 4 November 2020, the Tribunal was handed a further bundle which was labelled the 'HCPC *bundle'* consisting of in excess of 600 pages. In total, the Tribunal was faced with a bundle of documents numbering around 4,500.

Findings of fact

Background

10 The claimant was employed by the respondent between 16 December 2003 and 14 June 2016. The statement of main terms and conditions (commencing at page 2399) gives her job title as Occupational Therapist. She was initially employed to work 36 hours per week over five days. The claimant was entitled to the statutory notice of 12 weeks to bring her employment to an end.

11 The issue of the claimant taking a role with a third-party organisation (AAAA) while employed by the respondent is a significant feature of this case. The statement of main terms and conditions required the claimant to inform the respondent were she to consider taking additional employment either with the respondent or another employer. This was so as to ensure that the respondent was acting in compliance with the Working Time Regulations 1998.

12 The statement of terms and conditions of service was accompanied by a supplemental section at pages 2400(1) to 2400(8). Clause 2.7 of these at pages 2400(5) and (6) said that the employee was required to give maximum care and attention to her work at all times and to inform her line manager in writing of any outside paid employment which may have a material effect on her ability to discharge her duties properly. Clause 2.7 provided (under the heading *'Additional Paid Employment and Financial Interests')* that *'The Trust is entitled to know when there may be a conflict of interest. You are required to give maximum care and attention to work at all times, and therefore to inform your manager of any paid employment you undertake outside the Trust where it would have a material effect on your ability to discharge your duties properly (eg as a result of tiredness from working long hours). You should declare this interest in writing to your line manager. If you are unsure you should seek clarification from your line manager.'*

13 The statement drew to the claimant's attention the respondent's policies some of which are set out in paragraph 2.11 at page 2400(6). There was an expectation that employees would comply with them. Amongst those listed is the disciplinary policy which is in the bundle commencing at page 103 and an equal opportunities policy (commencing at pages 132(1)). The respondent also has a bullying and harassment policy which commences at page 132(21).

14 Also of relevance in the case is the *'declaration of interests and standards of business'* policy commencing at page 357AB. This requires the completion by the employee of a '*declaration of additional employment form'* where the employee takes another job within or outside the respondent and irresepective of whether the role is paid or voluntary. The policy provided (at page 364) that the employee may not without written approval of their line manager, engage in any remunerated outside employment. The claimant accepted this policy to be applicable to her as a member of staff (and thus within the scope of those to whom the policy applies *per* page 361AB).

15 The respondent included within the supplemental bundle its *'incident management policy and procedure (including serious incidents) policy.'* This is also of relevance in the case. It commences at page 6SB. Incidents occurring in a service user's home involving the respondent's employees are within scope. In a case of an incident or a near miss taking place in a service user's home then consideration is to be given to the provision of

information to the service user or their relatives in accordance with the respondent's statutory duty of candour and the *'incident policy'* and '*duty of candour policy'* as described in paragraphs 6.4 and 6.5 at pages 17 and 18SB. The duty of candour policy is in the bundle commending at page 132(55).

16 The claimant gave unchallenged (and therefore presumably uncontroversial) evidence that she was graded as a Band 6 Occupational Therapist after the implementation of Agenda for Change in 2004. The claimant took a career break in January 2007 until March 2008. She worked as an Occupational Therapist in Nigeria during this time. Acknowledgement that she was on a career break over this period may be found at page 2410.

17 The claimant gave birth to her son in September 2009. She then took a period of maternity leave and returned to work on an annualised contract working an average of 30 hours a week from 24 June 2010 as a Band 6 Occupational Therapist. We see her flexible working application form in the bundle commencing at page 2416.

18 By reference to performance and development reviews and appraisals and other documentation within the bundle, (commencing at page 2466), the claimant asserts that she had an exemplary work record. Again, this appears to be uncontroversial evidence and was not challenged by Ms Nowell. No issue was taken by the respondent with the claimant's account that she was anything other than capable and competent in her role.

19 With effect from 17 November 2014 the claimant was temporarily promoted to the role of Band 7 Assistant Team Manager for the city's Outreach Team (known as '[*x*]ORT' for short): *[x] is the name of the city and which has been anonymised in compliance with the orders referred to in paragraph 6.* The letter of confirmation of her promotion is at page 2436 and signed by Q in his capacity as her Team Manager. This was a six months' secondment. In the end, this was extended to a 12 months' secondment. At the time of her dismissal she had reverted back to her Band 6 post (upon expiry of the Assistant Team Manager secondment).

20 It is important for a full understanding of the issues to which this case gives rise for us to make factual findings about the claimant's domestic circumstances. In the absence of any challenge to what the claimant says about this in her evidence we infer that the respondent (sensibly) accepts what the claimant says about significant and serious matrimonial difficulties.

21 In her grounds of claim she pleads as follows:

> *"I suffered from an abusive relationship, as a result of my husband's anger issues. These anger issues resulted in physical and emotional abuse directed towards me and my toddler son for several years, until I separated from my husband in early 2012."*

22 The claimant gives evidence, in paragraph 9 of her witness statement, as follows:

> *"Although not related to work, since around 2009, there have been relationship issues between me and my husband at the time mainly due to my husband's anger issues. These issues gradually increased, which led to my separation from my husband at the time, in 2012."*

23 She goes on to say in paragraph 10 of her witness statement that:

> *"When my husband's anger issues worsened around late 2010/early 2011, I was extremely worried and distressed. Some of the key issues, worries I had at the time were: (185)*
>
> *(1) Anger issues of my husband towards me and my toddler son.*
>
> *(2) The safety of my toddler son due to my husband's anger issues.*
>
> *(3) Very low self-esteem (including the feeling that I was not attractive or desirable) due to the manner in which I was treated by my husband and due to my husband's lack of intimacy as well as my husband's minimal interest in sexual relations with me."*

24 The reference in paragraph 10 of the claimant's witness statement to page 185 is to a document that she filed with the Nursing and Midwifery Council ('NMC'). (The full citation is at pages 181 to 191. It is dated 14 September 2015). The passage that we have cited in paragraph 10 of her witness statement is a repeat of what she says in that document which is a referral of R to the NMC. We shall come back to this referral document in due course (in paragraphs 73 and 74).

25 The claimant goes on to say at paragraph 11 of her witness statement that:

> *"Initially, I spoke to one or two female friends/colleagues about some of the above issues. (Later, among other things, I also sought the support from the Workplace Wellbeing Counselling Service provided by [the respondent] (387 and 2355)."* The reference at page 2355 is to Workplace Wellbeing notes taken on 24 January 2012 in which the claimant relays her experiences with her husband).

26 It not being necessary, in the Tribunal's judgment, to make any further or more detailed findings of fact about the claimant's unhappy matrimonial relationship and her career history we now turn to our findings of fact around the events which ultimately led to the claimant's dismissal. It is however against this background that the relationship between the claimant and R is (from the claimant's perspective) to be viewed. We shall consider this in further detail in due course

The events of August 2015

27 In the helpful chronology of events presented to us by the respondent the starting point is an e-mail received by the respondent on 14 August 2015. This is at page 297. It is dated 14 August 2015 and was e-mailed from patient.confidentiality.shsc@gmail.com to the respondent. In essence the e-mail levelled an accusation against S that he had breached patient

confidentiality about medication being taken by three patients being looked after by the respondent on one of the respondent's wards.

28 On 17 August 2015 a verification meeting was held (page 437). This was attended by S (who was at the material time an Occupational Therapist employed by the respondent). Also in attendance were a Senior Occupational Therapist, K (Professional Lead Occupational Therapist) and M of the respondent's Human Resources Department. S was asked by M if he was in a trade union. S said, "*no I'm not but I have joined."* It is unclear from the note in what capacity the Senior Occupational Therapist was in attendance. However, the respondent (through Ms Nowell) accepted that S was given the right to be accompanied at the meetings which he attended about what became known as *'the patient confidentiality issue.'*

29 As we have said, the respondent's disciplinary policy is at pages 103-132(20). A flowchart of the disciplinary investigation process is at page 105. We see from this that where an allegation or complaint has been made or inappropriate conduct observed then the first step is for the respondent to carry out verification of the allegation (if applicable). The detail about this process is at paragraph 6.4 of the disciplinary policy (at page 116). Where concerns have been raised with regards to an employee's conduct then the disciplinary procedure provides that the relevant manager may decide to hold a *'verification meeting'* with the employee to establish whether or not there is cause to begin a formal investigation. A verification meeting is not necessary in each case. For example, one was not held in R's case: (see page 2755: this document is part of the respondent's management statement of case in R's case and which sets out the history of the process carried out).

30 An employee required to attend a verification meeting has a right to trade union representation. (It was X's understanding that an employee also has the right to representation when attending a meeting in the capacity as a witness). The policy goes on to provide that verification meetings are not always needed. The purpose of a verification meeting is to check whether there is a legitimate issue that needs to be investigated further or to confirm the facts and gather information to inform the manager's decision about the appropriate cause of action to take, to explain to the employee how the manager intends to deal with the allegation going forward and check the detail of the allegation with the employee.

31 During the verification meeting of 17 August 2015, S said that the claimant was involved in the chain of events leading to the allegation of breach of confidentiality on his part. S said he had received a text from her whilst she was away from work on annual leave. The text said:

> *"Hi, how are things without me at work. Can I ask you for a massive favour? Will text you from another phone in a bit."*

32 S informed the verification meeting that he then received a series of texts from the claimant's phone and from another phone at around the same time. These are set out at page 438. We need not go into them in detail. (Ms Nowell and the claimant's representative agreed that the Tribunal need not make detailed findings of fact about the patient confidentiality issue which set in train the chain of events with which we are principally concerned). In sum, S said that he thought he was exchanging texts with

the claimant when in fact (unbeknown to him) he was corresponding with a third party who was involving her in a ruse to entice him (S) to breach patient confidentiality.

33 On 19 August 2015 the respondent met with the claimant (page 302). (It appears that the note commencing at page 302 is wrongly dated 20 August 2015. By reference to the e-mail chain at page 607 dated Monday 17 August 2015 arrangements were made to meet with the claimant on *'the next Wednesday'* (which was 19 August 2015)).

34 At all events, the respondent wished to speak to the claimant about her involvement in S allegedly breaching patient confidentiality. There was suspicion on the respondent's part (based upon what S had said in his verification meeting) that the claimant had sought to entice or entrap S into breaching patient confidentiality for some reason.

35 The notes of the meeting are at pages 302-304. Present were the claimant, K and M.

36 The notes (at page 302) record that M opened proceedings by informing the claimant that the meeting was a verification meeting under the respondent's disciplinary policy. The claimant was asked about her communication with S regarding work issues during the time that the claimant was on annual leave. The claimant said that she had texted S to ask him if he would cover *"Monday's group"* (being a reference to a group of patients that the claimant was to supervise on Monday 17 August). The text in question asking S to cover the Monday group was sent on Tuesday, 11 August 2015 at 6:16pm. S later produced a screenshot of this (page 485) as well as the text divulging the patients' initials (page 484). The claimant said that she did not receive a reply from S on her work phone but got a text sometime later from S to say that he would cover the group. Presumably this text was sent to the claimant's personal mobile telephone. The claimant then said that she had received further text messages *"about Clozapine."* This was a reference to the medication at the heart of the allegation that S had breached patient confidentiality by referring to that as the medication being taken by three of the patients upon the ward.

37 The claimant afterwards submitted some comments upon the respondent's notes (at pages 306 and 307). She took issue with the description of the meeting as a verification meeting. She said that that was not said during the meeting and that she was told that she had been invited to attend as she may be able to help about the patient confidentiality issue. The respondent (through Ms Nowell) accepted that the respondent was in error in referring to the meeting of 19 August 2015 as a verification meeting because at that stage the claimant was being interviewed only as a witness.

38 On 20 August 2015 Q received an instruction from L, Service Director of the Community Services Directorate, to suspend the claimant. The instruction is in the e-mail at page 620. L refers to written information emanating from K and Q. L then said:

> *"The reason I have come to that decision is that I feel that there is enough risk to patient care to warrant this. There is some suspicion about her role in possibly enticing another OT to divulge confidential information to an unknown party (that he presumed to be [the claimant]). Taken in the context of the behaviour reported*

to you by [R], there is potentially a pattern of behaviour from [the claimant] that, following sexual relationships with colleagues, she has then been part of an attempt to set them up in some way, both in the last couple of weeks. As the second of these involved potential harm to service users, we do not know what other relationships or issues may yet come to light, I think that this warrants a suspension to minimise risks to patients and/or staff."

39 L went on to say that:

"Suspension is a neutral act and we have no proof that [the claimant] is involved in the data protection issue [being that involving S], and are not presently accusing her of anything, but I feel that there is enough suspicion to warrant a suspension."

40 L was prompted to act towards the suspension of the claimant upon the basis of the patient confidentiality issue and also because of what he had learned from Q (concerning the claimant and R) when L met with Q on 14 August 2015. At that meeting, Q told L of the events of the weekend of 8 and 9 August 2015.

41 Q says the following about these events in his witness statement (using the same paragraph numbering as in the statement):

"**Saturday 8th August 2015**

(30) *At around 10:30am on Saturday 8th August 2015, I heard my work phone ringing. Before I picked up, it rang off and my personal mobile started ringing. I answered and it was R. R was upset and said that he needed to speak to me about something confidential. He said that I would be receiving some graphic sexual images of him and [the claimant] and that he needed to let me know. He said that he had been having an affair with [the claimant]. He then said that [the claimant] had 'fallen in with' another man, and that this man was a 'control freak' and a 'psychopath.'*

(31) R seemed very distressed during this phone call and asked if he could come and see me at home the next day. I initially said no as it was a private matter and I did not want to blur the boundaries of work. R pleaded that he needed to speak with me as a friend. He said that he did not have any friends he could talk to as they were all connected to his wife. Although I was cautious about R's request, given the level of distress he was exhibiting, I agreed to see him as I felt it was the human thing to do. I therefore told R that he could come and see me at home but that I would not talk about work issues.

Sunday 9th August 2015

(32) R came to see me at my home on the Sunday morning.

(33) R told me that he had received a text message from [the claimant] asking him to send her a photo of himself to her mobile phone, which he said he did. R said he had then received a further text message from [the claimant] asking him to visit, which he said he did, having told his wife that he was walking the dog.

> *(34) R said that when he arrived at [the claimant's] house he had been greeted by [the claimant] at the door and that [the claimant] had led him upstairs. R said that once upstairs both he and [the claimant] had undressed and [the claimant] then left the room, before coming back into the room with an unknown Asian male who was filming R on his mobile phone. He said that the unknown male was 'ranting' about R's affair with [the claimant]. R said that he had asked the man to stop filming but that he refused and that he and the unknown male then had a scuffle. R said that during the altercation, the unknown male had slapped him and kicked him and was threatening to send the images of R, along with some other images, to me and O [another senior employee of the respondent].*
>
> *(35) R said that the images had already been sent to his wife and that she was extremely distressed.*
>
> *(36) R was very distressed and said that his wife had kicked him out. He said his wife had been sent images which made it clear he was having a liaison with [the claimant]. R said that the unknown man had also said that he was going to send the images to the Trust."*

42 Q's evidence is that on 9 August 2015 R requested Q to speak to his (R's) wife. Although Q initially refused saying it was a private matter he agreed upon the basis that R wanted his wife to know that he had visited Q. Q agreed to do so but only upon the basis that R left Q's house before Q did so. Q said that he made this request as he felt it was better that R not be there when he made the phone call to R's wife. In evidence under cross-examination Q said that, *"I didn't want [R] in the room to put words in my mouth and influence me. I thought it was better if he was not there."* Q went on to say that R *"likes to get his points across. I have to slow him down. I wanted to control the phone call."* Q said that he did not in the event receive any compromising images or photographs of R.

43 Q explained the delay of several days in reporting matters to L upon the basis that he was weighing whether this was a private or work matter. After mulling matters over for several days Q took the decision to *"disclose it further up"* (as Q put it). Therefore, he made arrangements to see L on the afternoon of Friday, 14 August.

44 On 20 August 2015 Q e-mailed L with a summary of the account given to him by R. This is at page 618. Q told the Tribunal that he made some notes in his log book and used that as the basis of the e-mail. The respondent did not give disclosure of Q's log book.

45 The e-mail gives an account in very similar terms to the passages of Q's witness statement that we have just cited. In the e-mail Q says that the events took place on 1 and 2 August 2015 which he acknowledges to be an error. He told the Tribunal that he was sure that the events took place on the weekend of 8 and 9 August 2015 as he took the telephone call on the Saturday morning as he was preparing to leave home to go to watch a football match being played in Blackburn that afternoon. A further point of detail in the e-mail not specifically referred to in the witness statement is that R told Q that he had had affairs with two other members of the

respondent's staff. He says that *"this unknown Asian man"* was going to disclose that fact to the respondent in addition to his relationship with the claimant.

46 L instructed Q to suspend the claimant on 20 August 2015 which was the same day as Q sent to L the e-mail summary at page 618. L's suspicion that the claimant was exhibiting a pattern of behaviour of seeking to somehow set up those with whom she had had a sexual relationship was in the context of what he had been told by Q and her involvement in the S issue.

47 The provenance of L's suspicion that the claimant and S were involved in a sexual relationship is unclear. It is the case that the claimant said (at a subsequent meeting held on 1 October 2015) that she and S had had what she described as *"one off liaison".* We refer to the notes of that meeting commencing at page 310: the relevant reference is in the second line of page 312. However, that information was plainly not before L when he sent the e-mail at page 620 to Q.

48 On the afternoon of 20 August 2015 Q told the claimant that he was suspending her. He describes the meeting at paragraphs 44-49 of his witness statement. Q said that when the claimant went to see him at his request she did not know what the meeting was about. Q then asked the claimant if she had attended a meeting with K earlier in the week. (This was the meeting of 19 August 2015). The claimant said that she had done so and there had been some discussion about her request for S to cover the Monday group and the texts around that time. Q says (in paragraph 46 of his witness statement) that he explained to the claimant:

> *"That I had asked to see her because the Trust had information which they were concerned about. I did not go into detail with [the claimant], I just said that the Trust were concerned enough to investigate and that whilst that was going on, we needed to suspend her from duty. I said that the reason the Trust needed to suspend her was that there were safeguarding concerns and the Trust had identified a potential risk to the Trust's service users. [The claimant] said that she understood this but kept saying that she was only a witness."*

49 Q's evidence is that during the meeting the claimant's phone kept ringing. Q did not know who was telephoning the claimant other than that the caller was male. Q said in paragraph 49 of his witness statement that:

> *"Throughout this conversation, [the claimant] seemed distracted and did not seem to be focused on the meeting itself. We were also constantly interrupted by her phone ringing and she kept leaving the office to answer it. After the meeting, I typed up a summary of my recollection of the meeting (page 624) and e-mailed these to L (page 625) (sic- it is actually at page 623)."* [This records that the claimant handed her phone to Q at the end of the meeting. EE was also copied in to the Q's email to at page 623. She was also aware of the claimant's suspension and was giving guidance to K about the ability of M to afford HR support: pages 623 and 628].

50 On 25 August 2015 Q sent to the claimant a letter confirming her suspension with effect from 20 August 2015 (pages 262 and 263). The letter of suspension is at page 642. The reason given for the suspension

was that it *"relates to an allegation of professional misconduct against the background that the Trust has received information alleging unauthorised disclosures of confidential patient information."* The letter confirmed that whilst on suspension the claimant would be in receipt of full pay. She was instructed *to "remain contactable during normal office hours (Monday to Friday 9:00am to 5:00pm)."* The letter said that:

> *"During your suspension, any annual leave already booked will be honoured and will still be classed as annual leave. You are able to request annual leave giving as much notice as possible, but in suspension situations only, a minimum of one week's notice period will be considered. Whilst any requests will be considered, it cannot be guaranteed that the request for annual leave will be granted."*

51 The disciplinary policy deals with suspension at clause 6.3 (in the bundle at pages 115 and 116). By clause 6.3.6 a suspended employee will receive full pay. The policy requires that the employee be given the reason for the suspension. A suspended employee is required to be available during normal working hours (9:00am to 5:00pm) throughout the suspension period. Further, by clause 6.3.9 at page 116 an employee on suspension must continue to request annual leave from their line manager as if still at work and annual leave rules still apply.

52 The claimant (as she confirmed when asked about this by the Employment Judge on 10 November 2020) interpreted the letter referred to in paragraph 51, and in particular the obligation to remain contactable, as effectively giving her licence to use her time while on suspension as she wished (provided she remained contactable). This was to have significant ramifications (as we shall see later on in the chronology).

53 It is plain from the evidence that Q gave under cross-examination and his demeanour before the Tribunal that he found himself in a somewhat uncomfortable position during August 2015. In addition to R's telephone call and R's visit to his home over the weekend of 8 an 9 August 2015 Q had had to decide whether to elevate the matter into a workplace issue and then had to suspend the claimant.

54 Upon the suspension issue, Q complained to the Tribunal that he had been *"left out of the loop."* He was unaware that the claimant had already been interviewed about the confidentiality issue on 19 August 2015. He was conscious that he was not being wholly candid with the claimant during the suspension meeting. He said that he had had to ask the claimant for information as to what had been discussed at the meeting on 19 August 2015.

55 Q's disquiet about matters is evidenced in the e-mail that he sent on 25 August 2015 to L, K and two others (page 634). He said that the claimant *"is clearly wondering what the suspension is about, I would like to put the allegation to her, I myself am not sure what has gone on, and in some ways I have just done the suspension and the investigation will be in someone else's hands, but can you have a look at this and let me know if it affects our investigation. This is the letter I would like to send to her today if possible."* Q told the Tribunal that he felt for the claimant *"as it wasn't comprehensive."* (Presumably this was a reference to what he told her at the suspension meeting). Matters were plainly not assisted by the

claimant leaving the meeting room upon several occasions to take telephone calls.

56 Returning to the provenance of the information in the respondent's possession about an alleged sexual relationship between S and the claimant, X was taken (during her cross-examination) to L's e-mail to Q of 20 August 2015 (page 621). The first paragraph refers to *"written information"* furnished to L by Q and K. The former is, of course, the e-mail sent by Q at page 618 to which we have already referred in paragraph 44. The respondent did not disclose to the Tribunal or to the claimant (at any stage) the nature of the written information apparently handed to L by K. The Tribunal also did not have the benefit of hearing evidence from K. X said that she did not know the nature of the information provided to L by K. As we have observed, L took the view that there was suspicion over the claimant's involvement in the patient confidentiality issue and her involvement with R such as to give rise to a concern about a pattern of behaviour on her part.

57 In his evidence to the Tribunal, R said that he and the claimant contacted one another through a messaging service known as Nimbuzz. He said in paragraph 6 of his witness statement that he *"used to delete the messages that I had received as some of these were intimate photos sent by the claimant. I have never kept any pictures sent by the claimant to me."*

58 About the events of the weekend of 8 and 9 August 2015, R says that the week before he was on a family holiday. On his return from the family holiday on 7 August 2015 he *"picked up a text message from the claimant on Nimbuzz requesting we meet. I was also asked to send her some pictures of myself which I did; I sent her two pictures, one of which was explicit in nature."*

59 It was suggested to R in cross-examination that he had in fact initiated contact with the claimant. This suggestion was made upon the basis of the exchange of text messages that we see at page 2054. There is a text from R to the claimant sent at 05:28 on 8 August 2015. This simply says *"Morning."* At 06:03 R sent the claimant an explicit image with an accompanying message, *"Needs perking up."* There then appears to be a further message at 06:05 being a photograph of R sent to the claimant. R did appear to be a little uncertain as to the sequence of events but maintained that he had returned from his family holiday on Friday 7 August to find a message from the claimant on Nimbuzz waiting for him. It was suggested to him by the claimant's representative that retention of the Nimbuzz message would have *"exonerated"* R and shown the initial contact to be from the claimant on this occasion. R says that he deeply regrets having deleted it.

60 The significance of who initiated contact with whom relates to claimant's assertion, made through her representative, that she wished to end the relationship with R but R wanted it to continue. R said that he would not have seen the claimant had she simply told him that she did not wish to see him. He said that he was aware that the claimant had other sexual partners. He said that neither he nor the claimant wished their relationship to become permanent. He said the claimant had told him that *"with me it's only about sex – an adult consensual relationship."*

61 R gives an account of the events of 8 and 9 August at paragraphs 16-18 of his witness statement. He says:

> "(16) *The following morning, 8th August 2015, I went to the claimant's home at approximately 7:15am. I was going to take my dog Ruby for a walk and I visited the claimant on the same outing. I went in through the back door and she put my dog in the front room, then led me upstairs. She undressed me, which I thought was strange as she would not let me kiss or touch her. She then told me to wait as she needed to get some clothes.*
>
> *(17) Moments later she came back in the room with the man I understood to be her new boyfriend. He took some further pictures of me, then after a scuffle I dressed and left. I did not hit him. I was completely blown away by the series of events, and remember turning to the claimant and asking, 'what have you done?' I then left shortly afterwards with my dog and, by the time I returned home, the claimant and her partner had already contacted my wife.*
>
> *(18) On 8th August 2015 I spoke with Q, who was at the time my manager. I disclosed to him my relationship with the claimant and that he may receive some explicit images. I did this because I was seriously worried what the claimant and her partner were planning to do next. I agreed to meet Q his house the following day – Sunday 9th August 2015, and I went into detail of what had happened at the claimant's house the day before."*

62 R says that he then remained off work due to the need to recover from a hip operation that he had recently undergone. He was off work until 26 August 2015. Following that he had two weeks' annual leave. Shortly after his return to work from his annual leave he was suspended on 24 September 2015 (pages 295-296) due to the referral made by the claimant to the NMC (at pages 181-191). We shall come to that complaint in further detail shortly. In sum, R was suspended to facilitate an investigation about the claimant's complaint against him of coercion and sexual harassment. It appears from page 691 (which is an email from Q to L and EE dated 21 September 2015) that the respondent was unaware (at the time of R's suspension) of the details of the complaint made to the NMC. R's email account was suspended on 9 October 2015 (page 955).

63 R's suspension followed just eight days after the date of an email sent by the claimant on 16 September 2015 (at page 194). In this email C made allegations against R. It was sent to E and Z. (Details of this may be found in paragraph 78 below).

64 During the course of his evidence before the Tribunal, R identified the claimant's representative in the Tribunal as the man who on 8 August 2015 had entered the bedroom at the claimant's home and taken photographs of him. The respondent and the respondent's legal team were unaware that the claimant's representative was the man involved in this incident until R identified him when he turned up to give evidence before the Tribunal on the first day of the hearing.

65 R curiously omitted from his witness statement any mention of the involvement of a friend of his named P. P is a serving Police Officer. We see from the notes of an investigation meeting conducted by X, K and M with P of 3 November 2015 (at pages 369-375) that on 9 August 2015 R's wife telephoned P's wife. P's wife was unavailable so P took the call. He said that R's wife was in a state of what P describes as *"a heightened state of distress."*

66 At R's wife's invitation P went around to R's family home. R's wife answered the door. He said that R "*was sat in the house with his head in his hands"* and then R's wife *"collapsed in a heap."* R's wife told P that R had got up early to walk the dog. She was dozing in bed when her telephone rang. P says that he was told that a man was on the line who had *"an Asian accent and he called himself Sean. He said to [R's wife] that he had caught R in bed with his partner and he had pictures, was she willing to give him her mobile so he could forward the photos."* P prevailed upon R to leave the house. He then spoke to R's wife who told P that *"the guy immediately returned a screenshot of R in the bedroom … in an unknown location."* We shall come back to the interview of 3 November 2015 when we get to it chronologically in due course.

67 During his cross-examination of R, the claimant's representative questioned R's belief that it was him (the representative) who had contacted R's wife. There was some discussion as to whether the representative had an Asian accent. Such an issue is subjective and very much a matter of interpretation. However, certain it is that the claimant's representative speaks with a distinctive accent. Sean may also be viewed as an Anglicised version of the representative's name.

68 During cross-examination R was prepared to accept that the claimant's representative had not initially spoken to his wife when she answered the telephone that morning. R said that his wife had in fact answered the call by speaking to the claimant who had then passed the telephone to a male caller (that is to say, the representative).

69 The Tribunal finds as a fact that it was the claimant's representative who spoke to R's wife on the morning of 9 August 2015. Only R, the claimant and the claimant's representative were present in the claimant's home on the morning of 8 August 2015. The description of the caller given by R's wife to P as having an Asian accent is consistent with the caller being the individual who represented the claimant before us. He did not deny being present at the claimant's home and taking photographs of R in a compromising position. No other credible candidates for the caller being someone else were suggested by the claimant and it is difficult to envisage a credible scenario in which someone else may have come to be involved in this matter. (When giving evidence on 9 November 2020 the clamant in fact said that it was she who sent the photographs to R's wife. The Tribunal find that C and her representative together decided upon that course of action and were together when the photographs were sent. It is immaterial, in our judgment, which of them actually pressed the 'send' button).

70 On 25 August 2015 a meeting took place between K, M, an employee of the respondent (D) and a work colleague (pages 466 to 468). This concerned the issue around S and patient confidentiality. D said she had spoken to the same individual whom she thought had spoken to S seeking

to elicit information about patients. D said that she "*thought he [the caller] had an Asian or South African accent."* She also formed the view that he was around 30 or 40 years of age. Such a description matches the claimant's representative in these proceedings.

The events of September 2015

71 On 14 September 2015 the respondent sent the claimant a letter (page 666) inviting her to attend a further formal investigation interview to be held on 18 September 2015 *"to discuss the following allegations: professional misconduct, against the background that the Trust has received information alleging unauthorised disclosures of confidential patient information."* It is apparent from her e-mail of 15 September 2015 to Q (page 679) that the claimant was concerned about the lack of information given to her about the reason for her suspension. She also asked in that email for a meeting with Q *"to discuss an important matter with you, which is also related to work. This matter is not connected with my suspension."*

72 Before us, Q acknowledged there to be a lack of particularity about the reasons for her suspension. Q (with some justification) defended himself upon the basis that he *"just worked within the rules of what I was told."* He replied to the claimant on 16 September 2015 (page 684). He told her that, having spoken to someone within the respondent's HR department, the claimant would have the opportunity of addressing any questions in relation to her suspension when she met with, the investigating manager at the meeting. It was K who had sent the letter of invite at page 666 to the claimant.

73 On 15 September 2015 the claimant sent to the NMC the referral form to which we have already referred in paragraph 24 and in which she raised concerns about R. The form is at pages 181-193.

74 The following are the salient parts of the form:

- That the claimant was complaining about R's conduct for a period of around four years from "*summer/autumn 2011 to July/August 2015."*
- That incidents took place not only at the premises of [x]ORT but also on service user respite trips between 2012 and 2015, the claimant's home and *"various outdoor and indoor locations in and around [the city]".*
- That in the context of the claimant's matrimonial difficulties to which we referred above R offered to provide therapeutic support and guidance. The claimant accepted this therapy as R was trained in cognitive behavioural therapy and *"was the most experienced community psychiatric nurse I knew at the time."*
- That R persuaded the claimant to meet to discuss her issues at a coffee shop notwithstanding that choice of venue was against her wishes that it should take place *"at a supervision/private room within the work environment."*
- That regular meetings took place in coffee shops thereafter.
- That at meetings *"R quite frequently said during these discussions that he found me to be quite attractive and that I should not feel undesirable."*

- That in mid-2012 R and the claimant were part of a group of workers in charge of organising and carrying out a five days' respite trip to a seaside resort for service users. The claimant said that, *"R had several drinks with me and invited me to his room under the pretext of having another drink and having a conversation. R started complimenting me on my 'good looks' at this point, reiterated that I should not feel undesirable and said that he considered me to be an attractive woman. Soon after, R initiated physical contact and started kissing me. I left his room at this point and made it clear to him that I had no intention of having sexual relations with him."*
- That R started to communicate with her more frequently via text message and using the instant messaging app.
- The claimant then said that, *"According to my recollection, a few weeks later, R initiated sexual contact with me and has been having sexual relations with me for a period of approximately three years until late July 2015. Throughout this period, R and myself have had sexual liaisons in several locations including my home, work environments and some outdoor locations. Many of these sexual interactions have taken place during R's regular working hours [with the respondent]."*
- The claimant said that she *"felt used and disgusted"* and sought counselling from her religious guidance counsellor. She says that, *"By this time R as a professional and a therapist had made me emotionally dependent on his guidance and support on how to deal with ongoing issues in my personal life. Therefore, I kept on seeing R and had sexual liaisons with him."*
- The claimant contended that she was vulnerable and that *"the therapeutic guidance and support I received from him was directly proportional to the sexual gratification I provided to him."* She said, *"I believe that R was aware of the fact that I was emotionally dependent on him for his guidance and support as well as company by this time. Therefore, it is my belief that acting as if he would stop contact with me if I did not have sexual relations with him was his way of manipulating me into having continuous sexual relations with him."*
- The claimant then goes on to say that, *"Some of the most disgusting and perverted sexual acts R coerced me into were having sexual liaisons in work environments which even potentially risked the safety of service users (patients) of the organisation and having sexual liaisons in outdoor environments where there was a risk of indecent exposure and potentially even being exposed to minors."* [The claimant maintained in evidence that this passage in the referral form constituted a confession to the NMC of sex having occurred in service users' homes].
- When the claimant intimated the ending of the sexual relationship with R he said that if she did so the claimant would not receive any more therapeutic support from him.
- That R requested explicit images of the claimant which she sent to him again as a way of continuing to obtain therapeutic support.

She feared that he would publicise those explicit images if she discontinued the sexual relationship with him.

- That in July 2015 she made *a "sudden and quite strong decision to stop all sexual liaisons with R."* She met with him and he responded *"by stating that he knew confidential information about my son and once again mentioned the explicit images I'd sent him as well, thereby implying he was willing to use them to discredit me and my son. That way he blackmailed me into having sexual contact with him once more."*
- The claimant said that she then *"took a very strong stand"* and decided to put an end to the relationship. She says, *"I was compelled to have brief communications with R for a few days in order to gather some evidence on the nature of the relationship he had with me and take steps to prevent R from attempting to control, blackmail or manipulate me."* We presume this to be a reference to the incidents of 8 and 9 August 2015.
- The claimant observed that she felt "*used and disgusted as well as disappointed in myself."* She had brought the matter to the attention of her religious counsellor. A similar sentiment is expressed in her witness statement in paragraphs 27 and 28.

75 In sum, the claimant alleged that R had abused his position in order to manipulate her into having sexual relations with him and that by having done so he had sexually abused her. She requested the NMC to look into matters and take appropriate action if a decision was taken that R had breached professional standards. The claimant's witness statement (between paragraphs 12 and 41) replicates much of what is said in the NMC referral. She said in paragraph 13 that R was a community psychiatric nurse in the [x]ORT team as well as a trained cognitive behavioural therapist. She says that *"because he was the most experienced community psychiatric nurse I knew at the time, I accepted his offer to provide me with therapeutic support and guidance on how to deal with the issues I was facing."*

76 When cross-examined about the allegations in the referral document, the claimant said that R had at no stage physically forced her to have sexual relations with him. It was suggested to the claimant that at no stage did R expressly intimate that there would be *"no therapy if no sex"* (as Ms Nowell put it). The claimant said that she had *"a feeling"* that was the case. She said that it was not "*as simple as that. He made it clear if I didn't … that my support depended upon it."* She went on to say that R, *"had power and influence over me."* She denied that she had made the referral to the NMC because she feared that R may seek to "*get revenge"* for what Ms Nowell described as the *"set up"* of R in the claimant's home on 8 August 2015.

77 It was suggested by Ms Nowell that the claimant must have realised that the issue with R was the reason why she had been suspended. This the claimant denied. She said that she thought that she was being suspended because of the patient confidentiality issue in accordance with the letter of suspension dated 25 August 2015 at page 642.

78 On 16 September 2015 the claimant e-mailed Z and E. This email is copied at several places in the bundle: pages 194 and 195, 687 and 820-821). She brought to their attention an allegation that R *"has used his work mobile phone* [number provided and ending 4597] *to communicate with me, mainly using text messages, regarding nonwork-related topics. Some of the communications which R has had with me using the same phone are of a sexual nature, while some communications could be classed as derogatory and/or discriminating. Please note that the above communications took place between R's work phone issued by [the respondent] and my personal mobile phone. Due to the abusive nature of the relationship which R had manipulated/coerced me into at the time I did not report this matter. However, now that I have taken steps to prevent R from further manipulating me I am able to reveal this matter. In future I do not wish to receive any contact from R unless it is absolutely necessary for work related purposes. I have also made it very clear to R that I do not wish to receive any personal contact from him in future."* The claimant made no mention of any offending material on her work tablet.

79 As we shall see, at the meeting held on 9 December 2015 the claimant produced a list of dates and times when she said that inappropriate messages had been sent to her personal phone from R's work phone (number ending 4597). These are at pages 339 and 340. The claimant quoted what had been said by R in two of these messages sent on 20 and 21 December 2014.

80 It was suggested that the claimant's emphasis at this stage was upon the question of mobile telephone use. The claimant said, *"that is an aspect but it was both abuse and telephone abuse - both elements."* The claimant then said that in any case she had raised the issue of coercion in her email of 1 October 2015 (page 196) following the meeting of that day to which we shall refer below.

81 It will be recalled that during the investigation into S's involvement in the patient confidentiality issue, S had raised an allegation that the claimant was involved. In contrast to S's case, the claimant's complaint against R was a stand-alone grievance. It was not raised by the claimant as part of a wider investigation into her conduct by the respondent. (The claimant's involvement in S's case was initially as a witness).

82 E forwarded the claimant's email of 16 September 2015 to EE five minutes after Cs email landed in his in-box. E did this as he was aware that EE was investigating the patient confidentiality issue in which the claimant had become involved. As we shall see, the respondent then shortly afterwards established an investigation panel to look into the claimant's allegations against R and her involvement in the patient confidentiality issue. The investigation was conducted by X and K.

83 On 15 September 2015, the same day that the claimant sent her complaint to the NMC, K and M again met with S. The notes of the meeting of 15 September 2015 are at pages 451-454. This was the third occasion upon which the respondent had met with S (following the meeting of 17 August referred to in paragraph 25 and a second meeting held on 1 September 2015 (pages 443 -448)).

84 The meeting of 1 September 2015 was attended by S, K and M. The purpose of the meeting was to go through the information imparted at the

verification meeting of 17 August 2015. S pointed the finger at the claimant's partner and that S was being targeted because the claimant had asked S out. S said that he had declined the invitation. S commented that the claimant's invite *"was in the context of trying to finish with him [the claimant's partner]."* S said that he had met her partner. He described him as being *"of Indian descendent."* K asked S if the individual had an accent. S replied that he had *"not a particularly strong accent."*

85 The meeting of 15 September 2015 with S was convened to discuss another e-mail that had been received from the 'patient.confidentiality' email account. This concerned an evening out in a pub some time ago and alleged that inappropriate jokes had been made about people with mental health issues. S recalled a night out which involved a meal at the claimant's house along with others. S denied ever having been in a relationship with the claimant. S said that *"her partner may be weird around me, he may be jealous."*

86 The respondent continued to have concerns about S's involvement in the patient confidentiality issue and therefore suspended him on 16 September 2015. The letter of suspension is at page 455. The reason given was said to relate *"to an allegation of patient confidentiality. The reason for the suspension is to allow a full and thorough investigation to take place."*

87 S had said at the meeting of 15 September 2015 that he was minded to go to the police (page 454) but was dissuaded from so doing by K pending S hearing from K again. K subsequently emailed S on 23 September 2015 (page 464) to say that the respondent could no longer stand in S's way should he wish to go to the police given the delays in making arrangements for the respondent to see the claimant about these matters. (As we shall see shortly, a meeting with the claimant arranged for 18 September 2015 had been postponed). Z confirmed in evidence that the respondent had no policy of discouraging employees from going to the police. Mention was made in an email of 23 September 2015 of K in fact having been sent another email from 'patient confidentiality' that day (pages 456 to 461). This referred to a video published on YouTube. A transcript of the video is at page 462 and appears to show an example of the breaches of confidentiality taking place (albeit with the patients' names 'bleeped out').

88 Notwithstanding S's obvious unhappiness about matters, he did not avail himself of the respondent's grievance procedure. (The grievance procedure does not appear within the bundle).

89 X was asked in cross examination as to whether she was aware of attempts to establish the individual(s) behind 'patient.confidentiality.' She was aware that an offer had been made by the respondent to meet those behind 'patient confidentiality' which had not been taken up. The respondent's IT department had advised that it was impossible to trace the sender as '*Gmail*' accounts are as easy to delete as they are to set up.

90 On 16 September 2015, in addition to her e-mail to Z and E, the claimant sent an e-mail to K in which she said she was unable to attend the meeting which had been scheduled with K for 18 September 2015. This e-mail is at page 807. The claimant said that this was "*due to having made other personal appointments, as this timeslot happens to be out of*

my usual working hours. Therefore, I would be thankful if you could kindly reschedule a time/date for this meeting, that falls within my usual working hours, which are Monday, Tuesday, Thursday 8:45am to 5:15pm and Wednesday, Friday 8:45am to 3:00pm."

91 The claimant confirmed in evidence that the shorter days on Wednesday and Friday are to accommodate her childcare arrangements. There is corroborative evidence for this as she recorded the fact that these flexible working arrangements had been arranged for childcare in her appraisal (pages 2466 to 2468, in particular at page 2467).

92 An important issue in this case arises around the claimant having obtained employment with AAAA commencing on 9 November 2015. She therefore held down a job with AAAA while suspended (on full pay) by the respondent. (In fact, she left the employ of AAAA on 29 June 2018, around two years following her dismissal by the respondent. The claimant said that she resigned from AAAA as she had obtained a different job).

93 It was the claimant's taking up of this post that ultimately led to the Crown Court proceedings against her of which we made mention in our introduction (and which led to the delay in the hearing of the case after March 2018).

94 In evidence given under cross-examination the claimant accepted it to be the case that she had worked for AAAA. She said that she was undertaking a thirty-seven-and-a-half-hour week for AAAA between Monday and Friday of each week. X accepted in evidence in cross-examination that the claimant was not working for another organisation when she told K on 16 September 2015 that she was unable to attend the meeting scheduled for 18 September.

95 X said that the claimant had only given K two days' notice that she was unable to attend. However, she fairly accepted that the letter convening the meeting had only been sent to the claimant on 14 September 2015. X therefore accepted that any delay in the disciplinary process arising out of the postponement of the meeting of 18 September 2015 could not be fairly attributed to the claimant. Y also accepted, notwithstanding a suggestion to the contrary in paragraph 29 of her witness statement, that this delay could not be fairly attributed to the Claimant upon the basis that it was scheduled outside her working hours (albeit that Y said that there was some uncertainty over those).

96 Another reason given by the claimant for postponement in the email at page 807 was that she was still not fully aware of the circumstances behind her suspension. However, she said that she was told at the previous meeting (presumably a reference to that of 19 August 2015) that there were concerns around a *"serious incident that had taken place relating to a colleague."* The claimant had sought further particulars about that and the basis upon which the respondent was seeking information from her mobile telephone. Ms Nowell said that the respondent accepted that in the event it had not given any particulars to the claimant of the issues about which the respondent was concerned until 1 October 2015. It is the case therefore that the claimant was kept in the dark about matters for a period of around six weeks (during which time she was suspended from work).

97 We have already mentioned that on 24 September 2015 the respondent suspended R. On 22 September 2015 he had received a letter from the NMC notifying him of the claimant's referral. The reason for R's suspension related to the allegations of professional conduct *"as advised in a letter received by the respondent [from the NMC] on 18 September 2015":* page 2755*.* Page 2755 confirms that R at the time of his suspension had shared with the respondent the letter that he had received from the NMC about the claimant's referral. (The respondent was unaware of the full details of the claimant's complaint when suspending R: see page 691).

The events of October 2015

98 The meeting scheduled for 18 September 2015 was held on 1 October 2015. The minutes of the meeting of 1 October 2015 are at pages 308-314. Present were the claimant and her trade union representative C. In attendance on behalf of the respondent were K, X and M. (The claimant had in fact asked for the minutes to be sent by email on 5 October 2015. K copied X into the claimant's request the next day and said that she (K) suspected an entrapment attempt of her by the claimant: page 903).

99 K referred to the earlier interview of 19 August 2015. C complained that that interview had taken place without informing the claimant of her entitlement to bring along a union representative, such entitlement arising where a member of staff under investigation is interviewed at a verification meeting. C also said that the claimant had not received any minutes of that meeting.

100 There then followed a discussion about the patient confidentiality issue involving S. As we have said, K asked the claimant if she had had a relationship with S. The claimant said that she had had *a "one off liaison".* X accepted there to be some ambiguity as to what this expression meant and conceded under cross-examination that there was no evidence that the claimant had had a sexual relationship with S. X was taken during cross examination to S's denials of that in the minutes of the meeting with him of 15 September 2015 (to which we have already referred at page 452 of the bundle).

101 Upon the issue of the minutes of the meeting of 19 August 2015, the claimant said that she had not been told that it was a verification meeting pursuant to the respondent's disciplinary policy. The respondent accepted through Ms Nowell that it had made a mistake by referring to this as a verification meeting in circumstances where the claimant at that stage was being interviewed only as a potential witness into the patient confidentiality issue. The respondent's case was that accordingly the claimant in fact had no right to be represented at that meeting. (X had and still has a contrary understanding that a witness also has the right to union representation as we have already observed).

102 The claimant followed up on the notes of the meeting of 1 October 2015 which were sent to her by K with some comments. (These are in fact dated 16 October 2015 and are at pages 978 to 980). She pointed out that her work mobile telephone was locked behind a security code.

103 On 1 October 2015 the claimant e-mailed Z, E, K, M, Q and X (page 819). She referred them to the complaint that she had lodged about R on 16 September 2015 (at page 820 and referred to earlier in paragraph 78) to

which she had as yet received no reply. She made reference to the fact that that complaint had been *"brought up briefly at today's investigatory meeting which was about a separate incident relating to patient confidentiality."* She maintained that she had been coerced by R into having an inappropriate sexual relationship and that he had abused the therapeutic trust that she had placed in him. She said that, *"The work related places R coerced or manipulated me into having sex with him were [x]ORT office shower area, corridor to the unisex toilet and open plan area next to the office of Q (on Saturdays/Sundays), in the house of service user [X] on [X] Road, in the caravans on several service user respite trips."*

104 On the same day, Z e-mailed the claimant to acknowledge receipt of the e-mail of 16 September 2015 (page 820). Z told the claimant that her complaint had been handed over to be investigated by senior officers within the respondent. E fairly accepted in cross examination that the 14-days' delay in responding to the claimant's email of 16 September 2015 was *"not very good."*

105 X in fact had first became involved in the matter on 28 September 2015, two days prior to the meeting of 1 October 2015. In evidence under cross-examination she told us that she was asked on 28 September to attend a meeting later the same day. There appear to be no minutes of this meeting. This may be considered surprising given the importance of it as it was at this meeting that X and K were briefed to carry out their investigations into the two issues that had arisen: the patient confidentiality issue; and the issue around the claimant's relationship with R.

106 To the best of X's recollection, Z and E were present along with three others (in addition to X and K). X told us that K was briefed to lead the investigation into the patient confidentiality issue. X was briefed to lead the investigation into the issues around the relationship between the claimant and R. They were also briefed to support one another. X said that she was to focus upon the claimant's allegation that the relationship was abusive and also about where sexual relations had taken place. Z was unable to say why there were no minutes of the meeting.

107 X gave evidence that this was in fact the first disciplinary investigation that she has undertaken. She has a great deal of experience of investigating serious incidents involving service users. She was also chosen as she was independent of the [*x*]ORT team. The Employment Judge asked if she was told that she had been chosen because of her professional skills and expertise as a psychologist. She said that that was not the reason why she had been chosen to lead the investigation, but, rather she was chosen because of her investigation experience. The Tribunal nonetheless notes and gives weight to X's significant experience and expertise as a psychologist while setting that against her lack of experience of disciplinary investigations.

108 Terms of Reference were prepared. These are at page 1364. These appear not to be referred to in X's evidence in chief. In sum, these were: to establish a chronology of events in relation to both matters (those being the patient confidentiality issue and that of the sending of explicit photographs); the impact of the events upon service users and professional behaviours of staff; changes and improvements that may be required; and any further action needed. In evidence given under cross examination, she said that she *"may have drafted"* this herself. She was

asked why there was no mention of the Claimant's allegation of the sexual abuse of her by R. X said that the investigation of this formed part of her remit and was in her view encompassed in the Terms of Reference in connection with the issue therein of '*the professional behaviours of staff.'*

109 K conducted a formal investigation meeting with D on 5 October 2015 (pages 471-475). The focus of this meeting was upon the patient confidentiality issue and D's account of the efforts of somebody calling himself '*James'* to ascertain patient information.

110 K then held disciplinary investigation meetings with XX and YY. Both are support workers. Again, these interviews were around the circumstances of S being approached by '*James'* for patient information.

111 From around 6 October 2015, in order to aid her investigations, X was seeking the claimant's and R's mobile telephone records from the respondent's IT department (pages 924-942). On 9 October 2015, X emailed Z (page 954) to confirm that she was in the process of seeking mobile telephone records. This was to assist in her investigation into possible misuse of work mobile telephones. As shown in the email of 16 October 2015 (pages 984 and 985) she had made good progress. *"Full billing data"* had been obtained from September 2013.

112 On 19 October 2015 (page 1052), X reported upon her investigations to M and K. The data she had garnered went back to some point in 2012 (unfortunately, the specific date in 2012 is obscured by the hole punch). There is a gap in the records between October 2012 and June 2013. She ascertained there to be 43 contacts between the claimant and R upon their work mobile phones in 2012 up to October of that year, 13 contacts after the end of June 2013, 128 contacts in 2014 and 10 contacts in 2015. She said that she had looked at R's mobile telephone and was *"99% sure that he has deleted loads of text messages."*

113 In cross examination, the claimant fairly accepted that X was progressing matters. Attached to the email of 16 October 2015 at pages 1053 and 1054 was a plan of action. This plan included a proposal to interview the claimant on 21 October 2015.

114 On 21 October 2015 C, the claimant's trade union representative, lodged a complaint with M (pages 197 to 202). The complaint was about the proposal to run both investigations jointly as one: that being the claimant's complaint about R being conflated with the patient confidentiality issue. The letter of complaint is at pages 197-202. The claimant's complaint to the NMC (page 181 FF) is copied into the letter at pages 198-202.

115 About the procedure adopted, X says in paragraph 3 of her witness statement that, *"the allegations made by the claimant against R were ultimately progressed into the disciplinary procedure against R. Rather than delay matters by dealing first with the claimant's complaints [on her behalf from the trade union] as a grievance before proceeding with the disciplinary investigation/hearing, it was decided that as the allegations against R were potentially very serious, to take them 'at face value' and investigate them under the disciplinary policy (pages 103-132). My findings in relation to that matter are at page 2774-2782 of the bundle."*

116 In cross examination, X accepted that this was a departure from the usual practice in cases of allegations from one employee against another. In such a case, the normal practice is to use the grievance procedure or the

bullying and harassment procedure. As we have seen, the latter is in the bundle commencing at page 132(21). When asked as to who had made the decision to which she refers in paragraph 3 of her witness statement X said that she could not recall but *"I assume it would be me."* When asked about this in cross examination, Z said that he had no recollection of setting X's terms of reference or who had decided not to utilise the bullying and harassment policy to deal with the matters raised by the claimant against R in her email of 16 September 2015.

117 E accepted that none of the support mechanisms set out in the bullying and harassment policy at page 132(28) were put in place for the claimant and that the claimant was only invited to interviews about the allegations that she had made as part of a disciplinary process. Initially, this was in her capacity as a witness and then as a respondent to disciplinary allegations made against her.

118 X then says in paragraph 6 of her witness statement that *"It was decided that the second allegation of having sex whilst at work, on service users' holidays and at a service user's home ought to be dealt with as a disciplinary matter."* The impression given by X in her witness statement is that both components of the allegation against the claimant (that is to say, the aspect of the matter about the sexual relationship between R and the claimant referred to in paragraph 6 of her witness statement and the patient confidentiality issue) were both at large when she was appointed on 28 September 2015. However, that is not actually the case as the respondent's knowledge of the issue around having sexual relations with R at a service user's home did not emerge until October 2015 as a consequence of Unison's complaint to the respondent dated 21 October 2015 (pages 197-202) to which we have just referred in paragraph 114 and the claimant's earlier email of 1 October 2015 at page 819 referred to in paragraph 103. On behalf of the respondent, Ms Nowell confirmed and accepted this to be the case. (It is right to observe however that the claimant had alleged sexually abusive telephonic communication on 16 September 2015 (paragraph 78) but that the respondent had not taken full cognisance of matters until 1 October 2015 (paragraphs 103 and 104).

119 The actual complaint accompanying Unison's letter at pages 197-202 is in the same terms as the claimant's complaint to the NMC of 15 September 2015 at pages 181-193. Effectively, Unison's letter gave full particulars of the allegations of 16 September 2015 (page 194) and 1 October 2015 (page 819 (and also at page 196)).

120 It was in this context that X met with R on 22 October 2015. R's RCN representative, K and M were also present. The notes are at pages 341-349. R had also prepared a written statement in advance of the meeting which is at pages 350-355.

121 The following are the salient parts of R's statement:

- He and the claimant developed a friendship during the summer of 2011 when away on the service user respite trip in Norfolk. During the trip the claimant told him a few times about issues relating to her personal life. R denied any sexual relations between him and the claimant at this stage.
- Sexual relations began in May 2012 upon the occasion of a further service user respite trip to a seaside resort. After that trip the

claimant and R started *"a full consensual adult relationship."* This continued until the claimant and her representative (before the Tribunal) informed R's wife of his infidelity in August 2015.

- A messaging service app was used for communication purposes. R denied using the respondent's phones to send to the claimant *"explicit or inappropriate photos or texts."*
- R and the claimant would meet for walks during the evenings and sometimes at weekends in the Peak District.
- Sexual relations took place at work premises (being 'N' House).
- Sexual relations also took place while away on respite holidays in 2013, 2014 and 2015.
- R denied trying to control or manipulate the claimant through withdrawal of therapeutic skills or relationships.

122 On the fifth page of this statement (at page 354) R relates an incident which took place in July 2015. We have already mentioned that R had had a hip replacement that summer. The operation took place on 17 June 2015. R met with the claimant the day before *"for a liaison"* (as R put it). R then had not seen the claimant after 16 June until a date in July during R's convalescence from the hip surgery. R describes a chance meeting in July 2015 as he was driving home after having assisted his wife at her work. He had parked his car on the way home in order to call at a shop or a chemist. He says that as he exited his car the claimant drove past and saw him. She stopped her car and then telephoned him from her work phone. After the phone conversation R says that the claimant joined him in his car. She said that she was going to a service user's flat. They both drove in their own cars to the flat. R says that *"Whilst at the flat there was a physical liaison between us."* He confessed to being deeply ashamed of his behaviour and actions in *"an unguarded moment."* He added that, *"I cannot remember whether [the claimant] invited me [into the flat] or I asked her if she wanted company, [the claimant] said she would like me to join her, as she did not like going into the flat alone."*

123 R denied acting as a CBT therapist for the claimant. R accepted having sexual relations with the claimant during working hours *"generally … at lunch or at weekends."* He admitted to having sex on [x]ORT premises *"on at least two occasions."* He also accepted having had sex on service users' holidays but denied putting the service users at risk as a consequence.

124 X asked R how the relationship between him and the claimant had come to an end. R then related to X the events of 8 and 9 August 2015 (in particular at pages 344 and 345 of the notes of the meeting). R then related the incident in July 2015 that led to sexual relations taking place in a service user's home. The service user was in fact in hospital at this time. R denied coercing the claimant in any way and said that the claimant and he maintained that the relationship was purely physical.

125 X produced a mobile phone at the meeting. This had been handed up to the respondent by R when he was suspended. R denied using the work mobile phone to send inappropriate texts to the claimant. However, he said that the phone in X's possession was not his work phone and that was unable to produce his work mobile phone as it had been destroyed by

R's wife who had *"taken a hammer to it"* on 9 August 2015. That said, he mentioned that he had put the SIM from the destroyed mobile phone into the one that he handed up to X upon his suspension.

126 R said that the Nimbuzz app when used was downloaded onto his smartphone and that it was not possible to download the app onto the respondent's phone. He said that he had not deleted any photographs from his work phone but had deleted work-related texts. In sum, R denied using the work mobile phone for improper purposes.

127 The Tribunal notes (according to an employee within the respondent's IT helpdesk) (in an email of 8 October 2015 at page 936) that internet access and photographs are barred on work mobile telephones.

128 R said that he had no objection to X making contact with P. R said that he had *"nothing to hide."*

129 In cross-examination, X accepted that R had been incorrect when he said in the written statement (in particular at page 354) that the sexual encounter at the service user's home took place on 14 or 15 July and that in fact it had occurred on 8 July 2015. X was also challenged as to the veracity of R's contention that it was the claimant who telephoned him from her work phone upon spotting him in the street. X said that to the best of her recollection she had checked the claimant's work mobile telephone log. It was suggested to X that the claimant had not in fact made a call to R that day and there was no such finding in the management's statement of case. There is no record of the claimant contacting R and thus we accept the claimant's case that R contacted her.

130 X was challenged as to her account (in particular in paragraph 15 of her witness statement) that she found R to be *"very credible and honest."* This assertion was impugned upon the basis that R's account of seldom using his work mobile telephone to contact the claimant was at odds with the fact that R had, upon further investigation, been found to have deleted a large number of texts, and X's acceptance that after the respondent's IT department retrieved the telephone records log it could not fairly be said that there were in fact only very few texts sent to the claimant by R from his work mobile telephone. X accepted that upon *"that specific aspect"* R's evidence was not credible but nonetheless she gave *"credence to a lot of what he said."* Evidence that text messages had been deleted by R may be found in the e-mail of 6 October 2015 at page 922.

131 The claimant's representative sought to further impugn the reasonableness of X's belief in R's credibility by reference to the fact that R, while contending he had spoken candidly to Q, had not told Q about where and when he and the claimant had met. We refer in particular to the passages towards the end of R's statement (in particular at page 352). X maintained that she *"found him to be credible taking into account what others said and that he had cooperated fully with the investigation."*

The events of November 2015

132 On 2 November 2015 X, K and M met with Q. The notes are at pages 360-367. The following are the salient parts that arise from this interview:

- Q thought highly of both R and the claimant.

- He noticed that R and the claimant were close but *"didn't think any more than it being him helping her out, working on projects within the team."*
- Q was aware that the claimant had made an appointment to see Workplace Wellbeing at the time of her separation from her husband. *(The Tribunal referred earlier to the claimant's consultation with Workplace Wellbeing of 24 January 2012)*. He did not recommend that she see R for counselling.
- Q was aware that the claimant was very vulnerable when she split from her husband. He was also aware of members of staff (in particular ZZ) warning her not to get too close to R. Q said that in ZZ's opinion *"R moved in when [the claimant] was extremely vulnerable."*
- Q observed that *"You could tell [the claimant] that the world was coming to an end and there would be no emotion. I didn't see that as a bad quality."* (In evidence before us, Q explained that he was referring here not to the claimant's own well-being but rather how she deals with patients in her care where emotional detachment is an essential quality in providing care and treatment for service users, many of whom present with a psychosis, are a high risk to themselves and the public and often have been sexually abused).

133 In evidence before us, Q said that the e-mail of 1 October 2015 to which we have already referred (at page 819) was the first occasion upon which the claimant had raised a complaint with him about R. (It will be recalled that Q was copied into this e-mail along with other staff members). He expressed surprise in his witness statement (at paragraphs 61-64) that the claimant was contending that she had been coerced or groomed by R. He also said that he was surprised by the suggestion that R was providing the claimant with a form of therapy, it being a fundamental ethical rule of the profession that it is not appropriate to provide counselling, therapy or treatment to somebody known to the counsellor. He was confident that the claimant would have been aware of this (as would R) and that the more appropriate thing to do was to make arrangements to see the Workplace Wellbeing service.

134 In this connection, the claimant's representative took Q to the document at pages 337-338. This is a document dated 28 October 2011. It is described in the bundle index as an *"extract of an e-mail the claimant states was sent to R on 28 October 2011."* R accepted in evidence that it had been sent to him. It contains a description of physical and mental abuse of the claimant at the hands of her former husband. The claimant raised concerns in this document for the welfare of her child. R accepted this to be a description of and to constitute domestic abuse. R said his recollection was that he had received this document from the claimant during a respite holiday in the Isles of Scilly.

135 When shown this document, Q said that were he to have seen it at the time within which he was involved in matters he would report the matter to the Safeguarding Lead as his first concern would be for the welfare of the child of the relationship. He also said that the document showed there to be a safeguarding adult issue as well. Q accepted that it was plausible and possible for the claimant to see work as a safe haven, to disassociate

her domestic and work situations and perform well in the workplace. Q said that his view was that the contents of the message of 28 October 2011 coupled with one incident to which he referred while giving evidence of the claimant (on an unspecified date) disassociating while in Norfolk on the service users' trip (when she was discovered to be *'staring into space*') were sufficiently serious to warrant triggering a report to a manager.

136 Q said that he had become aware during the course of these proceedings that there was, as we shall see, a diagnosis of post-traumatic stress disorder from an occupational health physician. He acknowledged it to be within the competence of such a physician to make such a diagnosis. He said that he could not be confident that a similar diagnosis would have presented in the autumn of 2011. Q said that while in his witness statement at paragraphs 61 to 64 he had expressed surprise at the allegation that the claimant had been coerced or groomed by R he agreed, based upon what he had heard in the course of the proceedings, that the claimant was in effect saying just that. Thus, he would (had he been aware of all the circumstances at the time) have *"moved straightaway to an investigation as that would be gross professional misconduct."*

137 X, K and M met with P on 3 November 2015 (pages 369-375). We have made reference to some of the salient parts of this interview earlier in these reasons.

138 In the *'additional comments'* towards the end of the meeting notes (at page 374) P expressed the opinion that the relationship between the claimant and R was going beyond the purely physical. P formed that view upon the basis that R told him that *"they had spent intimate meals together, on one occasion, shopping for ingredients together before cooking a meal at [the claimant's] house. The reason I wanted to mention this is to put in context what I believed to be a consensual relationship between the two of them. I formed the opinion that there was a strong likelihood of [the claimant] wanting more from the relationship than R was willing to give. However, I would like to stress that this is my opinion only and not based upon any factual evidence."*

139 R said in evidence that this was not the case from his point of view and his understanding was that the claimant viewed the relationship as only being about sex. He therefore disagreed with P's interpretation of events.

140 X and M met with ZZ on 18 November 2015. The notes are at pages 384-388. She appears to have a low opinion of R. In contrast, ZZ had a high opinion of the claimant. (We are referring here to ZZ's opinions of R's and the claimant's performances at work). ZZ had heard rumours that R and the claimant were in a physical relationship. She said that Q was unaware of this. She had not seen anything to support the view that R was bullying or harassing the claimant. She said that she formed the impression that the claimant was vulnerable as her former husband had been violent towards her. X asked if ZZ was using the phrase *"vulnerable"* not as a medical term of art but *"in a colloquial capacity."* ZZ confirmed that *"anyone would be vulnerable in that sense."*

141 X, K and M also interviewed QQ who is a member of the [*x*]ORT team. She said that she had heard gossip but had no concerns herself about how R and the claimant conducted themselves on service user holidays. The notes are at pages 379-382.

142 The meeting with the claimant which X had planned for 21 October 2015 did not in fact go ahead until 9 December 2015. On 11 November 2015 the claimant was formally invited by X to attend a formal investigation interview to be held on 23 November 2015 (page 54SB). (In fact, the claimant had been emailed by M on 5 November 2015 to suggest a meeting be held on either 12 or 23 November 2015. This followed the claimant informing the respondent that she was unable to attend the meeting which had been provisionally scheduled for 11 November 2015 as she had booked a day's annual leave).

143 In the event, the meeting did not take place until 9 December 2015. The letter of invite at page 54SB was in the same terms as the one subsequently sent to the claimant on 1 December 2015 at page 318 ahead of the 9 December 2015 meeting.

144 The meeting scheduled for 23 November 2015 was postponed at the behest of the claimant. She e-mailed at 8:10 in the morning of 23 November 2015 (page 1207) to say she was in no position to drive to the respondent's offices having suffered severe headaches. She said that she was going to take the day off as sick leave. The claimant was at this point undergoing training for her AAAA post having started work for them on 9 November 2015. She produced no evidence that she had taken annual or sick leave from AAAA on 23 November 2015. It was suggested that the claimant had not been truthful when she told the respondent of her illness on 23 November 2015 and was engaged in work for AAAA on that day.

145 The claimant was questioned by Ms Nowell as to whether she was in fact working for AAAA on 23 November 2015 and that was the reason that she could not or would not attend the investigatory meeting scheduled for that day. The claimant said that she commenced work with AAAA on 9 November 2015. This entailed a 15 weeks' induction period and training. She said that she was in fact on a training course in Manchester on 23 November 2015. She was staying in a hotel in Manchester throughout the duration of the course.

146 Also on 11 November 2015, K emailed the claimant's professional body. The email is not in the bundle. It was produced during the course of the hearing by the claimant's representative. In this email K expressed the view (based upon information acquired to date) that the claimant had played a part in the entrapment of S into disclosing patient information. She also said that there was as yet no evidence to support the claimant's coercion allegation against R. The claimant expressed concern in these proceedings that K had pre-judged the issues as she had no basis upon which to express these opinions.

147 In a similar vein, the claimant was concerned about a draft letter to the Information Commissioner's Office in connection with an investigation being carried out around the patient confidentiality issue. This was prepared by an officer of the respondent. A view was expressed that the claimant's current partner had engineered the breach of confidence in order to cause trouble for S. The draft was produced on 10 November 2015 (pages 1180 and 1181) and was sent by the author of it to K. These concerns, coupled with the issue around the narrow scope of the Terms of Reference (paragraph 108 above) led the claimant to the conclusion (put to X) that the matter had been pre-judged and that the claimant's allegations against R were not being properly considered.

148 These matters were also put to Y (upon the issue of pre-determination by the respondent of the claimant's guilt upon the matters under consideration). In a similar vein, Y was taken L's email to Q of 20 August 2015 (referred to in paragraph 56). Y said that K was not (in the *'written information'* provided by her and referred to by L) expressing a definitive view. In essence, Y's view was that K's comments were provisional in nature. It is unfortunate that this written information provided by K has not been produced to the Tribunal and that we have not had the opportunity to hear any evidence from K.

149 It will be recalled that earlier we made reference to the issues around the 'patient.confidentiality' account. The claimant's representative put it to X that the account had been blocked so as to preclude the individual(s) behind it from contacting anyone at the respondent other than Z. 'Patient confidentiality' had responded to a request from the respondent in order to (amongst other things) identify the source of his/her/their knowledge of S's personal mobile telephone number and role. S's details were upon the respondent's website (and therefore had not, it was suggested, emanated from the claimant as the respondent appeared to suspect).

150 The claimant's representative suggested to X that the features in paragraphs 145-148 formed part of a pattern of disbelieving or attributing blame to the claimant. It was suggested that mindset characterised X's and K's investigation report of March 2016 (commencing at page 133 and to which we shall come) (in particular by reference to the passage at paragraph 28.2 of the report where an unchallenged suggestion was made recorded attributed to S that only the claimant and four others had access to S's personal mobile number. This was in fact not the case, as the number was on the internet).

151 As the letter at pages 318 and 319 show, the matters which the respondent was investigating around matters involving the claimant had by November 2015 expanded from matters discussed on 1 October 2015 to include her having sexual relations with R in a service user's house (in addition to having sex in the workplace and on service users' holidays). She was also to be interviewed in connection with allegations against R that:

- He allegedly blackmailed, coerced or manipulated her into having sexual contact with him and that he had abused the trust that she had placed in him.
- Work mobile phones had been used to communicate images that were of a sexual nature, while others were regarded as being derogatory and/or discriminating.

152 The respondent interviewed MM on 30 November 2015. She was interviewed by X and M. The notes are at pages 389-393. MM thought highly of the claimant. She said that the claimant was a very good organiser of the service users' respite holidays. MM said that she observed that R and the claimant were friendly and she had heard rumours about a physical relationship but had not seen anything. She then went on to say that the claimant had *"always been prim and proper, she went off to be a nun."* She said that when she split from her husband she and the claimant became friends. She then said*, "I know she liked R, when she was around him, she was like a silly schoolgirl. It was like a*

sexual awakening for her. R is a flirt – instead of backing her off, he has encouraged her. I am shocked that they got it off. She used to go silly around him like a schoolgirl." She said that the relationship was one sided in that the claimant *"wanted to be in his space, wanted to be noticed. Something happened and he had finished it, he wasn't giving her any eye contact"* and *"he would ignore her."*

153 MM gave a similar account in R's disciplinary hearing (page 2835). Y accepted that of the respondent's employees only MM gave an account of this type of behaviour on the part of the claimant around R (although there was some corroboration of a consensual relationship from P's evidence (notwithstanding that P had not actually seen R and the Claimant together)).

154 As we said in earlier, on 30 November 2015 the claimant reverted to her band 6 role undertaking 30 hours per week. This followed upon the end of her band 7 secondment.

The events of December 2015

155 We now turn to the meeting with the claimant of 9 December 2015. Present were the claimant, C, X, K and an HR Adviser (BB). The notes are at pages 319-335. They also appear at pages 1253 to 1290 and 1489 to 1506. The following are the salient points to arise from this meeting:

- The claimant had known R from around 2008.
- The claimant said that she needed support due to issues in her personal life. Those are the issues with which we are now familiar. She said that R had offered to help her and to meet with her. She had agreed to the offer because he was a CBT therapist.
- The claimant produced a transcript of the e-mail of 28 October 2011 that she sent to R (this being the document at pages 337 and 338 referred to in paragraph 134).
- She had gone to see Workplace Wellbeing. She said that she had seen them three or four times. She had not spoken to a solicitor about her domestic situation.
- The claimant claimed that she had asked R for cognitive behavioural therapy and that he *"had offered a set time and place for the meetings and offered to meet her because he had the skills."*
- R had not asked the claimant to complete any questionnaires. He had offered suggestions as to what she could do, he told her to record things and that R had set homework and practice assignments for her to think about things.
- The meetings had taken place in coffee shops. Conversations with R had taken place before she went to workplace wellbeing.
- The claimant accepted that sexual relations had taken place on work premises and in work time.
- The claimant maintained that sex with R was not consensual and that he had blackmailed her throughout the relationship *"and it was a relationship based on misuse of power."*

- The claimant accepted that there had been sexual relationships on service users' holidays. She again maintained that that was not consensual.
- The claimant accepted that she and R had sex in a service user's house. Again, she maintained it was non-consensual. This had occurred upon the one occasion (on 8 July 2015). It occurred upon the occasion that she was driving to a service user's house. Her account is that she had stopped to get a cup of coffee and then R saw her. They had a conversation. He asked her where she was going and what she was doing. It is recorded in the minute that the claimant said that, "*She told him, then left to go to the house. As she entered the property – she had got out of her car, went and opened the door to go in – she turned around and he had followed her."* The claimant said that the meeting with R that day was coincidental.
- X asked the claimant why she had told R where she was going and why she had felt the need to tell him. The claimant said that *"It was because it was just part of a normal conversation."*
- X said that some messages upon work mobile phones had been deleted and it was not possible to access them. It is not clear here whether she is referring to messages to and from the claimant's work mobile, R's work mobile or both.
- At all events, the claimant said that she and R had contacted one another through Nimbuzz which involved the sending of sexually explicit images. These messages were sent to her personal phone. She referred to the list at pages 339 and 340 referred to in paragraph 79: that being a list of texts sent to her by R from his work mobile telephone. The claimant made no mention of an work tablet.
- The claimant was asked if X could look at the messages on the claimant's phone. She said that she thought the messages may have been deleted. The two cited at page 340 had been kept. The claimant was asked if she could find a way of retrieving the messages.
- The claimant said that she had a therapeutic relationship with R and that the therapy would be withdrawn or reduced were she to want less sexual contact with him. She said that therefore she felt the need to have sex with him in order to continue getting the therapeutic advice from him that she really needed. The claimant said that *"It was an overall feeling of being coerced."*
- The claimant said that she had confided in a spiritual counsellor.
- Notwithstanding her having gone to Workplace Wellbeing, she said that she had not sought counselling elsewhere because she had become reliant upon R's therapy.
- She said that in July 2015 *"she had made a strong decision to stop."* However, she was concerned that R had sexually explicit images of her and he was concerned that he would publish them.

- To end the relationship the claimant had to take *"extreme measures."* This was described at page 331 as the claimant inviting R to her house and taking *"an audio record and visual pictures of him while naked then sent the pictures to his wife. She had also taken a dressed photo of him [R] and sent it to her son's school so he could not turn up and talk to her son."*
- The claimant was then asked about training in the Trust's policies and in particular the safeguarding policy.
- The claimant accepted that a male third party had been involved in the taking of photographs of R on 8 August 2015.
- She decided to report the matter to the NMC because *"she had thought that the professional body was the right place to report it."*
- The claimant said that she had not availed herself of the opportunity of discussing matters with Q, the respondent's occupational therapy department or any of the respondent's procedures because she had felt so powerless.
- The claimant confirmed that she was in a sexual relationship with the man who was in attendance at the claimant's house when photographs were taken of R on 8 August 2015. The salient entry at page 1269 about this is in red. The significance of it being in red font is that BB (the notetaker) had flagged up at page 1252 that she was anxious that she may not have properly noted what was said in the passages in red (including that at page 1269). (X in fact did not convey to the reader BB's doubt when making reference to this matter in the management statement of case (at page 149). The claimant said in her annotation of the minutes of the meeting that she did not say that the relationship was sexual (page 1505)).

156 X then said that she had concerns about the claimant's emotional wellbeing and asked the claimant if she could refer her to occupational health. X explained that this was because how she was presenting was *"at odds with how her colleagues in [x[ORT had described her previously and she wanted to take advice on [the claimant's] emotional and psychological wellbeing at this time as a method of supporting her."* It was agreed that the claimant would discuss the matter with her trade union representative. X also suggested that the claimant seek further advice from Workplace Wellbeing.

157 C (the claimant's trade union representative) asked about the present position regarding the confidentiality issue as she had not heard anything about it for some time and it had been one of the reasons why the claimant had been suspended. The claimant said that she had requested that the two situations be dealt with separately (as we have seen). K said that the investigation into that matter was coming to an end but she could not go into any further detail at that time.

158 When cross-examined about the notes of the meeting, it was suggested to the claimant that she was under no illusions that the relationship between her and R was not a therapeutic one upon the basis that it would be inappropriate to ask a therapist for hugs and to apologise to the therapist for what was being divulged to him or her. (These are sentiments expressed by the claimant in the e-mail of 28 October 2011at pages 337

and 338). The claimant said that the relationship became abusive and coercive as matters progressed but at the stage that the e-mail was written in October 2011 she was simply trying to get on with matters herself. It was suggested to the claimant that if it really was a therapeutic relationship and R had behaved inappropriately she would simply walk away as she would if anyone else had conducted themselves in that way. The claimant said that it was *"very hard to explain"* and that she was *"desperate to get support. It's how they make you feel. It's not about knowing or capacity."*

159 It was suggested to her in cross examination that by sending R more explicit images the claimant was making the potential for blackmail worse. She was asked why she did not simply go to the police. She says that she sent the images because she wanted support and input. She maintained that R had explicitly threatened publication of the explicit images saying that that was *"how it was for me."*

160 Upon the conclusion of the meeting on 9 December 2015, it had been agreed that the notes were to be sent to the claimant and her trade union. X said in evidence that this would not be usual practice and it would be a matter for the employee to send a copy to their trade union representative. However, she did accept that in this case the trade union representative had been promised that a copy of the notes would be sent to her at the same time as the claimant.

161 M sent the notes to the claimant on 22 December 2015 (page 1400-1418). The claimant maintained that she had not received them. They were therefore resent on 11 January 2016 and emailed on 14 January 2016 (page 1427). A copy was not sent to C. In the circumstances the claimant was afforded until 27 January 2016 to return the notes (page 1474). The claimant sent her copy of the notes with her proposed amendments on 29 January 2016 but observed that C had not yet had a chance to have a look at them. We refer to page 1488. On 2 February 2016 the Claimant asked for the recorded delivery tracking number and details of the status of the delivery sent on 22 December (page 1509). There appears to have been no reply to this request. The Respondent has not produced evidence of the recorded delivery details.

162 It was put to the claimant that the reason that she was having difficulty reviewing the notes was because she was working for AAAA on a full-time contract at this time. The respondent's position was that there was ample time for the claimant to have reviewed the 18 pages of notes within her contractual hours had the claimant, on the respondent's case, made herself available for work in accordance with paragraph 6.3.9 of the suspension policy (at page 116). The claimant said that she was having difficulty "*with concentration"* at the time.

163 It has to be said that it was quite difficult to piece together the sequence of events around the notes after 9 December 2015. It is surprising that the respondent in particular did not lead evidence upon this issue given the allegation that it sought to make that the claimant was guilty of contributory conduct in delaying resolution of matters. At all events, the claimant's version of the notes was acknowledged by X on 29 January 2016 (page 1509). X wrongly informed the claimant that it was the claimant's responsibility to send a copy of the notes to C. This alleged error was pointed out to X by the claimant on 2 February 2016 (page 1509). X

accepted in cross examination that exoneration of the claimant for some of the delay in the process did not feature in her report.

164 On 8 January 2016 a formal disciplinary hearing took place involving D. On 19 January 2015 S faced a formal disciplinary hearing. Y, who chaired both disciplinary hearings, said in evidence that both admitted breach of confidence and each were given a disciplinary sanction. She did not know whether or not the patients involved in the patient confidentiality matter had been spoken to under the respondent's duty of candour policy to which Y refers in paragraph 27 of her witness statement and which is in the bundle at pages 133(55) to (83).

The events of March 2016

165 X's evidence is that she and K completed their investigation report in March 2016. A copy of the report is at pages 133-175. This report comprised the management's statement of case in relation to the claimant. The front page says that this was an investigation "*conducted and compiled by X … in conjunction with K …"* It considered the two allegations faced by the claimant*: that she had sex with R in the respondent's workplaces, on service user holidays over a period of several years as well as in the house of a service user; and that she was involved in a sequence of events which resulted in S and D disclosing patient information."* From this, it follows that at the very latest the respondent's investigation into S's allegations against the claimant concluded seven months after he first raised the claimant's involvement in matters on 17 August 2015.

166 X deals with the investigation report at paragraphs 28-33 of her witness statement. She says that she believed that there was a case to answer against the claimant and that the allegations if proven amounted to gross misconduct as an abuse of a position of power towards a patient. She therefore recommended that the matter should progress to a formal Stage 4 hearing in accordance with the respondent's disciplinary policy in order to consider the allegations.

167 Stage 4 of the respondent's disciplinary procedure is to be found commencing at page 120. It is appropriate where action has already been taken and conduct is still unsatisfactory or where the issue is proven to be that of gross misconduct. Guidance as to the meaning of gross misconduct may be found at appendix 1 which is copied at pages 128 and 129 of the bundle. The non-exhaustive list of examples of conduct that may be classified as gross misconduct fundamentally breaching the contract of employment includes breaching the respondent's values, contravening professional standards, unauthorised absence from work and failing to carry out reasonable instructions.

168 X said (in her report) that there was no doubt that the claimant and R had engaged in sexual activities "*in breach of Trust policy."* She goes on to say in paragraph 29 of her witness statement that *"The central issue was whether the claimant had done so without consent. On balance I felt that the claimant had given her consent and welcomed her relationship with R. In support of this view I took into account a number of factors."* These factors are then listed as follows:

(a) The relationship may possibly have started as one with therapeutic elements but diverged into a sexual one;

(b) X did not accept that the claimant was emotionally dependent upon R as she had a spiritual counsellor and knew how to access the respondent's Workplace Wellbeing service;

(c) Nothing in her sickness record suggested vulnerability. Her sickness absence record was good. None of the sick leave she had taken was for any form of mental distress, there were no concerns about her performance at work and no evidence therefore to support the suggestion that she was vulnerable to any significant degree for any length of time;

(d) Evidence from other members of staff supported the conclusion that the relationship was consensual;

(e) The claimant had organised the service users' holidays and it was her choice for R to accompany her. She could have avoided this by simply not permitting him to attend the holidays;

(f) The claimant had had regular training upon safeguarding. The courses that she has attended are listed at pages 140 and 141. A number of those relate to safeguarding adult issues;

(g) R was on sick leave at the time when he and the claimant had sex in the service user's home. It was her choice to divulge to R where she was going. He had no business to accompany her as he was not on duty that day.

169 X concluded that there was no evidence of overt coercion, manipulation or threats of blackmail and that sexual relations had taken place with the claimant's consent.

170 In the report X's conclusions are at paragraph 31.5. She concluded that the claimant had committed a number of serious, deliberate and reckless acts that had the potential to severely undermine public confidence in the occupational therapy profession and to breach the trust that the respondent as her employer should expect to have in her. She considered that the claimant's behaviour fell below the standards set out by the respondent particularly in its '*Relationships between Staff and Service Users/Carers' Policy (2009)'.* She also concluded that the claimant's behaviour fell below the standards set by the Care Quality Commission that staff should treat people with compassion, kindness, dignity and respect and that she had failed to demonstrate the behaviour and good character expected. She also concluded that the claimant had constructed a situation culminating in two members of staff (S and D) breaching the respondent's confidentiality code of conduct.

171 As we say, X recommended that the matter proceed at Stage 4 of the respondent's disciplinary policy. She also recommended that consideration be given to the development of training around the management of personal boundaries at work, the staff and the [x]ORT team and that the policy for service user holidays be updated.

172 The report at pages 133-175 was accompanied by the appendices listed at pages 176 and 177. The report and appendices combined occupy pages 133-603 of the bundle.

173 It is no part of the claimant's case that X was, prior to the preparation of her report, aware of any medical or other evidence emanating from any of those from whom the claimant was receiving support. The claimant's case

is that X became aware of an issue around the claimant's fitness to attend a disciplinary hearing in early April 2016: an email from X to the claimant of 6 April 2016 (at page 1598) refers to a conversation about fitness that she (X) had had with C and which prompted the occupational health referral to which we shall come shortly. It is the claimant's case that the respondent was given *"letters from [her] GP and councillor OH"* on or around 21 April 2016. The basis for this is an email from C to the claimant of 21 April 2016 (which is not in the bundle) to that effect. It is unfortunate that C did not specify precisely which documents she had handed over within the respondent and to whom they were handed.

174 The claimant has accepted that she received X's report and the documentation ahead of the disciplinary hearing which, as we shall see, eventually took place on 26 May 2016. The following emerged from the cross-examination of X about her report:

- That the claimant and Tribunal were not privy to the written information given to L by K (or Q) referred to in the e-mail of 20 August 2015 at page 621. We have dealt with this issue already above.
- That it was recognised that for therapy purposes staff may see service users for example in their home, a café, a park or in the street. X accepted that this was said by her (at page 140) but maintained that it was inappropriate for cognitive behavioural therapy to take place in public for reasons of confidentiality. She referred us to the publication at pages 394-397. This in fact is appendix 37 of her report and is information sheet C4 published by the British Association of the Counselling and Psychotherapy. On the second page of this (at page 395 of the bundle) we see it stated as a principle that *"certain boundaries would usually be expected in a therapy relationship, no matter what type of therapy is being provided."* These boundaries include *"ensuring that sessions are in an environment which is calm, with no distractions, and the focus is on you as the client."* X did fairly concede that it may be appropriate to hold meetings outdoors if there was an issue around agoraphobia or there were public transport issues. However, CBT should not be carried out in a café or park, she said, and if there were such transportation issues then the session would usually be cancelled.
- R was not a member of the British Association of Counselling and Psychotherapy as he was a cognitive behavioural therapist.
- The formal meeting with R of 22 October 2015 (pages 341-349) (which included R's statement at pages 350-355 to which we have already referred) was part of X's report. It is appendix 29. We have already made reference to the cross-examination conducted by the claimant's representative of X around the text message issue (see paragraphs 130-131 above). It was suggested to X that her report was partial as she had omitted reference to the fact that there was no evidence that the claimant had made contact with R on 8 July 2015 by text whereas she had mentioned that there was evidence of R not having done so.

- A log of the claimant's work mobile telephone usage was produced on 11 August 2015 (appendix 62 and at page 483 of the bundle). A detailed chronology of the sequence of events around that date was prepared by X in her report (at pages 166-171). X maintained that she had looked at the mobile telephone logs in considerable detail. It was put to X that the records show not one text from the claimant to R's personal mobile telephone. X said that she was *"unable to explain that."*

- X also accepted that she had not informed the claimant that she had been unable to establish any contact between the claimant's work mobile telephone on the one hand and an unidentified mobile telephone involving the patient confidentiality issue on the other. It was suggested that such information would have helped the claimant with her defence. Again, X confessed that she was unable to explain.

- X accepted that <u>if</u> the number of texts from R were disproportionate in number to those to him from the claimant then such would lend credence to the claimant's assertion of coercion. In this connection, X was taken, in re-examination to the mobile telephone records at pages 1012 to 1022. Page 1020 is a record of R's calls to the claimant's personal telephone. Pages 1021 and 1022 are of R's calls to the claimant's work telephone. Pages 1020 to 1022 span a period between January and June 2015. These records were commissioned by X as part of her investigation. Those at pages 1012 to 1019 are the claimant's work mobile record between 1 December 2011 and 11 May 2015. There are numerous calls to R's work number. X fairly accepted that it was not possible to discern which of these were legitimate and which were not legitimate work calls. X did not count the number of texts from the claimant to R at all let alone on a year-by-year basis as she did for those emanating from R (see also paragraphs YY to ZZ below). In this context, Y's determinations in R's case referred to in paragraphs 195-198 are pertinent.

- It was put to X that it would have been reasonable for the respondent to have asked the claimant for a log of all outgoing texts on both her work and home mobile telephones at the material time as the claimant now has difficulty in retrieving her text message records from her mobile telephone provider.

- X said that she regretted not examining the claimant's work mobile. She believed that she had not done so nor had anyone else within the respondent. She accepted that the work mobile had been taken from the claimant upon her suspension and that it would have been reasonable to let the claimant inspect it. (That said, the Tribunal notes that the claimant's work mobile telephone was locked in any case and the claimant did not provide the security code: paragraph 102).

- The table at pages 166-171 was compiled in part in reliance on the claimant's personal mobile telephone records. Some of the entries are those to be found at page 315 being a table of texts dated 14 August 2015 upon her personal mobile compiled by the claimant

and produced at the meeting of 1 October 2015. X had taken these at face value and did not see the claimant's personal mobile phone.

175 X accepted that there was no evidence of the claimant having a sexual relationship with S and that S denied any such relationship. This is a point that we have referred to earlier. (This being said, the claimant did say that on the record that she had a *"one-off liaison"* with S: see paragraphs 47 and 100).

176 In re-examination, X was taken to the claimant's email of 16 September 2015 to Z at page 687. We have referred to this already in paragraph 78. Within the email the claimant complained of the nature of the *"communications"* sent to her by R from his work mobile to her personal phone. X could not recall whether or not the claimant's complaint ever encompassed R sending offensive messages or communications to her work mobile. X did say that she had been told by IT that it was not possible to send photographs to and from the work mobiles. X said that the claimant had not taken her up on her invitation in her letter of 1 December 2015 (page 318) to bring her personal mobile to the meeting held on 9 December 2015. The issue was discussed at that meeting (see page 1498) but the claimant at no stage produced her personal mobile for examination. She had also not contended that texts had been saved onto her work tablet. The purpose of the suggestion of examining the claimant's personal phone was in furtherance of the investigation into the claimant's allegations.

177 X had examined what R regarded as his work phone. She accepted there to be some deleted texts. It was not possible for her to examine the work phone in R's possession at the material times prior to August 2015 as the phone *"had been smashed up."*

178 On 11 March 2016 X wrote to the claimant (page 602). The claimant was notified that the matter was going to be taken forward under Stage 4 of the respondent's disciplinary policy in relation to the following allegations:

- *That the claimant had sex with another member of staff (R) in [the respondent's] workplaces, on service user holidays over a period of several years as well as in the house of a service user.*
- *That the claimant was involved in a sequence of events which resulted in two of the respondent's employees disclosing patient information.*

179 The claimant was notified that the disciplinary panel was to comprise of Y and AA, Director of Therapy Services, supported by DD from the respondent's HR Department. DD was subsequently replaced by EE. Y said that the decision was one for the panel as a whole and each had an equal voice. The role of AA (from whom the Tribunal did not hear evidence) was, said Y, *"to give a perspective upon the claimant's conduct in the context of her professional obligations and accountability by reason of membership of her professional body".* EE's role was to give advice and guidance from a human resources perspective.

180 X was to present the respondent's case together with K (supported by M from HR). The claimant was told that one possible outcome was dismissal from the respondent's employment. She was also told that the respondent proposed to call ZZ, MM and P as witnesses. The claimant was invited to

submit her statement of case no later than 9:00am on 25 April 2016. She was told of her right to be represented by her trade union.

181 Y was asked when it was that she first knew that she was to be involved in the matters. She could not recall but accepted, by reference to the internal email at page 1359 (being confirmation of the dates of the disciplinary hearings involving the claimant and R) that the notification was by 16 December 2015 at the latest.

182 Y said that she conducted the disciplinary hearing by reference to the respondent's disciplinary policy. She did not refer to any Code of Practice or Guidance issued by ACAS. She accepted that her role was to look at matters objectively and to consider exculpatory evidence in favour of the claimant alongside evidence against her.

183 Y denied that she had had any involvement in her case prior to her appointment as chair of the disciplinary panel. She said that she was cognisant of the need to avoid finding herself conflicted by reason of any prior involvement. She denied knowledge of any views generally within the respondent upon the claimant's guilt.

184 Upon this point, she was taken to the email of 20 August 2015 at page 620. We have referred to this already (in particular in paragraph 56). EE was copied in to this email. This was suggestive, upon the claimant's case, of pre-determination and the tainting of members of the disciplinary panel with prior knowledge of the facts and issues.

185 It was suggested to Y that a decision had been taken to move the matter on to a disciplinary hearing some four months prior to completion of the management statement of case (dated March 2016). This was upon the basis of the email at page 1359 dated 16 December 2015 in which M spoke of a wish to *'formalise'* the disciplinary hearing dates. Y said that this was arranged so early in order to avoid a significant delay should it be decided later the matter ought to proceed.

186 The day before the letter of 11 March 2016 was sent to the claimant, the respondent took the decision to dismiss R. The disciplinary hearing had been held on 1 March 2016. Y chaired the disciplinary hearing at which R was dismissed. (In addition to chairing the disciplinary hearing in the case brought by the respondent against R and the claimant, Y had also conducted the disciplinary hearings in relation to S and D).

187 The respondent's management case in respect of the allegations against R is at pages 2744-2803. It is dated February 2016. This was five months after the claimant's complaint against R was first raised on 16 September 2015. R's staff side case is at pages 2824-2827. The allegations against R were:

- *That he had sex with the claimant in the respondent's workplaces, on service user holidays over a period of several years as well as in the house of a service user.*
- *That he blackmailed, coerced or manipulated the claimant into having sexual contact with him and that he abused the trust that the claimant had placed in him.*
- *That he used his work mobile phone to communicate with the claimant on her personal mobile phone and sent communication of*

a sexual nature, while others were regarded by the claimant as being derogatory or discriminatory.

188 Y's decision letter dated 10 March 2016 is at pages 2845 to 2847. This was almost exactly six months from the date that the claimant first raised her allegations against R on 16 September 2015.

189 Y found the first allegation against R upheld in part upon the basis that he and the claimant had sex in the house of a service user. As Y could not determine whether the sexual activity on service user holidays took place during working hours or downtime that allegation was not upheld.

190 Y considered there to be insufficient evidence to support the allegation that he had manipulated, coerced or blackmailed the claimant. Y set store by information contained within the respondent's statement of case (for the matter involving R) in section 15 (pages 2768-2773) identifying a number of points indicating to her that R was not offering professional, formal CBT therapy to the claimant.

191 X and K had also compiled the respondent's statement of case about R (in addition to that against the claimant). X concluded (at paragraph 15.9) that the relationship between R and the claimant may have *"started with a few elements in common with a therapy relationship. However, there is a clear difference in understandings of whether it was therapy ([the claimant] felt it was) or not (R was adamant it was not). There were aspects where, even at the outset, it diverged from a therapeutic relationship. But clearly as the nature of their relationship developed into a sexual one, the distinction was greater and most evidently not therapy."*

192 Y says that she does not have a clinical background and therefore had to rely upon the information provided in the investigation to determine whether or not there was enough evidence to support the suggestion that R had been providing the claimant with therapy. When asked by the Employment Judge if she had considered the possibility of using expert help to assist with the difficult issue of alleged coercion Y said that "*I cannot say that it never crossed my mind. If capacity had been called into question it would have been a different panel."* (By this, Y was referring to the determination of mental capacity by a different panel).

193 Y was asked by the Employment Judge whether she considered herself to be conflicted from hearing the claimant's case (which relied heavily upon mitigation by reason of coercion of her by R) in circumstances where she had determined in R's case that on balance of probability R had not acted in such a manner. Whilst accepting this to be a *"fair point"* she maintained that she said that she could have *"overruled myself*" and had assured the claimant of her objectivity.

194 Y was aware when considering R's case that C was arguing coercion (by reference to what the Claimant had said in her report to the NMC of 15 September 2015 (pages 181-193), her email of 1 October 2015 (page 819) and in her investigation interview of 9 December 2015 (pages 1400-1418). It was suggested to Y that she was clear or ought to have been clear therefore that a finding in favour of R upon this issue prior to the claimant's case being heard would have an influence on the outcome of her case. Y also said that R's professional body was awaiting the outcome of the case against the claimant before deciding what action to take. In re-

examination upon this point, Y told us that none of the employees involved had asked Y to recuse herself.

195 In relation to the third allegation at paragraph 187 above Y says that, *"Having considered the information presented to me, I concluded that R had used his work phone inappropriately, in as much as he used it to contact [the claimant] at least 200 times, however I acknowledge that some of these would have been work related. I was not provided with any objective evidence to determine whether these messages were of a sexual nature, discriminatory and/or derogatory. I therefore partially upheld this allegation (page 2846)."*

196 Appendices 39-42 of the statement of case against R show a record of contacts from R's work mobile phone to the claimant's personal mobile phone. We appear not to have the appendices themselves but they are summarised at pages 2776 and 2777. There is reference to there being 43 contacts from R to the claimant from his work mobile phone to her personal phone in 2012, 13 in 2013, 128 in 2014 and 10 in 2015.

197 There is also a finding at paragraph 18.12 of the same statement of case that a significant number of text messages had been deleted from R's mobile telephone. At paragraph 18.16 it is recorded that the claimant provided a list of dates and times when R sent her messages including a written transcript of the two messages dated 20 and 21 December 2014 at pages 339 and 340.

198 Y's conclusion was that there was evidence that R had used his work mobile phone to contact the claimant's personal mobile phone on almost 200 occasions since 2012 but there was insufficient objective evidence to confirm or deny the claimant's claims that some of the communications were of a sexual nature or were discriminatory and derogatory. It was upon this basis that Y therefore made a finding against R to the extent that he had used his work mobile phone inappropriately by contacting the claimant on almost 200 occasions while acknowledging that some of those could have been related to work. She therefore partially upheld the third allegation against R.

199 R did not pursue an appeal against his dismissal. The claimant was not called to act as a witness in the respondent's disciplinary case against R.

200 The notes of R's disciplinary hearing are at pages 2830 to 2844. In cross examination, Y was taken to the passage at page 2834 being the record of ZZ's evidence before the panel. ZZ said that she had heard third hand that the claimant had phoned R's wife to tell her of what had been going on and that the claimant had set people up to divulge confidential patient information. The suggestion was made that Y had thus being made party to information about the claimant from members of staff before Y heard the claimant's case. The inference from this line of questioning was that she was thus tainted and should have stood down from her role as chair.

The claimant's disciplinary hearing

201 Meanwhile, the disciplinary hearing involving the claimant was set for 3 May 2016. She was required to submit her statement of case by 26 April 2016. However, on 30 March 2016 C e-mailed X, M and K (page 1577).

She requested that the respondent obtain an occupational health report to establish if the claimant was in a fit mental state to go through the disciplinary process. C referred to having received medical information *"that casts doubt on this."*

202 The respondent agreed to an occupational health referral. E decided to adjourn the hearing fixed for 3 May 2016. (He was dealing with the matter in Y's absence, Y having embarked upon a period of planned sick leave at this time). His reason for doing so (as set out in the letter at pages 1667 and 1668) was because of the claimant's fitness.

203 The referral (prepared by X) is at pages 1620-1622 and is dated 6 April 2016. Dr G, Consultant Occupational Health Physician, was asked to consider whether the claimant was fit to participate in the disciplinary investigation currently being conducted, whether she was fit enough to face a formal disciplinary hearing which had been scheduled for 3 May 2016 and whether her health was likely to improve on conclusion of the disciplinary hearing. In the event, the report was prepared by Dr R and not by Dr G.

204 X says that after she had sent the referral to occupational health but before she received the occupational health report, X found out about the claimant's work for AAAA. E in fact puts X's date of knowledge as a little earlier. He says in paragraph 6 of his witness statement that X found out about this no later than 23 March 2016. Upon that day, E says, X spoke to 360 Assurance (which is the respondent's counter-fraud team).

205 This issue was a matter of some sensitivity. The Tribunal was told that the claimant was the subject of potential criminal investigation on the morning of 6 March 2018. (The claimant was already aware of this development. As we shall see, she was interviewed under caution by the police on 19 February 20018).

206 E says that X had found out about the claimant working for AAAA when on 6 January 2016 a student social worker had recognised the claimant through her (the student's) work at AAAA.

207 X emailed AAAA on 13 April 2016 to ask if it was the case that the claimant was working for them (page 2740). A letter of confirmation to this effect was received by X on 20 April 2016 (page 2739). The letter confirmed that the claimant had joined AAAA on 9 November 2016 and remained in their employ. No details were furnished about her hours of work.

208 X said before the Tribunal that upon an unspecified date X discussed the matter with the occupational health physician Dr R who took it as *"information received"* (as X put it). X did not reduce to writing her request for the issue the claimant working elsewhere to be considered by occupational health pertaining to the question of the claimant's fitness to appear before the disciplinary hearing and to effectively present her case upon the allegations around her relationship with R. This aspect did not feature in X's evidence in chief.

209 For her part, Y said in evidence that she knew that the claimant was working elsewhere at the time that she was dealing with matters but had not seen the letter at page 2739 referred to in paragraph 207. She said in her letter to the claimant of 12 May 2016 (page 1698 and 1699) that X had

told her that the claimant was working for AAAA (upon which Y reserved the respondent's position).

210 On 21 April 2016 C emailed Y, DD, AA and M (page 1639). C said that she had received an email from the claimant that day referring to the fact of her admission to the accident and emergency department of a local hospital with anxiety-related symptoms which came on while the claimant was preparing for the disciplinary hearing. C expressed concern about the claimant's mental state. She mentioned that the claimant had found engagement with her (C) to be difficult as when the issues regarding R were broached *"she has severe flashbacks."* C requested cancellation of the hearing pending improvement of her mental state.

211 An email in a similar vein was also sent the same day by the claimant to Y, M, Z and E (pages 1641 and 1660). The claimant re-sent that email the next day (22 April 2016) (page 1645). She asked for confirmation as to whether her postponement request had been granted. E acknowledged her request on 22 April and told her that she would receive a response during the next week (page 1647).

212 The claimant cancelled the OH appointment which had been scheduled for 26 April 2016. It was rescheduled for 10 May 2016. Accordingly, the disciplinary hearing set for 3 May 2015 had to be postponed. It was rescheduled for 26 May 2016: the letter notifying the claimant of this is at pages 1678 and 1679. The claimant was informed, amongst other things, that dismissal was a possibility and that should she "*fail to attend the hearing for any reason the hearing may go ahead in [her absence]."* The letter confirmed that the allegations faced by the claimant were: firstly, that she had sex with R in the respondent's workplaces, on service user holidays over a period of several years and in the house of a service user; and secondly, that she was involved in a sequence of events resulting in two employees disclosing patient information. The respondent notified her that the intention was to call P and ZZ to give evidence.

213 On 29 April 2016, the claimant emailed again (page 1653). She referred to C's request of 21 April 2016 for postponement and also referred to a letter from her GP dated 4 April 2016. This is cited below at paragraph 226. It had been delivered to the respondent by C on Friday 15 April 2016 (according to page 1633). The claimant said that *"attempting to recall the details of the sexual and emotional abuse I experienced has resulted in worsening of my conditions and has resulted in a higher dosage of medication being prescribed to me."* She said that she was not in a position to defend herself *"related to the abuse I suffered."*

214 The internal emails at pages 1654 and 1655 of 28 April and 2 May 2016 evidence some disquiet on the part of the respondent around these developments. E expressed the view that the claimant was *"ducking and diving"* and broached the possibility of dealing with the matter in her absence if she were to fail to attend the OH appointment. It was suggested by the claimant's representative that use of this pejorative term suggested a belief on his part in the claimant's guilt. In our judgment, that is a reasonable conclusion, a negative slant being put by him upon her non-attendance to date. E referred in the email at page 1655 to being in receipt of *"other information"* but was unable to say what this consisted of when asked about it in cross examination. It is a reasonable supposition, as was suggested by the claimant's representative, that this was the

information received from the respondent about the claimant's work for AAAA.

215 In the same email chain, Y referred to the claimant giving *"one 'reason' or another"* for rescheduling meetings. It was suggested that the use of quotation marks around the word *'reason'* by Y signalled scepticism on her part about the claimant's reasons for rescheduling. This Y denied, saying that she was giving emphasis to the word *'reason.'* This was unconvincing. There was no need to emphasise that word at all in context. We agree with the claimant that Y's use of that punctuation was pejorative. If emphasis is to be given to a word, the norm is to underline it or type it in bold.

216 Y expressed the opinion that should there be *"any further delay I think we should hear the case in her absence. This really is unacceptable from the staff member."* She expressed impatience commenting that *"…we need to proceed asap with this case not least because of the wasted dairy time and constant rearranging."* The tone of these remarks is indicative of impatience upon Y's part with the claimant and consistent with scepticism about the reasons given by the claimant for postponement. She said that "*I have acted as chair in 3 of the 4 inter-linked cases. This case concerns me the most and agree with others that we need to hear this asap."*

217 As we have seen, the OH appointment scheduled for 26 April 2016 was to be with Dr G. The email chain at pages 1654 and 1655 shows the respondent had been keen for this to go ahead and an OH opinion be obtained. The emails show that DD had spoken to OH, having been briefed by E around "*our expectations from that consultation"* following concerns having been expressed about the confidence that the respondent could repose in *"OH's opinion."* E suggested that the need for an assurance of confidence was because OH would not normally be asked about fitness to attend disciplinary hearings. This was not convincing evidence given that just such a question is posed as one of the tick box options in the *pro forma* referral form to OH completed by X at pages 1592 to 1594.

218 On 3 May 2016 the Claimant emailed (page 1658) to complain that she had only found out upon contacting C on the evening of Friday 29 April 2016 that the disciplinary hearing had been postponed. Z emailed the claimant on 3 May 2016 (page 1670) to apologise that the letter that had been prepared notifying the claimant of postponement which was dated 26 April 2016 (at page 1667 and 1668) had not been sent. Z mentioned in the letter that Y was now back at work, would take over from E and would resume dealing with the matter.

219 As was said at paragraph 209, Y wrote to the claimant on 12 May 2016 (pages 1698 and 1699). She referred to X having informed her that she had found out that the claimant was working for AAAA. She said that a private room would be provided for the use of a supporter but that he or she would not be permitted to attend the hearing.

220 On 12 May 2016 Dr R sent her report to X (page 1743). It is worth setting this letter out in full:

> *"Thank you for your letter about [the claimant]. I have been provided with copies of reports from [the claimant's] GP and other services on a strictly confidential basis which shed light on the background to this complex case.*

[The claimant] explained to me that there are two issues to be considered, one of which is actions leading to a breach of confidentiality and the other which is a more serious allegation. I understand that the intention had been to address these two as one process.

[The claimant] would feel able to provide the necessary information and participate in the investigation of the breach of confidentiality issue but it is clear from both her account, that of a friend who accompanied her and from GP and other reports that she is severely anxious as a result of the events underlying the more serious matter, to such an extent that a diagnosis of post-traumatic stress disorder seems appropriate. As a consequence of this, she is struggling to address these issues, and is suffering panic attacks and severe anxiety when reminded of the underlying events. She is receiving appropriate treatment for this, but I do not think she is yet sufficiently well to engage in a process to address these issues.

If it is possible to separate the two areas of concern and address the breach of confidentiality matters separately, this may assist [the claimant] by reducing the stress associated with these disciplinary processes.

I have not arranged to see her again at this stage.

[The claimant] has requested sight of this report before it is sent to you; we have e-mailed it to her and have her agreement to it being sent."

221 X says that upon receipt of this document she sent a copy of it to Y. X says that she received a copy of the report on 18 May 2016. X said that it was a matter for Y to make a judgement as to how to proceed in the light of the report. X and Y carried out no investigations into the matters referred to in the report. They did not make any enquiries about the *'other services'* referred to in the opening paragraph. Y said that X had not told her (Y) that the claimant was working for AAAA. X did not give evidence that she had told Y of this. (At all events, it is plain that Y know of the claimant's work for AAAA: she reserved the respondent's position about the matter on 12 May 2016).

222 Y says at paragraph 27 of her witness statement that, *"In deciding whether or not to proceed with the hearing on 26 May 2016, I had to try and balance [the claimant's] rights with those of the service user whose trust had been violated. I was very mindful of the Trust's duty of candour which, under the Trust's Duty of Candour Policy "simply means apologising and explaining what has happened to service users and/or their carers who have been involved in a complaint of service user safety incident" (page 132-159). Of particular concern to me was that the incident in the service user's house had taken place approximately 10 months ago. Although the conduct that was the subject of the disciplinary proceedings [the claimant] and [R] may not have fallen squarely within the scope of the Trust's policy, as a Trust, we had a duty to report this issue to the service user and demonstrate that we had taken appropriate action. I was concerned that the Trust could not do this until the disciplinary process had concluded."*

223 The Respondent conceded that the issue of the duty of candour policy was not raised with the claimant until the matter reached the appeal stage

following the claimant's dismissal. Y accepted that it had been "*remiss of me not to make it clear that the Duty was at the forefront of my mind. The issue was at the forefront at the appeal but not when I was writing to the Claimant prior to the disciplinary hearing."*

224 Y goes on to say that she was keen for the disciplinary hearing to commence on 26 May 2016. She says, *"I did make it clear in my e-mail to [the claimant] on 25 May 2016 [timed at 1727] that if she wanted me to consider any additional documentation regarding her fitness to attend, she could bring this to the hearing and I would consider the best course of action at that point (page 1806)."*

225 Y had also been provided with a copy of the letter from the claimant's GP dated 4 April 2016 (page 1635). Y received this on 18 April 2016. It was the only medical evidence unquestionably in Y's possession other than the report from Dr R. (There is an issue around other medical reports referred to in the claimant's statement of case prepared by her trade union to which we shall come in due course). Y had not been made aware by X of the existence of a letter of which X was aware from the [*x*] Rape and Sexual Abuse Centre.

226 It is worth setting out in full what the GP says in the letter of 4 April 2016:

> *"I can confirm this 35 year old lady is a patient of ours and is being treated for depression and anxiety relating to alleged, prolonged sexual assaults. She has been seen in A&E with significant anxiety attacks related to this and when she is having to recall events and think about the ongoing investigation. She is currently taking [medication] and also receiving specialist counselling. She finds it particularly anxiety provoking when having to talk through what happened and I wonder if it is possible for her to have a family friend or relative with her when she has to do this. She is struggling a lot with her anxiety symptoms at present and I would be grateful if you could possibly delay having to go through the investigation for at least two months while we instigate treatment for this. If you need any further information, please do not hesitate to contact me."*

227 About this report, Y said in evidence that she was concerned that no timescale had been given by the GP as to when the claimant would be fit to deal with the allegation involving R. She made no further enquiries about this. She said that the GP's request for a friend or relative to be present could not be accommodated to the extent of allowing their presence at the disciplinary hearing as that would be contrary to the respondent's policy of allowing an employee to be accompanied only by a work colleague or trade union official and that the hearing would be dealing with confidential matters pertaining to patient care.

228 In addition, it appears from paragraphs 23 and 28 of her witness statement that Y was motivated not to postpone matters (at least in part) by the fact that it had come to her attention that the claimant was working for a third party. As we have said, she had written to the claimant about this on 12 May 2016 (pages 1698 and 1699) in which Y said that the respondent reserved the right to investigate this matter at a later date.

229 At no stage was the claimant charged with a disciplinary offence of working for a third party while in the employ of the respondent and while on suspension. Y confirmed in evidence that the fact of the claimant

working for AAAA played no part in her decision to dismiss the claimant although the fact of her having done so contributed to the delays. Z took the view, when dealing with the claimant's appeal, that Y had not sought to imply that the claimant was deliberately postponing matters but was "*simply expressing her belief that you were working elsewhere during your suspension. She does not state that the delays were because you were working elsewhere."* We refer to pages 2299 and 2300.

230 Y said in evidence under cross examination that it was her *"genuinely held belief"* that Dr R was not aware that the claimant was working elsewhere. Y did not seek further advice from Dr R as to whether this feature would have changed her opinion about the claimant's fitness to attend the disciplinary hearing nor did she ask Dr R when the claimant would have been fit enough to deal with the R issue. Y said that she felt it inappropriate to do so as the issue of the claimant working elsewhere was being investigated by others within the respondent. She said that the issue of working elsewhere ought not to be *"interlinked with the investigation"* (as she put it). This was difficult evidence to understand as Y would have no involvement in any subsequent investigation had the claimant not been dismissed for the charges that she was facing and on any view the issue of her working elsewhere was germane to the issue of her fitness to attend the disciplinary hearing. She said that she had been *"blindsided"* by this development.

231 As has been seen, X had raised the issue with OH (albeit, somewhat surprisingly, not in writing but verbally). The inference drawn by X was that the fact of the claimant working for AAAA did not cause Dr R to alter her opinion of the claimant's fitness to attend the disciplinary hearing. X appeared to take the view that had Dr R taken a view to the contrary she may be expected to have prepared an addendum to her report. X's prescience was vindicated by a report subsequently provided by Dr R to the Claimant later (at paragraph 303 (5) below in which Dr R opined that the AAAA work did not alter her opinion about the claimant's unfitness to attend the disciplinary hearing.

232 C also received the OH report and said on 18 May 2016, in plain terms, that the claimant was unfit to attend and deal with the first allegation against her cited in paragraph 178 (page 1742). A postponement was asked for. Y told the claimant and C the same day that she would consider the OH report and revert shortly (page 1747). For her part, a few days earlier (on 13 May 2016), the claimant had emailed E, X, Z and KK (page 1713). She referred to the respondent's failure to send the postponement letter on 26 April 2016 (see paragraph 218 above). She reiterated her position that she was unfit to attend the disciplinary hearing in order to deal with the allegations involving R but was fit to discuss the patient confidentiality issue.

233 Y took the view that the disciplinary hearing should go ahead and informed the claimant of that fact on by letter on 23 May 2016 (page 1754) and by email (timed at 17:27) on 25 May 2016 (page 1806). Y said that she considered this to be in "the best interests" of all concerned.

234 In the former, she simply said that she considered it to be in the best interests of all concerned to proceed. She said that she would give her

rationale on the day. When asked about this she said that she chose to proceed in this way in order that the rationale for proceeding may be properly minuted. This was difficult evidence to understand as a rationale could just as well have been provided in letter form. Indeed, this may have been a preferable course (avoiding possible disputes as to what was said upon the matter in the context of a meeting and giving the claimant the chance to digest what was being said). When pressed upon this aspect of the matter, Y fell back upon the letter of 12 May 2016 (page 1698 and 1699). This was less than convincing as at that date she had not received the OH report. Y was a little more expansive as to her rationale for proceeding in the email of 25 May 2016 at page 1806. There she referred to the fact of the claimant working elsewhere (and of which she believed OH were ignorant) which Y considered to be evidence of the claimant's fitness to attend. When taken to page 1806 during cross examination, Y said that X had not informed her of her (X's) discussion with Dr R about the implications of the claimant's work for AAAA.

235 As we said earlier, the evidence of her reasons for going ahead with the hearing on 26 May 2016 is at paragraphs 23 to 30 of Y's witness statement. She referred there to the Duty of Candour policy in addition to the fact of the claimant working elsewhere. The issue of the Duty of Candour policy does not feature in any of the contemporaneous correspondence: see in particular the email from Y to the claimant of 27 May 2016 (pages 1823-1825) in which Y sets out justification for her decision to proceed with no mention of the Duty of Candour. Y said that she discussed the matter with CC of the Respondent who has expertise upon these issues and was advised by him that the Duty applied in these circumstances. She was challenged upon this by the claimant's representative upon the basis that the matter was not a notifiable incident according to Care Quality Commission (CQC) guidelines and the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 and also the matter had not been reported to the CQC or any other body such as the National Reporting and Learning Service (NRLS). (The respondent conceded this to be the case). Y maintained that she was following the Respondent's Duty of Candour Policy under the guidance of CC. Further, CC expressed the view that the incident did not reach the threshold of being a notifiable incident to the CQC (page 172).

236 Y did not know whether or not the service user has in fact been told of the incident, that being a matter for the [x]ORT team. The Tribunal was informed by Ms Nowell on the morning of 7 March 2018 that she had instructions that a decision was taken, in conjunction with the service user's psychiatrist, not to inform the service user about the matter. Ms Nowell also informed the Tribunal that the respondent had not notified the incident to the CQC or the NRLS.

237 Y said that she had been informed of the claimant working for AAAA by DD of the respondent's HR department. Although Y could not say when she knew about it, it is certain that she was aware of it by 12 May 2016 at the latest: (see paragraph 23 of Y's witness statement and her letter of that date to the claimant at pages 1698 and 1699). She said that there was a concern that this may conflict and clash with the claimant's contractual duties with the respondent.

238 Y did not know that X had informed Dr R of the claimant's work elsewhere and appears to have taken the view that had Dr R been aware of this her opinion about the claimant's fitness may have altered. Y accepted this to be a matter for medical opinion. However, she did not canvass this with Dr R out of concern to keep separate the instant investigation and that into the issue of the claimant working for a third party. She said that *"I needed to stay away from any investigation of her working elsewhere."* Y accepted in cross examination that she had engaged in speculation as to how the issue of working elsewhere may have impacted upon Dr R's opinion. Y also said that she was unaware at this time of the fact of the 360 Assurance investigation.

239 Y's evidence before us was that she was keen to *"at least commence"* the disciplinary hearing. That is clear from the email exchanges at pages 1654 and 1655 of 28 April and 2 May 2016 to which we referred earlier. She had also, as we have seen, expressed impatience in an email of 18 April 2016 (page 1636). She said in evidence that she was dealing with this matter alongside her substantive duties. She remarked that she has *"a busy role with little desk time"* and that "*I was doing this alongside my job."* This is telling and in our judgment serves to explain why no rationale was provided to the claimant for Y's decision to proceed prior to 26 May 2016: Y was simply too busy to give the matter proper attention prior to the date of the disciplinary hearing.

240 Y said in evidence that her view was that the patient confidentiality issue could have been dealt with at the time and that the disciplinary hearing was an opportunity to determine how best to deal with the other allegation and provide support to the claimant to manage the issues alluded to by Dr R.

241 Her evidence was that when deciding whether to go ahead she had discussed the matter with colleagues working in human resources. These discussions were not minuted and Y appeared uncertain with whom she had discussed these issues. She said that the decision to proceed *"sat with me."* She told us that no consideration was given at the time to splitting the disciplinary hearing into two parts so as to deal with the patient confidentiality issue and then move on to the issue around R when the claimant was fit to proceed. Y accepted that it was practicable to have separated out the issues in this way. She said however that consideration could have been given to so proceeding upon the commencement of the hearing.

242 The fundamental flaw in Y's approach was that the claimant would still be faced with having to prepare for the R allegation anyway (contrary to Dr R's medical advice and the opinion of the claimant's GP) given the uncertainty on the claimant's part as to how Y would proceed. Y fairly accepted, upon been asked by the Employment Judge, that the claimant was put in the position of reasonably expecting to have to deal with both issues at the hearing upon the contingency of a postponement request upon the sexual misconduct matter been refused. This was unfortunate in circumstances where there was medical opinion contra-indicating the claimant's fitness to prepare for the R allegation.

243 On 25 May 2015 (at 15:03 - pages 1801 and 1802) the claimant emailed Y and others. She referred to six pieces of medical evidence germane to the issue of her fitness to attend and deal with the issues pertaining to R. Two

of these were the OH and GP reports dated 12 May 2016 and 4 April 2016 respectively to which we have referred at pages 1743 and 1635 (and which were already in Y's possession): that Y had both documents is confirmed in an email that she sent to the claimant on 26 May 2016 (at 17:27) – page 1808.

244 There was in addition reference to a further letter from her GP dated 27 April 2016 (page 2018) and to an undated letter from her mental health counsellor at the [x]Rape and Sexual Abuse Centre *('[x] RASAC'*) (page 2022) and a letter dated 9 April 2016 from her spiritual counsellor (page 2020). Y did not in fact have these three letters on 25 May 2016. They were not attached to the claimant's email (albeit that they were referred to).

245 The sixth piece of medical evidence is dated 24 May 2016 and is a further letter from her mental health counsellor at [x] RASAC (page 2015). The claimant said to Y (in the email at pages 1801 and 1802) that her mental health counsellor had said *"that the risks of me taking part in this hearing at the present time are serious and that it may cause me 'further psychological harm'."* (This letter from [x] RASAC is at pages 2015 and 2016 of the bundle).

246 It is difficult to understand why the claimant did not attach the documents in paragraphs 244 and 245 (in particular, those at pages 2015 and 2022) to her email of 25 May 2016. When commenting upon this evidence, Y was plainly unimpressed with the spiritual counsellor's letter as she was unaware if the counsellor was possessed of any professional qualifications.

247 Y said in evidence (when taken to the letter from [*x*]RASAC at page 2015) that communication showing the claimant had been seen by [*x*]RASAC would have caused her to at least pause and seek advice. She knew of the claimant's counsellor at [*x]*RASAC and said that referring to [*x]*RASAC was *"a profound step for anyone."* She said that she may have asked her counsellor to support her (the claimant) in the process. Y said that she was unaware specifically of [*x*]RASAC's involvement until the matter reached appeal stage, the claimant referring in the email of 25 May 2016 to her 'mental health counsellor'.

248 Y replied on 25 May 2016 (at 17:27) at page 1806. She maintained her position and asked the claimant to present any additional evidence the next day. She again mentioned the fact of the claimant's work for AAAA.

249 The claimant then she wrote again to Y the same evening at 18:46 (page 1807). The claimant was unhappy with Y's approach. She questioned the basis upon which Y took the view that matters should proceed by reason of the fact of her working elsewhere in the light of medical opinion from Dr R and referred again to the email which we referenced at paragraph 243.

250 Y was challenged upon her approach to matters on 25 and 26 May 2016 given the OH and GP opinions. Y said that the patient confidentiality issue could proceed as there was for that no medical contra-indication for that issue. However, she accepted that at no stage was the claimant informed that the issues around R would not be considered. Y said that she was prepared to consider at the hearing submissions made by the claimant upon her fitness to deal with that allegation but accepted that her stance put the claimant in the position of having to prepare a statement of case

about it and be prepared to deal with it should an adjournment be refused, an approach which was contrary to the OH and GP advice.

251 Y considered that it was a supportive step to require the claimant to put her version of events in writing notwithstanding the OH opinion and that the claimant would have to deal with the issue at some stage anyway. She took this view because the GP's letter of 4 April 2016 said that the claimant was receiving counselling and thus had had to share details of the incidents already. It may be considered surprising to equate the sharing of information for counselling purposes with sharing information at a disciplinary hearing.

252 Y also said that she was mindful of the Duty of Candour policy and the obligations owed to the service user (albeit that this was not referred at this stage of her dealings with the claimant).

253 Y also said in evidence that her view was that as the claimant was fit and well enough to work for AAAA, she was fit enough to attend the disciplinary hearing and for that hearing to at least commence.

254 The day before the scheduled date for the disciplinary hearing, KK (who had succeeded Q as the claimant's line manager) emailed M (page 1784) (copying in X). This was about the claimant's holiday entitlement. KK alluded to the possibility of the claimant's dismissal the next day. An issue was raised with Y in cross examination as to how KK knew of this possibility in circumstances where Q had given evidence of being kept out of the loop. Y said that had Q remained as her line manager he would at an appropriate stage been informed of the position (as had been KK) albeit that the details of the issues would not have been shared with him. As Y put it, the line manager would be given a 'position statement.'

255 The disciplinary hearing was scheduled to commence at 9:45am on 26 May 2016. However, the claimant did not attend at the appointed hour. Y says that the hearing went ahead in her absence at 12:10pm.

256 Y prepared her detailed account of events of 26 May 2016 which she sent to the claimant by e-mail on 27 May 2016. This is at pages 1823-1824. This records that C attended at the scheduled time for an 08:30 start and told the meeting that the claimant had attended her GP and expected to arrive at the hearing venue at 10:00am. The claimant's written statement of case was presented by C there and then, Y having agreed to its late submission. Attempts by C to telephone the claimant proved unsuccessful. However, the claimant then sent a text to C to say that she was collecting a prescription and would then come to the meeting venue. She had not turned up by 11:00am and therefore Y sent a further e-mail at 11:02am. This was followed up by a further e-mail at 11:23am. At 11:50am the claimant said that she would be attending as soon as possible and she hoped to arrive at the venue for midday. Y therefore told the claimant that the meeting would commence at 12:10pm. The meeting in fact commenced at 12:15pm. Y called her witnesses and X presented the respondent's case.

257 There are some email exchanges at pages 1809 to 1815. In her email timed at 11:50 (page 1811) the claimant told Y that she would be attending as soon as possible. She expressed the view that Y was acting *"with utter disregard"* for her mental health and that she felt compelled to attend against medical advice.

258 As the claimant had not attended by 12;15pm C withdrew from the case prior to the commencement of the hearing. Y said in evidence before us and in her email of 27 May 2016 that the claimant's statement of case which had been presented that morning "*was physically withdrawn from the panel by your union representative prior to the start of the hearing as they did not have your permission to proceed. This was unfortunate and unhelpful."* The statement of case presented by the trade union was not in the hearing bundle. It was produced for the Tribunal on the morning of 7 March 2018. Unsurprisingly, Y could not recall how (if at all) it differed from the one later presented by the claimant on 3 June 2106 and whether the one withdrawn by C had sought to deal with the R allegation. Y was given the opportunity on the morning of 7 March 2018 to consider the trade union's submission to see if this helped her recollection.

259 The trade union's statement of case was dated 22 April 2016. It was common ground that it had not been circulated that day and was in fact brought to the disciplinary hearing by C (as had been agreed with Y). It sought to deal with both allegations against the claimant.

260 Y said in evidence that C did not distribute the statement of case to those present and then upon her departure on 26 May 2016 scooped them up and left. Y said that she had not considered the statement of case.

261 This account appeared to contradict that given by Y in the statement of case that she prepared for the appeal hearing dated December 2016 (pages 2057 to 2076). Y was assisted by EE in preparing this document. When recounting the events of the morning of 26 May 2016 Y recorded at page 2061 that *'[the claimant's] representative presented her case at 8.30 am on 26 May 2016.'* At page 2062 she said that '*in preparation for the hearing, I had reviewed the staff side case provided by Unison at 8.30 am that morning. I recall that [the claimant's] case consisted of a brief statement from [the claimant] and various printed internet search results regarding coercive, controlling and abusive relationships.'*

262 Y said that what she herself had recorded at pages 2061 and 2062 about her time of arrival was not accurate as she would not get to work until 9.30 am for child care reasons. She also referred to the start time which was set for 9.45 am and thus fitted with her domestic circumstances. The claimant's representative put to her that her recollection of events in December 2016 was likely to be more accurate than when giving evidence about this in March 2018. He also drew her attention to the fact that the Unison case did contain internet search results and thus she must have seen it at the time (otherwise she would not have mentioned them). Y countered by saying that she could not find a brief statement from the claimant within the Unison case. However, the appendix refers to a *'statement showing [the claimant's] state of mind dated 28/10/11.'*

263 The trade union statement of case contains the [x]RASAC letter of 24 May 2016 at page 2015 of the bundle. (This had been inserted as the first page of the statement of case immediately following the index of the documents. It thus enjoyed a prominent place in the presentation). The statement of case also included the spiritual counsellor's report at page 2020 and the undated report of the [x]RASAC at page 2022. (We also refer the reader to paragraph 304 below where we cite further salient extracts from these reports). The trade union's submission also included the GP's letter of 27 April 2015 (page 2018).

264 Although the [x]RASAC report at pages 2022-2023 makes no mention of the colleague concerned in the matter as acting in a therapeutic capacity it does describe the colleague as "*a mental health nurse and CBT who happened to be colleague"* and whom the claimant said had "*repeatedly sexually abused"* her *"over a period of time."* The counsellor described a series of panic attacks. She observed that *"she has some of the most severe symptoms of PTSD that I have encountered in my work."*

265 In her report of 24 May 2016 (page 2015) the counsellor opined that the claimant was *"experiencing many of the symptoms of post-traumatic stress disorder"* and that "*much of our work together has been focused on strategies to counteract the overwhelming emotions and distress she experiences on a daily basis."* The counsellor said that she *"could not stress enough how concerned and anxious I am on [the claimant's] behalf*" about the claimant attending the disciplinary hearing on 26 May 2016 and *'seriously urged'* Y to postpone the hearing until she could attend safely, provide support for her by allowing her to have a trusted friend accompany her, adjust the process by allowing her to write her answers to questions from the panel and allow *'her the time and space to ground herself and manage her PTSD symptoms.'*

266 We find that Y did have the Unison statement of case before her from around 8 am on 26 May 2016 and had considered its contents. It is difficult to see why Y would have written an account as she did at pages 2061 and 2062 had she not. Her account that EE may have told her that C had arrived at 8.30 am is unconvincing and inconsistent with her clear and contemporaneous account at pages 2061 and 2062 (including writing about and referring to herself and the events in the first person).

267 Equally unconvincing is her assertion that she may have been confused when writing as she did at page 2062. The account was written in December 2016 after she had had time to reflect and recall events. Even if it is the case that EE and not Y saw the Unison case, the fact of the matter is that the respondent was on notice of the [x]RASAC letter of 24 May 2016. Y's reference in her account at pages 2061 and 2062 to documents within the Unison pack can only have been made had she seen them. The claimant's representative made a telling point when he put to Y that the internet searches only feature in the Unison case and not elsewhere. Upon these bases we find that Y was cognisant on 26 May 2016 of the *[x]*RASAC letter of 24 May 2016 at page 2015 and the other medical and quasi-medical materials at pages 2017 to 2022.

268 In the email of 27 May 2016 at pages 1823-1824, addressed to the claimant recounting the events of 26 May 2016, Y referred to the Occupational Health report. She remarked that, *"when clarity was sought from the Occupational Health physician who assessed your fitness to attend it became apparent that you had not disclosed the fact that you had been working as part of that assessment. In the Trust's view, it is reasonable to believe that if you are fit enough to work then you are fit enough to attend the disciplinary hearing."*

269 Y was cross examined about this passage. She said that she had not sought clarity from OH about the impact of the claimant being fit to work. However, she was unable to say who had obtained the '*clarity'* referred to at pages 1823-1824. She said that she was not here referring to X. Such clarity as may have been obtained was not shared with the claimant. Y did

not say that Dr R had opined that the claimant was fit to attend the disciplinary hearing but rather that it was the view of the respondent that she was fit. That view was contrary to the opinion of Dr R (as expressed to X) in any case.

270 When Z was cross examined about the material that was before the disciplinary panel when it came to determining the claimant's appeal, he said that Y did not have the documents at pages 2015 to 2022 before her. We have found as a fact that she did have them. They were in the trade union's statement of case. Z then remarked that he *"had to wonder why"* they were only produced on the day of the disciplinary hearing. His attention was drawn to the disciplinary outcome letter of 14 June 2016 at pages 1889 to 1894 in which Y records her earlier agreement to accept the staff side case on the morning of the hearing.

271 Q was called as a management witness to the disciplinary hearing in addition to those notified to the claimant in the letter convening the disciplinary hearing at page 1678.

272 The claimant arrived (according to Y's e-mail at pages 1823 and 1824) at 12:51. By that stage, the panel had already heard the evidence of ZZ. Q was part way through answering panel questions when the claimant arrived. The respondent had thus commenced by considering the issue concerning R rather than the patient confidentiality issue. This was done for the convenience of the witnesses ZZ and Q. The respondent proceeded in this way notwithstanding its knowledge that the claimant had been medically advised not to engage with the R issue.

273 Y's account is that upon arrival the claimant was asked by K to remain outside of the room. There was then a discussion out of earshot of the claimant. Y and EE then emerged from the disciplinary hearing room and introduced themselves to the claimant (who was accompanied by her Tribunal representative).

274 Y said that the respondent was not prepared to admit either the claimant or her representative into the hearing. She was told that the respondent had not reviewed her case, it having been withdrawn from the panel by C. Y said (at page 1824) that the claimant then attempted to hand to Y a further statement of case. Y did not know whether this was the same as the one that had been withdrawn by C and it was therefore not accepted. Y told the Tribunal that she was taken by surprise by the appearance of her representative and found the situation difficult.

275 Returning to the email at pages 1823 to 1824 Y then told the claimant that she was going to give the claimant an opportunity to submit her written statement of case so that the matter could be considered on the papers. She was told that this should be accompanied by evidence upon which she wished to rely. The panel was to reconvene on 6 June 2016 and therefore Y asked the claimant for her evidence no later than 3 June 2016.

276 On the morning of the fourth day of the hearing before the Tribunal, the respondent produced a signing in sheet. Rather mysteriously, this refers to the claimant's companion as *'Dan Brown.'* This is not his real name and the claimant was unable to give any satisfactory explanation as to why she gave that as his name. It was put to the claimant that Y said that she had introduced her companion to Y as '*James'.* (It may be recalled that this was the name used by the person who spoke to D in connection with the

patient confidentiality issue). The claimant said that she was unable to recall doing that. Y said that that was how the claimant's representative introduced himself.

277 The time of arrival appears to have been altered upon the signing in sheet. The claimant accepted that it was she who had made the alteration. The document does appear to confirm her arrival at 12:50.

278 Upon the resumption of the Tribunal hearing on 22 November 2017, the claimant's representative said that a recording of the discussions outside the disciplinary hearing room had been obtained. The provenance of the recording (which was covert) is that it was upon a device given to the claimant for the purposes of therapy at the [*x*] Rape and Sexual Abuse Centre. The device had been handed back when she ceased counselling there. She then began voluntary work for [x] RASAC and the device had been returned to her in that capacity. It was discovered that the recoding was still upon the device and its existence was then made known to the respondent. The respondent objected to the admission of the recording into evidence. The Employment Judge directed there to be a *'voir dire'* before a different Employment Judge to decide upon the admissibility of the recording. Employment Judge Little held that it was admissible and gave directions for it to be transcribed.

279 On 27 November 2017 a transcript prepared by WorldWave International Limited was produced. The transcript has to be treated with some caution as it has not been possible to transcribe the entirety of the discussions that took place. The Tribunal had the opportunity to listen to it on 8 March 2018. The following are the salient passages:

- Y told the claimant that the hearing had commenced.
- Y said that C had withdrawn her representation.
- The hearing was to proceed in the claimant's absence.
- The claimant would be informed of the outcome and that she would have the opportunity to appeal should she wish.
- The claimant's representative said that C's withdrawal of her case was against the claimant's *"views"* and that she did not want it to be withdrawn
- There was an issue as to the status of the claimant's representative and his standing to represent her.
- Her representative requested on three separate occasions that the claimant be allowed to attend the hearing. This was refused by EE upon the basis that it had commenced. This was questioned upon the basis that it had only commenced 20 minutes prior to the claimant's arrival.
- EE was asked by the claimant's representative to confirm in writing that she was being refused admission to the disciplinary hearing.
- The claimant and her representative were concerned as to how questions were to be put to the respondent's witnesses in the claimant's absence.

- The claimant attempted to reintroduce her written statement of case. EE refused to accept it upon the basis that it had been withdrawn by Unison.
- On the tenth page of the transcript the claimant's representative said, *"could you confirm to us that in that case in writing that you're refusing [the claimant] the opportunity to join the hearing at this point in time"* EE and Y both confirmed that to be the case and that they would put it in writing. On the twelfth page the claimant's representative says, *"she (the claimant) wishes to question the staff side weaknesses and how would you allow that if you're not allowing her to take that in the hearing today—"*
- *(Having listened to the transcript, the Tribunal is satisfied that the conversation was professionally conducted by all participants. We reject any suggestion of any untoward aggression by or towards anyone).*

280 Y agreed that (in light of the transcript) the suggestion made by her in paragraph 42 of her witness statement that the claimant was not willing to attend the hearing on her own was incorrect. She also accepted that the claimant arrived 21 minutes after the first witness (ZZ) had been called. ZZ had finished her evidence her appearance having been scheduled around her professional commitments in the afternoon. She could not be recalled that day.

281 C had withdrawn at 12.10. Y denied that there was any conversation between her and C about the claimant's ability to proceed and that the conversation was solely as to the claimant's whereabouts. Y said that she did not want to engage in any such discussion without the claimant being present. We accept Y's evidence upon this point. There is nothing to the contrary from C.

282 Y said in evidence that it was unclear whether the statement of case the claimant sought to present after C's withdrawal was the same one that we had received on 7 March 2018. This copy prominently features the Unison logo upon its frontispiece. She said that the one that was presented by the claimant on 26 May 2016 looked different to the one presented by C that day and came in a plastic wallet *"with a print out and some writing."* This contrasts with Y's contemporaneous account: if the document did look distinct from the one produced by C it is surprising that this observation was not made by Y at the time.

283 Further, in her email of 26 May 2016 (at 14:15) (page 2141) the claimant referred to having sought to '*re-enter'* her statement of case. On balance we prefer the claimant's account and find that she sought to hand the Unison document to Y who refused to accept it. It is unlikely and against the probabilities that the claimant will have prepared her own when she had Unison's support. She could not have foreseen C's withdrawal and thus it is not plausible that she would prepare an alternative statement of case (in a different format) upon that contingency. She would not have had the time to prepare a new and different written submission upon the morning of 26 May 2016. The claimant's reference to 're-entry' corroborates our finding as does the inconsistency between Y's contemporary account about the document's appearance and her evidence before us.

284 Y said that she had experience of trade unions withdrawing from cases and statements of case prepared by the union not then being issued. Her view was that it was not open to a member to adopt a case prepared by the union should the union withdraw. She felt uncomfortable about accepting the case from the claimant (if it was indeed the Unison one) for that reason as it could have potentially *"left me open."* Y did not expand on what she meant by this. It is difficult to understand why Y thought fit to intermeddle in the relationship between the claimant and the trade union. It was a matter for the claimant if she wishes to adopt the Unison statement of case. Y said that she felt it preferable to proceed without the claimant as to allow her in would be "*messy."* Y was also troubled by the prospect of allowing the Claimant to *"parachute in"* (as Y put it) part way through. She decided not to allow this and *"it had been very messy and to make it as clear and transparent as possible."* Y also thought it would be difficult for the claimant to enter at the stage that had been reached as Q was part way though so could not be asked questions about what he had said so far.

285 It was suggested by the claimant's representative that allowing her in part way through was preferable to not allowing her in at all as to do would give her "*half a chance as opposed to zero chance"* as it was put by him and that she would have stood a better chance of success by being able to cross examine at least some of the respondent's witnesses. Y said she may be criticised for allowing her in and that *"the claimant did not show up at the time appointed –she chose not to attend."* It was put that the claimant had no choice in the circumstances. Y said that it was a matter of opinion and that she had been surprised "*at the time it took from the GP appointment to the start of the hearing."* The claimant explained in the email at pages 2140 and 2141 that her GP had prescribed *"even more medication"* which she purchased from the pharmacy and took to calm her before going to the hearing.

286 Y was asked why the claimant could not have been allowed in to deal with the patient confidentiality issue. Y conceded this to have been possible but felt that "*the clear way forward"* was to allow her to respond in writing.

287 The disciplinary hearing thus took its course without the presence of the claimant. P was heard and then X and K went through the management statement of case. Y said in the appeal statement of case (page 2068) that P's evidence was *"not fundamental or material to the decision to dismiss"* (a point subsequently accepted by Z: page 2290).

288 Y confirmed that X did not produce to her, at the disciplinary hearing, the claimant's work mobile phone or work diary. She was in no position to say whether or not X had these in her possession.

289 On 3 June 2016 the claimant submitted her statement of case, which is at pages 1868-1886. The focus of these representations was around the patient confidentiality issue. She did not, in contrast to the Unison case, deal with the R allegation at all.

290 Amongst the claimant's submission was an appendix numbered 5 (presented in two parts). The claimant's case was that the information in this appendix would help to exonerate her from involvement in the patient confidentiality issue. Essentially, she and her trade union representative had emailed 'patient confidentiality' seeking to establish his, her or their

identity. 'Patient confidentiality' had furnished information to the effect that he, she or they was/were behind a complaint to the Advertising Standards Agency about claims made upon the respondent's website about Care Quality Commission report outcomes. The ASA had written the letter at page 1885 addressed to the 'patient confidentiality' email address and another account. 'Patient confidentiality' had sent this to the claimant but with the details of the natural person to whom the letter was sent redacted. It was suggested that Y ought to have commissioned enquiries of the ASA about this in order to demonstrate that the natural person was not the claimant. Y said that she did not do so as there was insufficient evidence to inculpate the claimant upon this issue anyway. She said that she may have done so had matters been more finely balanced upon the issue.

291 The disciplinary panel met on 9 June 2016. Y communicated the respondent's decision to dismiss her for gross misconduct in a letter dated 14 June 2016 (pages 1889-1894/2079-2082). The first allegation, that the claimant had had sex with R in the respondent's workplace, on service users' holidays and over a period of several years as well as in the house of a service user, was upheld in part. As with the case against R, Y felt unable to confirm whether or not the sexual activity on holidays took place during work or downtime. She was therefore not able to uphold that part of the allegation. She upheld that part of the allegation about having sex in the service user's home in July 2015 only.

292 The patient confidentiality allegation was not upheld. From this, it follows that the conclusion into the respondent's investigation about the patient confidentiality issue concluded after 10 months after S had raised it on 17 August 2015.

293 Y was unable to accept the claimant's mitigation around coercion. This was upon the basis that there was no evidence to substantiate what the claimant said. In particular:

- The claimant did not record or report that R had entered into the service user's home with her despite him being absent from work due to sickness.
- The claimant took no action to curtail the visit or remove herself from the situation.
- The complaint to the NMC by the claimant made no mention of the fact that the claimant and R had sex in the service user's home. (The claimant says that this was raised with the respondent on 1 October 2015: see paragraph 103 above).
- That she had not reported or raised any concerns about R with the respondent nor had she reported his conduct to the police.
- That she was a well-trained, competent and assertive professional with extensive knowledge and experience of safeguarding procedures.

294 Y confirmed her decision to summarily dismiss the claimant for gross misconduct. She was informed that the matter would be reported to her professional body.

295 Y was cross examined about the competing versions of events around the day in July 2015 leading to sex in the service user's home. Y said that she

was not precluded from the findings that she had made based upon the factors at paragraph 293 *"whichever version was the truth".*

296 Y was asked what evidence she would have accepted to satisfy her that the claimant was in a coercive relationship. Y said that *"it's not a court of law"* and acknowledged that the claimant had submitted evidence from her counsellors and GP. Y was influenced by the fact that there was no physical coercion, that the claimant had possession of the keys to the service user's house and had cause to go there on Trust business (to collect belongings while the service user was in hospital) and that R had no reason to be there. Y said that *"I cannot accept where the sex took place as a custodian of the public purse. How could we justify such an event to our loved ones? It would be different if it had been an assault or criminal activity."* She went on, *"it could've happened elsewhere- they didn't lack capacity to know right from wrong. Unless she couldn't remove herself physically- there's no need for it to have happened in the service user's home."*

297 Y's evidence was essentially that absent physical force she would find it difficult to accept coercion was at play although she did accept that it is possible to compel without the use of physical force in certain circumstances (such as instances of child abuse for example). Y set great store by the fact that the claimant could have prevented R from entering the property by simply not going there. Y said under questioning from the Employment Judge that it was upon this basis that she felt that sex in the service user's home could have been prevented. She did acknowledge the situation to be a difficult one and that *"there are experts that could help"* to resolve the question.

298 Y reached her decision without the Unison statement of case or indeed any statement of case (about the R issue) from the claimant.

The claimant's appeal

299 The claimant appealed against Y's decision. The grounds of appeal and supporting documents are at pages 1961 to 2054. Y along with EE prepared the management statement of case for the appeal which is at pages 2057-2076 with appendices at pages 2077-2244. She presented the management case at the appeal hearing which took place on 17 January 2017. The minutes are at pages 2245 and 2281.

300 Z was the disciplinary appeal hearing manager. He was assisted by E. Z said that he was the decision-maker but would be guided by advice from E. The appeal was in the form of a review rather than a rehearing (as confirmed in the appeal outcome letter at pages 2287-2301).

301 Z said that it would be open to the claimant to produce evidence that was not before the disciplinary panel. Had the evidence not been before the disciplinary panel when it was available, he would enquire why the appellant had not adduced it but that in and of itself would not rule out its admissibility at appeal stage.

302 The claimant's appeal was made up of eleven points. These are set out at page 1962 and are as follows:

(1) That the respondent's disciplinary policy was not followed and the claimant was treated unfairly.

(2) That the respondent called witnesses to the disciplinary hearing without providing advance notice to the claimant.

(3) That the disciplinary panel allowed unreliable evidence from witnesses who could not be considered credible.

(4) That Y did not consider all of the relevant information available to the respondent when making a decision about the claimant's fitness to take part in the disciplinary hearing.

(5) That Y misinterpreted *"an important medical report."*

(6) That the panel did not give any consideration to the wellbeing or state of mind of the claimant and did not consider whether she was fit to take part in the disciplinary hearing.

(7) Y denied the claimant the opportunity to take part in the disciplinary hearing upon the claimant's arrival.

(8) Natural justice was not allowed to prevail.

(9) The respondent and the disciplinary panel *"lacked the ability to maintain accurate records as well as lacked the ability to act according to records made."*

(10) Y arrived at conclusions without considering relevant information and displayed a reluctance to consider evidence which did not support her views.

(11) The respondent as well as the disciplinary panel denied reasonable requests made by the claimant thereby causing her disadvantage and hindering her ability to defend herself.

303 The particulars of each point of appeal were then set out at pages 1963-1972. In relation to each point the claimant's case was:

(1) That the claimant was not offered the opportunity to bring a trade union representative or work colleague to the verification meeting held on 19 August 2015.

(2) Q was called as a witness at the disciplinary hearing. He was not amongst those notified to the claimant in the respondent's letter of 5 May 2016.

(3) That P was a family friend and therefore likely to be loyal to R. The claimant also said that P's actions "*have currently been categorised as potential gross misconduct"* by the relevant police force.

(4) The claimant relied upon the occupational health assessment of 12 May 2016 (page 1743) in support of her contention that she was not fit to take part in the disciplinary hearing. She also referred to the e-mail sent on 25 May 2016 (at pages 2009 and 2010) referring not only to the occupational health assessment of 12 May 2016 but four other documents. By way of reminder these were: the undated letter (which the claimant said had been issued by her mental health counsellor on 29 March 2016) (page 2022); the letter issued by her GP on 4 April 2016 (page 2021); the letter issued by the claimant's spiritual counsellor dated 9 April 2016 (page 2020); a further letter from the claimant's GP dated 27 April 2016 (page 2019 ; and the letter from the [*x*] Rape & Sexual Abuse Centre of 24 May 2016 (page 2015). These documents were included within the

claimant's appeal case at Appendix 5. (They are at pages 2015-2023 of the bundle).

(5) The fifth issue relates to the issue of the claimant working for AAAA. The claimant said that Y was of the view that Dr R's opinion upon her fitness to attend the disciplinary hearing would be different had she been aware that the claimant had been working elsewhere. On 2 and 3 June 2016 the claimant in fact sought Dr R's further views upon this issue of her fitness to work and that the respondent took the view that she was fit to attend because she had been working from AAAA (pages 2012 and 2013). In her email of 2 June 2016, the claimant canvassed Dr R's views about this and mentioned there to be, from her viewpoint, a therapeutic benefit to her working as "*I have managed [to] take my mind (at least somewhat) away from the abuse I experienced."* Dr R in fact maintained her view that it was not appropriate for the claimant to be involved in formal proceedings relating to the specific issue around her relationship with R. Dr R said in an e-mail of 3 June 2016 that, *"As your GP and counsellor have indicated you need time to benefit from the treatment you are receiving and there is a danger that being asked to discuss those circumstances in a hostile environment will set back your progress and treatment."* Dr R confirmed that there was no reason why the claimant was unable to participate in other formal proceedings relating to separate issues (that being the patient confidentiality issue).

(6) In reality, this was a reiteration of the fourth and fifth issues in the claimant's notice of appeal.

(7) This relates to the fact that the claimant was not allowed to participate in the hearing upon her late arrival on 26 May 2016.

(8) The natural justice point is effectively a reiteration of the seventh ground of appeal.

(9) This relates to the issue around the sending of the notes of the meeting of 9 December 2015 to C. Further, it was the claimant's case that the respondent was incorrect to say that the claimant had not raised concerns about R until 1 October 2015. She had done so on 16 September 2016. This was reference to the claimant's e-mail to Z and E copied in the appeal documents at pages 2039 and 2040. A further aspect of the ninth ground of appeal was the claimant's contention that she had informed Y that her companion was not named *James* and yet Y persisted in referring to him by that name. Perhaps more significantly, the claimant took issue with Y's assertion that the issue of sex in the service user's home was not referred to in her complaint about R to the NMC. The claimant said that it was as the claimant took the view that it was covered by her reference to having sex in *"work related locations"* per paragraph 78 above.

(10) This is effectively closely linked with issues (4), (5) and (6). The claimant contended that Y disregarded the medical opinions available to her and decided to proceed with the disciplinary hearing on 26 May 2016. The claimant also took issue with Y's assertion in her letter of 12 May 2016 (referred to in the appeal

documentation at pages 2049 and 2050) that the claimant was postponing meetings in order to facilitate her work with AAAA.

(11) This is effectively a reiteration of grounds (4), (5) and (6) upon the point about the claimant's fitness to attend the disciplinary hearing and also ground (7) upon the point that Y denying the claimant the opportunity of participating in the disciplinary hearing when she arrived.

304 The claimant enclosed 18 appendices with her appeal. It is not necessary to deal with them all. However, the following merit comment:

- Appendix 2 contained a copy of the claimant's e-mail to the relevant police force on 25 May 2016 in relation to P's alleged gross misconduct. She received confirmation that an initial assessment into this matter was undertaken by a serving DCI with the relevant police force (page 2006).

- Appendix 3 consists of the exchanges of emails between Y and the claimant of 25 May 2016 at 17:27 and 18:46 to which reference has already been made. (Appendix 3 is at pages 2007 and 2008). Y maintained that the only medical evidence that she had was that from the claimant's GP of 4 April 2016 and the occupational health physician. The claimant took issue with this in her appeal (page 2007). She said in the e-mail of 25 May 2016 (18:45) that she had sent all of the medical evidence listed on page 2009 (<u>except</u> for the letter from [*x*] Rape & Sexual Abuse Centre of 24 May 2016 at pages 2015 and 2016) at 15:03pm on the afternoon of 25 May 2016.

- Appendix 5 consists of the medical evidence on which the claimant sought to rely. As we have said, this is at pages 2015-2023. It is, we think, worthwhile summarising this again. In the order in which this material was presented by the claimant here, it consists of: *firstly,* a letter from [*x*] Rape & Sexual Abuse Centre of 24 May 2016. This says that the claimant was *"experiencing many of the symptoms of post-traumatic stress disorder and that the disciplinary hearing would be extremely traumatising and place her at risk of further psychological harm."* The counsellor opined that asking her to recount her experiences 'will be *<u>extremely traumatising</u>* and may well place her at serious risk of *<u>further psychological harm'</u> [emphasis added by the counsellor].* The counsellor reported the claimant as being extremely distressed with difficulty breathing which had resulted in her attending A&E on two occasions. The counsellor offered the opinion that the claimant would not be able to present her evidence/experiences and could lead her to the point of collapse; *secondly*, Dr R's report of 12 May 2016 to which we have already referred; *thirdly*, a GP report of 27 April 2016 confirming anxiety symptoms with anxiety attacks; *fourthly*, a letter from her spiritual counsellor of 9 April 2016 in which she reported the claimant telling her (at a session in January 2013) that she felt pressured to have sex with R; *fifthly,* the letter from the claimant's GP of 4 April 2016; *sixthly*, an apparently undated letter from the [*x*] Rape and Sexual Abuse Centre confirming that they had been seeing the claimant for counselling from 3 November 2015. The counsellor said that, *"This*

followed her sharing her experience of having been repeatedly sexually abused over a period of time by a mental health nurse and CBT who happened to be a colleague and offered to professionally support [the claimant]."

- Appendix 6 is a copy of a prescription medicine label dated 26 May 2016 which was advanced in support of the claimant's case that she had sought medical advice that day.
- Appendix 13 consists of annotations to Y's e-mail of 27 May 2016 (being that in which Y relayed her account of the events of 26 May 2016). In particular, the claimant took issue with Y's understanding that the fact that she was able to go and pick up her prescription evidenced fitness to attend. The claimant said that the fact that she was prescribed more medication in fact shows the opposite. She also took issue with the imputation in Y's e-mail that the fact that she had not submitted her statement of case in advance of the disciplinary hearing should be held against the claimant, as Y had agreed to accept the statement of case upon the morning of the hearing. The claimant also said that some time was lost following her arrival at the hearing venue as the receptionist was unable to contact Y to inform her that the claimant had arrived. The claimant said that the discussion at 12:55pm with her representative, Y and EE took place nine-and-a-half minutes after the claimant had arrived and not 4 minutes after her arrival. The claimant said that Y had refused to accept the claimant's statement of case.
- Appendix 16 is an e-mail dated 9 December 2015 sent from the claimant to her son's school. She attached to it a photograph of R and requested that he not be allowed contact with the claimant's son.
- Appendix 17 is the e-mail of 28 October 2011 to which we referred earlier in paragraph 134 (and which was commented upon by Q).
- Appendix 18 is the text exchanges of 7 August 2015 with the explicit image of R again to which we referred earlier.

305 Z wrote to the claimant on 15 December 2016. Arrangements were made for the appeal hearing to take place on 17 January 2017. We refer to pages 2055 and 2056.

306 The management statement of case was prepared by Y. It is at pages 2057-2078. The appendices are at pages 2079-2244. Y said in evidence that she considered that the appeal was by way of review rather than by way of rehearing. When he gave evidence before us, Z confirmed this to be the case.

307 Y's response to each of the claimant's grounds of appeal were as follows:

(1) The meeting of 20 August 2015 (or, properly, 19 August 2015) related to an issue in respect of which Y did not make a finding against the claimant. It therefore did not materially alter the decision to dismiss her.

(2) Y considered the request to call Q to give evidence at the disciplinary hearing about the claimant's role and competency to be reasonable. Q was interviewed as part of the disciplinary

investigation on 2 November 2015 and a copy of his interview was included in the management case provided to the claimant. The claimant was therefore aware that Q's evidence formed part of the management case. As the claimant was allowed to submit written representations after the hearing Y did not consider that the claimant suffered any detriment as a result of her decision.

(3) Y was aware that P was a family friend of R. She was also aware of the relevant police force's investigation into his conduct. He provided evidence in respect of the sequence of events which ensued after photographs of R in a compromising position were sent to R's wife. Y said that the evidence of P was not fundamental or material to the decision to dismiss.

(4) Y said that prior to the date of the disciplinary hearing she had only had sight of the letter from the claimant's GP of 4 April 2016 and the OH report of 12 May 2016. Y said that the OH report confirmed that the claimant was well enough to participate in the hearing relating to allegations involving breach of confidentiality. She said that had the claimant attended on time she could have presented the additional evidence regarding her fitness to attend and deal with the R allegation. No further comment is made upon the medical materials produced by the claimant.

(5) Y was not aware that the claimant had contacted Dr R for clarification about fitness to attend and answer the allegation around her relationship with R notwithstanding that she was working for AAAA. The claimant's e-mail exchange with Dr R took place on 3 June 2016. Obviously, this was after the disciplinary hearing of 26 May 2016 but before the decision was taken on 9 June 2016. Y was clearly maintaining her view that the claimant's fitness to work for AAAA was indicative of her fitness to appear before the disciplinary hearing.

(6) Y simply repeats her response in relation to appeal ground (5).

(7) Y defended her decision not to allow the claimant to participate upon the basis that the hearing was already well underway and that two of the three witnesses had already given their evidence.

(8) Y says that there was no breach of the principle of natural justice as the claimant was given the opportunity to submit her written statement of case together with evidence in support before the panel deliberated.

(9) Y says that the issue around the provision of the minutes of the meeting of 9 December 2015 was not material to her decision. With reference to the issue of not reporting concerns about R until 1 October 2015, Y said that the e-mail to Z and E of 16 September 2015 concentrated upon text messages and an abusive relationship that bore no reference to an allegation of non- consensual sex. She referred to Appendix 3 of the management disciplinary case and the claimant's e-mail of 1 October 2015 at 13:05 being the first time that the claimant notified the respondent of an allegation of coercion and manipulation on the part of R. Y says that, *"This was significant in my consideration of the case because [the claimant's] admission of the sex at the service user's home was key to my*

decision to dismiss [the claimant] (as outlined in the disciplinary outcome letter)." Y says that the claimant did not describe the sex at the service user's home as non-consensual until she was interviewed on 9 December 2015. Y says that the claimant had ample opportunity to raise concerns with Q and K. Y says that referring to the claimant's companion as *"James"* was not material to her decision. Y maintained that she was correct to say that the claimant had not raised the issue of sex in the service user's home with the NMC. Y says that during the investigation meeting of 9 December 2015 the claimant said that omission to refer to sex having taken place in the service user's home as an oversight on the claimant's part.

(10) Y repeated her response to ground (4).

(11) Y defended her position to proceed on 26 May 2016. She did not wish there to be a postponement on an indefinite basis. She acknowledged Dr R's recommendation that the patient confidentiality allegation should be hived off but reasoned (at page 2074) that "*Dr R did not provide a prognosis of when [the claimant] would be able to complete the process regarding [that] allegation ..."*

308 Notes of the appeal meeting are at pages 2245-2281. The claimant was present and was represented by HH of Unison. There was no application for an adjournment and the claimant answered questions from those representing the respondent. Z was the hearing manager supported by E. Y presented the management's case. She was supported by AA and EE. A note taker was also in attendance.

309 The following are the salient passages from the appeal notes:

(1) The claimant requested access to her tablet and phone in order to illustrate that she had received abusive text messages from R (page 2247). Z indicated that he "*would not be trying to access this information today."* In cross examination Z said that he did not do so and confined himself to the eleven points of appeal raised by the claimant.

(2) The claimant's representative went through her eleven points of appeal (pages 2249-2252). Having considered the notes of the meeting, there appears to be little additional information presented at the hearing than has already been recorded in these reasons upon the claimant's written grounds of appeal.

(3) The claimant then went on to consider in detail the information in appendix 5 of her appeal (this being the medical information at pages 2015-2023 and her trade union representative's e-mail of 21 April 2016 expressing concern about the claimant's mental health at page 2024). Her representative said that the claimant did not report what was going on in respect of R until she felt safe to do so. She had phoned and e-mailed her son's school because of fear of R. (There is evidence in the Tribunal's bundle of the school having a record of her phoning the school on 11 June 2015 to inform the school that R *"was making threats to contact her son and that he must not be given any contact."* The school's letter of 19 July 2017 confirming this contact also makes reference to her emailing the

school on 9 December 2015 to reiterate her instruction accompanied by a photograph of R: see the HPC bundle page 1017).

(4) Reference was made to the e-mail of 28 October 2011 as the basis upon which the claimant maintained that she viewed the need for the relationship with R as therapeutic. Her representative said that the sexually explicit text picture sent to the claimant by R on 8 August 2015 (appendix 18, page 2054) showed that the claimant did not start the conversation that day but that it was initiated by R. The claimant said that she could not go on with the relationship due to the stress and strain upon her being caused by it. She maintained that it was R's message that "*brought [the claimant] into inviting R to her house."*

(3) The claimant observed that R had said that the relationship had ended in June or July of 2015 yet he was still sending sexually explicit images to the claimant in August 2015. She said that he had also lied to the respondent by implying that he had used his work mobile phone to contact the claimant on a limited number of occasions when in fact *"hundreds of messages"* had been sent to the claimant from his work and personal mobile telephones.

(4) The claimant is recorded as saying (at page 265) that three others were in her house upon the day when R was entrapped. The claimant was asked by Z why evidence had not been called from any of them. The claimant's trade union representative said that the claimant's Employment Tribunal representative was in attendance (outside the room where the appeal was taking place). In evidence under cross examination about this, Z said that he had spoken to the representative but had not allowed him in to the room as he wished to come in only to take notes. Z said that he was concerned that a false name had been given in the visitor's book (albeit that Z did not know the individual's true name) and that there had been no suggestion that he wished to give any evidence. Z said that he would have heard the evidence had the trade union requested. Z felt that to hear that evidence would not have availed the claimant in any case as his view was that R and the claimant were in a consensual relationship. *(We observe that we were told by the representative on 5 November 2020 that the mention of there being three others involved in the episode (including him) was because the claimant had involved all three in the plan to photograph R. The photographer would be the individual who happened to be present when R called at the claimant's home. This was the first mention of others being involved in the plan).*

310 At the appeal hearing, Y was given the opportunity of questioning the claimant. Y asked a number of questions about the events of 26 May 2016. She then went on to question the claimant about the events of 8 July 2015 (being the incident of having sex in the service user's home). Y suggested that the claimant had not made an accurate record upon the respondent's system (known as Insight) as she had omitted mention of R entering the premises (whether lawfully or unlawfully). Questions were then raised about the relationship between the claimant and R on service user holidays. The claimant accepted that she had a choice as to whether

to attend the service user holidays or not but felt that there was an obligation upon her to so to do for the benefit of the service users.

311 The claimant was asked by C as to why she did not report her concerns about R to the police. The claimant said that she was *"petrified".* She said that she was in an abusive relationship with her husband and she was trying to protect her child *"to make sure he wasn't abused".* It was to evidence her concerns about the threat posed by R to her son that the claimant requested access to her tablet.

312 Y then went through the management statement of case. The appeal panel then heard from Q who was called as a witness. Q relayed his involvement in the matter.

313 The claimant and her representative were then invited to ask questions of management. Y was questioned about the issue of the claimant's fitness to attend the disciplinary hearing. She was then questioned about the events of the morning of the disciplinary hearing and the issue around the incident at the service user's home. In particular, the claimant disputed that she had lured R to the house.

314 The summing up on behalf of the claimant is at pages 2282 to 2284. In summary the claimant said:

- That the respondent had demonstrated a lack of care for her.
- That the respondent believed R even though there was irrefutable evidence proving that he had lied.
- If R had the claimant's best interest at heart he would have signposted her to appropriate services and therapy.
- The claimant sent her notice of appeal on 21 June 2016. She contrasted the seven months' period taken to arrange for the appeal hearing with the respondent's refusal to postpone the disciplinary hearing scheduled for 26 May 2016.
- That the claimant was unfit to attend the disciplinary hearing to deal with the issue around R.
- That the claimant was vulnerable having been in an abusive marriage.
- That the respondent was placing an impossible burden upon the claimant to prove that the sex between the claimant and R was not consensual. It was difficult to see how the claimant could have proved that it was non-consensual other than a full confession from R.
- That the incident in the service user's home happened only a few miles away from the claimant's house. Therefore, had the claimant planned to have consensual sex with R she could have taken him there instead of "*someone else's less than clean home".*
- The respondent had hampered the claimant's defence by refusing her access to her phone, diary, emails and tablet.

315 The management summing up is at page 2285. In summary, this said that:

- There is no dispute that the claimant was in a sexual relationship with R for three years between 2012 and 2015.
- There was no dispute that sex took place in a service user's home. R entered the property which was not documented or reported by the claimant.
- The claimant could have removed herself from situations where she would have proximity to R including service user holidays and early morning attendance in the office. She did not raise any concerns with her line manager.
- The claimant did not report the fact that R coerced her into having sex at any stage (in particular in the service user's home) to the police.
- That the decision to proceed on 26 May 2016 was reasonable in the circumstances.
- That the claimant has not expressed any remorse or empathy for the service user in that she was party to the gross breach of trust and misuse of her home.

316 The following emerged from Ms Nowell's cross-examination of the claimant around the documentation and evidence presented by her in connection with her appeal:

316.1 That the text and picture message sent to the claimant by R on the morning of 8 August 2015 (appendix 18 at page 2054) was consistent with what R said at paragraphs 12 to 15 of his witness statement before the Employment Tribunal: that R considered the relationship to be at an end in June or July of 2015, that he met her coincidentally in July 2015, that after the incident in the service user's home they met for drinks and that R found a message on Nimbuzz from the claimant upon his return from his family holiday. This prompted R to contact her and thus she had taken the initiative. The claimant said that the text and explicit photographs sent to her by R was consistent with her statement of the case that it was R who had initiated contacts on the morning of 8 August 2015.

316.2 That the claimant had been given the opportunity to cross-examine Q during the course of the appeal hearing. It was not put to Q at the time that he had given permission to her to work for AAAA.

317 Z concluded the appeal hearing and said that he would then write to the claimant with the outcome of it in due course. On 14 February 2017 he said the matter was *"a little more complex than we first thought"* and that he was in the process of drafting an outcome letter. We refer to page 2286.

318 The outcome letter is at pages 2287 to 2301. It is dated 1 March 2017. Z addressed each of the claimant's eleven points of appeal. His conclusions were as follows:

(1) That the failure to allow the claimant trade union representation at the meeting of 19 August 2015 did not disadvantage the claimant. Z found that the claimant was not disadvantaged in comparison to S who was not accompanied at the verification meeting that he

attended on 17 August 2015 nor was he given the opportunity to be accompanied at it. Z found that there was no evidence that the outcome would have changed even if the claimant had been offered the opportunity to be accompanied. (Z's conclusion that S was not accompanied in fact appears to be factually incorrect in light of the respondents' concession that he was given such a right).

(2) The reason why the claimant was not able to question Q was not his late inclusion as a witness but rather her late arrival at the disciplinary hearing by which point he had already given a substantial proportion of his evidence. Z also said that the claimant had had the opportunity of questioning Q at the appeal hearing. Z could not understand how the claimant having the opportunity of cross-examining Q at the disciplinary hearing would have altered the outcome.

(3) The disciplinary outcome letter did not refer to the evidence of P. Z therefore agreed with Y that P's evidence had made little difference to the outcome.

(4) Y had reasonably convened the disciplinary hearing and had given the claimant the opportunity to present any evidence in relation to her ability to discuss the issues surrounding R at the beginning of the hearing. Her inability so to do arose from her late arrival at the disciplinary hearing. Z said there was no indication that she had attempted to provide any evidence even when she did arrive. Further, Z said that the claimant had been able to discuss the issues surrounding R during the investigation process and he therefore determined that Y's decision was reasonable. He concluded that Y had made a reasonable decision upon the issue of the claimant's fitness to attend the disciplinary hearing and answer the R allegation. He justified his conclusion upon the basis that the question of fitness had only been raised shortly before 26 May 2016 and that the claimant had been "*perfectly capable of discussing these issues during the investigatory stage and in particular at the meeting of 9 December 2015."* Z stood by his conclusion during cross examination notwithstanding the medical material in appendix 5 of the claimant's appeal documents and the email trail with Dr R of 3 June 2016. Z said in evidence that "*I* struggle to see *how you can work but not be fit to attend a disciplinary hearing."* He appeared to take issue with Dr R' opinion.

(5) and (6) These grounds of appeal significantly mirrored ground (4).

(7) Z concluded that Y's decision to proceed in the claimant's absence was reasonable.

(8) This largely repeats ground (7).

(9) Both the notes and the claimant's amended notes of the meeting of 9 December 2015 were included in the papers available to the disciplinary panel. Z preferred the management's case in relation to the issue of whether or not the claimant had raised concerns about R before 1 October 2015. Z said that in the email to him (Z) of 16 September 2015 there had been no mention of the encounter in the service user's home. Further, the claimant indicated a willingness to continue to work with R if absolutely necessary which Z

considered at odds with the subsequent allegation of non-consensual sex. Z rejected the claimant's case that Y referring to the claimant's companion as '*James'* was evidence of a hidden agenda or a foregone conclusion. Z also rejected the claimant's complaint that there were inaccuracies in the disciplinary outcome letter reflective of the inability of the respondent to take an accurate note of the disciplinary hearing.

(10) This was largely a repeat of grounds (4) and (5) of the appeal. Z says that Y was not being pejorative in implying that the claimant was delaying matters through her work for AAAA but simply said that the claimant was doing so as a matter of fact.

(11) This was a repeat of grounds (4), (6), (7) and (10) of the appeal. Further, Z concluded that the claimant had not sought to present any additional evidence to enable Y to consider whether to remove the R allegation from the scope of the disciplinary hearing.

319 Z says at paragraph 55 of his witness statement that, *"my overall finding was that [the claimant] did not dispute the fact that she had had sex with R in a service user's house. I took into account her mitigation argument that she had been 'groomed' by R and that the sex had been non-consensual but I noted no evidence to substantiate that accusation. I noted inconsistency in [the claimant's] actions in not having presented these issues to the police which, if proven, could have amounted to a criminal offence".*

320 Z was asked what evidence would satisfy him that the claimant was being coerced by R. He replied that the respondent does not have investigators and a serious allegation would be passed on to the police. He said that to investigate such a matter would take healthcare professionals away from patient care. He set store by the claimant not having involved the police and that he would expect the claimant to "*take steps to safeguard herself and her son."* He found it to impact upon the claimant's credibility that the claimant had reported matters to the respondent and the NMC but not to the police.

321 He appeared reluctant to accept that the reports at pages 2020 (the spiritual counsellors' report of 9 April 2016) and 2022 (the [x]RASAC report) identified R as involved in coercion of the claimant. He said that he had seen *"no evidence of that"* and was satisfied upon the point by there been no adverse finding against R in the disciplinary case against him and the findings of X. He pointed out that neither report identified R by name. In our judgment, this evidence lacked conviction. Page 2020 refers to a *"work colleague"* with whom she felt *"pressured to have sex."* Page 2022 refers to *"her sharing her experience of having been repeatedly sexually abused over a period of time by a mental health nurse & CBT, who happened to be a colleague and offered to professionally support [the claimant]."* In the context of the action taken against the claimant and R for having sexual relations (including in a service user's home), of R having faced a disciplinary charge of subjecting the claimant to a coercive relationship and the coercion being the claimant's defence to the allegation which she faced upon the matter, in reality, there can be no other credible candidates than R as the individual being referred to in the reports. Z said in evidence that he did not know why these reports were produced by the claimant. It was suggested that they had been given little

weight by him because of his erroneous belief that they had been produced late. Z's reply was that he *"could not remember."*

322 Regrettably, it did Z little credit before the Tribunal to seek to argue that he could not be satisfied that R was the individual in question in the claimant's medical reports. He suggested that the spiritual counsellor referred to the claimant reporting *"leaving what she described as a difficult relationship"* did not necessarily refer to the relationship between the claimant and R. This was unconvincing as the context of the report is the relationship between R and the claimant. No other relationship was being remarked upon. It was suggested to Z by the claimant's representative that R was the only CBT-qualified member of the claimant's team. Z asked, *"why wasn't that highlighted more significantly."* His own evidence therefore is that at the time of the appeal hearing Z was incurious as to the identity of the individual being referred to in the reports advanced by the claimant in her defence in circumstances where on any view the answer was plain and if not, was readily ascertainable from a check of the membership of the claimant's team at the material time. In our judgment, Z closed his mind to the fact of the claimant praying in aid in her defence that she had been coerced by R.

323 Z fairly accepted that appendix 6 of the claimant's appeal case (page 2026) corroborated the claimant's position that she had needed to seek medical assistance on the morning the disciplinary hearing.

324 Z upheld Y's decision not to allow the claimant to enter the disciplinary hearing upon her arrival and for her refusal to accept the statement of case from the claimant. Z justified his position upon the basis that *"the hearing had already started, she was late and a case like this [the Unison statement of case] needs proper consideration of the documents put before it."* He also commented that *"the case had started, two or three witnesses had given their evidence, there had been several adjournments."* He did not accept the claimant to have been prejudiced by not being allowed in to the hearing and felt that allowing her to present written submissions was a fair way to proceed, notwithstanding that she would not know what was said by the witnesses prior to her arrival and thus was in no position to respond to their evidence. Z was asked when the claimant may have had the opportunity to present evidence in support of the exclusion of the R allegation upon her arrival at the disciplinary hearing on 26 May 2016. He said that there was an opportunity for her to make written representations afterwards and had the chance to present evidence prior to the hearing.

325 It was suggested that there had been procedural unfairness because the claimant was not notified in advance that Q was going to attend the appeal hearing to give evidence. Z defended the respondent's position upon the basis that Q was called so as to give the claimant's side the opportunity of asking him questions. This was the position as set out in Z's appeal outcome letter at page 2290.

326 Z did not accept that the contents of the email chain between the claimant and Dr R of 3 June 2016 at pages 2012 and 2013 justified upholding the appeal and ordering a rehearing. (The option of a rehearing was one open to Z). He set little store by the claimant's representative's contention that the allegation of there being coercion gained credibility because of the proximity of the claimant's and service user's homes (the suggestion being

that a consensual relationship was more likely to take place in a commodious home environment).

327 The respondent's credibility was also impugned upon the basis that an inaccurate note had been made of the claimant allegedly saying (according to Y in the management statement of case and recorded in Z's letter of 1 March 2017 at page 2298) at the investigation meeting of 9 December 2015 that "*by oversight*" she had omitted reference to having had sex in the service user's home when she actually said that she thought that had been included in the NMC complaint.

Cross examination of the claimant in July 2017

328 The following additional points not covered above emerged from the cross-examination by Ms Nowell of the claimant:

- She acknowledged that it was not appropriate to start a therapeutic relationship with R who was a friend and colleague. When it was suggested that she should not have got involved with him she said that she saw him as skilled and he offered her help.
- The claimant accepted that therapy in a coffee shop was not appropriate. She maintained that there had been *"numerous"* formal sessions.
- The claimant felt that she was unable to stop seeing R because she had already started to discuss matters with him. She denied that the relationship was no more than an adult one.
- The claimant maintained that she had no control over which staff would go on service users' holidays. The staff who would go would be those who had been involved with the service user's care.
- The claimant accepted having sent a number of explicit sexual images from her personal phone to R. The claimant said that this was *"more than one or two".* The majority of contact was through personal mobile telephone use.
- The claimant was unable to produce her mobile telephone records at this stage as her mobile phone provider is only able to retrieve records from up to two years ago.
- She said that she sent the explicit photographs and images by Nimbuzz to R in order to attract his attention in order that the therapy would continue.
- The claimant felt that she had no choice but to submit to sexual intercourse in the service user's house notwithstanding the fact that she had decided to separate from R at this stage and therefore (on the respondent's case) could not blame the incident on the continued need for therapy.
- That R, according to the claimant, made arrangements for the appointments in coffee shops. The claimant said that she would have preferred the meetings to take place in an "*official room".* The claimant accepted that it was not possible to *"book"* a meeting with R as he is a member of the [*x*]ORT team.

- Although the claimant was aware of the respondent's bullying and harassment policy (in particular at pages 132 (21),(29) and (35)) the claimant felt she was unable to raise any complaints about R until the relationship had ended. When it was suggested that there was nothing the respondent could have done in the circumstances the claimant said that, *"disclosing abuse is very difficult".*
- The claimant accepted that the majority of the relationship was conducted out of the workplace in coffee shops, *"up mountains"* (as Ms Nowell put it) in a local national park and at the claimant's house. The claimant accepted this to be the case. Under questioning from the Employment Judge, the claimant said that the therapy sessions took place in coffee shops during working hours but also at the workplace where R would take her into a separate room. The claimant said that the longer sessions took place at coffee shops.
- The claimant had presented no mitigation evidence to the disciplinary panel around the issue of her relationship with R.
- The claimant confirmed that R was keeping no medical notes of his meetings with the claimant which the claimant contends to be therapy.
- The claimant said that R's blackmail of her "*started subtly and got more threatening. That's why I went to my son's school."* She thought that there was a threat of him publishing the explicit images at some point *"after 2012. It ended in July 2015. I imagine it was to the middle and end. That's what I've said. I had a long feeling he'd use them."*

The AAAA issue and the criminal proceedings

329 As we have said, an issue in this case arises around the claimant having obtained employment with AAAA commencing on 9 November 2015 and ending on 29 June 2018. The respondent called evidence from E and JJ.

330 E's evidence is that the fact of the claimant working for AAAA came to light when X became aware via a colleague that the claimant had been seen working for AAAA. X spoke to DD who advised X to inform the respondent's counter fraud team. This is known as 360 Assurance. E says that X contacted 360 Assurance on 23 March 2016 before formally referring the matter on 18 April 2016. (X gives the date upon which she found out about the claimant's work for AAAA as being in April 2016).

331 JJ explains that, *"360 Assurance is part of NHS Audit England and is hosted by the Leicester Partnership NHS Trust. 360 Assurance provides internal audit and counter fraud services to Trusts including the respondent".*

332 JJ undertook the counter fraud investigation upon behalf of the respondent. The investigation *was "into alleged fraud by [the claimant] relating to her employment with AAAA during her period of paid suspension by [the respondent]".* JJ refers us to the copy of the prosecution case which is at pages 288 to 292AB. Witness statements obtained in the course of the criminal investigation into the claimant's conduct may be found at pages 295 to 319AB.

333 DD's witness statement (at pages 303 and 304AB) corroborate JJ's case that X contacted DD requesting advice about how best to proceed. It also corroborates that DD advised X to report the matter to 360 Assurance.

334 Pages 307 and 308AB confirm X's statement. This sets out how the matter had come to light. In essence, the claimant had been seen working for AAAA by a student social worker who knew her from her work within the respondent's Outreach Team.

335 JJ's evidence is as follows:

"(6) I can confirm that as soon as I was informed of a potential fraud issue, I informed X that the Trust should not conduct its own investigation into the allegation of fraud. I was made aware at the time that the Trust was investigating allegations of misconduct against [the claimant], though I was not aware of the details. I advised the Trust that it could continue with its disciplinary investigation into those allegations as long as the investigation did not involve any action that might "tip-off" [the claimant] or prejudice the counter fraud investigation. This is standard practice and in line with the guidance issued by NHS Protect (now known as NHS Counter Fraud Authority) regarding "parallel criminal and disciplinary investigations" ("the guidance") (pages 491 to 502) (additional bundle)."

336 In evidence given under cross-examination, JJ said that NHS Counter Fraud Authority is the lead organisation.

337 JJ goes on to say in paragraph 8 of his witness statement that:

"*The guidance is clear that a disciplinary hearing should not normally take place if it will prejudice ongoing criminal proceedings (see paragraph 2.3 at page 494 of the additional bundle). In this case there was a significant risk that a disciplinary investigation by the Trust could prejudice the counter fraud investigation. Consequently, from the perspective of counter fraud investigation, it was decided that the Trust should delay any disciplinary investigation into [the claimant's] employment with AAAA. For example, a disciplinary investigation could have "tipped off" [the claimant] about the counter fraud investigation and this could have put potential evidence or Trust witnesses at risk that might have been relevant to the criminal case, which could have had a significant impact on the counter fraud investigation. [The claimant] would have potentially also have been alerted to the criminal investigation before she had been interviewed under caution of possible criminal offences and would have been pre-prepared for that interview*".

338 JJ says in paragraph 9 of his witness statement:

"That being said, there are circumstances where the disciplinary process can run in parallel with the counter fraud investigation. For the reasons and risks outlined above, such an approach is the exception rather than the rule. However, the guidance states that parallel investigations can occur where there are overriding public interest considerations, where allowing someone to remain in post whilst counter fraud secures the necessary evidence for a criminal investigation would enable the individual to continue the alleged fraudulent activity and/or bring about increased financial loss to the organisation (see paragraph 3 of section 2.3 on page 494 of the additional bundle)."

339 It may be worth citing paragraph 2.3 of the guidance (at page 494AB) in full:

"*2.3 Timing of parallel investigations.*

There is no legal rule giving precedence to the criminal process over the disciplinary one, and the employer may undertake disciplinary proceedings even if a criminal investigation is ongoing. The ACAS guidance on discipline and grievances at work (March 2011) states that "where the conduct requires prompt action the employer need not await the outcome of the prosecution before taking fair and reasonable action". Furthermore, the Court of Appeal has held that where an employee chooses to remain silent in anticipation of criminal proceedings, the employer is entitled to draw conclusions from the evidence before it about the employee's actions, and the dismissal in this case may be fair.

However, a disciplinary hearing should not normally take place if it will prejudice ongoing criminal proceedings. The circumstances of the case may be such that HR wished to delay disciplinary proceedings until the LCFS has secured all evidence for use in the criminal enquiry. Such a decision should be made in consultation with the LCFS and director of finance. Delays in disciplinary proceedings do not necessarily make a dismissal unfair.

On the other hand, public protection is paramount; the decision to give precedence to the criminal process over the disciplinary one must be subject to overriding public interest considerations – namely, the risks to the organisation, patients and/or the wider public caused by a delay in applying a disciplinary sanction. For example, allowing someone to remain in post while the LCFS secures the necessary evidence for the criminal investigation could mean enabling that individual to continue the alleged fraudulent activity, bringing about increased financial loss to the organisation and, some cases, endangering patient safety. In serious cases (in particular where there is a high risk to patient safety) the organisation should proceed with relevant employment processes expeditiously whilst at the same time keeping the LCFS informed of any proceedings".

340 LCFS stands for "*the Local Counter Fraud Specialist*". We refer to the introduction section at page 483AB.

341 In paragraph 10 of his witness statement JJ says that:

"If [the claimant] had not been dismissed by the Trust in June 2016 and the Trust had approached me to insist that it be allowed to conduct a disciplinary investigation into her employment with AAAA rather than continue on paid suspension and delay disciplinary action until the conclusion of the criminal process, then this is likely to have provided sufficient justification to warrant a parallel investigation. In those circumstances, I would have had a conversation with the Trust's directors of HR and finance in order to agree how an internal disciplinary investigation could proceed without prejudicing the counter fraud investigation and the Trust would have to have kept 360 Assurance updated and sought guidance at every stage of the disciplinary process".

342 In paragraph 11 of his witness statement, JJ refers to some of the documentation which he obtained as part of his investigation. He refers to the offer letter sent by AAAA to the claimant. This is dated 4 November

2015 and is at pages 397 to 400AB. Pages 400 to 404 is a statement of the particulars of employment issued to the claimant by AAAA signed by her on 8 November 2015. He says in paragraph 12 that he "*was not able to share with the Trust any of the information I obtained as part of the counter-fraud investigation, until the conclusion of the criminal prosecution."*

343 The claimant's application form dated 23 October 2015 is at pages 391 to 393AB. The claimant said in that form that she did not currently work or intend to work for any organisation other than AAAA (page 391AB). She provided as a referee the centre manager of a children's centre for whom she had worked between 1 July 2014 and 1 October 2015. She said that the children's centre was her last employer. This was of course untrue.

344 JJ also obtained a copy of the curriculum vitae which the claimant had submitted to AAAA. This is at pages 430 to 432AB. The CV referred to the claimant having worked for the respondent between December 2003 and 2007 but omitted mention of her current employment with the respondent.

345 Accompanying the CV (at pages 428 and 429AB) is a statement from LL. She is an employee of a recruitment agency used by AAAA. The respondent asked LL for a copy of the CV that had been submitted to the agency (and which was subsequently used as the basis of her application for employment with AAAA). LL provided the copy of the CV at pages 430 and 432AB. LL confirmed that the agency holds no other versions of the claimant's CV.

346 Following his investigation, JJ wanted to interview the claimant. He invited her to attend an interview to take place on 30 August 2017. The claimant was told that 360 Assurance suspected the claimant of having committed possible offences contrary to the Fraud Act 2006. She was invited for interview to take place under caution. The claimant did not attend. The invitation was repeated on 31 August 2017. The claimant was invited to attend for interview on 19 September 2017. Again, she did not do so. A further invitation was therefore issued on 18 December 2017. We refer to pages 465 to 467AB.

347 The claimant having failed to attend voluntarily upon three occasions, JJ enlisted the help of South Yorkshire Police. The claimant was arrested on 19 February 2018. She was interviewed under caution at a police station that day. A copy of the notes of interview is at pages 438 to 454AB. JJ's evidence is that the claimant provided a *"no comment"* interview.

348 On 27 April 2018 the claimant was charged with the offence of dishonestly failing to disclose information to make a gain for herself or another or cause or expose another to loss. JJ refers to the details of the charge sent to the claimant's solicitor on 11 May 2018 (page 285AB). The charge read as follows:

"Between 23 October 2015 and 19 September 2017 at [X] committed fraud in that you dishonestly failed to disclose to your employer [the respondent] information, namely that you completed an application form with AAAA Health Care to be a HCP disability analyst and that you made false representations in that application and undertook that position during a period of suspension on full pay from your employer, which you were under a legal duty to disclose intending by that failure and false

representation to make a gain, namely £21,219.58 for yourself in pay from your employer".

349 The claimant appeared in the Magistrates' Court on 18 June 2018. The matter was committed for disposal in the Crown Court. The trial commenced in the Crown Court on 8 January 2019 and concluded on 14 January 2019. The claimant was found guilty by a jury of *"dishonestly making false representations to make a gain of herself/another or cause loss to other/expose other to risk."* The certificate of conviction to this effect is at page 2SB.

350 JJ says that "*the CPS altered the charge in response to the unfortunate death of one of the prosecution witnesses [Q] although [Q's] evidence was allowed into evidence following hearsay application*".

351 The claimant was convicted of a criminal offence contrary to sections 1 and 2 of the Fraud Act 2006, specifically for dishonest false representation to make a gain for herself. The claimant received a non-custodial sentence.

352 The indictment upon which basis the claimant was convicted is that at page 278AB/1SB. This is dated 9 January 2019. The charge in the indictment is different to that set out in paragraph 348. The particulars of the offence of which she was convicted is that the claimant did on or about 23 October 2015 dishonestly make a false representation to AAAA namely that she had not been subjected to any proceedings for professional misconduct and/or that a last employer was in the children's centre and that she did so knowing that the same were, or might be, untrue or misleading, and intending thereby to make a gain for herself or others. It is unknown whether the jury found the claimant to be guilty of both limbs of the indictment. However, it is a reasonable supposition that the claimant was found guilty only of making a false representation about the identity of her last employer because in October 2015 she was not facing any professional misconduct proceedings before her professional body.

353 As we have said, the indictment upon which the claimant was first arraigned is that at page 285AB. The claimant was unable to confirm the amount of remuneration received but accepted that she had received pay from the respondent while working for AAAA.

354 In supplemental evidence given in chief, JJ was taken to the sentencing remarks of Mr Recorder Doig who presided over the claimant's criminal trial. These are at pages 3 to 5SB. Mr Recorder Doig said that he had "*considered carefully whether I should make any orders for compensation or order you to pay the costs incurred on your prosecution*". JJ explained that he had presented two accounts or bills to the court. One of these was the salary paid to the claimant in the sum of £17,322.25 (being the net wages paid to her by the respondent during the suspension period) together with 360 Assurance's costs. In the event, no compensation order was made upon the basis of the claimant's impecuniosity.

355 JJ was taken to the claimant's defence statement which is at pages 281 to 284AB. From this, we see that the claimant contended that she had had a conversation with Q and was led to believe that she could perform work with another organisation providing that the other work did not clash or compromise her work with the respondent. She challenged the accuracy of Q's statement (at 297AB). Q said in this statement that, "*around four*

years ago I recall [the claimant] mentioning some possible part-time work for AAAA Healthcare undertaking Department for Work and Pensions Personal Independent Payments in [X] to me, verbally. I replied this would be in order as long as it did not interfere with [the claimant's] work for the Trust. Records show no formal declarations of other work from [the claimant]. This has remained the same following [the claimant's] suspension from employment with the Trust on full pay. [The claimant] has not requested approval for nor declared any non-NHS work to the Trust".

356 The other issue to which JJ's attention was drawn arising from the defence statement at pages 281 to 283AB concerns the issue of the claimant's CV. The claimant maintained that an accurate CV was sent to the recruitment agency. This CV was accurate, she said, because it did disclose that she was employed by the respondent. JJ said that no other CV featured in the Crown Prosecution Service's disclosure than that at pages 430-432AB (also appearing at pages 462 to 464AB). JJ said that during the course of the Crown Court trial it was suggested that there was a second and accurate CV. He said that Recorder Doig had adjourned proceedings in order to provide the claimant with an opportunity of producing evidence that a second CV had been sent to the recruitment agency but to no avail. The Tribunal was in fact furnished with a copy of the second CV during the course of the hearing in November 2020.

357 The claimant applied to the Tribunal for permission to adduce a witness statement from LL. This application was made on 13 December 2019. It was refused. The claimant repeated her application on 16 December 2019 and on 4 November 2020. The application was refused upon the basis that the claimant was seeking to mount a collateral attack upon the fact of her conviction. Pursuant to section 11 of the Civil Evidence Act 1968, the fact of conviction is admissible in evidence for the purposes of proving that the person convicted committed that offence. The statutory presumption may be displaced where the individual is able to adduce fresh evidence not available at the time of the criminal proceedings which would probably have an important influence on the case. Authority of this proposition is to be found in the House of Lords judgment in ***Hunter v Chief Constable of West Midlands Police*** [1982] AC 529. The fact of the claimant submitting a second truthful CV would not, in our judgment, have had an important influence on the outcome as the fact of the matter is that the claimant submitted a misleading first CV accompanied by an application form, both of which omitted reference to her being at that time (in October 2015) an employee of the respondent.

358 JJ said that Q's evidence for the criminal case was formally entered into evidence with the agreement of the claimant (subject to an alteration of a date within the statement). The same was the position upon the evidence of LL. The claimant was asked about this during cross examination. It was suggested that the claimant only raised the matter of the second CV in the middle of the criminal trial <u>after</u> her agreement of LL's evidence. She was given a warning by the Employment Judge that she need not disclose the legal advice given to her by the legal team in the criminal case as it was protected by litigation privilege. The claimant acknowledged this but said that in any case she had little recollection of matters as it was *"a difficult time."*

359 The following evidence emerged from the cross-examination of JJ:

359.1 It was put to him that the reason for the change in the indictment from that at page 280AB to that at pages 278AB/1SB was because there was no obligation upon the claimant to make any disclosure to the respondent that she was working for AAAA. By way of reminder, the indictment against the claimant as originally framed was one of dishonesty failing to disclose to the respondent that she had obtained work for AAAA. The indictment upon which she was charged was one of making a false representation to AAAA. JJ accepted that the Crown Prosecution Service had changed the indictment. However, he attributed this to the passing of Q. He was unable to otherwise comment as to the basis upon which the CPS had altered the indictment.

359.2 That said, JJ considered that the claimant did have an obligation to disclose her activities to the respondent. He referred to her statement of terms and conditions (at page 2400(5)) and the respondent's *"declaration of interests and standards of business conduct policy"* which commences at page 357AB and to which we referred above.

359.3 JJ fairly accepted that it was *"not viable"* for the respondent to have been told by 360 Assurance that the respondent could proceed with its investigation into the AAAA matter (were the claimant not to have been dismissed). JJ accepted that, while hypothetical, it was a reasonable supposition that were the claimant not to have been dismissed on 14 June 2016 the respondent would not have been in a position to proceed (or at any rate, told by 360 Assurance that they could proceed) prior to 30 August 2017. This, it will be recalled, was the first date scheduled for the claimant to voluntarily attend for interview under caution. JJ was asked that were the respondent to have been permitted to proceed prior to that date, what could have been shared with the claimant? JJ seemed unsure and said that it was *"hypothetical"* and that he would need to liaise with others. JJ then said that had the claimant attended voluntarily for the interview under caution on 30 August 2017 the respondent may have been given permission to proceed with its internal disciplinary investigation. JJ then said that permission may have been withheld for the respondent to proceed in the event that the claimant exercised her right to conduct a *"no reply"* or "*no comment"* interview.

360 It was put to JJ that the recruitment agency may have been sent a second CV but this was not available because of the recruitment agency's policy upon shredding documents. JJ said he was not aware of the agency's shredding policy.

361 Upon questioning from the Employment Judge, JJ was asked where the decision rests when deciding whether or not to proceed with an internal disciplinary investigation where there is a pending 360 Assurance investigation. JJ said that this would be a joint decision upon a case-by-case basis. He said that advice would have to be taken from the Crown Prosecution Service and that it can take several months for the specialist fraud division to revert to the local counter fraud section dealing with the matter.

362 Upon the AAAA issue, E gave the following evidence:

(*9) … "When [the claimant's] employment with AAAA came to light the Trust was instructed by 360 Assurance not to investigate the matter under the Trust's disciplinary procedures to avoid any prejudice being caused to the fraud investigation. For the same reasons, the Trust was not able to inform [the claimant] about the ongoing fraud investigation. This is consistent with the Trust's disciplinary policy (see paragraph 6.5.12 at page 342 (additional bundle) and also with the guidance issued by NHS Protect regarding "parallel criminal and disciplinary investigations"). This is the guidance followed by the Trust when dealing with incidents of suspected fraud, which give rise to both criminal and disciplinary investigations ("policy statement – April 2013 at pages 481 to 490 (additional bundle)" and the "guidance for local counter fraud specialists – April 2013" at pages 491 to 502 (additional bundle))".*

363 Paragraph 6.5.12 of the respondent's disciplinary policy to which E referred says: "***Incidents involving fraud*** *– where employees have been involved in incidents that are potentially fraudulent, the local counter fraud specialist must be informed immediately who will provide advice on what next steps should be taken".*

364 The April 2013 policy statements to which E refers says (at page 483) that "*it is not unusual for the criminal and disciplinary processes to overlap. For example, an employee who is being investigated for suspected fraud may also be the subject of disciplinary proceedings by their employer arising out of the same set of circumstances. In the case of parallel criminal and disciplinary processes, these should be conducted separately, but there needs to be close liaison between the LCFS and the HR functions since one process may impact on the other. This may include the sharing of information where lawful and at the appropriate time. A joint working protocol should be established and agreed between the LCFS and director of HR, indicating the responsibilities of specific individuals; the frequency of liaison meetings; and specific interaction points during parallel investigations. Support and oversight from the director of finance and senior management are required to ensure this implemented effectively".* It then goes on to refer to the basic aspects to be covered by such a protocol which is set out within the policy statement at sections 4 and 5.

365 The policy statement provides that:

"*Criminal and disciplinary investigations must be conducted separately and by different people. The two investigations have different purposes, standards of proof in determining guilt, and different outcomes, and therefore it would not be appropriate for one process to cover both. The LCFS should not conduct disciplinary investigations: if the LCFS were to act as investigator in both the criminal and disciplinary investigations, this would risk undermining the integrity of both processes in relation to the way evidence has been gathered. The criminal process may determine the actions and timing of related disciplinary investigations, particularly where there is a risk of prejudice to the criminal case. However, there may be other circumstances where sanctions are pursued concurrently, so that the public interest is protected and disciplinary proceedings are heard in a just and timely way. All relevant personnel should be made aware of the parallel proceedings*".

We have cited the salient parts of the *"guidance for local counter fraud specialists"* (in particular the issue of the timing of parallel investigations cited at page 494AB in paragraph 339).

366 E says in paragraph 10 of his witness statement that,

"*Clearly in [the claimant's] case the initial stance adopted by counter fraud was that the Trust's disciplinary investigation into [the claimant's] employment with AAAA should be delayed so as not to prejudice the investigation into suspected fraud. For that reason, the Trust did not conduct its own disciplinary investigation at that time regarding the allegation that [the claimant] was working at AAAA during the period of her suspension, but proceeded with the disciplinary hearing on 26 May 2016 to deal with the allegations that had already been investigated under the Trust's disciplinary procedure".*

367 E says at paragraph 11 of his witness statement that he considers this to have been the appropriate way to proceed. He says that,

"I would not have considered it appropriate to put the disciplinary process on hold pending the conclusion of the counter fraud investigation (and any subsequent criminal proceedings) in the absence of a request to do so and given the uncertainty regarding how long that process may take."

This approach was justified upon the basis that the matter being investigated by counter fraud was entirely different in nature to the disciplinary allegations being faced by the claimant.

368 At paragraph 12 of his witness statement E says that,

"*Had [the claimant] not been dismissed in May 2016 for having had sex with a colleague in a service user's home, I consider it extremely likely that she would have been dismissed soon after for working for AAAA during her suspension. In any event, [the claimant] may not have been able to return to work for the Trust had she not been dismissed, as I am now aware that she was employed by AAAA on a full-time basis working 37.5 hours a week (see page 394 – additional bundle). I am also aware that [the claimant] continued to work for AAAA until she resigned in or around June 2018*.

369 At paragraph 13 of his witness statement E says that,

"It is difficult to predict how soon after the disciplinary hearing on 26 May 2016 that [the claimant] would have been dismissed".

He says that because of the ongoing investigation by counter fraud and the fact that the claimant was working for AAAA during a period of suspension meant that it was "*very unlikely that the Trust would have been willing to allow [the claimant] to return to work after the disciplinary hearing*". This is because the claimant *"did not disclose that she was working elsewhere but instead tried to conceal the fact (for example, see [the claimant's] comments in her email dated 24 May 2016 (at page 1781) which undermined the trust and confidence the Trust had in her".*

E took the view that the claimant was concealing information from the respondent as the tenor of her request would lead the reader to conclude that it was tantamount to a denial.

370 The email at 1781 to which E refers was addressed to X and Y. Z and C were copied into it. The claimant said,

"Please forward me any and all information in the possession of [the respondent] to suggest or indicate that I have been working for another organisation since 9 November 2015 as stated in your correspondence and that makes you believe that I have been postponing hearings/OH appointments during a period of time because I had been working for another organisation (as stated in your correspondence)" [emphasis added by the Tribunal].

She went on to say that if the respondent was unwilling to respond voluntarily, then her email was to be treated as a subject access request made by the claimant under the Data Protection Act 1998. The email was also addressed to *"Freedom of Information"* (presumably that being a department within the respondent).

When taken to this email in cross examination, the claimant maintained that she had not sought to conceal that she was working for AAAA. She was seeking the information in the respondent's possession upon which basis the respondent believed the claimant was delaying matters because of her work for AAAA. The word *'and'* emphasised in the citation was, in our judgment, unfortunate and created ambiguity as its inclusion left open each party's interpretation whereas its omission would not.

371 E said in paragraph 13 of his witness that,

"*It was essential for the organisation to have full Trust in [the claimant] that she would be open and honest with the Trust if/when things went wrong (in accordance with the HCPC Standards of Conduct, Performance and Ethics – see page 248).*"

This was the case given that the claimant's role *"involved looking after individuals with mental health problems and learning difficulties".* He took the view that the claimant's actions *"fundamentally undermined that trust, as well as breaching her professional obligations to be 'honest and trustworthy' in accordance with the HCPC Standards of Conduct".*

372 E then says that,

"In those circumstances, I have no doubt that the Trust would have contacted counter fraud to inform it of the need for the Trust to conduct its own disciplinary investigation into the issue, to run in parallel with the counter fraud investigation".

He then refers to section 2.3 of the guidance for local counter fraud specialists cited above.

373 At paragraph 15 of his witness statement he says that,

"*As it is not in dispute that [the claimant] was in fact working for AAAA during her suspension, the Trust would have conducted a relatively quick investigation under the Trust's disciplinary procedure to establish details of her employment with AAAA. Following the conclusion of that investigation, it is more than likely that a disciplinary hearing would have been convened and [the claimant] would have been dismissed for either gross misconduct or for a breach of trust and confidence caused by [the claimant's] lack of honesty and integrity".*

He then says at paragraph 16 that he "*can recall two cases in the last 24 months where the Trust has conducted its own internal disciplinary investigation in parallel with a criminal investigation*".

E estimated that there had been five or six cases over the same period where domestic action had been suspended pending criminal proceedings. He was unsure if some or all of those cases involved employees exercising a right to silence.

374 E was asked why he considered that the claimant's actions in working for AAAA amount to gross misconduct. He said that she was doing so without the respondent's knowledge and was being paid by the respondent during her period of suspension. His view was that she was thus obliged to fulfil her contractual duties (apart from being required to work). He rejected the claimant's representative's suggestion that being contactable and able to attend work at short notice (even if working for a third party when called upon) was acceptable. He rejected the suggestion that the suspension letter dated 25 August 2015 at page 262-263 (which required the claimant to be contactable during normal office hours) was effectively a variation of the contract or of the disciplinary policy (at paragraphs 6.3.6 and 6.3.9 at page 115).

375 E acknowledged that there may be mitigation for working for a third party available to an employee in such a circumstance. In the judge's sentencing remarks in the criminal case, reference was made to the judge accepting that claimant was motivated to work during her suspension *"to remain active at a time of personal strife."* E said that he would need further information about the nature of the personal strife in question when deciding upon an issue of mitigation. He fairly did not discount the possibility of strife in the form of coercion from R being good mitigation if credible evidence was advanced. Likewise, it was accepted by E that express permission from her line manager would be a good defence to the allegation. E was not aware of Q having done so and commented that it would be "*not usual"* for a line manager to make such a decision without discussing matters with HR.

376 Upon the question of when disciplinary action may have taken place against the claimant upon the AAAA issue, E commented that it was a decision for HR after discussion with counter-fraud as to when an investigation that is run in parallel with criminal proceedings may take place. Z agreed with E's view. Under questioning from the Employment Judge, E accepted that the respondent would "*not normally*" go against a request from counter-fraud not to run a parallel enquiry. In re-examination, he considered this case to be *"black and white"* and saw no reason for there to have been a delay in domestic proceedings notwithstanding there to be a parallel criminal case.

The professional misconduct proceedings

377 The claimant appeared before the Conduct and Competence Panel of the Health and Care Professions Council. The transcript of the hearing is at pages 1 to 277AB. The hearing was held on 14 and 15 May and 15, 16 and 17 August 2018. The allegation against the claimant was that *"whilst registered as an occupational therapist, and during the course of your employment at [the respondent]: (1) in approximately July 2015, you had sexual intercourse with [R] in service user A's home; (2) the matters set out in at (1) constitute misconduct; by reason of your misconduct, your fitness to*

practice is impaired." The claimant faced a similar allegation when the matter came before the respondent's disciplinary panel (paragraph 138 above).

378 The HCPC panel, as the claimant accepted, is an independent panel. It comprised of a female chair, a male lay member and female occupational therapist. The claimant did not accept that the occupational therapist member would necessarily have the same degree of safeguarding experience as she herself was possessed of.

379 The panel found the allegation proved and that the claimant's fitness to practice was impaired. The decision is at pages 266 and 267 of the HPC bundle. The panel held that the claimant's conduct "*had the clear potential to cause harm to service user A by diminishing the trust that she was entitled to have in the professionals charged with her care."* The panel held the claimant to be in breach of the HCPC's standards of conduct and that fellow professionals would regard the claimant's behaviour as *"deplorable."*

380 The claimant ran the same defence as she raised before the respondent's disciplinary and appeal panels: that she had been coerced into having sexual relations with R. The HCPC considered the claimant's defence that she "*had no choice over whether to have sex."* The panel said that, *"[the claimant's] insight is …limited by the fact that she does not accept that she had the ability to decline to behave in a way she accepts was wrong."* The panel said that the claimant's "*failure to accept personal responsibility for her actions on 8 July 2015 has the consequence that the panel cannot be satisfied that [the claimant] would take control of circumstances in the future if matters followed an unprofessional direction. For these reasons, the panel finds that [the claimant's] fitness to practice is impaired upon consideration of the personal component."*

381 The panel imposed a sanction of a caution order for a period of three years. The Tribunal takes judicial notice that this is the least restrictive sanction that may be imposed by the HCPC panel.

382 The claimant was represented at the HCPC panel hearing by the same representative as appeared before us. The claimant, R and X appeared and gave evidence to the panel.

383 The HCPC bundle contains the documents before the HCPC panel. This included the management's statement of case referred to in pages 133 to 603 and referred to in paragraph 172 above. (Some of the material within pages 133 to 603 was omitted from the HCPC bundle as the patient confidentiality issue was not before the HCPC).

384 There is then within the HCPC bundle what is described as the *'end of evidence bundle.'* This comprises of the claimant's evidence. We can see that the medical material summarised within appendix 5 of the claimant's appeal before the respondent is included here. The claimant also included an email from the claimant's son's school dated 19 July 2017 to confirm that the claimant telephoned the school on 11 June 2015 to inform the school that R should not be given contact with her son. The school also confirmed that the claimant emailed the school on 9 December 2015 to confirm her instruction and sent to the school a photograph of R. (The email of 9 December 2015 was that at appendix 16 of the claimant's appeal). Also included was the email from Q of 20 August 2015 summarising his account of R's conduct which we have referred to in paragraph 44 above.

385 The claimant said that her ability to give evidence before the HCPC was impaired. In support of this contention she produced a letter from her GP dated 14 August 2018. This said that the claimant had "*a panic attack on the day she was meant to be attending the hearing of [her] professional body."* It is not clear upon which date the panic attack occurred. The Tribunal accepts that the HCPC proceedings were stressful for the claimant.

386 The HCPC gave full reasons for the decision reached in August 2018. These are at pages 503 to 513. The panel rejected the claimant's case that the claimant *"had no ability to prevent the incident [of 8 July 2015] occurring"* and that there was a *"formal therapist/service user"* relationship.

387 The panel found that the relationship between the claimant and R was consensual at the beginning and that at no time did R *"knowingly coerce, threaten or blackmail [the claimant] into doing anything."*

388 The panel rejected the claimant's evidence that R entered the service user's house on 8 July 2016 without the claimant knowing that he was intending to go there and did so without her knowledge and found that the claimant could have declined to have sex if she had wished.

389 The claimant's case came before the HCPC again on 25 September 2020. This followed the claimant's conviction upon 14 January 2019 (as certified at page 2SB). The HCPC ordered that the claimant's name be struck off the register. The claimant has lodged an appeal against the HCPC's decision as it appears that her defence was lodged in time but not seen by the panel. Indeed, the HCPC intends to review the decision of its own motion and remit the matter to a fresh panel. The claimant informed the Tribunal that by consent an Order was made by the High Court quashing the striking-off order. She produced a copy of a Consent Order of the High Court dated 31 December 2020 to this effect in which it is recorded in the recitals that the HCPC accept the decision of the conduct and competence committee to be unjust due to a serious procedural irregularity.

Cross examination of the claimant in November 2020.

390 The claimant was asked questions during her cross examination upon the conduct of her defence to the criminal charges. (The claimant had been cross examined on the first and second days of the hearing in July 2017 about the other matters that arise. She was recalled to be cross examined a second time in November 2020 given the significant events that had occurred during the currency of the case (in particular the criminal proceedings and the HCPC proceedings)).

391 The defence statement at pages 281 to 284AB contains the assertion that Q had given permission to the claimant to work for AAAA. We have cited what was said by Q about this in his witness statement of 26 June 2017 at pages 297 and 298AB in paragraph 355 above. The claimant's defence statement asserted that the conversation with Q did not occur in 2013 as Q said but had in fact taken place after she was suspended in August 2015, leading her to believe that it was permissible to take up her role with AAAA. The claimant also said, at page 284AB, that her representative before the Tribunal had heard the conversation in question.

392 Sadly, Q died on 6 January 2018. It was suggested by Ms Nowell to the claimant that she had opportunistically seized upon Q's passing when putting together her defence statement. Q would not be able to gainsay an assertion by the claimant that he had given permission for her to work for AAAA. The

respondent's contention of opportunism was based upon the claimant not having made such an assertion before Q's death. The claimant had not given evidence to that effect before the Employment Tribunal. The closest she came to saying so was when she said (in evidence given on the first day of the hearing) that *"I did try to meet with Q to discuss everything with him."* She conceded, on 9 November 2020 when the matter arose again, that *"it would have been good to have mentioned it"* and that *"if I'd met with him I'd have discussed it more fully."* It had not been put to Q when he was cross examined before this Tribunal that he had given permission. Notwithstanding these points, the claimant maintained that Q had given her permission to work for AAAA.

393 During her second re-examination (on 10 November 2020) the claimant's representative asked questions which seemed to be directed at eliciting from the claimant that what was said in the defence statement was down to her legal team. The Tribunal can accept that the claimant will have found the criminal trial stressful and may not have a clear recollection of matters. However, her legal team can only have asserted that Q gave permission for her to work for AAAA on instructions. They would not have invented such an assertion and placed it before the Crown Court. The claimant maintained that based upon the legal advice which she had obtained, she believed herself to be innocent of any wrongdoing.

394 It was suggested to the claimant that upon receipt of Y's letter of 12 May 2016 reserving the respondent's rights about the AAAA issue (at page 1698 and referred to in paragraph 209) and asserting there to be no record of any permission being given to her, the claimant may have pre-empted the issue altogether by telling Y that Q had given permission for her to work there. The claimant said that she had not done so as the respondent's focus at the time was upon the disciplinary charges being faced by her and that Y was relying upon the work for AAAA as evidence of the claimant's fitness to attend the disciplinary hearing. There is merit in the claimant's position upon this point as we have already observed.

395 The claimant accepted that the provision of a reference from Q would have carried some weight. That being the case, she was unable to satisfactorily explain why she did not ask Q for a reference in circumstances where she said he had given permission for her to apply to work for AAAA. The referee in the AAAA application form was in fact from the children's centre whom the claimant also held out as being her last employer: see the AAAA application form at pages 391- 393AB.

396 A further aspect of the application form was the claimant answering in the negative the question "*do you currently work or do you intend to do work (either an employee or as a contractor) for any person/organisation other than AAAA origin."* The claimant sought to justify this upon the basis that she thought she was not actually working for the respondent. This was simply not a credible answer particularly as the claimant said that had the respondent invited her back from suspension she would have resigned from her AAAA post. The claimant appeared to recognise her position with an acknowledgement before the Tribunal that she would complete the form *"differently now."*

397 The Tribunal notes the sentencing remarks of the judge who presided over the criminal case (at pages 4 and 5SB). We have mentioned these already. We observe that the judge considered the evidence of dishonesty around the

claimant obtaining her AAAA role to be overwhelming. He considered it to be *"unfortunate that [the claimant] required a jury trial to confirm that position."*

The claimant's post-dismissal employment history

398 The claimant resigned her employment with AAAA on 29 June 2018. She earned a salary of £32,000 *per annum* with AAAA together with a stakeholder pension entitlement. She took a post with the DWP as a 'community disability partner' from 2 July 2018 until March 2019. This was upon a fixed term contract upon a salary of £28,000 *per annum*. She says that she then took a short break from work before obtaining a retail post for [x] Skincare. This appears to have been a short-lived employment as she then took up her current post as a key worker with a local is a charity partly funded by the local authority. She works 30 hours a week in this role earns a salary *pro rata* the full time equivalent of £24,000 *per annum.*

399 It was suggested to the claimant that had she not been dismissed by the respondent upon the allegations faced in the disciplinary hearing, she would have then faced a charge arising from her work with AAAA. It was suggested that the claimant may have anticipated an adverse outcome and chosen to resign from the respondent. The claimant accepted that had she survived the disciplinary proceedings with which the Tribunal is principally concerned, she would have had to make a choice between AAAA and the respondent. Ms Nowell suggested that the probability would be for her to stay with AAAA rather than resign from there and then face the loss of her position with the respondent.

The issues in the case

400 The following is the agreed list of issues to which this matter gives rise:

Direct Sex Discrimination

1.1 Was the claimant treated less favourably than S in the speed with which her complaints against R were dealt with by the Respondent, when compared with the speed at which S's complaints against her were dealt with?

1.2 Were the circumstances of S's complaint against the claimant such that there was no material differences in circumstances to that of the claimant's complaint against S?

1.3 Was there a reason not related to the claimant's sex for this difference in treatment?

2.1 Was the claimant refused a private conversation with her line manager in August/ September 2015?

2.2 If she was refused a private conversation with her line manager in late August/ September was she treated to her detriment when compared with R.

2.3 Were the circumstances surrounding R's private conversation with his line manager materially different to those of the claimant when she made her request?

2.4 Was there a reason not related to the claimant's sex for this difference in treatment?

3.1 Was the meeting on the 20th August 2015 a verification meeting?

3.2 If it was a verification meeting was the claimant treated to her detriment when compared with S in the failure to inform her of the right to be accompanied by a trade union?

3.3 Was there a reason not related to the claimant's sex for this difference in treatment?

4.1 Was the claimant treated to her detriment when compared to R when she was dismissed for having sexual relations with R in a service users home?

4.2 Was the claimant treated to her detriment when compared to R when his version of events was believed over hers regarding the consensual nature of those sexual relations?

4.3 If she was treated to her detriment when compared to R, were R's circumstances at the time materially different?

4.4 Was there a reason not related to the claimant's sex for this difference in treatment?

5.1 Was there conduct extending over a period so that the claims relating to matters occurring before 5 May 2016 were brought within 3 months (plus early conciliation extension) of the end of that period as required by s 123 Equality Act 2010?

5.2 If not, were those claims brought within such other period as the Tribunal thinks just and equitable pursuant to s 123 (1)(b) Equality Act 2010?

Sexual Harassment

6.1 Did R subject the claimant to unwanted conduct of a sexual nature that had the purpose or effect of violating her dignity or creating an intimidating, degrading, humiliating or offensive environment for her by:

6.1.1 subjecting her to unwanted sexual advances from mid 2012;
6.1.2 subjecting her to non-consensual physical sexual activity from a few weeks after that until July 2015;
6.1.3 subjecting her to unwanted sexual advances in the form of text messages and photographs until about August 2015.

6.2 Was the alleged conduct of R in 6.1 carried out in the course of his employment with the respondent, pursuant to section 109 of the Equality Act 2010?

6.3 If the alleged conduct was carried out in the course of R's employment with the respondent did the respondent take all reasonable steps to prevent R conducting himself in the manner alleged by the claimant.

7.1 Did R threaten or blackmail the Claimant when she tried to end the relationship by threatening to reveal confidential information about her and her son in about June/July 2015 and August 2015?

7.2 Was the alleged conduct of R in 7.1 carried out in the course of his employment with the respondent, pursuant to section 109 of the Equality Act 2010?

7.3 If the alleged conduct was carried out in the course of R's employment with the respondent did the respondent take all reasonable steps to prevent R conducting himself in the manner alleged by the Claimant.

8. The claimant's claims for harassment having been brought outside the 3 months' limitation period, were the claimant's claims brought within such other period as the Tribunal thinks just and equitable pursuant to s 123(1)(b) Equality Act 2010?

Unfair Dismissal

9.1 What was the reason for the claimant's dismissal and was it a potentially fair reason, pursuant to section 98(2) of the Employment Rights Act 1996 ("ERA")?

9.2 Did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant. In particular:

9.2.1 Did the respondent have reasonable grounds for the belief that the claimant was guilty of misconduct having followed a reasonable investigation? The claimant contends that: too much weight was placed on the evidence of P; too much weight was placed on an allegation that the claimant was involved in a coercive relationship with an unknown third party; and the respondent did not approach the matter with an open mind.

9.2.2 Was the claimant given a reasonable opportunity to defend herself in all the circumstances? In particular: was any refusal of access to work emails, phone and tablet unreasonable and such as to prevent her defending herself; was the decision to hear the disciplinary in her absence unreasonable and such as to prevent the claimant defending herself; and was the claimant not given proper notice regarding the calling of one of the witnesses to the

disciplinary hearing and did this unreasonably prevent the claimant defending herself?

9.2.3 Was the decision to dismiss within a band of reasonable responses?

Wrongful Dismissal

10. Did the respondent act in breach of its contract of employment with her by failing to give her notice of dismissal?

11. Did the claimant act in a manner capable of amounting to a repudiatory breach, prior to her dismissal?

12. Did the respondent affirm that breach?

13. Was the claimant's claim for wrongful dismissal brought in time and if it wasn't, was it reasonably practicable for the claimant to have brought it in time?

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14. In so far as the claimant's dismissal is found to be procedurally unfair, would the dismissal have fairly taken place in any event, had the procedural error been remedied, by reason of the allegations of having sex in a service users home?

15. If the claimant had not been fairly dismissed by reason of the allegation at 14, what was the likelihood of:
i) the respondent having fairly dismissed the claimant for the AAAA allegations? or

ii) the claimant resigning from the respondent's employment before such investigation/ disciplinary took place

Contributory Conduct/ Causation

16. Did the claimant contribute to her dismissal by reason of her own conduct in:

a) having sexual relations with R at a service users home;
b) working full time for AAAA whilst on paid suspension with the respondent; and
c) failing to attend investigation meeting and the disciplinary hearing without good reason.

17. Should the claimant's basic award be reduced/ extinguished by reason of her pre-dismissal actions in working for a third party during her suspension, without the permission of the respondent?

18. Should the compensatory award for the unfair dismissal claim be reduced/ extinguished by reason of her pre-dismissal actions in working for a third party during her suspension, without the permission of the respondent?

Compensation for the Equality Act Claim

19. What losses have flowed from any discriminatory acts found to be proven?

20. What is the appropriate award for injury to feelings in respect of any discriminatory acts found to have been proven?

The relevant law and conclusions

401 The Tribunal received helpful written submissions from Ms Nowell and from the claimant's representative. The respondent's submissions run to 56 pages. The claimant's submissions run to 83 pages. As the Tribunal indicated during oral submissions on 23 March 2021, the Tribunal shall not set out the written submissions within these reasons. Where necessary, reference will be made to the submissions when setting out our conclusions.

402 The Tribunal shall take each of the issues in the agreed list of issues in turn and in the order in which they are there set out. We therefore start with the complaint of direct sex discrimination.

403. By section 13 of the 2010 Act, a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. By section 23 of the 2010 Act, on a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case. Direct sex discrimination is made unlawful in the workplace pursuant to the provisions in Part 5 of the 2010 Act. In particular, by section 39(2)(d), an employer must not discriminate against an employee of A's by subjecting the employee (B) to a detriment.

404. By section 136 of the 2010 Act, if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred. However, that does not apply where A can show that A did not contravene the provision. Thus, it is for the claimant to show that there are facts from which the Tribunal could decide that an unlawful act of discrimination has taken place and if she does so then the burden of proof shifts to the respondent to prove a non-discriminatory explanation: (the two-stage shifting burden of proof also applies to the claimant's complaint of harassment to which we shall come in due course).

405. In order to claim discrimination under section 13, the claimant must have been treated less favourably than a comparator who was in the same or not materially different circumstances as the claimant. A successful direct discrimination claim depends on a Tribunal being satisfied that the claimant was treated less favourably than a comparator because of a protected characteristic. The relevant protected characteristic in this case is sex. The primary question in a complaint of direct discrimination is to identify whether

the complainant has been less favourably treated than the chosen comparator in a case where an actual comparator is being advanced or has been less favourably treated than would be a hypothetical comparator and then to identify the reason why the complainant was treated as they were. If there were discriminatory grounds for the less favourable treatment then usually there will be no difficulty in deciding that the treatment was less favourable and amounts to direct discrimination. The essential questions are whether the complainant, because of a protected characteristic, received less favourable treatment than others and the reason why the complainant was treated as they were.

406. The protected characteristic need not be the only reason for treatment. The Equality and Human Rights Commission's *Employment Code* provides (in paragraph 3.11) that, *"the protected characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause".*

407. It is now well established that direct discrimination can arise in one of two ways. The first is where a decision is taken on a ground that is inherently discriminatory – that is, where the ground or reason for the treatment complained of is inherent in the act itself. In such a case, the thought process of the discriminator will be irrelevant. The second kind of case is where a decision is taken for a reason that is subjectively discriminatory – that is, where the act complained of is not in itself discriminatory but it is rendered so by a discriminatory motivation. In such a case, the mental process (whether conscious or unconscious) which led the putative discriminator to do the act needs to be considered by the Tribunal.

408. Unconscious (or subconscious) discrimination can include cases where stereotypical assumptions about a complainant can be shown to have influenced the employer's less favourable treatment of them. The EHRC *Employment Code* gives an example of an employer who believes that memory deteriorates with age and upon that basis excludes the individual from a promotion opportunity: (paragraph 3.15). In such a case, the conduct is influenced by a stereotyped view of the competence of individuals upon attaining a certain age.

409. Something more than less favourable treatment compared with someone not possessing the claimant's protected characteristic is required. The mere fact of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities the respondent has committed an unlawful act of discrimination.

410. With these principles in mind the Tribunal turns to the first complaint of direct sex discrimination. This is that the claimant was less favourably treated than S in the speed with which her complaints against R were dealt with by the respondent when compared with the speed at which S's complaints against her were dealt with. The claimant's focus here is upon the speed of investigation. S raised a complaint against the claimant on 17 August 2015 in the verification meeting of that date (paragraphs 28 and 31 above). The investigation was concluded in March 2016 (paragraph 165). Following the conclusion of the investigation, the respondent resolved to put to the claimant a disciplinary charge about the patient confidentiality issue. The claimant was exonerated of this charge and was notified of that on 14 June 2016. From start to finish, therefore, the respondent took 10 months to

investigate S's complaints against the claimant arising out of the patient confidentiality matter.

411. The claimant complained about R on 16 September 2015 (paragraph 78). There was then the second limb of her complaint against R. This was lodged on 21 October 2015 (paragraph 114). By this time, R had been suspended on 24 September 2015. As we said in paragraph 62, the respondent was aware of the subject matter of the claimant's complaint about R prior to 21 October 2015 (the claimant's complaint of 21 October 2015 being effectively a repeat of the complaint that she made to the NMC on 15 September 2015 (paragraphs 73 and 74)).

412. The respondent's investigation into R's conduct was concluded in February 2016 (paragraph 187). This was five months after the first of the claimant's complaints against him. He was then dismissed on 10 March 2016 (paragraph 188). From start to finish therefore just less than six months was taken by the respondent to deal with R following the claimant's complaint about him.

413. In his submissions, the claimant's representative contrasts the actions taken by the respondent following S implicating the claimant in the patient confidentiality matter on 17 August 2015 with the respondent's immediate response to her first complaint against R.

414. There is merit in the claimant's contention that the respondent acted very quickly following S's complaint against her. She was invited, on 17 August 2015, to attend a meeting on 19 August 2015 and was then suspended with effect from 20 August 2015. In contrast, the respondent took no immediate action against R upon receipt of her complaint of 16 September 2015. E fairly accepted that the delay in responding to the claimant's complaint was *"not very good":* (see paragraph 104). While overall the investigation into R's conduct in fact took less time than did the investigation into the claimant's conduct around a patient confidentiality matter, the alacrity with which matters proceeded upon S's complaint may be contrasted with that upon the claimant's complaint. To that extent, the claimant has succeeded in establishing a difference in treatment between her and a male colleague.

415. However, the difference in treatment and status is not without more sufficient to shift the burden to the respondent to provide a non-discriminatory explanation. The claimant needs something more.

416. In his written submissions, the claimant's representative argued that the respondent had taken the view that the claimant was a *"woman scorned"* and that this was a stereotypical view which permeated into the respondent's decision making and led to the delay in dealing with the claimant's complaint and which prevented the respondent from treating it seriously. He made reference to the matters referred to in paragraphs 38 and 200 above which allude to the claimant setting up those with whom she had had sexual relations.

417. Reference was made by the claimant in her submissions to the famous poem *The Mourning Bride* by the English playwright William Congreve and the famous lines, *"heaven has no rage like love to hatred turned, nor hell a fury like a woman scorned".*

418. This is a bold literary submission by the claimant. However, the Tribunal rejects her case that she was less favourably treated than was S because of her sex.

419. Firstly, that there was a perception amongst the respondent that she was a *"woman scorned"* was not put to any of the respondent's witnesses. There is no factual basis upon which for the Tribunal to find that stereotypical assumptions played a part (consciously or sub-consciously) in the decision-making process. Secondly, in our judgment, the failure to respond to the claimant's complaint of 16 September 2015 was due to a management incompetence and was not in any way (consciously or subconsciously) influenced by her sex. Thirdly, there is, in our judgment much force in Ms Nowell's point in that pressure was being brought to bear upon the respondent by S of a threat by him to go to the police (paragraph 87) and which led to the respondent's decision to deal with S's complaint as one of urgency.

420. Ms Nowell also puts in issue the question of whether S is in any event an appropriate comparator of the claimant's. Of course, the respective cases need not be identical. We agree with Ms Nowell that there is a material difference in that S was interviewed at a verification meeting as a prelude to disciplinary proceedings against him whereas the claimant's complaint was effectively the initiation of what she anticipated to be a grievance procedure or a process carried out under the respondent's bullying and harassment policy. (Of course, in the event the respondent decided to deal with matters under the disciplinary procedure instead).

421. While there are, therefore, material differences such as to render S not to be an actual comparator for the purposes of the sex discrimination complaint the Tribunal is satisfied that the respondent's treatment of S provides sufficient material from which the Tribunal may determine how a hypothetical male comparator in similar circumstances to the claimant would have been treated by the respondent. There is simply no evidence that a male comparator raising a grievance in these circumstances would have been more favourably treated than was the claimant. The differences in treatment between the claimant's case and that of S have a non-sex based explanation.

422. The second complaint of direct sex discrimination is that the claimant was refused a private conversation with Q in August and September 2015 in circumstances where R was granted an audience with him. The relevant findings of fact are at paragraphs 41 to 45 and 71 to 72 above. Again, there is some merit in the claimant's complaint that a man (R) was granted the favour of seeing Q in private at his home. A similar request made by the claimant was turned down by Q. In an attempt to alight upon something additional to a difference in treatment and a difference in sex, the claimant's representative argued that the difference in treatment had a conscious or sub-conscious basis in *"male bonding"* or a notion of *"all men together".*

423. However, a significant difference in the two cases is that by the time the claimant made her request on 15 September 2015, she had been suspended by Q. At the time that R asked to see Q at his home on 8 August 2015 he was not under suspension. Plainly, therefore, there is a non-sex based explanation for the difference in Q's treatment of R and the claimant. This allegation therefore fails. There is no evidence to suggest that had R been under suspension, he would have been entertained by Q. Indeed, Q's disquiet about seeing R on 9 August 2015 (paragraph 41) suggests that he would not have done so had R been suspended at the time.

424. We now turn to the third allegation of sex discrimination. This is an allegation that S was allowed to be accompanied at his verification meeting held on 17 August 2015 whereas the claimant was not allowed to be accompanied at her meeting which took place on 19 August 2015.

425. In paragraphs 12 and 13 of her submissions, Ms Nowell concedes on behalf of the respondent that the meeting with the claimant was described as a verification meeting. However, she was being interviewed only as a witness in the patient confidentiality issue at that stage. Therefore, the meeting was not intended to be a verification meeting. The relevant factual findings made by the Tribunal upon this issue are at paragraphs 33 to 37.

426. It is unfortunate that management incompetence caused confusion in the claimant's mind. That said, the fact of the matter is that the meeting with the claimant of 19 August 2015 was not a verification meeting and accordingly she had no right to be accompanied by a representative. That is sufficient to provide a non-sex based explanation as to the reason why S was allowed to be accompanied at the meeting held on 17 August 2015 and the claimant was not so permitted at her meeting two days later.

427. The fourth allegation is that the claimant was subjected to a detriment when compared to R when she was dismissed for having sexual relations with R in the service user's home. As a point of law, a dismissal is distinct from a detriment. By section 39(2)(c) an employer must not discriminate against an employee by dismissing them. As we have already said, by section 39(2)(d) an employer must not discriminate against an employee by subjecting them to any other detriment. Plainly, therefore, Parliament has distinguished between a dismissal on the one hand and a detriment on the other.

428. At all events, this contention must fail upon the facts. R and the claimant were both dismissed for having sexual relations in the service user's home on 8 July 2015. Therefore, they have been treated the same and the claimant is unable to establish a *prima facie* case of less favourable treatment of her compared to a male comparator in the same or similar circumstances.

429. The next allegation is that the claimant was subjected to a detriment compared to R when his version of events was believed over hers regarding the consensual nature of the sexual relations. This allegation arises out of the decision not to accept the claimant's case that she had been manipulated and coerced to have a sexual relationship with R and to have sex in the service user's home on 8 July 2015.

430. The claimant's case that she had been coerced to have a sexual relationship with R was not upheld in R's disciplinary proceedings. The charge faced by him that he had coerced her was dismissed. R was dismissed for having sex in the service user's home on 8 July 2015. Further, the claimant's mitigation in answer to the charges faced by her that R had manipulated and coerced her into sexual relations was of course dismissed.

431. As will be apparent when we come to the issue of sexual harassment, the Tribunal has concerns about the respondent's conclusions in favour of R and against the claimant upon the issue of coercion. However, for the purposes of the complaint of direct sex discrimination the question that arises is the reason why the respondent preferred R's account.

432. Y's reasons for not accepting the claimant's mitigation around coercion is summarised in paragraphs 293 and 296-297. Z's reasoning is at paragraphs 319-320. The other side of the same coin is Y's decision to uphold R's defence that there was no coercion. Y's reasoning is summarised in paragraph 190 (in particular by reference to pages 2768 to 2773). Here, X sets out 25 points against there being objective evidence of overt coercion and manipulation.

433. In the circumstances, the Tribunal agrees with Ms Nowell's submission (in paragraph 24) that the respondent has provided credible evidence that the reason for preferring R's evidence over that of the claimant is not related to the sex of R or the claimant. As will be seen in due course, the Tribunal does not accept the respondent's conclusion to be one which could have been reasonably reached. However, the Tribunal nonetheless accepts that Y (and Z on appeal) had genuine reasons for preferring R's case over that of the claimant and that those reasons were untainted by the fact of the claimant's sex. There is a non-sex related reason for the difference in treatment which was the respondent's acceptance of R's case.

434. Further, Ms Nowell prayed in aid the decision of the HPC and their rejection of the claimant's defence of coercion as against R. This conclusion was reached after hearing from the claimant and R and after considering similar materials to those before the respondent.

435. Ms Nowell submitted (in her oral submissions) that the respondent does not seek to rely upon the HPC's findings as corroborative evidence in support of the factual findings which the respondent advocates ought to be made by the Employment Tribunal. The respondent accepts (pursuant to the rule in ***Hollington v F Hewthorn and Co Limited*** [1943] 1 KB 587) that the findings of the HPC are inadmissible as *prima facie* evidence of the claimant's conduct. This is because the respondent was not privy to the HPC proceedings.

436. The nearest analogous case to that before us to be found in the jurisprudence appears to be that of ***Conlon and another v Simms*** [2006] EWCA Civ 1749. In this case, an action was brought against the defendant solicitor by his erstwhile partners who alleged misrepresentation and deceit against him arising from which they had entered into a partnership agreement. The Solicitors' Disciplinary Tribunal found the defendant to be guilty of dishonesty and had struck him from the roll of solicitors. The claimants wished to rely upon the STD's findings as *prima facie* evidence of the defendant's dishonesty. It was held that the STD's findings were inadmissible as such and that in the civil proceedings brought against him by his erstwhile partners he was entitled to contest the allegations of dishonesty and was not abusing the process of the court by doing so notwithstanding the STD's findings.

437. Like the HPC, the Law Society is a professional body which exercises a disciplinary function in relation to its members. However, unlike the Employment Tribunal, the Law Society and the HPC do not form part of a public system for the administration of justice.

438. Just as the claimants in the ***Conlon*** case were not parties to the disciplinary proceedings, so too the respondent in the instant case was not party to the HPC proceedings against the claimant. Upon that basis, Ms Nowell was right to acknowledge that it is not open to the respondent to

rely upon HPC's findings as evidence of a lack of coercion or manipulation upon the part of R.

439. That being said, the Tribunal finds that it is open to the respondent to pray in aid the HPC's findings against the claimant to a limited degree. (This issue also features in the unfair dismissal claim to which we shall come in due course).

440. Upon the issue of sex discrimination, the reliance placed upon the HPC's findings by the respondent is that another body upon like evidence reached the same conclusion. Therefore, this reinforces the genuineness of the belief of Y and Z that the coercion and manipulation defence advanced by the claimant should fail. In our judgment, this is a submission well-made and which we accept.

441. The final issue upon the complaint of direct sex discrimination is whether or not the complaints were brought in time. By section 123 of the 2010 Act, proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. Conduct extending over a period of time is to be treated as done at the end of that period.

442. The claimant presented her complaint to the Employment Tribunal on 3 October 2016. Before doing so she underwent mandatory early conciliation as required by the Employment Tribunals Act 1996. She contacted ACAS to commence early conciliation on 4 August 2016. The ACAS early conciliation certificate was issued on 4 September 2016.

443. The issue that arises therefore is whether there was conduct extending over a period so that claims relating to matters occurring before 5 May 2016 were brought within three months (plus the early conciliation extension) at the end of that period as required by section 123 of the 2010 Act.

444. In our judgment, the claimant's complaints of direct sex discrimination were brought in time. As at the date that the claimant approached ACAS on 4 August 2016, she had received notice that she was summarily dismissed and that her coercion mitigation had been rejected by the respondent. The allegation against her around the patient confidentiality issue was not upheld.

445. These decisions were the culmination of a process which had started with the claimant attending the meeting of 19 August 2015 (which she thought to be a verification meeting). The process encompassed her complaints against R of 16 September and 1 October 2015 which ultimately led to the disciplinary proceedings taken against her and R. That process involved her suspension by Q and her reaching out to Q by asking him to see him privately.

446. K was intimately involved in the process as were X (from the end of September 2015) and then ultimately Y. All of the matters of which the claimant complains as acts of direct sex discrimination involved individuals within the respondent intimately involved in the process throughout and which may be regarded as all having culminated in the claimant's dismissal on 14 June 2016.

447. The claimant contacted ACAS to commence early conciliation on 4 August 2016. That is within three months of 14 June 2016. The dismissal of her by the respondent may rightly be viewed as the culmination of the course of

conduct which commenced at the previous August. Therefore, the complaints were presented in time.

448. We now turn to the complaint of sexual harassment. The issue is whether R subjected the claimant to unwanted conduct of a sexual nature that had the purpose or effect of violating the claimant's dignity or creating an intimidating, degrading, humiliating or offensive environment for her. The allegation is that R subjected her to sexual harassment by subjecting her to unwanted sexual advances from the middle of 2012, subjected her to non-consensual physical sexual activity from a few weeks after that until July 2015 and then subjected her to unwanted sexual advances in the form of text messages and photographs until about August 2015.

449. The claimant's representative, during oral closing submissions, confirmed that the latter complaint (of subjecting her to unwanted sexual advances in the form of text messages and photographs) is not pursued as a complaint in these proceedings. (Factual findings have of course been made about such matters). The issue at paragraph 400 (7.1) was not addressed in the claimant's submissions and is understood not to be pursued.

450. The focus of the Tribunal's judgment therefore is upon the question of whether or not R subjected the claimant to unwanted sexual advances from mid-2012 and to non-consensual physical sexual activity for a period of around three years until July 2015.

451. By section 26 of the 2010 Act a person (A) harasses another (B) if A or another person engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect referred to in subsection (1)(b) of section 26. That is to say, the requirement is that such conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

452. In deciding whether conduct has the effect referred to in subsection (1)(b) of section 26 the 2010 Act, the Tribunal must take into account B's perception, the circumstances of the case and whether it is reasonable for the conduct to have that effect.

453. Sexual harassment (being unwanted conduct of a sexual nature) is made unlawful in the workplace pursuant to section 40 of the 2010 Act. This provides that an employer (A) must not, in relation to employment by A, harass a person (B) who is an employee of A's.

454. By paragraph 7.8 of the EHRC's *Code of Practice*, the word *"unwanted"* means essentially the same as *"unwelcome"* or *"uninvited". "Unwanted"* does not mean that express objection must be made to the conduct before it is deemed to be unwanted. In paragraph 28 of her submissions, Ms Nowell cited the well-known passage from ***Reed and Bull Information Systems Limited v Stedman*** [1999] IRLR 299. At paragraph 30, the Employment Appeal Tribunal said:

"As to whether the conduct is unwelcome, there may well be different factual issues to resolve. In general terms, some conduct, if not expressly invited, could properly be described as unwelcome. A woman does not, for example, have to make it clear in advance that she does not want to be touched in a sexual matter. At the lower end of the scale, a woman may appear, objectively, to be unduly sensitive to what might otherwise be regarded as unexceptional behaviour. But because it is for each person to define their own levels of acceptance, the question would then be whether by words or conduct she has made it clear that

she found such conduct unwelcome. It is not necessary for a woman to make a public fuss to indicate her disapproval; walking out of the room might be sufficient. Tribunals will be sensitive to the problems that victims may face in dealing with a man, perhaps in a senior position to herself, who will be likely to deny that he was doing anything untoward and whose defence may often be that the victim was being oversensitive. Provided that any reasonable person would understand her to be rejecting the conduct of which she was complaining, continuation of the conduct would, generally be regarded as harassment. But at all times the Tribunal should not lose sight of the question at issue: was the applicant subjected to a detriment on the grounds of her sex? The answer to that question does not depend upon the number of incidents. A one off act may be sufficient to damage her working environment and constitute a barrier to sexual equality in the workplace, which would constitute a detriment."

Miss Nowell then went on to say in paragraph 52 of her written submission that, "*the claimant's feelings, if accepted, are only one half of the definition. It can only be harassment if any reasonable person would understand her to be rejecting the conduct of which she is complaining in the context in which R found himself given all the circumstances of the case."*

454A. The claimant's representative, in paragraph 170 of his written submissions, contrasted the statutory language in section 26 of the 2010 Act with that to be found in the Protection from Harassment Act 1997. The 1997 Act created a criminal offence of harassment and also provides civil remedies of those affected by such conduct.

By section 1 of the 1997 Act, a person must not pursue a course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment of another.

455. In paragraph 171 of his submissions, the claimant's representative observed that, *"Notably, the 1997 Act, which creates the criminal offence of harassment requires the perpetrator "to know or ought to know" that the conduct in question "amounts to harassment"; whereas there is no such requirement under the relevant provisions of the 2010 Act. Under the 2010 Act, having the "… effect referred to in subsection (1)(b)" would suffice*.

456. He goes on to say that section 26(4)(a) of the 2010 Act indicates that the perception of the victim is a key factor in determining the effect of the perpetrator's actions. He then cited a passage from ***Thomas Sanderson Blinds Limited v English*** UKEAT/0316 and 317/10 in which it was held that the Tribunal should look at "*the claimant's own perceptions and feelings in order to decide whether the alleged unwanted conduct had the effect of violating [the claimant's] dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for [the claimant]."*

457. Upon this basis, the claimant submitted that there is a significant difference between the 1997 Act on the one hand and the 2010 Act on the other. The former requires the perpetrator to have actual or constructive knowledge that their conduct amounts to harassment of another whereas Parliament has not legislated for such a requirement when enacting the 2010 Act. Ms Nowell fairly accepted there to be merit in principle upon the claimant's submission on this issue and accepted that it would be wrong to submit that conduct may only be harassment in this case if R knew of the claimant's feelings and yet continued to impose sexual relations upon her. Ms Nowell submitted that nonetheless it would be erroneous for the Tribunal

to consider the claimant's feelings only and that it is proper to consider whether any reasonable person would understand the claimant to be rejecting the conduct of which she is complaining. The Tribunal considers Ms Nowell's submission to be correct by virtue of section 26(4)(c) which imports an objective consideration of whether it is reasonable for the conduct complained of to have the proscribed effect upon the complainant.

458. The Tribunal finds it credible that the claimant took the view, in mid-2012, that R may be able to offer her therapeutic help. X, who was employed by the respondent as a professional lead psychologist, credited the possibility of the relationship having started out as one with therapeutic elements (paragraph 168). In the respondent's statement of case, X said much the same thing (paragraph 191).

459. In paragraph 13 of her witness statement, the claimant said that she accepted R's offer to provide her with therapeutic support and guidance upon the basis that he was a community psychiatric nurse, a trained cognitive behavioural therapist and the most experienced community psychiatric nurse whom she knew at the time.

460. By application of the test in ***Stedman***, therefore, the Tribunal concludes that on any view around mid-2012 (at the time of the service user's holiday to a seaside resort) the claimant wanted R to provide support and guidance to her and that any reasonable person would not understand her to be rejecting R's conduct in so doing. Indeed, at this stage, the relationship had not moved on to become a sexual one.

461. The claimant's account, in paragraph 22 of her witness statement, is that while on the seaside holiday with the service users, R initiated physical contact and started to kiss her. She left his room and made it clear to him that she had no intention of having sexual relations with him. For his part, R says that during this service user's holiday "*the claimant and I ended up in my bedroom and we had a sexual liaison without intercourse."* He goes on to say that, *"shortly after this trip the claimant and I commenced a full consensual sexual relationship."*

462. The claimant gives a similar account that she and R commenced full sexual relations a few weeks after the service user's trip. She then goes on to say in paragraph 28 that, *"<u>some time after</u> [R] initiated sexual liaisons with me, I felt used and disgusted as well as disappointed. I subsequently brought this to the attention of my religious guidance counsellor as well"- [emphasis added].* It will be recalled (from paragraph 304) that there is a record of her telling her spiritual counsellor at a session in January 2013 that she felt pressured to have sex with R. The claimant goes on in paragraph 28 of her witness statement to say that, *"by this time [R], as a therapist had made me emotionally dependent on his guidance and support, on how to deal with ongoing issues in my personal life. Therefore, I kept on seeing [R] and had sexual liaisons with him."*

463. From this, the Tribunal finds that the claimant wanted sexual relations with R from around the middle to the end of 2012. However, we accept the claimant's account that from the end of 2012 the sexual relations had become unwanted.

464. The claimant's account that sexual relations became unwanted is corroborated by what she told her spiritual counsellor in January 2013. There is also much medical evidence that by 2015 matters had manifested

themselves in the claimant experiencing symptoms of post-traumatic stress disorder: see in particular paragraph 304. She had taken what on any view is the profound step of consulting a rape and sexual abuse centre. She had contacted her son's school on 11 June 2015 to express concerns about R making contact with her son. She reported to the [x]RASAC a pattern of sexual abuse over a period of time at the hands of a work colleague (see paragraph 264). She was under the care of the general practitioner arising out of these matters.

465. Upon the basis of the evidence before the Tribunal, we find that R's conduct towards the claimant had the effect of violating her dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We find that these effects were causally linked to conduct of a sexual nature, in particular engaging in the physical sexual activity with R from the start of 2013 until July 2015.

466. The Tribunal must therefore look at the other side of the coin: would any reasonable person understand the claimant to be rejecting the conduct of which the claimant is complaining in the context in which R found himself given all the circumstances of the case.

467. Ms Nowell submits, in paragraph 55 of her written submissions, that R was not extending therapeutic help to the claimant as would a counsellor to a patient but rather was offering her friendship.

468. The Tribunal accepts Ms Nowell's submissions that it is not credible that the claimant considered R to be a counsellor of her in the professional sense. As Ms Nowell said, the claimant had taken a level 3 safeguarding course and knew that it would not be appropriate to have counselling from a colleague or friend. Further, counselling sessions were inappropriate if held in a public place such as a coffee shop. Physical contact was also inappropriate and comments made by R regarding her appearance gave rise to safeguarding issues. We also consider Ms Nowell to make a good point that the spiritual counsellor does not say (in the report at page 220) that R was acting as her counsellor.

469. Ms Nowell says that it is not credible that the claimant had become reliant upon R's therapy once physical contact had started because insufficient time had elapsed before she had become wholly reliant upon him. The difficulty with that submission is that the Tribunal finds as a fact that the conduct became unwanted at around the end of 2012 at which time R and the claimant had been conducting a sexual affair and had had contact which the claimant found beneficial from a therapeutic viewpoint (albeit outside of a professional care setting) for a period of around six months.

470. The respondent's submission that the claimant ought to have been aware that physical contact gave rise to a safeguarding issue is something of a double- edged sword. This consideration also applies to R.

471. The claimant had shared with R the document of 28 October 2011 at pages 337 to 338. In cross-examination, R accepted this to be a description of domestic abuse of the claimant by her husband.

472. As we said in paragraph 135 above, when shown this document during the course of the Tribunal proceedings, Q said that were he to have seen it at the time he would have reported the matter to the respondent's safeguarding lead as raising both safeguarding child and adult issues.

473. It is striking that Q, upon being shown the document (at pages 337 to 338) for the first time at the hearing immediately recognised that it gave rise to safeguarding issues. There was no suggestion by the respondent that R was anything other than a highly competent medical practitioner in his field. It is not credible that R, upon seeing the document at pages 337 to 338, would not have reached the same conclusion as did Q. Indeed, he accepted that it showed domestic abuse had taken place: paragraph 471.

474. Q was aware of the claimant's vulnerability (paragraph 132). His opinion was that R had taken advantage of this when he *"moved in"* on the claimant (as Q put it). ZZ said also considered the claimant to be vulnerable (in a colloquial sense). We refer to paragraph 140.

475. We find that R's behaviour towards the claimant was exploitative and predatory. It led the claimant to seek the advice of several medical practitioners. Indeed, by 9 December 2015 X had become concerned for the claimant's well-being (paragraph 156).

476. In paragraph 232 of his written submissions, the claimant's representative referred the Tribunal to the guidance issued by the Royal College of Nursing on domestic abuse. The salient passages appear in the HPC bundle at pages 1069 and 1080. It provides there to be a need for nurses to have an understanding of the impact of domestic abuse upon patients, clients and colleagues and to contact the local safeguarding lead in cases of suspected abuse. R was aware that the claimant had suffered domestic abuse and through his professional expertise (based upon Q's evidence) knew or ought to have known that her circumstances gave rise to safeguarding issues. The claimant's representative, in our judgment, makes a telling point when he says that, *"it can reasonably be inferred that the inaction of R was due to an ulterior motive to manipulate the claimant and keep her under his coercive control".*

477. Ms Nowell asked the Tribunal to infer that a reasonable person would not understand the claimant to be rejecting the conduct of which she now complains for a number of reasons set out in paragraph 52 of her submissions. She says that the sexual relationship continued for three years without the claimant taking any appropriate steps to terminate or report it. She did not tell R that she did not wish to have sex with him or attempt to push him away. She sent explicit images to him. The therapeutic relationship was not formal or even semi-formal. The sexual relationship took place at convenient times for the claimant and away from the workplace in the local beauty spots and other locations.

478. Submission does not equate to consent nor does previous consensual activity denote consent upon a later occasion. It is in the nature of coercive and controlling behaviour that a victim of it may become trapped and may fear loss of emotional bond which has been established with the abuser. These were the gist of the submissions made by Unison in the staff side case on behalf of the claimant which was presented at the disciplinary hearing.

479. Further, is well recognised that victims of sexual abuse react in different ways and that there is no typical reaction. The Tribunal takes judicial notice that just such considerations regularly exercise the criminal courts. There may be a range of explanations for a delay in reporting or indeed in not reporting such matters which can include shock and shame as well as

dependency. The fact of R not physically threatening the claimant and not reporting to the police as pointing away from a coercive relationship is to adopt a stereotypical approach to the question of whether the relationship was consensual or coercive. The reason for any delay in reporting to the police or not reporting such matters at all must be explored. Those explanations were advanced by Unison in the statement of case and by reference to the literature which accompanied it.

480. Unison went on to say that the claimant was driven to ending the relationship by taking the dramatic and somewhat desperate measures which are recounted above and which took place over the weekend of 8 and 9 August 2015 in order to end what Unison described as *"the abusive cycle."*

481. In addition, the claimant was diagnosed by several different medical professionals as having suffered from post-traumatic disorder. The claimant was in an abusive marriage. There may be an issue that R's conduct was not the sole cause of the disorder. That said, none of the opinions exclude R's conduct as being an operational cause. There is supportive medial opinion that R's conduct towards the claimant was traumatising.

482. The Tribunal is driven to the conclusion that had the claimant pursued a case under the 1997 Act against R it would be more than arguable that she would be able to establish that R knew or at least ought to have known that his conduct amounted to harassment of her. It is difficult to see (given Q's reaction to the Facebook posting at pages 337 and 338) how R would, as a trained medical professional, reasonably be held to know anything other than that the claimant presented as a vulnerable individual to whom safeguarding concerns applied and whose circumstances gave rise to capacity issues. R's conduct towards her (in maintaining a sexual relationship in such circumstances where he must have realised that informal emotional support was being provided by him to her) amounts, in our judgment, to gross professional misconduct on his part such that any reasonable person in R's position can only have understood her to be acting under duress in circumstances of an impaired ability to consent to continued sexual relations with him.

483. In the Tribunal's judgment, therefore, the claimant has succeeded in establishing that R subjected her to non-consensual physical sexual activity between early 2013 and 8 July 2015. The sexual advances of R towards her likewise constitute sexual harassment over the same period for the same reason.

484. The claimant has not of course brought a claim against R. She has brought the action against the respondent seeking to hold the respondent vicariously liable for R's actions.

485. By section 109 of the 2010 Act, anything done by a person (A) in the course of A's employment must be treated as also done by the employer. In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment, it is a defence for B to show that B took all reasonable steps to prevent A from doing that act or from doing anything of that description.

486. The first issue which therefore arises is whether R's conduct towards C was in the course of his employment.

487. Ms Nowell drew the Tribunal's attention to the case of ***Chief Constable of Lincolnshire Police v Stubbs and Others*** [1999] IRLR 81. The

complainant was a female police officer who were subjected to discriminatory comments by a colleague on two separate occasions. One instance of the impugned conduct took place when she went for a drink at a pub after work with several fellow officers. The second incident also took place in a pub, at another officer's leaving party.

488. The Employment Tribunal held that, although the two incidents did not occur at the police station they were *"social gatherings involving officers from work either immediately after work or for an organised leaving party".* In the EAT's view, the incidents came within the definition of *"course of employment".* It would have been different if the discriminatory acts had occurred for example during a chance meeting at a supermarket.

489. The EAT observed that the borderline between incidents for which an employer is liable and those for which it has no liability may be difficult to pinpoint and the matter is a question of the exercise of good judgment by the Tribunal.

490. The passage cited by Ms Nowell from ***Stubbs*** in paragraph 63 of her written submissions refers to ***Jones v Tower Boot Co Limited*** [1997] IRLR 168 and ***Waters v The Commissioner of Police of the Metropolis*** [1997] IRLR 589. In each of these cases, the issue of the meaning of the phrase *"in the course of employment"* in section 109(1) (or its predecessor legislation) was considered.

491. It is right to observe that employment law originally adopted the approach of the common law in tort cases, whereby an employer was only held liable for acts done by employees when those acts are connected with acts which the employer has authorised and which could rightly be regarded as modes, albeit improper modes, of doing the authorised acts.

492. However, in ***Jones*** the Course of Appeal rejected the proposition that the common law principles of vicarious liability are to be imported into anti-discrimination legislation. In ***Jones***, the complainant was subjected to a vicious campaign of harassment related to race. The Course of Appeal held that to require that the phrase *"course of employment"* in the statute be read as subject to the gloss imposed upon it at common law would result in the anomaly that the more heinous the act of discrimination, the less likely it would be that the employer would be found liable. That would cut across the underlying policy of the discrimination legislation which is to deter harassment by making the employer liable for the unlawful acts of employees while providing a defence for the conscientious employer that has done its best to prevent such harassment. This is a reference to the statutory defence now to be found in section 109(4) of the 2010 Act.

493. The decision in ***Waters*** illustrates that, even adopting the broad approach set out in ***Jones***, there are limits to an employer's liability under section 109(1). In ***Waters*** a police constable claimed that she had been victimised by her employer after complaining of a sexual assault by a male colleague. It was held that the assault was not committed in the course of employment because the parties were off duty at the time of the assault which occurred in the early hours and the male officer was a visitor to the woman's room in the police section house. The parties were in the same position as would have applied if they had been social acquaintances with no working connection.

494. Similarly, in ***HM Prison Service and Others v Davies*** EAT 1294/98 a prison officer alleged that she had received an unexpected visit at home one

evening from a colleague who then made wholly unwanted sexual advances towards her. She alleged that the sexual harassment was in relation to employment or in the course of employment. One of the reasons that she so contended was that the employer's disciplinary code stated that the conduct of employees on- and off-duty must not bring discredit on the prison service. The code also provided for disciplinary action to be taken when an alleged criminal offence was committed away from the workplace. It was argued that since employees were subjected to contractual provisions that governed their behaviour 24-hours-a-day the off-duty conduct towards the complainant occurred in the course of employment.

495. The EAT rejected that argument. In the EAT's view, the fact that an employer can legitimately complain about an employee's activities outside employment does not bring that activity within the course of employment. The incident of harassment had only the most slender of connections with work and had not occurred in the course of employment. The EAT expressed the view that ***Davies*** was indistinguishable from ***Waters*** and the only real difference was that in ***Waters*** the incident occurred in accommodation owned by the employer.

496. The claimant's representative cites paragraph 10.46 of the ECHR Employment Code of Practice. This says that, *"the phrase 'in the course of employment' has a wide meaning: it includes acts in the workplace and may also extend to circumstances outside such as work related social functions or business trips abroad. For example, an employer could be liable for an act of discrimination which took place during a social event organised by the employer, such as an after-work drinks party".* He goes on to say that, "*but for their employment, neither R nor the claimant would have attended the service users' holiday where sexual contact occurred between the claimant and R for the first time …"*

497. It is insufficient, in our judgment, that but for employment, sexual relations between R and the claimant would not have occurred. Something more than that must be established in order to bring the conduct within the course of employment. Authority for that proposition may be found in ***Waters*** and ***Davies.***

498. The claimant does not seek to advance a complaint of sexual harassment upon the basis of the text messages and photographs that were exchanged between R and the claimant. In our judgment, this is a concession rightly made by the claimant. Exchanging such material on their own mobile telephones cannot be considered to be acts in the course of their employment. The evidence was that photographs could not be downloaded and sent upon work telephones. However, even if such material had been sent upon work telephones we would have held such conduct to be outside the course of employment. Such conduct would be no different to the visits to the homes in ***Davies*** and ***Waters.*** The working relationship was the setting for the telephonic contact in the instant case and the domestic contact in ***Davies*** and ***Waters***. Aside from that, the connection with work around that activity was slender.

499. For similar reasons, if pursued, the claim in paragraph 400 (7.1) is rejected. Attempts by R to blackmail the claimant have no connection with work. The only connection with work was that R and the claimant happen to be in the same employment.

500. The real issue is whether subjecting the claimant, as we have found, to non-consensual sexual advances and physical sexual activity for around two and a half years from the end of 2012/the start of 2013 until July 2015 was in the course of employment.

501. In so far as sexual activity was carried out at the claimant's home or in the outdoors then such is on any view outside the course of employment. This falls on the ***Waters*** and ***Davies*** side of the line (if the test may be expressed in that way). Upon those occasions, the only connection between the claimant and R is that they happened to work for the same organisation.

502. The Tribunal takes a different view, however, where such sexual activity and advances occurred upon work premises or upon service user holidays. We have found that R was not acting in a formal counselling capacity in relation to the claimant. The claimant viewed his role as being one of support and friendship falling short of a professional therapeutic relationship. From that perspective, the actions of R towards the claimant upon service users' holidays and in work premises cannot be considered as an improper mode of doing unauthorised act (such as providing a professional counselling service). (We acknowledge that there may be professional bars to R having provided a professional therapeutic service to the claimant in any case even had R been willing so to do). However, that is not the correct test per ***Jones***. Even though the therapeutic benefit fell short of that of a professional therapist-patient relationship, it R was providing his skills to the claimant who benefitted from them. It would undermine the policy of the anti-discrimination legislation were an employer able to escape vicarious liability upon the basis that the employee in question was not fulfilling their substantive role but was only doing something aligned to it in some way.

503. There was no issue of fact that sexual relations between R and the claimant took place in locations such as those referred to by the claimant in paragraph 103 above. We have found that R was the dominant personality in the relationship. He effectively used his professional skills to take advantage of the claimant's vulnerability. He did so in workplace settings.

504. Such activity, in our judgment, goes way beyond the simple fact of R and the claimant happening to have the same employer. It was R's employment with the respondent and his role within the respondent which attracted the claimant to him in the first place. It was professional skills being exercised by R which led to his ability to take advantage of the situation. Where R ought to have recognised a safeguarding case (and probably did so) he chose instead to exploit the claimant's vulnerability. He did so in workplace settings not only at the respondent's premises but also on service user respite trips. It is difficult to see how there can be any sensible distinction between a sexual assault of an employee at a social event organised (formally or informally) through work in an outside location such as a public house on the one hand and a gathering of employees organised for the purposes of work-related trips away on the other. In those circumstances, the authorities point in only one direction which is that R's conduct towards the claimant in so far as it was undertaken within work-related locations was in the course of his employment and for which the respondent therefore has a vicarious liability.

505. Upon the issue of the sexual activity which took place in the service user's home on 8 July 2015, the respondent argues that R was in fact on sick leave at the time and was therefore not undertaking work. The Tribunal rejects this

proposition. It is common ground that sexual relations had taken place in the house of service users in the past and even in caravans being used by service users on respite trips. When the claimant and R met by chance on 8 July 2015 the claimant was going about her duties. R knew that full well.

506. It is difficult to see why such conduct is not in the course of employment merely because of the happenchance that R was on leave at the time. Upon this basis, if a sexual encounter had taken place in the work premises at, say, 5pm where R's duties finished at 4pm, the respondent would have no vicarious liability. Such seems to us to be an unrealistic proposition. We are satisfied that there was close proximity with work (particularly as the claimant was actually going about her duties that day) such that that incident too should be considered as having taken place in the course of employment.

507. The respondent seeks to rely upon the statutory defence that they took all reasonable steps to prevent R from engaging in unwanted conduct of a sexual nature. The difficulty for the respondent upon this issue is that the Tribunal simply heard no evidence of what reasonable steps were undertaken by the respondent to stop R so conducting himself.

508. Ms Nowell submits in paragraph 66 of her written submission that R's *"professional training as well as a safeguarding training provided to [R] by the respondent would have made it clear that any of the conduct complained of by the claimant was totally unacceptable in the context of a counsellor/client or patient relationship".*

509. There is a schedule of the training undertaken by R within the bundle at pages 2753 to 2754. This includes *"safeguarding adults awareness"* carried out on 18 March 2014. However, the Tribunal received no evidence about the contents of this course. There is no basis upon which the Tribunal may conclude that the course (or indeed any other course attended by R) dealt with equality issues generally and the 2010 Act in particular.

510. Further, in our judgment, it is insufficient for the respondent to simply pray in aid R's professional training. Again, the Tribunal has no evidence as to the professional training undertaken by R to achieve his professional qualifications. Much of the statutory protection afforded by the 2010 Act to workers and employees would be eroded were an employer simply able to say to a Tribunal that the individual is professionally qualified and has undergone professional training. That is way short of what is required to satisfy the Tribunal of the steps taken by the employer to prevent the discriminator or harasser from conducting themselves in breach of the 2010 Act. Such an approach would be to render the statutory employment protections in the 2010 Act a dead letter in cases of employees holding a professionally recognised qualification of some kind.

511. A limitation issue also arises upon this aspect of the claimant's claim. We have found as a fact that the relationship was brought to an end by the claimant in rather forceful circumstances on or around 8 August 2015. The last sexual activity between R and the claimant occurred on 8 July 2015. Were it to be the case that the course of conduct of which the claimant complains upon this issue ended that day then she needed to commence early conciliation pursuant to the Employment Tribunals Act 1996 by 7 October 2015 and then present her complaint to the Employment Tribunal within three months of 8 July 2015 together with the period spent in early conciliation.

512. The claimant, of course, did not do so. She did not contact ACAS until 4 August 2016. On the face of it, accordingly, the sexual harassment complaint appears to be out of time.

513. However, the claimant presented a complaint to the respondent about R on 16 September 2015 and then again on 1 October 2015. As we have seen, those matters were investigated and culminated in the dismissal of R in March 2016 and the claimant on 14 June 2016.

514. In the Tribunal's judgment, the relevant course of conduct upon this complain (being the sexual harassment claim) ended on 8 July 2015. In ***South Western Ambulance Service NHS Foundation Trust v King*** [UK EAT/0056/19] HHJ Choudhury (President) said, at paragraph 36, that it was for the claimant to *"establish constituent acts of discrimination or instances of less favourable treatment that evidence a discriminatory state of affairs. If such acts or instances cannot be established, either because they are not established on the facts or are not found to be discriminatory, then they cannot be relied upon to evidence the continuing discriminatory state of affairs".*

515. Earlier, at paragraph 33, he said, *"if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act. If a Tribunal considers several constituent acts taking place over the space of a year and finds only the first to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over the year. To hold otherwise would be … to render the time limit provisions meaningless. This is because the claimant could allege that there is a continuing act by relying upon numerous matters which either did not take place or which were held not to be discriminatory".*

516. There were no further instances of harassment after 8 July 2015. That complaint has therefore been presented out of time.

517. Employment Tribunals have a wide discretion to allow an extension of time under the *"just and equitable"* test in section 123. However, this does not necessarily mean that the exercise of the discretion is a foregone conclusion. Indeed, the Court of Appeal made it clear in ***Robertson v Bexley Community Centre trading as Leisure Link*** [2003] IRLR 434, CA, that when Employment Tribunals consider exercising the discretion to extend time there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, the Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. The onus is therefore on the claimant to convince the Tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable.

518. Section 123 of the 2010 Act does not set out any list of factors to which a Tribunal is instructed to have regard in exercising the discretion whether to extend time for just and equitable reasons.

519. In ***British Coal Corporation v Keeble and others*** [1997] IRLR 336 EAT it was suggested that in determining whether to exercise discretion to allow

the late submission of a discrimination claim, Tribunals would be assisted by considering the factors listed in section 33(3) of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached and to have regard to all of the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once they knew of the facts giving rise to the course of action; and the steps taken by the claimant to obtain appropriate advice once they knew of the possibility of taking action.

520. Jurisprudence following ***Keeble*** has emphasised that there is no requirement for the Tribunal to slavishly adhere to the section 33(3) factors. There will be no error of law by failing to consider the matters listed in section 33(33) when considering whether it is just and equitable to extend time provided the Tribunal leaves no significant factor out of account in exercising its discretion. The checklist in section 33(3) should not be elevated into a legal requirement but should be used as a guide. The factors in section 33(3) serve as a valuable reminder of what may be taken into account but the relevance of them depends upon the fact of each individual case.

521. In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23 Underhill LJ cited with approval the Judgment of Leggatt LJ in ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640. Here, Leggatt LJ said (in paragraph 19) that, "*the factors which are almost always relevant to consider when exercising any discretion whether to extend time are:*

(a) The length of, and reasons for, the delay and

(b) Whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

522. In ***Abertawe*****,** the Court of Appeal rejected the proposition that in the absence of an explanation from the claimant as to why they did not bring the claim in time and an evidential basis for that explanation, the Tribunal could not properly conclude that it was just and equitable to extend time. The Court of Appeal held that the discretion under section 123 of the 2010 Act for a Tribunal to decide what it thinks to be just and equitable is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reasons are relevant matters to which the Tribunal ought to have regard. However, there is no requirement for a Tribunal to be satisfied that there was a good reason for the delay before it can conclude that it is just and equitable to extend time.

523. A Tribunal will fall into error when considering whether it is just and equitable to extend time if the focus is simply upon whether the claimant ought to have submitted their claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent. Of course, some prejudice will always be caused to the employer if an

extension of time is granted given that the case would otherwise be dismissed. However, the prejudice caused needs to amount to more than that.

524. In our judgemnt, it is just and equitable to extend time to enable the Tribunal to consider the complaint. This is because the claimant awaited the outcome of which she viewed as the respondent's internal procedures before making her claim. Where the claimant has sought to achieve redress of matters internally, in our judgment, such is a fact which weighs in favour of granting an extension of time.

525. Additionally, the Tribunal takes into account the claimant's medical condition as evidenced in the medical materials before the Tribunal. This evidence shows that the sexual misconduct (as we have found it to be) had a profound effect upon the claimant resulting in severe post-traumatic stress disorder.

526. There was no credible suggestion that any cogent evidence had been lost and which may have benefited the respondent. Ms Nowell prayed in aid that this had resulted in the loss of material upon the telephone and work tablet devices.

527. The loss of the work tablet is the fault of the respondent. No one is able to say what became of it. Blame cannot be attributed to the claimant about that aspect of the matter and the loss of any cogent evidence which may have been upon the device.

528. Further, all of the evidence points to material upon the telephones being actually in the claimant's favour. The Tribunal refers to paragraphs 111 and 112, 174, 195-197. As the claimant's representative said in paragraph 113 of his submissions, 194 texts were sent by R from his work mobile phone to the claimant's personal mobile phone (page 1052). X accepted that a disproportionate number of texts from R may evidence coercion of the claimant. The probability is therefore that the lost images and material would have benefited the claimant's case in any event and therefore any prejudice weighs on her side and not that of the respondent. The inability of the claimant to recall the security code (paragraph 102) was apparent as early as October 2015 and thus loss of material upon her work telephone was not caused by the claimant's delay in issuing the proceedings. The inability to access the work mobile phone as a consequence was therefore not as a result of any delay on the part of the claimant in instituting the proceedings and in any case, the inability to access it probably is more prejudicial to the claimant.

529. The balance of prejudice therefore favours the claimant. The prejudice to the claimant of the Tribunal refusing to extend time to consider the sexual harassment complaint will result in the loss to her of that complaint which the Tribunal has held to be meritorious. She would then suffer a significant injustice. There is in reality no prejudice to the respondent other than that of having to meet the claim.

530. All of the other factors favour the claimant: her raising the issue internally before resorting to the Tribunal; the medical evidence of the profound effect of the sexual harassment upon her; and the loss of the cogency of the evidence prejudicing her case rather than that of the respondent. The Tribunal also notes that the medical evidence is to the effect that there was a significant impairment upon her ability to present her case at the disciplinary

hearing in May 2016. It follows, by parity of reasoning, that the claimant's ability to effectively present an Employment Tribunal case would also have been similarly impaired. For all of these reasons, time shall be extended to vest the Tribunal with jurisdiction to consider the claimant's sexual harassment complaint. It is just and equitable so to do.

531. The Tribunal now turns to the unfair dismissal complaint. This is a complaint brought under the 1996 Act.

532. The respondent, of course, admits having dismissed the claimant. Therefore, it is for the respondent to show a permitted reason for the dismissal of the claimant. In this case, the permitted reason relates to the claimant's conduct.

533. Should the respondent satisfy the Tribunal that they had a genuine belief in the guilt of the employee of that misconduct at the time, then the Tribunal must go on to consider (the burden upon this being neutral) that the employer had reasonable grounds upon which to sustain that belief and that at the stage at which that belief was formed the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from their employment for a conduct reason.

534. Should the Tribunal be satisfied that there existed reasonable grounds for the belief in the guilt of the employee and that a reasonable procedure was carried out then the Tribunal must consider whether the dismissal of the employee for that reason was one that fell within the range of reasonable responses.

535. In judging the reasonableness of the employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses to the employees conduct within which one employer might reasonably take one view, and another quite reasonably take another view. The function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair. If the dismissal falls outside the band it is unfair. In taking into account fairness, the Tribunal shall take into account the size and administrative resources of the employer's undertaking and the issue shall be determined in accordance with equity and the substantial merits of the case.

536. In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of criminal misbehaviour, where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as upon the evidence directed towards proving the charges.

537. A breach of the principle of natural justice would clearly be an important matter when a Tribunal considers the questions raised by section 98(4) of

the 1996 Act. The requirements of natural justice are: firstly, that the person should know the nature of the accusation against them; secondly that they should be given an opportunity to state their case; and thirdly, that the disciplinary panel should act in good faith.

538. The claimant's representative drew to the Tribunal's attention the case of ***William Hicks and Partners (a firm) v Nadal*** (UK EAT) 0164/05. The EAT held that the denial of an opportunity to attend a disciplinary hearing may render a procedure unfair.

539. In that case, the EAT referred to ***Khanum v Mid Glamorgan Area Health Authority*** [1978] IRLR 215 which is authority for the proposition that the three basic requirements of natural justice are those as just described in paragraph 537.

540. In ***Uddin v London Borough of Ealing*** (UKEAT 0165/19) the Employment Appeal Tribunal held that where an investigating officer knows of a fact germane to the issues in the case but that is not passed on to the disciplining officer, this may render a dismissal unfair. In paragraph 78, the EAT held that, *"In a case where someone responsible for the conduct of a pre-investigation did not share a material fact with the decision maker, that could be regarded as relevant to the Tribunal's adjudication of the section 98(4) question".*

541. In ***Watson v University of Strathclyde*** (UK EATS/0021/10) the EAT held, in paragraph 30, that *"for there to be a fair hearing, a court or tribunal must not only be free from actual bias but must also be free from apparent bias. The assertion of bias in the present case did not of course relate to a court or tribunal. It related to the conduct of the appeal hearing stage of a grievance procedure. However we do not consider that the principles of bias are irrelevant because it follows from the employee's right to be afforded a reasonable opportunity to achieve redress of their grievances (**W A Goold (Pearmark) Limited v McConnell** [1995] IRLR 516) that any hearing that forms part of a grievance procedure should be conducted in accordance with the principles of natural justice. Those principles in turn require that the hearing afforded to the employee is, in all the circumstances, a fair one".*

542. On the facts of ***Watson***, the claimant raised a grievance concerning the director of marketing and communications at the university. She included the fact that he had just been convicted of an offence of breach of the peace which supported her view that he could display aggressive behaviour. The decision to appoint the director had been taken by the appointing committee of which the secretary to the university was a member and the secretary supported the director after hearing of his conviction, saying there was no reason why he should resign. The claimant's grievance was not upheld. She appealed against the decision but was advised that the appeal panel would include the secretary. She wrote to say that she would not attend as she believed that the secretary had a conflict of interest in her case having been involved in the appointment of the impugned director and in supporting him after his conviction. The appeal hearing went ahead without her. The appeal was rejected. The secretary was included as a member of the panel. The claimant resigned and claimed constructive unfair dismissal. The EAT held that no reasonable tribunal could have thought it appropriate that the secretary should sit on the panel. Any reasonable employer should have regard to the need to afford the employee a fair hearing and would have

considered it would not be fair to include the secretary as a member of the hearing panel.

543. It follows therefore that where clear views have been expressed about a matter which constitutes a live and significant issue in a subsequent case, an issue may arise as to whether a fair-minded observer might entertain a reasonable apprehension of bias by reason of pre-judgment.

544. The application of the range of reasonable responses test to the procedural aspects of this matter gives of only one answer: that the respondent's conduct fell outside the range of reasonable responses of the reasonable employer. The procedure followed by the respondent was fundamentally flawed in a number of respects such as to take the process outside the band of reasonableness.

545. On any view, the claimant was not fit to actively participate in the disciplinary hearing held on 26 May 2016. Dr R indicated in her report 12 May 2016 (paragraph 220) that the claimant was not fit to answer the sexual misconduct charge. Indeed, not only was the claimant unfit so to do, it was medically contra-indicated to require her do so. The claimant's GP was supportive of an adjournment (paragraph 226). The claimant's counsellor with the [x]RASAC said the claimant had been extremely traumatised by events and expecting her to recount her experiences may place her at further psychological harm. The counsellor went so far as to say in her report of 24 May 2016 that she *"cannot stress enough how concerned and anxious I am on [the claimant's] behalf at your request to attend this hearing on Thursday."*

546. The very strong medical evidence advanced by and on behalf of the claimant pointed in only one direction – that the disciplinary hearing should not go ahead on 26 May 2016 or if it did go ahead, it should be confined to the patient confidentiality issue only.

547. Y's decision to proceed on 26 May 2016 was against medical advice and thus fell outside the range of reasonable responses. Indeed, matters were compounded by the fact that Y said that she would consider the claimant's adjournment application during the course of the hearing. Such placed the claimant in an invidious position as then she would have to prepare to proceed with the sexual misconduct charge should Y refuse the adjournment application. Such a course was medically contra-indicated. No reasonable employer would proceed in this way. Y's decision fell way outside the band of reasonable managerial prerogative.

548. Y sought to justify her decision to go ahead upon the basis of the duty of candour. The Tribunal does not accept that Y had any regard to the duty of candour until appeal stage. We refer to paragraphs 222-223 and 235. This strikes the Tribunal as being an attempt by Y to arrive at an *ex post facto* justification for the unjustified course of conduct on her part.

549. The impression the Tribunal has is that Y was simply impatient with the claimant, was affronted by the conduct of the claimant and R and was sceptical of her claim that she was unable to proceed. We refer to paragraph 216. In a similar vein, there is also much in the claimant's point that there was an *animus* towards the claimant from key players involved in the matter upon the respondent's side: paragraphs 146-150, 174 (fourth bullet point), 214- 217, 227-229 and 239.

550. Y's impatience with the process and the apparent dislike of the claimant cannot override the interests of natural justice which would be defeated in the event that the claimant was unable to attend and present her case due to medical unfitness. The medical evidence (commissioned both by the respondent itself and the claimant) pointed overwhelmingly in favour of adjourning the matter.

551. Furthermore, it was plainly inappropriate for Y to have sat in judgment on the claimant's case. She had reached a conclusion against the claimant on R's case. She had decided to reject the case against R that he had coerced and manipulated the claimant into having sexual relations. That was essentially the claimant's defence in answer to the sexual misconduct charge.

552. This gave rise to a clear case of apparent bias such as to require Y to recuse herself from any further involvement in the matter *per* ***Watson***. She had reached a concluded view against the claimant in R's case upon the point which was central to the claimant's defence. On any view, a fair-minded observer would entertain a reasonable apprehension of bias by reason of pre-judgement in the circumstances. Any reasonable employer having regard to the need to afford the claimant a fair hearing would thus have concluded that it would not be fair for Y to sit in judgment upon her case. Y's continued involvement was a breach of the third requirement of natural justice per ***Khanum***.

553. Y's determination to proceed with the hearing on 26 May 2016 appears to have been motivated at least in part by the fact that the claimant was undertaking work for AAAA. Y plainly took the view that if she was fit so to do then she was fit to attend a disciplinary hearing. This is a view which Z also adopted.

554. The difficulty for the respondent upon this issue is that X was aware that the claimant was working for AAAA and that Dr R had not nonetheless changed her views about the claimant's unfitness to attend the disciplinary hearing (paragraph 208). X was also aware that the claimant had attended the [x]RASAC (paragraph 225). (The Tribunal accepts that Y did not know that X had approached Dr R for a view as to whether or not the claimant working for a third-party employer changed the picture).

555. The Tribunal agrees with the claimant that X not sharing with Y a material fact with Y about the claimant's continued inability to attend the disciplinary hearing is relevant to the section 98(4) question of whether the employer acted reasonably and fairly in the circumstances per ***Uddin.*** It does appear remarkable that X did not pass this information on to Y. At all events, the respondent knew (through X) that the respondent's occupational health physician's opinion that the claimant was unfit to work was maintained notwithstanding Dr R's knowledge the claimant was working for AAAA. This knowledge notwithstanding, the respondent decided to proceed with the disciplinary hearing.

556. Y's conduct of matters on the day also fell outside the range of reasonable responses. We have found as a fact that Y was aware of the content of the Unsion statement of case (paragraphs 259-268). Notwithstanding the medical evidence (in particular from [x]SRASAC) of 24 May 2016 Y decided to proceed with the disciplinary hearing nonetheless.

557. Further, Y did not permit the claimant to participate in the hearing upon her arrival: paragraphs 272-288. This is a clear breach of the second principle of natural justice in ***Khanum***: that the employee should be given an opportunity to state their case. Remarkably, Y shut the claimant out from doing just that and would not even accept the claimant's written statement of case.

558. True it is that the claimant arrived late. Some witness evidence had been heard. However, the Tribunal is satisfied that the claimant had good reason for arriving late because she needed to see her GP and to obtain medication to deal with the stress brought about Y's refusal to grant a very strong adjournment application. To simply refuse to allow the claimant to come in when she did arrive is a plain and obvious breach of the principle that an employee has a right to a fair hearing.

559. This was then compounded by Y's refusal to accept from the claimant the resubmission of the Unison statement of case. Y's justification for refusing to accept the statement of case does not stand up to scrutiny. It is not her business to intermeddle in the relationship between Unison on the one hand and its member on the other. It is a matter for the claimant whether to adopt the Unison statement of case. She elected to do so. It should have been accepted into evidence. It fell outside the range of reasonable responses for Y to accept from the claimant the Unison statement of case which Y may safely have accepted, the claimant by her conduct giving authority for it to be presented and to stand as her case.

560. In summary, therefore, the respondent's conduct of the disciplinary hearing fell outside the range of reasonable responses broadly because:

a. Y unreasonably refused the adjournment application.

b. Y should not have sat in judgement in the case in any event because of her prior involvement with R's case.

c. Y prevented the claimant from appearing at her own disciplinary hearing when she arrived.

d. Y refused to accept from the claimant her written statement of case.

561. Other criticisms may be added which simply add to the conclusion that the respondent's conduct of matters fell outside the range of responses of the reasonable employer. Firstly, the claimant was invited to make written submissions by 3 June 2016 in circumstances in which she had no way of knowing what had been said by the witnesses who had been heard up to the time of her arrival or, for that matter, those witnesses from whom the respondent heard after she left following the refusal of entry. The claimant was effectively having to argue her case in the dark.

562. Secondly, the claimant was caught by surprise by the respondent's decision to call Q to give evidence. He was not on the list of the witnesses notified to the claimant in advance.

563. Finally, it was unfortunate that the respondent vested X with a duty to investigate of a sexual misconduct matter in circumstances where X, although a very experienced and knowledgeable psychologist, had no experience of dealing with disciplinary matters. With respect, X's naivety in these matters may have contributed to X's failings in particular to relay to Y what Dr R had told her (X) about the AAAA issue. X did not follow through with obtaining OH opinion in December 2015. X did not appreciate, as did Q, the significance of the email dated 28 October 2011 which was presented to

her on 9 December 2015 (paragraph 155). She appeared to have little understanding of the issues that arise in difficult cases such as this or pay heed to the well-founded submissions made by Unison in their statement of case. She accepted R to be a witness of truth when there could be little dispute that he is an inveterate liar having for long deceived his wife about his relationship with the claimant, misled X about his telephone activity (paragraphs 130 and 174) and misled Q (paragraph 131).

564. None of these issues were remedied at appeal stage. The appeal was in the form of a review and not a re-hearing. Notwithstanding the fundamental flaws identified by the Tribunal, Z nonetheless upheld Y's decision. It is remarkable that an individual as experienced as Z should not have taken cognisance of the inappropriateness of Y sitting in judgment in the circumstances, of the strength of the medical evidence supportive of the claimant's adjournment application and the failure to allow the claimant effective participation in her own disciplinary hearing.

565. Given the size and administration resources of the respondent, plainly it would have been possible for an officer other than Y to have had conduct of the disciplinary hearing. There was no compelling reason why the disciplinary hearing had to take place on 26 May 2016 in circumstances where the claimant's GP suggested tentatively a delay of around two months.

566. Y and Z both gave similar accounts of the exculpatory evidence which they would expect to see to uphold the claimant's coercion claim: (paragraphs 296-297 and 319-320). There was little appreciation of the difficult issues to which these claims give rise. Their somewhat stereotypical expectation of the reaction of a victim of sexual abuse left the claimant with an impossible evidential burden to surmount and was a dereliction of the respondent's duties to conduct a reasonable investigation in circumstances where there were going to be inevitable professional implications for the claimant.

567. Upon the basis of these findings, the Tribunal's conclusion is that the claimant was unfairly dismissed. The issue that arises therefore is what would have happened had the respondent carried out a fair procedure? The claimant was fit to attend the appeal hearing which took place on 17 January 2017. She faced questioning from Y at the appeal hearing. In the Tribunal's judgment, had the respondent carried out a fair procedure and granted the claimant an adjournment she would have been fit to attend a disciplinary hearing at around the same time as she in fact attended the appeal hearing and thus presumably was fit so to do.

568. We say this because, as has just been said, the claimant's GP tentatively suggested that she may be fit no less than two months from the date of the GP's report of 4 April 2016. We know that in fact the claimant was not fit to attend on 26 May 2016. We also know that the respondent arranged in December 2015 for the disciplinary hearing to take place on 3 May 2016: paragraph 185. Therefore, working upon these timescales, we can infer that the claimant's health may have improved by late summer/early autumn of 2016 such that she was able to indicate a fitness to attend. It would then have taken the respondent several months to organise the disciplinary hearing.

569. Assuming, therefore, that the matter came on at disciplinary hearing stage before a disciplinary officer other than Y, would the respondent have reached the same conclusion as did Y? Plainly, the respondent could entertain a reasonable belief that the claimant and R had sex in the service user's home on 8 July 2015. This is not in dispute. The real issue was around the claimant's mitigation.

570. This brings to the fore the difficult question of whether the respondent may have acted within the range of reasonable responses in not commissioning expert evidence to assist with the question of whether the claimant's coercion defence was meritorious.

571. The Employment Judge drew to the attention of the parties and invited submissions upon the cases of ***City of Edinburgh Council v Dickson*** (EATS/0038/09) and ***Grossett v City of York*** [2018] EWCA Civ 110. In both of these cases, employees advanced medical explanations for egregious examples of misconduct.

572. In ***Dickson***, the claimant was found to have been watching pornography on a school computer and sought to attribute his behaviour to a hypoglycaemic episode caused by diabetes which led to him behaving out of character. The dismissal officer decided to dismiss the employee without investigating or understanding his medical condition or apparently taking it seriously. The EAT commented that there was justified scepticism about the employee's explanation but it was supported by some material from the employee such that the explanation may be true. A reasonable employer, it was held, would investigate it.

573. In ***Grossett***, the employee blamed cystic fibrosis for an error of judgment in showing an 18-rated horror film to children aged 15 and 16 years of age. There was some limited medical evidence before the disciplinary panel but dismissal was held to be within the range of reasonable responses.

574. In this case, the claimant was successful in her role. She had achieved a temporary promotion. Her explanation in reporting R to the NMC was her self-preservation in the hope that steps may be taken to protect her from R. We refer to paragraph 75.

575. As was recognised by Y (paragraph 261), the staff side case prepared by Unison contained various printed internet search results regarding coercive, controlling and abusive relationships. Coupled with that was the diagnosis of post-traumatic stress disorder by Dr R and the claimant's medical attendants.

576. When the issue of commissioning expert medical health to assist with the difficult issue of alleged coercion was raised with Y by the Tribunal, she said, "*if capacity had been called into question it would have been a different panel".* Although this answer was not entirely clear, Y therefore did not rule out the possibility of expert assistance with the issue.

577. The approach of Y (endorsed by Z) was that absent physical force it would be difficult to accept coercion was at play albeit that Y did accept that it is possible to compel an individual without the use of physical force in certain circumstances. We refer to paragraph 297. Regrettably, Y and Z appeared to have a poor understanding of the issue of grooming and coercion alluded to by the claimant's trade union representative. The Tribunal's observations in paragraph 566 above are pertinent. Y and Z appeared to adopt a

stereotypical assumption about the behaviour of those subjected to sexual abuse.

578. Ms Nowell prayed in aid that the HPC had decided the issue of coercion without obtaining expert opinion upon the question of coercion. It bears repeating that the respondent is not seeking to rely upon the HPC's findings as factual determinations binding upon or persuasive of this Tribunal. Ms Nowell's point upon this issue was that the HPC's handling of the case was similar to that of the respondent and thus corroborates the respondent's case that by not commissioning medical evidence the respondent acted within the range of reasonable responses.

579. The Tribunal has some difficulty with this submission. The HPC did not obtain expert opinion: the medical member was an occupational therapist. It cannot be enough for an employer in any given situation to seek to bolster its position upon reasonable conduct simply by finding another example of a different body or institution approaching matters in the same way. Such falls short of establishing there to be a reasonable body of opinion. If the respondent's submission upon this were to be correct then all that would be entailed in a given case of impugned unreasonable conduct on the part of an employer is for the employer to find another employer who has acted in the same way (even if that way is also unreasonable).

580. The Tribunal has some difficulty in accepting it to be within the range of reasonable responses to decide upon an issue as difficult as the ascertainment of grooming and coercion without commissioning the medical opinion of a suitably qualified psychiatrist or other medical practitioner. The danger of proceeding and committing an injustice against the employee by proceeding without a proper understanding of matters is only too apparent.

581. The respondent had the resources to undertake such an investigation. There were a number of red flags which presented themselves. Given the profound professional implications for the claimant of finding that she had freely consented to sexual activity in a service user's home, that she drew the attention of her conduct to the NMC and the respondent herself (with no obligation upon her to do the latter at least) and the content of the Facebook message of 28 October 2011 it surely falls outside the range of reasonable responses not to invest resources into the commissioning of medical expert evidence to aid an understanding of the claimant's defence. Indeed, the claimant was censured by the HPC and received a caution upon her record. This is a professional blemish which may impair her career. The claimant's conduct was reported to a professional body by the respondent. This has the potential to cause grave injustice to an employee hence the *dicta* in ***A v B*** [2003] IRLR 405 EAT that where criminal misbehaviour or professional misconduct is in question, the employer must always carry out a most careful and conscientious investigation into matters.

582. On 9 December 2015, X was so concerned about the claimant's welfare that she wishes to refer her to occupational health (paragraph 156). Nothing came of this proposal. The report was never commissioned. The OH report that was commissioned was directed at the claimant's fitness to attend the disciplinary hearing and not her mental health generally. This may be viewed as an opportunity missed. The respondent seemed to lose sight of the obligation to explore the question of possible medical evidence exculpatory of the claimant. Y lost sight of this obligation.

583. An analogy may be drawn with an employer dealing with an incapacity case for a previously well-thought of and long-standing employee who acts as unfit for the role in which they have hitherto performed well or where they act out of character. A well-resourced employer would be expected to investigate the cause.

584. Had the respondent undertaken those enquiries, then the next question that arises is what the outcome may have been? The Employment Judge raised very early on during the course of these proceedings the prospect of commissioning expert evidence. Neither party saw fit to produce such in order to assist the Tribunal. The Tribunal must therefore do the best it can upon the basis of the evidence presented to it. Our findings upon the complaint brought under the 2010 Act of sexual harassment persuade us that had the respondent acted within the range of reasonable responses by commissioning professional expert help to get to the bottom of the grooming and coercion allegation raised by the claimant, then this would have exonerated her. Therefore, it would not have been open to the respondent to dismiss the claimant upon the allegation of sexual misconduct.

585. That is however not the end of the matter. The respondent, of course, became aware of the claimant working for a third party whilst she was on paid suspension. Y properly reserved the respondent's position upon the issue.

586. The Tribunal accepts the respondent's case that had she not been dismissed for sexual misconduct then it was open to the respondent to pursue disciplinary proceedings against the claimant for having worked for AAAA. The first issue that arises therefore is the question of when the respondent may have moved against the claimant upon this issue. We have determined that the claimant was fit to attend a disciplinary hearing in January 2017 to face the allegation about sexual misconduct. The claimant was invited to interview by JJ about the AAAA issue on 30 August 2017 (paragraph 346). Therefore, had the claimant not been unfairly dismissed in June 2016, we find that the respondent would have taken action upon the AAAA issue after January 2017 but not until the summer of 2017 at the very earliest (it not being open to the respondent to dismiss her upon the sexual misconduct allegation).

587. We know that the claimant did not in fact respond to JJ's invitations to attend an interview. JJ had to enlist the assistance of South Yorkshire Police. The claimant was arrested on 19 February 2008. It would, in our judgment, be unjust for the claimant to take advantage of the delay of five or six months attributable to her evading interview by JJ. The claimant ought to have responded to his invitation at the end of August 2017.

588. The claimant was charged with the offence of dishonesty on 27 April 2018, around two months after the interview of 19 February 2018. Had she attended interview at the end of August 2017, assuming the same timescale holds, she may have been expected to have been charged at around the end of October or early November 2017.

589. The evidence of E and JJ was to the effect that disciplinary proceedings may have commenced once the claimant was charged. As E put it, the issue was *"black and white"* and he saw no reason for there to have been a delay in domestic proceedings notwithstanding there to be a parallel criminal case (paragraph 376). We agree with E upon this issue. It is difficult to see any

reason for the respondent not to have proceeded with disciplinary proceedings notwithstanding the criminal case was pending. The claimant admitted that she worked for AAAA while on paid suspension. Prejudice to the criminal case in these circumstances was unlikely.

590. We therefore find that had the claimant not been unfairly dismissed for the sexual misconduct charge, the respondent may have brought disciplinary proceedings against her for working for AAAA while on suspension leave and that those proceedings may have commenced in late October/early November 2017.

591. The claimant was entitled, pursuant to the respondent's disciplinary policy, to 20 working days' notice of a disciplinary hearing (paragraph 2.7.6). The Tribunal takes into account that the respondent may well have undertaken a verification meeting with the claimant about this issue before levelling a charge against her. That said, there is no dispute that the claimant was working for AAAA during her period of suspension. The investigation into the AAAA matter would have been nothing like as complex as was the investigation into the patient confidentiality and sexual misconduct matters.

592. In our judgment, the claimant may reasonably have faced a disciplinary hearing upon an allegation of working for AAAA while suspended at the end of February 2018. The question then is whether the claimant would have been liable to dismissal.

593. The starting point is that the common law implies into every contract of employment a duty of fidelity on the part of the employee. This imposes an obligation on the employee to provide honest, loyal and faithful service during employment. As the Court of Appeal pointed out in ***Wessex Dairies Limited v Smith*** [1935] 2 KB 80, CA, an employee is employed to look after the interests of the employer and not their own individual interests. The implied contractual duty of fidelity requires employees, during working hours, to devote the whole of their time and attention to the job they are employed to do. Thus, an employee who works either for themselves or for another during those hours without the consent of the employer will be in breach of the duty of fidelity whatever the type of work involved.

594. As we said in paragraph 51, the disciplinary policy requires the suspended employee to be available during normal working hours throughout the suspension period. The claimant was told in the suspension letter (paragraph 50) that she had an obligation to remain contactable during normal office hours.

595. Examples of gross misconduct in the disciplinary policy include unauthorised absence from work and failing to carry out reasonable instructions (paragraph 167). JJ also pointed to the term at page 2040(5) that an employee has an obligation to inform their line manager of any paid employment outside of the respondent and the declaration of interests and standards of business conduct policy which requires (at page 359AB) the completion of a declaration of additional employment form where such a situation arises.

596. Taking all of these matters into account, the Tribunal is satisfied that working for a third party employer without obtaining the sanction of the employee's line manager or at the very least notifying the line manager of the position may in an appropriate case be considered an act of gross misconduct. This is all the more so where the employee is on suspension

and is told to make themselves available during working hours. A suspended employee is only relieved of the duty to attend work and not of the other obligations in the contract of employment (including those which arise by reason of implied terms such as the duty of fidelity).

597. The Tribunal is satisfied that Q did not give permission to the claimant to work for AAAA. The Tribunal accepts that Q indicated to the claimant that she may undertake some part time work for AAAA provided it did not conflict with her duties with the respondent. We refer to paragraph 355. However, this was a statement made by Q around four years prior to the statement which he gave to the police in connection with the criminal proceedings. Further, the claimant's role with AAAA was a full time role and not a part time role. The impression the Tribunal has is that the claimant was floating with Q the possibility of doing part time work alongside her work for the respondent at a time well before the events with which the Tribunal has been concerned.

598. We agree with Miss Nowell that it is telling that it was not put to Q when he gave evidence before the Tribunal that he had given the claimant express permission to work for AAAA during her period of suspension. Also, that was not put to Q during the course of the criminal proceedings.

599. The Tribunal does not find convincing the claimant's representative's argument that the claimant worked for AAAA in the open and therefore there was a degree of transparency. The matter only came to light because she was seen by chance working for AAAA by a medical student (paragraph 206). The impression that the Tribunal has is that the claimant was less than transparent with the respondent. Such lack of transparency is evidenced by the email at page 1781 to which we refer in paragraph 370. Certainly, on one reading, this could be construed as an attempt to deflect the respondent away from the suggestion that she was working for AAAA. Further, on 23 November 2015, the claimant said that she was unfit to attend the meeting of 23 November 2015 in circumstances where she was in fact working for AAAA that day (paragraph 144).

600. The conclusion of the Tribunal is that the claimant has not demonstrated that Q or anybody else within the respondent gave her permission to work for AAAA during her period of suspension. The vague suggestion by Q four years prior that such would have been in order to do so falls way short of an express permission as required by the respondent's terms, conditions and policies. Had permission been given it would have been a very straightforward matter for the claimant to have asked Q to give his confirmation of it.

601. In the judgment of the Tribunal, therefore, the respondent could plainly have reasonably concluded that the claimant was working for AAAA from November 2015 whilst she was on paid suspension leave. The respondent could, acting within the range of reasonable responses, have reached the decision that the claimant's conduct amounted to gross misconduct and would have been acting reasonably by dismissing her. The Tribunal's judgment therefore, is that the claimant's contract of employment with the respondent would have come to an end by the end of February 2018.

602. The Tribunal rejects any suggestion that the respondent was precluded from acting against the claimant upon the AAAA matter upon the basis that Y knew of it and yet decided to dismiss her upon the sexual misconduct charge alone. There is authority for the proposition that where an employer

specifically chooses not to rely on an available reason but unfairly dismisses and employee for a different reason then it is not open to the employer to then turn around and rely upon the eschewed reason as a fair reason to have dismissed the claimant in any case. The Tribunal refers to ***Devonshire v Trico-Folberth Limited*** [1989] ICR 747, CA as authority for this proposition.

603. The distinguishing feature between ***Devonshire*** on the one hand and the instant case on the other is that in the former the evidence was that the employer had decided not to dismiss for the eschewed reason. On the contrary, in the instant case, the evidence was in the opposite direction. Y had reserved the respondent's position to take disciplinary action against the claimant because of the AAAA matter. The Tribunal considers Miss Nowell to make a valid point that the respondent was in no position to move against the claimant about the AAAA matter in the summer of 2016 because at that stage the matter was being investigated by the prosecuting authorities. Therefore, it cannot be said that there was evidence that this employer had effectively abandoned or eschewed the possibility of acting against the claimant arising from her work for AAAA.

604. As the dismissal of the claimant on 14 June 2016 was unfair, it follows that the respondent shall pay to the claimant a basic award. This shall be calculated in accordance with the formula in section 119 of the 1996 Act.

605. The issue that then arises is whether the basic award ought to be reduced by the Tribunal upon the grounds that the conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent. If so, then the Tribunal shall reduce that amount accordingly.

606. To make a reduction to the basic award, the Tribunal must determine on the facts that the employee was guilty of culpable or blameworthy conduct. There must be a finding that there was conduct on the part of the employee in connection with their unfair dismissal which was culpable or blameworthy. The concept of culpability or blameworthiness does not necessary involve only conduct amount to a breach of a legal obligation of some kind. It can include conduct which is perverse, foolish or bloody minded or unreasonable in the circumstances. There must then be a finding that it is just and equitable to reduce the assessment of the claimant's award to a specified extent. For the basic award, there need not be a finding that the unfair dismissal was caused or contributed to some extent by action that was culpable or blameworthy.

607. In the Tribunal's judgment, it is just and equitable to reduce the basic award in this case by 50%. The Tribunal accepts that there may have been some therapeutic benefit to the claimant in working for AAAA. Indeed, Dr R commented as much (see paragraph 303(5)) as did the Judge who had conduct of the criminal case. Further, the respondent bears a large degree of responsibility for the unhappy circumstances in which the parties found themselves.

608. That said, the claimant clearly acted in a foolish manner by not telling the respondent that she was working for AAAA whilst suspended by them. This was, frankly, simply to store up trouble for the future. In our judgment, the degree of culpability for the unfair dismissal resting upon the respondent is significant. On the other hand, the claimant acted in an underhand way by

working for AAAA and effectively collecting money from the respondent and drawing another salary from a third party unbeknown to the respondent. The equities being approximately equal, the Tribunal's judgment is that there shall be a 50% reduction to the basic award.

609. We now turn to the issue of the compensatory award. The claimant would, as we have found, been fairly dismissed by the respondent at the end of February 2018 in any case. She was in fact dismissed on 14 June 2016. She has therefore lost approximately 20 months or so of employment with the respondent.

610. The claimant shall bring into account by way of mitigation the earnings which she has enjoyed with AAAA post-dismissal. Her employment with AAAA did not end until June 2018. The entirety of the earnings must therefore be brought into account.

611. This being the case, the issue raised by the Employment Judge in the letter (caused by him to be sent to the parties on 11 March 2021) does not arise. This concerns the post taken by the claimant with another public sector employer from 2 July 2018 until March 2019. As the claimant's employment with the respondent would have ended in February 2018 anyway, any issues which may arise from the ending of the claimant's employment with that employer in March 2019 are irrelevant.

612. The Tribunal makes no reduction to any compensatory award because of the claimant's conduct. Although we have found her work for AAAA to be culpable and blameworthy conduct such as to render it just and equitable to make a reduction to the basic award, the work undertaken by the claimant with AAAA was not causative of Y's decision to dismiss the claimant. Y reserved the respondent's position upon it and it did not feature as a reason for her dismissal.

613. Further, the respondent sought to attribute to the claimant blame for the delays in convening the disciplinary hearing until 26 May 2019. The delays between 18 September 2015 and 1 October 2015 were not attributable to any fault upon the part of the claimant (paragraphs 90 to 96).

614. The delay between 22 December 2015 and 29 January 2016 was attributable to the respondent not complying with the agreement reached to send the investigation meeting notes to C (paragraphs 159 to 163).

615. That then leaves the delay between 29 January 2016 and 26 May 2016. That delay cannot be attributed to the claimant. As Y said, in December 2015 she arranged the disciplinary hearing (in fact for 3 May 2016) in order to coordinate diaries. The delay was therefore not because of any fault upon the claimant but because of a need to coordinate the diaries of busy professional people.

616. The only delay across the piece where there may be some valid criticism of the claimant was for the period between 21 October 2015 until 9 December 2015. These delays were attributable to the claimant undergoing training with AAAA (at least in part).

617. We can go so far with the respondent upon this issue that the claimant was seeking to further her career with AAAA and did not prioritise her dealings with the respondent. This led to some delay in commissioning the investigation meeting. However, there is no evidence that this delay caused the unfair dismissal of which the claimant complains to any material degree.

Indeed, the delay is not even mentioned in the dismissal letter. Y's impatience with the claimant was plainly around her attempts to persuade her to adjourn the disciplinary hearing which had been fixed for 26 May 2016 and not because of earlier delays. In the Tribunal's judgment therefore however ill-advised the claimant's actions were in October and November 2015 in prioritising her work with AAAA this was not causative at all of her dismissal. There shall therefore be no reduction to the compensatory award accordingly.

618. In summary, therefore, upon the unfair dismissal complaint:

a. There shall be a basic award but this shall be reduced by 50% by reason of the claimant's conduct.

b. Upon the compensatory award, the claimant would have been dismissed in any event 20 months after the date of her dismissal. The claimant is therefore entitled to compensation for loss of earnings over this 20 months' period but must bring into account all earnings from AAAA received by her over that period by way of mitigation.

619. We now turn to the wrongful dismissal complaint. The claimant was summarily dismissed on 14 June 2016. The question that arises is whether she was guilty of gross misconduct such as to justify the respondent summarily dismissing her. The Tribunal has found as a fact that the claimant was working for AAAA during a period of suspension leave. She was therefore acting in breach of the implied duty of fidelity, the terms of her contract of employment, letter of suspension and the respondent's policies. On any view, the claimant's actions were a repudiation of fundamental terms of the contract such as to warrant summary dismissal. (The claimant was not in repudiatory breach by having sex in the service user's house for the reasons that we have given).

620. A difficulty for the respondent, of course, is that the claimant was dismissed for sexual misconduct and not for acting in repudiatory breach by working for AAAA. ***Boston Deep Sea Fishing and Ice Co v Ansell*** [1888] 39 CHD 339, CA is authority for the proposition that the employer need not know of the breach when dismissing to rely on it. A more recent example of this principle in play may be found in ***Williams v Leeds United Football Club*** [2015] IRLR 383, QPD. The claimant in that case was given notice of termination of his employment. However, during the notice period the respondent discovered that he had acted in repudiatory breach by forwarding pornographic emails earlier in the course of his employment. Even though the employer in that case did not know of the repudiatory breach when the employee was dismissed, the employer was nonetheless held entitled to rely upon them and to summarily dismiss the employee.

621. A difficulty that presents for the respondent in this case of course is that the respondent knew of the fact of the claimant's work for AAAA but did not dismiss for it. Rather, the employee was dismissed upon the sexual misconduct charge. Were it not for her work for AAAA, this would, on our findings, have been wrongful dismissal.

622. The Tribunal agrees with Miss Nowell that ***Jackson v Invicta Plastics Limited*** [1985] QPD is authority for the proposition that where the fact of breach is known before dismissal but not acted upon, that breach can still be relied upon if found to be a repudiatory breach. At page 342 g and h Peter Pain said, "*It seems unjust that an employer, who neglects to do so and who*

knows all the circumstances, should be entitled to put forward other reasons for the dismissal but I feel that authority constrains me to hold that he may do so and I will deal with the case on that basis."

623. In any case, we agree with Ms Nowell that the claimant was in fundamental breach of the contract upon each day upon which she worked for AAAA. The claimant did so until the end of her employment with the respondent. Therefore, the respondent did not affirm the contract and waive their right to accept the breach in order to end the contract. This is all the more the case given that Y reserved the respondent's position. The breach was not a one-off act nor was it a course of conduct committed over a period which had ended some time prior to 14 June 2016.

624. The claimant sought to argue that the respondent was in fundamental breach of the contract by failing to utilise the respondent's bullying and harassment policy upon receipt of her complaints about R and instead making the decision (from 11 November 2015) to use the disciplinary policy instead. In ***McNeill v Aberdeen City Council (No. 2)*** [2013] CSIH 102, it was held that the obligation of trust and confidence is not suspended or put in abeyance because one party has broken that obligation. Thus, if one party is in fundamental breach and the other party continues with the contract and then is themselves in fundamental breach, there is nothing to stop the first party from accepting the other's breach notwithstanding their own unaccepted breach.

625. The Tribunal doubts that the respondent was in fundamental breach of the obligation of trust and confidence in any case as the respondent had reasonable and proper cause to invoke the disciplinary policy against the claimant. Even if the Tribunal is wrong upon this, then the respondent is not precluded from accepting the claimant's breach by working from AAAA simply because of their own breach which had not been accepted by the claimant. Further, the respondent's conduct is unconnected with the claimant's decision to take employment with AAAA. The claimant's conduct is no less objectively repudiatory because of how the respondent conducted matters.

626. Accordingly, the Tribunal's conclusion is that the claimant's wrongful dismissal complaint fails and stands dismissed. Had the wrongful dismissal complaint succeeded, the Tribunal would have had to make a declaration to avoid a double recovery in any case given that the notional 12 weeks' notice period is covered by the compensatory award in any case.

627. Therefore, this only leaves the question of remedy upon the sexual harassment complaint. By section 124 of the 2010 Act the amount of compensation which may be awarded corresponds to the amount which could be awarded by a County Court. This is a tortious method of assessment of damages. The basic principle is to put the complainant in the position that they would have been but for the discriminatory conduct. By section 119(4) an award of damages may include compensation for injury to feelings.

628. The issue that arises is the losses that flowed from discriminatory acts found to have been proven.

629. We have determined there to have been no direct sex discrimination arising out of the respondent's dismissal of the claimant. There is no

allegation from the claimant that the sexual harassment resulted in the claimant's dismissal.

630. On one view, had R not subject the claimant to sexual harassment, then she would not have been dismissed. It was the sexual harassment which ultimately led to her dismissal. But for that conduct the claimant would not have found herself in the trouble that beset her. The real reason for the claimant's dismissal was not the sexual harassment. That was the setting for the dismissal. The real reason for the dismissal and her pecuniary losses from it was the conduct of Y and Z in taking the view which they did upon the claimant's conduct. R played no part in the decision-making process that led to the claimant's dismissal. It is for the Tribunal to decide upon "the real reason, the core reason, the *causa causans*, the motive" *per* Lord Scott in ***Khan v Chief Constable of West Yorkshire Police*** [2001] ICR 1065, HL. The real reason was the view taken by Y and Z of claimant's conduct and not the sexual harassment of her by R. Indeed, Y and Z rejected the claimant's complaint that she had been subjected to sexual harassment at all. It cannot have been the *causa causans* of her dismissal. Accordingly, the only issue that arises upon the sexual harassment complaint is that of injury to feelings.

631. In ***Prison Service and Others v Johnson*** [1997] ICR 275, EAT, the EAT summarised the general principles that underlie awards for injury to feelings:

a. Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party.

b. An award should not be inflated by feelings of indignation at the guilty party's conduct.

c. Awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches.

d. Awards should broadly be similar to the range of awards in personal injury cases.

e. Tribunals should bear in mind the value in everyday life of the sum they are contemplating.

f. Tribunals should bear in mind the need for public respect for the level of the awards made.

632. In ***Vento v Chief Constable of West Yorkshire Police (No 2)*** [2003] ICR 318, CA the Court of Appeal set down three bands of injury to feelings awards indicating the range of award that is appropriate depending on the seriousness of the discrimination in question. These comprise of a top band which is to be applied only in the most serious cases, such as where there has been a lengthy campaign of discrimination harassment, a middle band for serious cases that do not warrant an award in the highest band and a lower band which is appropriate for isolated or one-off occurrences.

633. In ***Vento***, Lord Justice Mummery said that injury to feelings were to compensate for, *"subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise."*

634. The claimant issued her claim form on 3 October 2016. By that stage, the Vento guidelines had been reviewed by the Employment Appeal Tribunal in

Da'Bell v National Society for Prevention of Cruelty to Children [2010] IRLR 19, EAT. The EAT issued a formal revision of the figures to uprate them in line with inflation. The top band thus became £18,000 to £30,000; the middle band became £6,000 to £18,000; and the lower band became £600 to £6,000. These figures were increased further to reflect the level of damages in civil claims following the decision of the Court of Appeal in ***De Souza v Vinci Construction (UK) Ltd*** [2017] EWCA Civ 879, CA. This case endorsed a 10% uplift to the ***Vento*** bands together with an uplift for inflation. This led to the President of the Employment Tribunals issuing Presidential Guidance to reflect the uplifting of the ***Vento*** bands in accordance with ***Da'Bell*** and ***De Souza*** for cases presented on or after 18 July 2017.

635. Plainly, the instant case was presented prior to that date. In the Tribunal's judgment, therefore, it is appropriate to assess the claimant's award for injury to feelings based upon the ***Vento*** guidelines as uprated in the ***Da'Bell*** case.

636. In our judgment, the appropriate amount to award the claimant for injury to her feelings attributable to the sexual harassment is in the sum of £20,000. We take into account the following.

637. Firstly, the claimant was subjected to sexual harassment for a period of around two-and-a-half years from the end of 2012/early 2013 until 8 July 2015. This conduct upon the part of R (and for which the respondent is vicariously liable) has had a profound effect upon her culminating in a diagnosis of significant post traumatic stress disorder.

638. On any view, therefore, this is a serious matter tantamount to a lengthy campaign of discrimination harassment and which places the matter in the top ***Vento*** band.

639. The Tribunal gives credit to the respondent for the fact that the respondent took action against R very swiftly after the claimant raised her complaint on 16 September 2015. R was suspended on 24 September 2015. This is not a case where the employer has effectively condoned the harasser's conduct. It is this feature which in our judgment takes the matter down towards the bottom end of the top band.

640. An issue which troubled the Tribunal is whether the award for injury to feelings was liable to reduction on account of the claimant's wrongful conduct in taking her role with AAAA. We are satisfied that this would be inappropriate. Firstly, the injury to feelings award is to put the claimant in the position that she would have been in had the harassment not taken place. Compensation for the injury to her feelings cannot be said to be a profit from her unlawful conduct in acting in breach of her contract with the respondent. The award merely restores her to her non-injured condition. Secondly, to make such a reduction would amount to a double reduction given that her earnings with AAAA have been taken into account in the unfair dismissal claim and there is no pecuniary award in the Equality Act claim.

641. Thirdly, the statutory tort only gave the claimant the occasion to take a post with AAAA and it would not, in our judgment, be an affront or offensive to the public notion of the fair distribution of resources for the claimant to receive tortious compensation under the 2010 Act. The claimant's wrong was independent of the respondent's wrong against her and which was simply the setting for her act in breach of contract. Applying the test in ***Hall v Woolston Hall leisure Ltd*** [2001] ICR 99, CA the complaint of sexual

harassment is not so closely bound up with or linked to the claimant's unlawful conduct that the Tribunal may be seen to be condoning the claimant's unlawful conduct.

642. Fourthly, an employee may be called upon to give an account of sums earned elsewhere when the employment is used for wrongdoing: ***Wood v Commercial First Business Ltd*** [2021] EWCA Civ 471. In this case, it cannot be said that the claimant used her position with the respondent to attain the sums earned from AAAA such that she may be called upon to account for the monies earned with AAAA. The claimant did not use her position with the respondent to attain the sums earned with AAAA. On the contrary, she kept the fact of her employment with the respondent from AAAA, a factual finding that we are bound to accept under section 11 of the Civil Evidence Act 1968.

643. Pursuant to the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996* interest shall run upon the injury to feelings award with effect from 1 January 2013 until 8 July 2015. This is the period over which R sexually harassed the claimant by inflicting unwanted conduct upon her. That two-and-a-half years' period shall be reduced by six months to reflect the fact that there was a delay in the hearing of the proceedings before this Tribunal between September 2018 and March 2019 which was attributable to the Crown Court case. It will be recalled that after the hearing in March 2018, the matter was listed to resume in September 2018. In between times, criminal proceedings were preferred against the claimant. The matter was therefore adjourned until March 2019.

644. The hearing did not take place in March 2019 but this was through no fault of the claimant. Rather, it was attributable to an illness which befell one of the panel members. In summary, therefore, the period of the delay attributable to the criminal proceedings in which the claimant found herself and for which she was convicted was six months. In the Tribunal's judgment therefore it is appropriate that interest shall run from 1 January 2013 until 24 September 2018 and then between 18 March 2019 and the date of promulgation being the calculation date.

645. As agreed at the hearing upon 23 March 2021, the Tribunal shall now leave it to the parties to seek to agree quantum. The parties may apply to list the matter for a remedy hearing if agreement cannot be reached. An application to list the matter for a remedy hearing must be presented to the Tribunal within 42 days of the promulgation date set out below.

Employment Judge Brain

Date 3 June 2021