Case Number: 2300117/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr L Philander

Respondent: Leonard Cheshire Disability

Heard at: London South **On:** 03, 04, 05 & 06 October; 29 & 30 November 2016
In chambers 01 December 2016 & 05 January 2017

Before: Employment Judge Freer
Members: Ms S Campbell
Ms C Edwards

Representation:
Claimant: Mr C Milsom, Counsel
Respondent: Mr R Hignett, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claims of disability discrimination, unfair dismissal, and wrongful dismissal are unsuccessful.

REASONS

1. By a claim presented to the Tribunal on 13 January 2016 the Claimant claimed unfair dismissal and disability discrimination.

2. The Respondent resisted the claims.

3. The Claimant gave evidence on his own behalf and the Respondent gave evidence through Mr Sam Clubb, Director of Operations, East & South East Division; Mr Robert Edwards, Head of Operations; Mr Colin Francis, Support Worker.

4. The Tribunal was presented with two lever-arch files comprising 988 pages and other documents during the hearing as agreed by the Tribunal.

5. The issues for determination are those agreed by the parties before a Preliminary Hearing on 21 March 2016 as set out in a document at page 27 of the Tribunal bundle. At the commencement of the hearing the Claimant made an application to amend his particulars of claim to include claims of discrimination arising from disability, which was refused for the reasons given orally to the parties, but an application to amend to include a claim of wrongful dismissal was not opposed and was granted.

6. Employment Judge Freer sincerely apologises to the parties for the delay in providing this written judgment and reasons, which has been due to lack of judicial resources and available writing time.

The law

7. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

8. Where it is uncontroversial that an employee has been dismissed, an employer has to show one of the prescribed reasons for dismissal contained in sections 98(1) and (2). It is trite law that the reason for dismissal is a set of facts known to, or beliefs held by, an employer at the time of dismissal, which causes that employer to dismiss the employee. The reason for dismissal does not have to be correctly labelled at the time of dismissal and the employer can rely upon different reasons before an employment tribunal (**Abernethy –v- Mott, Hay and Anderson** [1974] IRLR 213, CA).

9. Also, a Tribunal may properly find that that the reason proffered by the employer is not the real or principal reason, provided it is satisfied on adequate evidence that the reason it selects was the employer's reason at the time of the dismissal (**McCrory –v- Magee** [1983] IRLR 414, NICA). In addition and in practice, a principal reason may be compounded of several elements which do not necessarily each in themselves constitute several reasons **(Bates Farms and Dairy Ltd –v- Scott** [1976] IRLR 214, EAT).

10. If there is a permissible reason for dismissal, the Employment Tribunal will

consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

> "the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case"

11. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of a reasonable employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).

12. It is established law that the guidelines contained in **British Home Stores Ltd –v- Burchell** [1980] ICR 303 apply to conduct dismissals, such as in the instant case. An employer must (i) establish the fact of its belief in the employee's misconduct, that the employer did believe it. There must also (ii) be reasonable grounds to sustain that belief, (iii) after a reasonable investigation. A conclusion reached by the employer on a balance of probabilities is enough. Point (i) goes to the employer's reason for dismissal (where the burden of proof is on the Respondent) and points (ii) and (iii) go to the general test of fairness at section 98(4) (where there is a neutral burden of proof).

13. It is also established law that the **Burchell** guidelines are not necessarily determinative of the issues posed by section 98(4) and also that the guidelines can be supplemented by the additional criteria that dismissal as a sanction must also be within the range of reasonable responses (also a neutral burden of proof) (see **Boys and Girls Welfare Society –v- McDonald** [1997] ICR 693, EAT).

14. The Court of Appeal in **Taylor –v- OCS Group Ltd** [2006] IRLR 613 emphasised that tribunals should consider procedural issues together with the reason for the dismissal. The two impact upon each other. The tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss.

15. This decision was echoed in **A –v- B** [2003] IRLR 405, EAT and the Court of Appeal in **Salford Royal NHS Foundation Trust –v- Roldan** [2010] ICR 1457 with regard to assessing reasonableness of the process and the decision to dismiss with the seriousness of the alleged conduct.

16. With regard to inconsistency of treatment the Court of Appeal in **Post Office –**

v- Fennell [1981] IRLR 221held:

> "It seems to me that the expression equity as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that an industrial tribunal is entitled to say that, where that is not done, and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal".

17. However, allegedly similar situations must truly be similar *(see* **Hadjioannou –v- Coral Casinos Ltd** [1981] IRLR 352, EAT*,* approved by the Court of Appeal in **Paul –v- East Surrey District Health Authority** [1995] IRLR 305:

> ". . . decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances. We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that industrial tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by [s 98(4) of the ERA]. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation".

18. Section 13 of the Equality Act 2010 ("the EqA") provides:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

19. On comparison between the Claimant and the case of the appropriate

comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

20. The burden of proof reversal provisions in the RRA are contained in section 54A. The burden of proof reversal provisions in the EqA are contained in section 136:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

21. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, prove facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If the Claimant does establish a *prima facie* case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

22. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

23. The Court of Appeal in **Madarassy** above, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts 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 had committed an unlawful act of discrimination.

24. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

25. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC

has confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

26. Some main principles applicable in cases of direct discrimination have helpfully been summarised by the EAT in **Law Society v Bahl** (as approved by the Court of Appeal [2004] IRLR 799) and have been taken into account by the Tribunal in the instant case.

27. A tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A tribunal should not extend the range of complaints of its own motion (**Chapman v Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

28. The law relating to wrongful dismissal is well-established at common law and dismissal without notice requires a claimant to have committed a repudiatory breach of contract which was accepted by the respondent.

29. The Tribunal was also referred to many authorities by both parties in their written submissions (and will not be duplicated in theses reasons), which the Tribunal has also fully taken into consideration.

Facts and associated conclusions

30. It was agreed between the parties that at all material times the Claimant was a disabled person pursuant to section 6 of the Equality Act 2010 with the condition of Dyslexia.

31. The Claimant commenced his employment with the Respondent on 14 December 1998 as a Support Worker. He was subsequently promoted to the position of Service Manager for two of the Respondent's services at Maple House and Elmers End House in the London Borough of Bromley. The Claimant was the Registered Manager for both services. The Elmers End House service closed in 2013 but the Claimant continued managing Maple House and from November 2013 also agreed to become Service Manager and Registered Manager for Parkside in Penge, also in the London Borough of Bromley. The Claimant went through an application process to become a Registered Manager with the CQC.

32. Prior to November 2013 the Claimant had been line managed by Ms Clair Waterman and from November 2013 Mr Sam Clubb became his line manager.

33. Ms Waterman arranged support measures for the Claimant, including a report from Dyslexia Action dated 15 January 2012 (pages 65 to 79 of the bundle) and providing an employer's observation to that organisation in December 2012 (page 82 to 85).

34. The Dyslexia Action Report states that the Claimant: "has significant weaknesses in processing of information and working memory. This means he may take longer than his peers to process information at speed and may sometimes forget instructions/information shortly afterwards. These scores do not mean that Lindon will be unable to undertake such tasks that involve high levels of processing or working memory, merely that he may require additional time when conducting them. Typically however, people with Dyslexia tend to have a good long term memory, suggesting that when adequate strategies are applied they are able to effectively recall information. Lindon will need to adopt effective coping strategies for learning/retention in order for his working memory and processing speed to keep pace with his high functioning in other areas. Lindon will need to adopt effective coping strategies for learning/retention in order to process and retain written information. Lindon may find a more creative approach to learning would suit his style e.g. use of imagery including mindmaps, pictures and drawing".

35. The Respondent acted upon the recommendations in the Report and with the assistance of Access to Work the Claimant was provided with a number of aids and equipment to assist him, such as literacy support software with training; visual planning software with training; a speaking dictionary; and digital voice recorder with training, at a cost of around £2,000. The Claimant was also provided with financial help by Access to Work for a Dyslexia Strategy Training tutor for a period of one year at a cost of around £4,000.

36. The agreement by the Claimant to undertake Service Manager duties at Parkside was recorded in a letter to him by Mr Clubb dated 13 November 2013 (pages 90 to 92 of the bundle). Support measures are detailed in seven bullet points. In particular it was agreed that extra advice and support would be provided by colleague Service Managers Mr Kevin Parkes and Ms Allison Hardy. The Respondent's policy on supervision recommends that Service Mangers have 4 supervision sessions per year, one of which is an annual appraisal. Due to work pressures it was not possible for Mr Clubb to meet this requirement with regard to all Service Managers. However, it was also agreed upon the Claimant's appointment to Parkside that Mr Clubb would "aim to meet with [the Claimant] formally every six weeks for supervision".

37. Mr Clubb held his first supervision meeting with the Claimant on 26 February 2014 (see page 119 to 130 of the bundle). It records: "Service users at both Maple House and Parkside have Person Plans in place. These remain a work in progress and, to his credit, Lindon has been in contact with Cat Eglington and invited her to come to Parkside on 5 March 2014 to review the progress

made here and gain any further advice/support in terms of improvements required. If time permits, Lindon proposes to ask Cat to also visit Maple House or he'll arrange for the Senior Support Worker to bring a couple of Personal Plans to Parkside for review". This demonstrates that the Claimant had available lines of support.

38. During the meeting the Claimant's Dyslexia condition and Access to Work was discussed and the notes record: "To date Lindon has had 8 sessions with his Tutor whom he finds to be very helpful and supportive. He has been provided with appropriate equipment and software to support him with reading, understanding and writing communications. Lindon feels that this support has improved his communication skills and also increased his confidence. We discussed Lindon's communication with me and vice versa and I stressed the importance of him letting me know if he is having any difficulties at all understanding communication sent to him, instructions/advice given, etc.".

39. A proposed restructure was discussed potentially involving a new Team Leader structure and it is noted: "At this stage, Lindon informed me that he doesn't intend to worry about or dwell on this has he wishes to remain focused on what he would like to achieve both Parkside and Maple House. I agreed that this was a sensible approach to take and assured Lindon that I will keep him updated as appropriate".

40. In the conclusion of the supervision notes there is a section entitled "Employees Comments" in which it is recorded: "I am very happy in post and appreciate the support I receive from my line manager and also my colleague, Allison Hardy, who agreed to be my 'support buddy'. I am enjoying my post and the challenges presented which I feel I am meeting head on. It is encouraging to see the improvements being made. I appreciate that there is still a lot of work to be done at Parkside that it is still, therefore, very much a work in progress real for me".

41. During the meeting Mr Clubb used his hands to demonstrate the level of both his expectation of managers generally and that he saw the Claimant being below that level of expectation. The Tribunal accepts that this was a clumsy attempt by Mr Clubb to tell the Claimant what he could achieve and did not intend it to be condescending or patronising, although he Claimant took it that way, but did not register any upset or objection at the time.

42. On 01 November 2013 there was a CQC unannounced inspection at Maple House, where it was assessed as "Action needed" with regard to management of medicines. The report states: "While most occasions the recording of medicines was accurate, we found some examples when this had not been implemented correctly" (see pages 99 to 118). Compliance actions were stipulated.

43. On 09 July 2014 the Respondent received an announced Contract Compliance Monitoring visit at Parkside by LB Bromley (Report at pages 131 to 148 of the bundle). The Report itemised a number of areas for

improvement, in particular that service users' weights needed to be recorded consistently and that support plans should be more up to date, with historical documents having been archived. The Report produces a score summary of eight A's, sixteen B's, six C's and two D's.

44. On 22 July 2014 Mr Clubb and the Claimant held another supervision meeting (see pages 149 to 164) and an action plan was agreed (see page 153) in which the Claimant was to reinforce the requirement to maintain accurate, clear and consistent care and support documentation and to set a target date for the plans to be to be fully updated as recommended.

45. It is recorded that, with regard to the failings in support documentation, the Claimant had discussed this with Team Leader, Ms Susie Fergusson, that measures were in place to ensure improved delivery and that the Claimant was focussed on ensuring that the staff team understood the requirements to maintain accurate, detailed and up-to-date records.

46. Again there is an employee's comments section which states: "I am hoping to improve on the findings from the Bromley Contract Compliance visit. I am very happy with the support I receive from Sam as my line manager and also from Allison Hardy and the admin team. I remain focused on having a full complement of staff at Parkside and hope to fill vacant posts following the interviews which will take place in the near future"

47. There was an announced Contract Compliance Monitoring visit by LB Bromley at Maple House on 18 September 2014 (see Report at pages 165 to 180). The score summary was nineteen A's; eight B's; five C's and no D's.

48. On 20 November 2014 there was a supervision meeting between Mr Clubb and the Claimant. At the start of the meeting it is recorded: "I discussed Lindon's preference regarding using the standard SDAS form or moving to this new approach for making bulleted notes of our discussion. Lindon confirmed that he was happy to try this format". Mr Clubb took this new approach to all Service Managers and with which they all agreed (see pages 181 to 191)

49. Notes of the meeting under the heading 'PCP documentation' states: "As discussed above in 1.2 & 1.3, the CMO from LB Bromley Social Services highlighted concerns in both services about the level of detail and accuracy of information recorded PCP documentation. Lindon has raised this with both staff teams and is currently working with the Team Leader at Parkside and the Senior Support Worker at Maple House to ensure that the quality of record-keeping improves. From my perspective, it is imperative that staff understand and acknowledge the importance of maintaining accurate records and a failure to do so may result in disciplinary action taken".

50. It is recorded that three new full-time Support Workers had been recruited, two to start on 01 December 2014 and the third as soon as possible thereafter.

51. The notes also record the discussion regarding an updated Service Emergency Plan by the Claimant and states: “Discussed this with Lindon today and whilst, technically, the document is fine, it could be written slightly better. Some of the LCD staffing information also requires update”. The Claimant was to review the document with the assistance of Ms Lisa Duggan.

52. Also: “Feedback to Lindon re our discussions during the budget meetings on Tuesday 18 November 2014. Generally, I felt the meetings went well although I was concerned that Lindon did not appear to be clear in his understanding on LD’s ‘off-rota’ hours. During our discussion this morning, Lindon explained that, due to his dyslexia, he cannot always process information quickly in order to enable him to respond appropriately. This is supported by a copy of the assessment produced by the Dyslexia Association which Lindon gave to me today”.

53. Further, with regard to Deprivation of Liberties Safeguards (“DoLS”): “Discussed DoLs as Lindon has not yet made any application to the Local Authority DoLs team. I have re-sent the guidance issued by Giles Budd on 21 October 2014 for Lindon to re-read as I believe that all Service Users at Parkside and Maple House may fall under this legislation because of their lack of freedom to come and go from either service freely”. The Claimant was referred to Allison Hardy for support with regard to the application.

54. The final section is entitled ‘Lindon’s comments’ and states: “I appreciate the continued support and opportunity to discuss my performance in these sessions. I feel that you are fair and honest in terms of highlighting and discussing areas of my performance where you have concerns and the support given”.

55. On 14 January 2015 there was a further supervision meeting between Mr Clubb and the Claimant (see pages 194 to 206). Under the heading ‘PCP documentation’ it states: “Lindon confirmed that work continues to improve quality and accuracy of the records being kept of both Parkside and Maple House. PCPs have been reviewed and updated where required to address the issues raised during the LBB Contract Monitoring visit and staff have been instructed to ensure that documents are updated on a daily basis as appropriate/required. In addition, Lindon has arranged for staff from both services to attend PCP training on 16 March 2015 at Head Office”.

56. The proposed restructure was also considered and it is recorded: “Updated Lindon on the proposed restructure of the management of Parkside, Garden House and Maple House. I confirm that the Business Case to appoint Team Leaders, which have been approved in principle, will now have to be resubmitted as the process for submission has now changed. In view of this, two Service Managers will remain in post for the immediate future - one covering Maple House and Parkside and the other covering Garden House - until the new Team Leader structure has been implemented and it is fully operational”.

57. The notes also record the Claimant raising a complaint with Mr Clubb: “We also discussed a telephone conversation we had on 16 December 2014 when Lindon called me to inform me that a member of staff was changing her contracted hours. Lindon felt that I was dismissive in my tone and manner towards him and he also pointed out that he did not like being compared to his colleagues - this refers to my comment that his colleagues don’t call me to inform me of things like this unless there is a specific staffing management issue/concern they wish to discuss. I apologised to Lindon if I came across as having been insensitive as this was not my intention and reinforced the point that he needs to make a judgement on what he reports to me just as I have to when I report things through my Line Manager. Overall I believe we had a positive discussion around this issue. Lindon also clarified that he does not hide behind his dyslexia that he tries not to think about it. He acknowledges that he can and will be slow to provide information and/or respond to requests for information but that he will always do his best. I have agreed that, from this point forward, I will be more open and honest with Lyndon in providing feedback on written work and, instead of making corrections for him, I will offer guidance and comments to him to consider so that he gains confidence in his ability to complete written work to a high standard”.

58. The document concludes with ‘Lindon’s comments’ which states: “I appreciate being able to have an open discussion about some concerns I have and that these were resolved”.

59. The Claimant’s oral evidence was that he had told Ms Irene Ross of difficulties he was having and hoped that she in turn would inform Mr Clubb, although the Claimant had not expressly asked her to do so, but stated that he considered any repercussions would still be on him.

60. On 07 and 08 July 2015 Parkside received an unannounced CQC inspection.

61. On 30 July 2015 there was a supervision meeting between Mr Clubb and the Claimant (see pages 226 to 241). The CQC inspection was not discussed in great detail because the Report from the inspection had not yet been received.

62. Under the heading of "Recruitment/Staffing" it is recorded: “As indicated above, the Team Leader from Parkside and one Support Worker had resigned following the completion of an investigation into allegations about their conduct. Another support worker was dismissed following a disciplinary hearing. These posts are currently vacant which equates to 112.50 hours per week. In addition a new full-time support worker who joined the staff team on 9 April 2015, left in June due to a change in her personal circumstances. This brings the total number of vacant posts to 4 x WTE = 150 hours. On the positive side, Lindon has recruited a number of staff who are willing to work occasional hours. They are currently covering most of the hours listed above supported by permanent staff working overtime. Consequently this has virtually removed the use of agency staff".

63. Under the heading 'Proposed restructure of staff' it states: "Updated Lindon on the proposed restructure of the management of Parkside, Garden House and Maple House. I confirmed that, with the reduction in income of Parkside and the resignation of the Team Leader, I will now be working with HR and Finance to identify the most effective and efficient structure across all three services. In order to commence this process, I have asked Lindon to ensure that costing assessments for all Service Users of Parkside are updated in the first instance. It would then be sensible to ensure that this is also the case for the Service Users at Maple House. Once this information is available and we have confirmation regarding the future of IDs replacement at the Service and whether or not we can fill the void should it arise, I will then work on reviewing the structure of the services".

64. Under the heading 'Complaints/Safeguarding Issues'' the notes record: "There have been two safeguarding alerts recently. One of these, remains open and the other has now been closed. Full details on CASS. DoLS - Following our discussion at his last 1:1 session during which Lindon had spoken with a member of staff from the Bromley DoLS team and had received advice on how to proceed, he confirmed today that applications had been made and have been approved by Bromley DoLS team. Unfortunately, despite my request that Lindon keep me updated, he has failed to do so. In discussion today, Lindon informed me that he has not informed CQC of the outcome of the DoLS application nor has he updated LCDs Safeguarding Advisor. Lindon then informed me that he had not heard of Lele Bobesko despite having been at the MCA/ DoLS training session she delivered at the Patch meeting at Sobell Lodge on 12 March 2015 and having received emails from her. In light of the above, I advised Lindon that he has now left me with no option but to invoke the LCD Capability Policy".

65. There then follows a note of a conversation between Mr Clubb and the Claimant relating to the DoLS application in respect of which Mr Clubb concludes: "In light of the above conversation, I am not sure that the DoLS applications have been approved and I was also concerned by Lindon's lack of understanding of the process despite the training he has had and the access he has to support for assistance. I therefore asked Lindon to contact the Bromley DoLS team to obtain an update on the status of this application (and also the others that have been submitted) in an effort to clarify the current status of it".

66. Under the heading 'Progress towards objectives set in APR' the notes record: "Maple House and Parkside are well run and managed and Lindon endeavours to ensure that the health safety and well-being of all Service Users, staff and all other stakeholders is maintained the highest possible standard. Complaints and Safeguarding Alerts are reported and managed appropriately with support from HoO as required and in accordance with the relevant policies, procedures and legislation and are recorded on CASS"

67. On 31 July 2015 the CQC issued two Warning Notices. One to the Claimant in his capacity as Registered Manager of Parkside under section 29 of the Health and Social Care Act 2008 in respect of failing to comply with safe care

and treatment under Regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (see pages 242 to 247) and one to the Respondent's Head Office as Service Provider in respect of premises and equipment under the same Act and Regulations (see pages 248 to 252).

68. Mr Clubb discussed the section 12 Warning Notice with the Director of Services, Ms Rosemarie Pardington, the Director of Operations, Ms Kim Moore and Mr Fernando Caicedo, Senior HR Business Partner. It was decided that the Claimant should be suspended pending an investigation into his conduct. No notes of that meeting were taken. On balance, having considered the evidence, the Tribunal concludes that it was the Director of Services, Ms Pardington, who made the decision to suspend the Claimant and undertake an investigation under the Respondent's disciplinary procedure.

69. Mr Clubb met with the Claimant on 04 August 2015 and notified him of his suspension. That was confirmed in a letter dated 05 August 2015 (pages 265 and 266). The allegations related to: "1. You are alleged to have failed in your duty of care and this may have put service users at risk. 2. You are alleged to have neglected service users' needs, thereby creating untenable safeguarding risks to people who use the service, that you were tasked to manage. 3. That your failures have directly bought Leonard Cheshire Disability into disrepute".

70. The Claimant was warned that the allegations may constitute gross misconduct and result in his dismissal. The Claimant was informed of a right to be both supported and accompanied.

71. After the Claimant was suspended, Mr Kevin Parkes, a Service Manager who was covering for the Claimant, discovered that the required statutory notification to CQC of the approved DoLs applications had not been made and therefore Mr Clubb sent the Claimant a further suspension letter on 18 August 2015 containing this additional allegation (pages 310 to 311).

72. CQC provided its final Report to the Respondent on Parkside on 02 September 2015. The Report found that the service was 'Inadequate' for safety; 'Requires Improvement' for effectiveness, 'Good' for caring; 'Requires Improvement' for responsiveness and 'Requires Improvement' with regard to being well-led. The Report contains a detailed narrative of the findings (see pages 412 to 426).

73. Ms Sue Hopkins undertook the investigation into the Claimant's disciplinary allegations and produced a detailed Investigation Report on 07 September 2015 (see pages 399 to 411). The documents and interviews relied upon and produced are listed at page 411 of the Tribunal bundle and are included in the bundle in their entirety. The Claimant's interview notes are at pages 336 to 349. Mr Clubb was also interviewed and there is an exchange that includes; "SH asked SC why he thought Lindon was not telling him things. SC said that possibly he was frightened to tell him. SC said that there were past instances

where Lindon had come to him with things he should not have and recognised that in those instances he could be quite short with him . . . .".

74. The conclusions reached by the report are: "Throughout the investigation LP does not seem to comprehend the great range of responsibilities that are involved with managing a complex and challenging LCD service. LP does not have a consistent comprehension of the need to comply with LCD and national regulations commensurate with service users well-being and ongoing care. There is undeniable evidence that his lack of planning, record-keeping and staff education puts service users at risk. It is apparent that CQC's unannounced inspection and the subsequent report with its inherent criticism is are unfortunately entirely justified".

75. The recommendation made by the Report is: "This case should be heard at a disciplinary hearing in line with Leonard Cheshire Disability's Disciplinary Policy".

76. By letter dated 23 September 2015 the Claimant was invited to a disciplinary hearing (see pages 441 to 442). The allegations mirrored those in the second investigation invite letters. A dismissal warning was given, the Claimant was given a copy of the Investigation Report, informed of his right to be accompanied, given contact details of the National Staff Association and provided with an opportunity to call witnesses and submit new evidence.

77. The hearing, which was rearranged at the Claimant's request, took place on 09 October 2015 and was conducted by Mr Rob Edwards, Head of Operations, and attended by Ms Drew, HR Business Partner; Ms Hopkins, the Claimant, his Trade Union representative, Mr Pat Murphy, and witness Mr Colin Francis. The notes of the meeting are at pages 451 to 490.

78. The Claimant was informed of the outcome of the disciplinary hearing by letter dated 20 October 2015 which is at pages 491 to 495 of the bundle. The letter sets out in detail the conclusions of Mr Edwards with regard to the four allegations and found them to be upheld. Ms Edwards had considered mitigation, the points the Claimant had raised with regard to his dyslexia condition and his relationship with Mr Clubb. Ultimately Mr Edwards concluded: "As a result, I have no option but to find that due to the gross nature of the findings against you, I have no option but to summarily dismiss you from your post of Service Manager at Parkside without notice or payment in lieu of notice, your last day of employment therefore was 15th October 2015".

79. The Claimant was notified of his right of appeal. He did appeal by letter dated 21 October 2015, which simply notified the Respondent of his wish to exercise his right of appeal.

80. By letter dated 28 October 2015 the Claimant was invited to a disciplinary appeal meeting and reminded him that the Respondent needed to receive details of the appeal prior to the meeting itself. The Claimant was notified of his right to be accompanied.

81. The Claimant provided his grounds of appeal to the Respondent by an email dated 4 November 2015. The grounds of appeal were: "1. A failure of duty of care with regard to the disability discrimination act. 2. The decision to dismiss me in relation to similar inspection cases was unfair, unreasonable and inconsistent. 3. The decision to dismiss me was inappropriate and disproportionate with regard to the allegations made against me".

82. Parkside was re-inspected by the CQC on 28 October 2015 and the Report was published on 23 November 2015. Parkside was assessed only with regard to whether the service was safe, consequent to the issued Warning Notices and given a rating of "Requires Improvement".

83. The Claimant's appeal hearing took place on 07 December 2015 undertaken by Ms Kim Moore supported by Mr Fernando Caicedo, Senior HR Business Partner. The Claimant attended together with Mr Murphy his trade union representative. The notes of the meeting are at pages 512 to 517 of the tribunal bundle.

84. The Claimant was provided with the outcome of his appeal hearing by a letter dated 10 December 2015 (see pages 518 to 521). The letter addresses separately the three grounds of appeal. With regard to ground of appeal relating to similar inspection cases the appeal letter concludes: "Other CQC reported services did result in formal action been taken about the management of the service, however in no circumstance did a service managers actions directly put service users at risk, as it was in your case".

85. Overall the decision was that the appeal was unsuccessful and the decision to dismiss upheld.

86. The Claimant makes a comparison between his circumstances and those of Mr Jason Semple, Service Manager at Seven Springs and Mr Yogan Dullip, Service Manager at Shore Lodge.

87. Shore Lodge provides a service for 10 adults with physical and learning disabilities. The CQC inspected this facility on 20 and 21 July 2015 and received a rating of 'Inadequate' in all areas (see pages 810 to 829 of the bundle). Four Warning Notices were also issued against the Respondent as Registered Provider relating to lack of adequate care and treatment standards and effective systems (see pages 708A to 729).

88. The Respondent considered that the inspection process for Shore Lodge was flawed for a number of reasons. It was argued that the Respondent discovered that the Inspector had sight of the minutes from a multidisciplinary meeting, to which the Respondent was not invited, at which concerns about the quality of service delivery Shore Lodge been discussed. Some of the issues raised were historic and had already been addressed. The Respondent believed the Inspector had a negative and confrontational mind-set and was unwilling to alter her perception of the service. On a number of occasions it was considered the assumptions and observations the Inspector

made were clearly incorrect and the Inspector's concerns about a particular member of staff, Ms Betty Bishop, had strongly influenced the Inspector's views of the service.

89. As a result of these concerns the Respondent made substantial representations to the CQC against the Warning Notices (see pages 730 to 769).

90. The Report findings led the Respondent to implement conduct allegations against Ms Bishop. However, the Respondent did not believe that the circumstances supported conduct allegations against Mr Dullip. Mr Dullip was, however, placed in the Respondent's formal capability process. The Respondent considered that Mr Dullip demonstrated a desire to turn the service around, which the Respondent considers was vindicated by an inspection on 04 March 2016 that reflected an improvement in one category to 'Good', while the other categories remained as “Requires Improvement” (see pages 832 849 of the bundle).

91. Seven Springs is a larger service for up to 32 adults with physical disabilities. The CQC inspection took place on 27 October 2014 and received ratings of 'Requires Improvement' for four categories and 'Inadequate' for the remaining category of whether the service was well led. The Report was not received until the end of May 2015 (see pages 557 to 593 the bundle). No Warning Notices were issued in respect of this Report.

92. Stage 1 of the Respondent’s Capability Procedure was implemented with regard to Mr Semple. A second CQC inspection took place on 22 September 2015. The second Report increased the rating for the whether the service was caring to 'Good' and the remainder ‘Requiring Improvement’. As a consequence, the Respondent progressed Mr Semple to Stage 2 of the Capability Process. At that stage the Respondent considered that Mr Semple demonstrated that the required actions had been met with sufficient improvement for the process to be concluded.

93. The Claimant claims direct disability discrimination based on two acts of less favourable treatment, first invoking the disciplinary procedure and second, dismissing the Claimant.

94. The Claimant relies upon the actual comparators of Mr Semple and Mr Dullip. The Tribunal considers that it is not proportionate to set out all the precise circumstances relating to Mr Dullip and Mr Semple in these reasons and cross-refer them to the circumstances relating to the Claimant, but the Tribunal emphasises that it has taken them all into account and has also carefully considered the detailed submissions of the Claimant.

95. With regard to the identified comparators, the Tribunal concludes that the Warning Notices with regard to Shore Lodge and Mr Dullip were substantially and genuinely challenged by the Respondent. That is evident from the submissions made to the CQC as completed by the Service Director, Ms Pardington, at pages 741 to 769. As explained by Mr Clubb in his one-to-one

meeting with Mr Dullip on 15 September 2015: "To date we have submitted a Factual Accuracy Log to the CQC and we have also submitted detailed representations in response to the Warning Notices. The amount of work involved in preparing these responses whilst onerous will, it is hoped, persuade the CQC that the quality of service delivery is not as bad as the report and Warning Notices imply".

96. The Respondent did not challenge the Warning Notices in the Claimant's circumstances. It is not alleged that a failure to do so was an act of disability discrimination. Indeed, the content of the Inspection Report and Warning Notices were not and have not been challenged by any party.

97. The Tribunal further concludes that the effect of the Respondent's challenge to the Report and Warning Notices for Shore Lodge makes Mr Dullip's circumstances materially different from those relating to the Claimant. In particular, the Respondent could not realistically, nor reasonably, pursue conduct allegations against Mr Dullip where the substantive nature of the Report and Warning Notices were so materially challenged by the Respondent.

98. The Tribunal concludes therefore that the Respondent's challenge to the Report and Warning Notices for Shore Lodge makes a material difference between the Claimant's circumstances and those of Mr Dullip.

99. There were no Warning Notices issued by CQC with regard to Seven Springs and Mr Semple. The CQC Report was also challenged and clarifications sought in respect of Seven Springs. The Tribunal concludes that these matters, particularly the lack of any statutory Warning Notice which was the principal reason why the Claimant was placed into the disciplinary process, also makes a material difference to the circumstances between Mr Semple and those of the Claimant.

100. Therefore on the basis of an absence of appropriate comparators, the Claimant's claim of direct discrimination must fail.

101. Further as set out under the 'Complaints/Safeguarding Issues' in the 30 July 2015 Supervision Meeting, Mr Clubb initially considered that the Claimant should be referred under the Respondent's Capability Procedure with regard to the DoLs application.

102. That anticipated course of action was superseded by the section 12 Warning Notice. A decision was then taken to suspend the Claimant pending an investigation into his conduct. The Tribunal finds as fact that the decision to take that course of action was made by the Director of Services, Ms Pardington, not Mr Clubb.

103. The matter was investigated by Ms Hopkins, who made a recommendation that the case be heard at a disciplinary hearing. The disciplinary was considered by Mr Edwards. The Tribunal received no clarification in evidence on who made the decision to place the matter into a formal disciplinary

process upon the recommendation of the investigation report. Whether the recommendation from Ms Hopkins was sufficient or whether there was a further decision made. The issue was not pursued by either party in submissions. However, the Tribunal can conclude from the facts that Mr Clubb was not the decision maker, whether regarding the Claimant's suspension and investigation or to progress the matter through the disciplinary route upon the conclusion of the investigation report.

104. The Tribunal concludes having regard to all the facts that the Claimant has not raised primary findings of fact from which the Tribunal could conclude, even by inference, that the Respondent's decision to invoke the disciplinary procedure was done *because of* the Claimant's Dyslexia condition.

105. Adopting a *Shamoon* approach and asking the reasons why the Respondent acted the way it did, the Tribunal concludes that it was because of the receipt of the section 12 Warning Notice from the CQC. Ms Pardington made the decision to consider the matter as one relating to the Claimant's conduct. There was no evidence to indicate that Ms Pardington made that decision, consciously or subconsciously, because of the Claimant's Dyslexia condition.

106. The Tribunal concludes on balance that the decisions to consider the circumstances of Mr Semple and Mr Dullip under the capability procedure were made by Ms Pardington after discussion with colleagues, in the same manner as it was for the Claimant (as indicated, for example, by the Stage 1 capability meeting notes between Mr Clubb and Mr Dullip on 16 September 2015, see pages 779 and 780). Even if the different decisions that were made regarding Mr Semple and Mr Dullip could be described as a detriment to the Claimant, there was no evidence before the Tribunal from which it could conclude, including by inference, the 'something more' and that Ms Pardington's decisions were 'because of' the Claimant's Dyslexia.

107. The decision to dismiss the Claimant was made by Mr Edwards. The Tribunal unanimously concludes that Mr Edwards made his decision to dismiss the Claimant genuinely based upon the allegations raised and on the evidence produced to him. There was no evidential material to infer that the decision of Mr Edwards was consciously or subconsciously influenced by the Claimant's Dyslexia condition. Further, Mr Edwards was not involved in the circumstances of Mr Semple and Mr Dullip and therefore no inference can be drawn from those circumstances relating to Mr Edward's decision regarding the Claimant.

108. The Appeal against dismissal was considered by Ms Moore on the grounds supplied by the Claimant. Ms Moore did not give evidence at the Tribunal hearing. Ms Moore was involved in discussions relating to the decision not to suspend Mr Dullip. There was no evidence of a similar involvement in respect of Mr Semple. Further, there was no evidence of any involvement by Ms Moore in placing Mr Semple and Mr Dullip into the capability process rather than a disciplinary route.

109. Accordingly, the Tribunal concludes on balance that the Claimant has not discharged his burden of proof relating to the decision making process of Ms Moore and proved primary findings of fact from which the Tribunal could conclude that her decision not to uphold the Claimant's appeal and overturn the decision to dismiss was done because of the Claimant's Dyslexia condition. Again, there is the absence of the 'something more' required for the claim to be successful. The Tribunal concludes that the reason 'why' Ms Moore made her decision was because of a combination of a genuine consideration of the decision to dismiss and the Claimant's grounds of appeal in light of the CQC Report and Warning Notice.

110. The Tribunal heard a good deal of evidence relating to the treatment of the Claimant by Mr Clubb and how it was alleged that Mr Clubb thought less of the Claimant because of his Dyslexia condition. However, that evidence is rendered largely irrelevant as the comparators are not appropriate comparators and Mr Clubb was not the decision maker on the issues relating to the Claimant being placed into the disciplinary process or the Claimant's dismissal. There is also no evidence to demonstrate that the actual decision makers were unduly influenced by Mr Clubb.

111. Mr Clubb created a briefing document for the investigating officer, but the Tribunal concludes that at that stage it was reasonable for the line manager to set out the issues for review and, as the covering e-mail states, it was a document for review and for Ms Karen Salley of HR, who commissioned the investigation, and/or the investigation officer to "feel free to amend as required". Mr Clubb also, as would be expected, gave evidence to the Respondent's investigation regarding the disciplinary matter.

112. The Tribunal has also taken into account the comments made by Mr Clubb during the investigation process when he conjectured that the Claimant was possibly frightened to tell him things. However, the Tribunal concludes that Mr Clubb, although perhaps sometimes having a blunt approach generally, had been open and candid during the disciplinary process, the Claimant's supervisions, and his evidence to the Tribunal.

113. The Tribunal concludes that Mr Clubb considered the matters raised by the Claimant in respect of his Dyslexia condition, there was an open dialogue and Mr Clubb positively altered his approach to the Claimant, which was acknowledged by the Claimant as being "fair, honest and supportive" in the employee comments section of the supervision notes. The Claimant did not raise any areas of concern save for the way he contends he was spoken to by Mr Clubb on one occasion. It is notable that the Claimant clearly felt able to raise with his line manager and that he felt he had been "dismissive in tone and manner", which is not a minor complaint. The Claimant raised that issue, Mr Clubb openly acknowledged it and the Claimant signified in the employee's comments that he was able to have an open discussion about his concerns and that they had been resolved.

114. The Tribunal concludes having regard to all the evidence available that Mr Clubb's involvement in the Claimant's disciplinary matter was not consciously

or subconsciously tainted by the Claimant's Dyslexia condition and that the reason why Mr Clubb acted as he did was because of the Warning Notice received from the CQC, the serious issues raised therein and the Claimant's responsibility at Parkside both as a Service Manager and as Registered Manager.

115. It should also be noted that the Claimant argued in evidence that both the restructure and the removal of a service user were reasons for his dismissal, which had no connection to his Dyslexia condition and ran contrary to the discriminatory dismissal point.

116. Accordingly, even if the comparators could be made out in fact and law, the Tribunal concludes that the less favourable treatment relied upon was not done because of the Claimant's Dyslexia and the direct discrimination claim is unsuccessful.

117. With regard to the unfair dismissal claim, the Tribunal concludes that the Respondent genuinely believed in the Claimant's conduct.

118. The Tribunal has concluded above that the Claimant has not made out his claim of a discriminatory dismissal. The Claimant in his evidence also believed that there were other reasons for his dismissal. He argued that his dismissal was part of a plan by the Respondent to facilitate a restructure so that the three services of Parkside, Maple House and Garden House could be managed by one Service Manager. The Claimant also argued that his dismissal was due to him being considered responsible for the removal of a service user from Parkside which had an impact on income received by the Respondent.

119. The Claimant first mentioned the Respondent facilitating a restructure to dismiss him in his witness statement. As shown above, Mr Clubb discussed restructuring openly with the Claimant during supervisions. No decisions had been made and even if the Claimant is correct over his anticipation of the future number of Service Managers, there was no material evidence to suggest that it would be the Claimant who would be considered surplus to requirements.

120. The Claimant's argument regarding the removal of a service user was not raised by the Claimant during the disciplinary process. The Tribunal concludes that the service user was removed from Parkside because he was detained under the Mental Health Act 1983 and was unmanageable. It had no impact on the Claimant.

121. The Tribunal concludes that the restructuring and service user removal did not form part of the reason for the Claimant's dismissal. The reason for the Claimant's dismissal related to the CQC Report and principally the Warning Notice.

122. The circumstances of Mr Dullip and Mr Semple may indicate that the Warning Notice was not the genuine reason for the Claimant's dismissal on

the basis that they both were placed under the capability procedure in similar situations. However, as explained above, the warning Notices were significantly challenged with regard to Mr Dullip and Mr Semple received no statutory Warning Notices. Their circumstances were materially different. The content of the CQC Report and Warning Notice with regard to the Claimant was not challenged.

123. The Tribunal also concludes that the Respondent adopted a reasonable process. The Tribunal finds that the Warning Notice was the reason why the Claimant was placed into the disciplinary process.

124. The Tribunal concludes that it was objectively reasonable to suspend the Claimant from work in circumstances where the unchallenged statutory Warning Notice raised safety matters relating to a regulated environment where the Claimant held responsibility as both the Service Manager and Registered Manager.

125. The Claimant was invited to an investigation meeting, provided with details of the allegations, and given the right to be accompanied. The Investigation Report was detailed and the content and recommendations fell within the range of reasonable responses on the basis of the evidence available. The Claimant was invited to a disciplinary hearing; provided with details of the allegation; given copies of all documents in advance; given the right to be accompanied, the opportunity to call witnesses and to introduce evidence. There was a disciplinary hearing, the Claimant was accompanied and had a full opportunity to participate and to raise any objections relating to the process, which he did not. Detailed notes of the hearing were produced. The Claimant was provided with a detailed outcome letter and given the right of appeal. There was an appeal hearing. The Claimant was given the right to be accompanied, a full opportunity to participate and provided with an outcome letter explaining the decision. The Tribunal concludes that the process overall was within the range of reasonable responses.

126. The Claimant's representative at the end of the disciplinary hearing stated that he thought the Claimant: "had received a thorough investigation where every 'i' had been dotted and every 't' crossed'" and that Mr Edwards had "conducted a fair and rigorous hearing, going above and beyond".

127. The Tribunal concludes that Ms Moore was not aware of the detail of the disciplinary matter prior to addressing the appeal such that it was outside the range of reasonable responses to conduct the appeal process.

128. The Tribunal also concludes that the Respondent held a reasonable belief in the conduct on the evidence reasonably available to it.

129. The Claimant as both Service Manager and Registered Manager at Parkside had key responsibilities and accountabilities with regard to vulnerable persons in a regulated environment.

130. As Registered Manager the Claimant had a legal responsibility to ensure that the care services delivered met the requirements of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (Regulation 8(1)). Under Regulation 7 the Claimant is required to be fit to be a Registered Manager, which includes having the necessary qualifications, skills and experience to manage the regulated activity.

131. With regard to service planning and Personal Care Plans, all service users must have an agreed Plan in place which defines the services that must be delivered to that individual. It is an important tool for empowering service users and meeting their particular needs. Importantly, the Respondent's Individual Service Planning Policy confirms what an effective Plan should deliver (see page 877 to 879), including being an adequate record for monitoring purposes, an active daily working document and to ensure continuity of service. The Policy also sets out what Plans should not be, including becoming a paper exercise or a cyclical experience with little meaning.

132. As set out above, it was highlighted as part of the LB Bromley Contract Compliance Monitoring visit in July 2014 which was addressed with an action plan at the subsequent supervision meeting. Although the position was better in a similar visit to Maple House, at the January 2015 Supervision Meeting the Claimant confirmed that work continues to improve quality and accuracy of record keeping and that Personal Care Plan's had been reviewed and updated.

133. However, the Warning Notice from the CQC inspection in July 2015 assessed the records relating to three of the five service users living at Parkside and issued a Warning Notice for infringing Regulation 12: that care and treatment must be provided in a safe way for service user. For example, the CQC Inspector found that the support plan for one service user had not been reviewed since 2014 and had recorded the next review should be in December 2014. The Warning Notice highlighted a number of deficiencies in the Personal Care Plans and consequent risk of harm to service users.

134. At the disciplinary hearing the Claimant accepted that it was his responsibility for ensuring documentation was up-to-date.

135. The Tribunal concludes that it was reasonable for the Respondent to conclude that the Claimant had overall responsibility for ensuring the Personal Care Plan documentation was up to date.

136. It was a similar position with regard to risk assessments. Clear responsibilities are set out under the Respondent's Health, Safety and Environmental Policy. Deficiencies were highlighted in the Local Authority Compliance Monitoring visit.

137. The Warning Notice from the CQC inspection of Parkside in July 2015 revealed serious deficiencies in risk assessments of service users. It highlighted significant review failures for all the service users assessed, with

last reviews of risk assessments dating back to March 2014 and September 2013. There was inadequate recording of essential information, such as a failure to record expert guidance including the use of safety equipment, no risk assessment for a service user at risk of food choking and no monitoring in place for a service user with Type 2 Diabeties. Occasions were also identified where the risk assessments were not being followed such a service user, who was at risk of causing fire and burns when smoking, not being accompanied on smoking breaks.

138. The Tribunal will not set out all of the issues identified by the CQC in the Warning Notice, save to say that it can fairly be described as a catalogue of significant failures that placed the health and safety of service users at substantial risk, which fully explains why the statutory Warning Notice had been issued by the CQC in addition to the poor Inspection Report.

139. The Warning Notice also identified failures in the care and management of medicines. The Respondent has detailed policies on the management of medicines and it was the Claimant's responsibility as Service Manager and Registered Manager to ensure that the Policy was implemented effectively. The Claimant had received medication training in March 2013.

140. The Policies confirm, unsurprisingly, that medicines should be stored safely in a locked facility and only be accessible to those with responsibility for the administering or disposing of them. This was recognised by the Claimant at the disciplinary hearing (page 478).

141. An issue had arisen over the recording and audit of medication in the CQC inspection of Maple House, where the Claimant was Service Manager. This was discussed with the Claimant in the supervision in February 2014. An action plan was completed and forwarded the CQC.

142. The CQC inspection in July 2015 found that the systems and processes to ensure the safe and proper management of medicines were not completed or followed (see page 245). The Claimant accepted at the disciplinary hearing that the incident highlighted in the CQC Warning Notice had been overlooked and it should have been his responsibility to ensure the medication was picked up.

143. With regard to the Control of Substances Hazardous to Health ("COSHH"), the Respondent has a detailed Policy reflecting the statutory requirements.

144. It is the Service Manager's responsibility to ensure that COSHH risk assessments are made about the measures that are necessary to control hazardous substances.

145. The CQC Warning Notice reported that COSHH items, including cleaning products, were stored in an unlocked cupboard in the laundry room and the room had the door wedged wide open despite being fitted with an entry code door for safety and was a room which service users could access with ease.

146. The Claimant acknowledged at the disciplinary hearing that he understood that COSHH items should be kept in a locked cupboard and they had not been on this occasion. The Claimant argued that other mangers stored items there, but he knew that it was incorrect to do so. The Claimant suggested that due to their mental capacity, none of the service users would go to the laundry room or do anything with the items. The Claimant accepted that the items should have been locked away, but said he was trying to explain that it was not a significant risk.

147. The Warning Notice found that despite a service user having Type II Diabetes, there was no treatment or management plan in place, or any reference to this within their health care plan in order to support and manage their condition. The Claimant told the CQC Inspector that he did not know the service user was a Type II Diabetic. There was no record of blood sugar monitoring. There was also no monthly monitoring of weight and the records showed significant gaps (e.g. from June 2014 to February 2015). The Claimant acknowledged at the disciplinary hearing that he understood residents needed to be weighed and monitored for health reasons and stated that there should have been guidance to staff on how to monitor or support a Type II Diabetic.

148. With regard to the final disciplinary allegation relating to the Deprivation of Liberties Safeguards (DoLS), these applications arise from the Mental Capacity Act 2005 in circumstances where an individual is not regarded as having an appropriate level of mental capacity. Any restriction applied to such a person without their consent is considered as being a potential deprivation of liberty. Therefore, an application must be made to the Local Authority for approval to implement appropriate restrictions and the CQC must also be notified.

149. The Claimant received training on DoLS in October 2013.

150. It was drawn to the Claimant's attention in the supervision in November 2014 that he had not made any DoLS applications in respect of Parkside service users and Mr Clubb considered that all service users at both Parkside and Maple House may fall under these legislative provisions. The Claimant was a reissued with the Respondent's Guidance document, which covered the statutory obligation to notify the CQC, and tasked as part of the action plan to complete the applications as appropriate and to seek support from Ms Allison Hardy if required.

151. In January 2015 the Claimant made applications to the Local Authority with regard to service users at Parkside and these were approved on 11 February 2015 and 12 March 2015.

152. On 12 March 2015 there was a two hour safeguarding briefing at a monthly meeting of Service Managers, which covered DoLS applications. The Tribunal finds on balance that it was reasonable for Mr Edwards to consider that notifying the CQC was covered.

153. At the supervision meeting on 30 July 2015, it became clear the Claimant had not informed Mr Clubb that the Local Authority had approved applications.

154. At the disciplinary hearing the Claimant accepted that there had been a failure to notify the CQC but argued that he did not realise he needed to send any notification and that he was going to raise DoLS issues with Mr Clubb at a supervision in March 2015, which was cancelled.

155. The Tribunal concludes that it was reasonable on the evidence for Mr Edwards to conclude that the allegation was upheld. It was reasonable for Mr Edwards to conclude the Claimant had received training and guidance on the matter, had been provided with access to assistance if required, and therefore it amounted to a misconduct matter.

156. The Claimant raised issues at the Tribunal that most particularly went to the reasonableness of the decision to dismiss him. These matters were addressed in evidence and by both Counsel in their submissions. They are (1) the effect of the Claimant's Dyslexia on his ability to carry out his work; (2) alleged failings in supervision; (3) staffing issues at Parkside; and (4) inconsistency in treatment between the Claimant and Mr Dulip and Mr Semple at Seven Springs and Shore Lodge.

157. With regard to the arguments made relating to (1) generally, the Claimant's Dyslexia was considered by Ms Waterman, the Claimant's earlier manager. The Report by Dyslexia Action stated that the Claimant has significant weaknesses in the processing of information and working memory and suggested the Claimant should adopt a range of coping strategies. In consequence of that Report the Claimant was provided with relevant aids/equipment and also the use of a tutor for a period of a year.

158. The Report confirms that the Claimant is not unable to perform tasks that involve high levels of processing or working memory, just that he may require additional time when conducting them. When adopting coping strategies the Claimant should have a good long term memory and was "high functioning" in areas other than the difficulties highlighted with regard to working memory and processing speed.

159. Ms Waterman recorded as part of the Respondent's observations to Dyslexia Action that the Claimant did not have any hesitation in checking with someone if unsure of what was required of him.

160. The effects of the Claimant's Dyslexia were discussed at the first supervision session with Mr Clubb in February 2014, who stressed to the Claimant the importance of letting him know if the Claimant was having any difficulties at all, particularly with regard to communications, instruction or advice.

161. There was thereafter a clear line of communication available between the Claimant and Mr Clubb regarding the effects of the Claimant's dyslexia, as highlighted by the discussions during the supervisions on 20 November 2014 and 14 January 2015.

162. Importantly, at no time prior to the results of the CQC Inspection and Warning Notices did the Claimant raise any issue with regard to lack of support relating to his Dyslexia. When matters had been mentioned they were acknowledged and acted upon (see November 2014 and January 2015 supervisions above). The Claimant's recorded comments include "I feel you are fair and honest in terms of highlighting and discussing areas of my performance where you have concerns and the support given" and "I appreciate being able to have an open discussion about some concerns I have had that were resolved".

163. Mr Edwards did not view the Dyslexia Action report during the disciplinary proceedings, but did not understand the Claimant to be saying that the CQC breaches were caused by his Dyslexia condition. The Claimant made representations regarding his Dyslexia condition to Mr Edwards at the disciplinary hearing and they emphasised the main matters raised in the Report. The Tribunal accepts the evidence of Mr Edwards that if he had seen the Report, particularly the first two paragraphs on page 66, his decision would not have been any different.

164. However, crucially, it is the decision of Mr Edwards to dismiss the Claimant that is the fundamental issue and the Tribunal concludes it was reasonable that Mr Edwards considered the problems identified by the CQC, particularly with regard to the content of the Warning Notice, principally involved the Claimant's responsibility over a period of time to oversee circumstances and to ensure appropriate steps were taken and that they did not relate to insufficient time or opportunity to process relevant Policies or other written material.

165. With regard to the arguments made relating to (2) generally, it was part of the Respondent's Policy on Supervision that Service Managers should have four supervision sessions per year. In the period from January 2014 to January 2015 the Claimant had the recommended number of supervision sessions. There were no formal meetings every six weeks as stated as being an aim by Mr Clubb in November 2013. The notes of the supervision meetings demonstrate that they were well structured and comprehensive.

166. The Claimant was able to inform Mr Clubb of problems and issues he was experiencing. Mr Clubb gave guidance and set targets and was reliant to a good degree on what the Claimant reported to him.

167. Importantly, at the end of each supervision the Claimant positively confirmed that he was happy with the level of support being provided by his line manager and others. The Claimant did not indicate that he required additional supervision meetings or required more support. Further, there was no occasion where the Claimant requested supervision from or even a meeting with Mr Clubb to discuss any issues of concern.

168. The Claimant was provided with a copy the supervision notes following each session, which would have provided an aide-memoire of what had been discussed and the action points he was required to undertake.

169. However, again fundamentally, with regard to the decision of Mr Edwards to dismiss the Claimant, he considered whether more supervision would have prevented the issues raised by the CQC Report and Warning Notice for Parkside and concluded that it was difficult to identify any that could have been avoided had there been more frequent supervision. The Tribunal concludes that this consideration was reasonable on the facts available to Mr Edwards.

170. The Claimant argued in cross-examination that he did not raise problems with Mr Clubb because he was concerned about reprisals. In his oral evidence the Claimant contended that he informed Ms Ross who he hoped would pass on that information to Mr Clubb in her own supervisions. The Claimant however, confirmed that he did not ask Ms Ross to forward that information and remained of the view that even if Ms Ross did pass on his concerns he would be subject to reprisals. The Tribunal found this evidence unconvincing and not credible. This matter was also not raised during the disciplinary process.

171. With regard to (3), the Respondent reached a reasonable view that staffing issues did not impact upon the matters identified by the CQC. It was reasonable for Mr Edwards to conclude that the matters identified by the CQC were not resource heavy, such as locking away medicines and COSHH, weighing service users, overseeing care plans were up to date, and notifying the CQC of DoLS applications. There was also the availability of agency staff.

172. With regard to (4), the circumstances relating to Mr Semple and Mr Dulip when reading the Reports and Warning Notices on their face appear to raise some issues that could be argued to be similar to those relating to the Claimant.

173. At the time of the published CQC report on 21 May 2015 relating to Mr Semple and Seven Springs, Mr Clubb stated that it was “one of the worst reports received by the organisation and calls into question your competence in managing and leading Seven Springs”.

174. However, as stated above, there were no Warning Notices with regard to Seven Springs, the Report had been challenged by the Respondent on the basis of factual inaccuracies and the Report pre-dated the Parkside Report and Warning Notices. Some of the failures identified in the Seven Springs Report were similar in type to those in the Report relating to the Claimant, however, they were not at an increased level where the CQC considered any statutory Warning Notice was necessary under section 29 of the Health and Social Care Act 2008. Warning Notices were introduced for all purposes under that Act from October 2010 and therefore were active at the material times.

175. Mr Dullip at Shore Lodge was issued with Warning Notices, which involved some matters similar in type to those relating to the Claimant and the Tribunal has carefully considered those similarities. However, the Report and Warning Notices were substantially challenged by the Respondent. In those circumstances the Respondent would have been in difficulty in pursuing disciplinary proceedings against Mr Dullip relating to conduct in circumstances where the Respondent fundamentally disagreed with and did not accept the findings of the CQC.

176. The authorities regarding disparity of treatment are clear, well-established and confirm that the circumstances need to be "truly parallel" or "truly similar". The Tribunal concludes, on a similar rationale to that relating to comparators in the discrimination claim above, the nature of the conduct and the surrounding facts of Mr Semple and Mr Dullip were materially different and not truly similar to those of the Claimant.

177. The Tribunal concludes that in all the circumstances it is not outside the range of reasonable responses for the Respondent to consider the Claimant's circumstances as a disciplinary conduct issue in circumstances where the content of the CQC Report and Warning Notice were not, and still have not been, challenged and have been accepted by all parties.

178. The evidence of Mr Edwards, accepted by the Tribunal, that it was the Warning Notice gave cause for concern as it was a reflection of the CQC putting the issues up to a higher level.

179. In addition, the Tribunal finds that Mr Edwards had no involvement in and was not aware of the detailed circumstances relating to Mr Semple and Mr Dullip and the matter was not argued by the Claimant at the disciplinary stage.

180. The Respondent argued, particularly at appeal stage, that the Claimant's actions put service users directly at risk of harm. The Tribunal concludes that this assessment is a matter of degree for the Respondent and it was within the range of reasonable responses to arrive at that conclusion given the circumstances quoted in the appeal outcome letter relating to the COSHH materials and the Type II Diabetic service user, which was based on the conclusions of the disciplinary outcome and the content of the CQC Warning Notice.

181. The Tribunal concludes overall that it was reasonable for the Respondent to believe in the Claimant's conduct after a reasonable process.

182. With regard to sanction the Tribunal concludes that it was within the range of reasonable responses for the Respondent to conclude that the Claimant's conduct fell within a description of gross misconduct given the unchallenged findings of the CQC, the evidence reasonably obtained during the disciplinary process and the objectively reasonable conclusions drawn from that material.

183. As recognised by the Claimant's representative at the disciplinary hearing, there was a range of options available to the Respondent from a note on the Claimant's file to dismissal given the mitigation and context.

184. The Tribunal accepts the evidence of Mr Edwards that he did consider mitigation and alternatives to dismissal but in the circumstances concluded that that there was no option other than summary dismissal the Claimant.

185. The Tribunal concludes that dismissal was an option reasonably available to the Respondent given the terms of the CQC findings and the seriousness of the Warning Notice; the nature of the evidence available; the failings that reasonably could be attributed to the Claimant; the Claimant's responsibilities as Service Manager and Registered Manager; the regulated environment; the safety and well-being of the service users and the level of trust required moving forward.

186. Accordingly, in all the circumstances the Tribunal concludes that the Respondent genuinely believed in the Claimant's conduct, that belief was reasonably held after a reasonable investigation and dismissal fell within the range of reasonable responses having regard to equity and the substantial merits of the case

187. Finally, with regard to the Claimant's claim of wrongful dismissal, the Tribunal concludes the Claimant did commit a repudiatory breach of contract, principally based upon the terms of the Warning Notice for Parkside, which obviously is made by an independent body entrusted to make such judgements and the accuracy of which was not challenged.

188. The matters raised in the Warning Notice clearly were serious, it was the Claimant's contractual obligation to oversee those matters in a regulated environment. The Tribunal concludes from the evidence it has seen that the serious issues raised by the CQC, especially with regard to the Claimant's responsibility to oversee those matters that had occurred over long periods of time, were not matters in respect of which the Claimant's Dyslexia condition had material bearing. In particular the Tribunal refers to the terms of the Dyslexia Action Report relating to the Claimant's ability undertake tasks that involve high levels of processing; that he may take longer to process information at speed and "merely that he may require additional time when conducting them"; and that he was advised to adopt effective coping strategies to enable memory and processing to keep pace with his high functioning in other areas. There was substantial time available to the Claimant to assimilate and understand the circumstances and any Policies relevant to the defects made in the CQC findings. The principal example is the care of the service user with Type II Diabetes. The Claimant was significantly at fault. It was a substantial omission or oversight in respect of which the Claimant's condition, according to the terms of the Dyslexia Action Report, had no material impact. The same observation can be made regarding the lack of update of care plans, risk assessments and weight records over a significant period, many since 2014.

189. Accordingly, on balance the Tribunal concludes that there was a repudiatory breach of the Claimant's contract of employment and the claim of wrongful dismissal is unsuccessful.

Employment Judge Freer
Date: 11 May 2017