EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: General Dental Council

Heard at: London Central **On:** 2, 5, 6, 7 & 8 Nov 2018

Before: Employment Judge H Grewal
Ms J Cameron and Ms C Smith

Representation

Claimant: Father
Respondent: Mr A Sugarman, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is not well-founded;

2 The complaints of disability discrimination are not well-founded.

REASONS

1 In a claim form presented on 16 February 2018 the Claimant complained of unfair dismissal, wrongful dismissal and disability discrimination.

The Issues

2 The issues to be determined were agreed at a preliminary hearing on 9 May 2018. They were as follows.

Unfair Dismissal

2.1 What was the reason for the dismissal? The Respondent contends that it was a reason related to conduct.

2.2 If it was, whether the dismissal was fair.

Wrongful Dismissal

2.3 Whether the Respondent was contractually entitled to dismiss the Claimant without notice (The Respondent contends that the Claimant has in any event been paid his notice pay and, therefore, cannot recover any damages for the breach of contract, if there was one).

Disability Discrimination

2.4 The Respondent concedes that the Claimant was disabled at the time of his dismissal by reason of suffering from Chronic Pain Syndrome. It does not concede that the Claimant was disabled in July 2014.

2.5 Whether the Respondent dismissed the Claimant because he was disabled, contrary to section 13 of the Equality Act 2010;

2.6 Whether the Respondent dismissed the Claimant because of something arising in consequence of his disability (namely his long sickness absence, inability to work full time, having to work from home and the likelihood of further sickness absences), contrary to section 15 of the Equality Act 2010;

2.7 If it did, whether the Respondent can show that it was a proportionate means of achieving a legitimate aim.

2.8 Whether the Respondent failed to investigate or have regard to the Claimant's evidenced contention that his 2014 medication regime might have affected his behaviour at the time of the alleged offence;

2.9 If it did, whether that was unfavourable treatment and amounted to disability discrimination under section 15.

2.10 Whether he Respondent applied PCPs which put the Claimant at a substantial disadvantage in comparison with persons who were not disabled. The PCPs alleged by the Claimant were as follows:

(a) The appeal process or practice of refusing to consider relevant medical issues raised by employees. In this instance, once on notice of the effects of the Claimant's disability, they failed to consider and investigate this properly or at all (this was amended after the preliminary hearing);

(b) The practice of placing a unilateral burden upon the Claimant to prove the contentions made around the effects of disability, without carrying out their own investigation into the same.

2.11 If it did, whether the Respondent failed to take such steps as it was reasonable for it to take to avoid the disadvantage.

The Law

3 The onus is on the Respondent to prove the reason or the principal reason for the dismissal. A reason relating to the conduct of the employee is a potentially fair reason (section 98(1) and (2) of the Employment Rights Act 1996 ("ERA 1996"). Once the employer establishes a potentially fair reason, the Tribunal has to consider whether the employer acted reasonably or unreasonably in all the circumstances of the case in treating the reason established as a sufficient reason for dismissing the employee, and that should be determined in accordance with equity and the substantial merits of the case (section 98(4) ERA 1996).

4 The well-established authority of **British Home Stores Ltd v Burchell [1978] IRLR 379** provides that in a conduct dismissal case the Tribunal must ask itself the following three questions:

(i) Did the employer believe that the employee was guilty of misconduct?
(ii) Did he have in his mind reasonable grounds upon which to sustain that belief? and
(iii) at the stage which he formed that belief on those grounds had he carried out as much investigation into the matter as was reasonable in the circumstances of the case?

5 In determining the issue of fairness the Tribunal also needs to consider whether there were any flaws in the procedure which were such as to render the dismissal unfair, and, finally, whether dismissal was within the band of reasonable responses open to a reasonable employer in all the circumstances of the case. The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439,** approved by the Court of Appeal in **Post Office v Foley [2000] IRLR 827**, lays down the approach that the Tribunal should adopt when answering the question posed by Section 98(4). It emphasises that in judging the reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer and that the function of the 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.

6 Section 13(1) of the Equality Act 2010 provides that a person (A) discriminates against another (B) if because of disability A treats B less favourably than A treats or would treat others. In comparing the treatment of B with the treatment of others, there must be no material difference between the circumstances relating to each case (section 23(1)).

7 Section 15(1) of the Equality Act 2010 provides that a person (A) discriminates a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate

means of achieving a legitimate aim. That section, however, does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.

8 A duty to make reasonable adjustments is imposed by a person (A) where a provision, criterion or practice ("PCP") of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. If the duty arises A is required to take such steps as it is reasonable to have to take to avoid the disadvantage (section 20(3) Equality Act 2010); A is not subject to the duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to in Section 20 (paragraph 20 in Schedule 8 Equality Act 2010).

9 Section 136(2) of the Equality Act 2010 provides that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred unless A shows that he did not contravene the provision.

The Evidence

10 The Claimant gave evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent – Luke Whiting (Information Governance Manager), Gurvinder Soomal (Executive Director), Ian Brack (Chief Executive) and Jennifer Parker (HR Advisor). The documentary evidence comprised about 1,000 pages. Having considered all the oral and documentary evidence the Tribunal makes the following findings of fact.

Findings of Fact

11 The Respondent is the UK-wide statutory regulator of about 100,000 members of the dental profession, including dentists and dental care professionals. Its primary purpose is to protect the public and to maintain public confidence in the dental profession. The Respondent registers qualified dental professionals, sets standards for the dental profession, investigates complaints about dental professionals' fitness to practise and works to ensure the quality of dental education. It is funded almost entirely by fees paid by dental professionals. It is essential that it is seen by members of the profession and the wider public to be an effective and efficient regulator and one in which the dental profession can have confidence.

12 On 6 January 2014 the Claimant commenced employment with the Respondent as a Caseworker in its Fitness to Practice Team. He had ten years' experience of having worked in variety of roles in both the public and private sector, his most recent role having been with the Royal College of Physicians where he had worked a little over three years.

13 In February 2013 the Claimant developed pain in the front of his chest while lifting some heavy wardrobes. Over the next six months he developed pain at the back of his chest. He was prescribed medication for the pain. This included Naproxen and Co-Codamol. In a form that he filled in before commencing employment with the Respondent he stated that he did not consider himself to be disabled under the

Equality Act 2010 and did not require the Respondent to make any reasonable adjustments. He declared that he was taking prescribed medication.

14 The Claimant was absent sick for 3.5 days from11 to 14 February 2014 because of back pain. On 11 February he saw his GP because there had been a flare up of his back pain. In addition to the medication that he was already taking he was prescribed 10 mg Amitriptyline to be taken regularly. Following that, the Claimant had an MRI scan of the thoracic spine which revealed a minor disc bulge at T3/4. He was absent sick for one day on 17 March because of back pain. On 25 April he saw his GP and said that the Amitriptyline was not working and asked for stronger medication. He was prescribed Gabapentin 100 mg to be taken three times a day. It appears that he did not take that for very long. He was absent sick because of back problems on 19 May.

15 The Claimant's contract provided that his employment was subject to a probationary period of six months during which time his employment could be terminated with one week's notice save in the case of gross misconduct. Thereafter, he was entitled to two months' notice except in the case of gross misconduct. There was a confidentiality clause in his contract which provided,

> "*You shall not use or disclose to any third person either during or at any time after the period of you employment with the GDC any documents, confidential facts, information or opinion relating to the business or affairs of the GDC, its projects, the Council or Associates, which come to your knowledge during such period, without the permission of a Director.*
>
> *You are required to protect the sensitive personal data entrusted to you by registrants and the public. Where any loss of information does occur, you must report it to your line manager immediately."*

16 On 8 May 2014 the Claimant had induction training on the Data Protection Act 1998 and Information Security, and on 23 June 2014 he attended a day long Fitness to Practise masterclass on the Professional Standards Authority and Audit requirements. The Claimant accepted in evidence that he was familiar with and understood the contents of Respondent's Information Security and Data Protection policies.

17 The Respondent had a number of Information Security Policies which included its Data Protection policy. The introduction to the policies contained the following provisions –

- *"It is the policy of the GDC to ensure that … confidentiality of information is assured; integrity of information is maintained; all breaches of information security, actual or suspected are reported and investigated."*

- *"Definitions*

  Personal data - information about a living individual, who can be identified from that information, or from any other information the GDC holds or is likely to hold. Personal data includes any expression of opinion about the individual by others and any indication of the intentions of the Data Controller (the GDC) or any person in respect of the individual."

- *"Users will … ensure that their actions are appropriate and professional when using the internet, electronic messaging and IT systems … report any data breaches, actual or suspected to the Information Manager as soon as they are identified.*

- *"Failure to comply with these policies may … lead to instigation of the relevant disciplinary or capability procedures and, in certain circumstances, legal action may be taken against the employees;*

- *The list below sets out the type of activities which fall within the ambit of unacceptable use and are forbidden… Disclosing personal data or sensitive personal data especially relating to registrants/employees/Council members and/or Associates to parties outside the GDC unless authorised to do so."*

18 The Fitness to Practise Casework Guidance provides, inter alia,

> "*All the information we deal with in Fitness to Practise is confidential and must always be treated as such… The fact that a registrant has a case against them* ***must not*** *be disclosed to any unauthorised third party, such as other dentists, the press or members of the public"* and
>
> "*Where a breach of personal or sensitive data has occurred, this must be reported to a Casework Manager immediately."*

19 The Respondent's Disciplinary Policy gives examples of gross misconduct which are sufficiently serious to warrant dismissal. These include breach of confidentiality, committing a serious breach of duty prejudicial to the GDC's relations with other bodies or the general public or any willful attempt to damage the GDC's reputation or to bring its operations into disrepute and failure to comply with significant relevant statutory or regulatory requirements.

20 On 2 July 2014 a Casework Manager in Fitness to Practise sent to all the caseworkers an email informing them that a registrant (referred to in this decision as "L") had been notified that day that he had been placed on the Respondent's habitual and vexatious contacts list and the consequences of that. One of them was that he had been advised that any correspondence relating to his fitness to practise matter would be forwarded to "the relevant person". The caseworkers were advised that if he called and tried to talk to them, they could tell him that they were not able to speak to him and terminate the conversation. The registrant's name was given as the subject of the email and featured three times in the email. The names of those on the list are not published or revealed to anyone outside the Respondent.

21 The Claimant saw the email when he arrived at work the following morning. At 9.12 a.m. he forwarded it to two of his former colleagues at the Royal College of Physicians and wrote,

> "*We so should have had a 'habitual and vexatious contacts list' at PTB, ha ha. I think you should suggest it to…"*

22 Both his colleagues responded. One of the responses was,

"*That's mental! So does that mean he's an arse?* [followed by smiley face].

The other one was,

"… *seeing that's his name do you feel tempted to shout down the phone to him 'GOOOOAAAAAALLLLAZIO!'* [followed by a smiley face].

That was a reference to the opening signature tune to a 1990s football TV programme and prompted by the similarity between Lazio and the registrant's name. The Claimant's reply to that was,

"*Hahaha, that actually made me 'lol', haha.*

Your knowledge of Channel 4's Italian football coverage in the 1990s impresses me no end … [smiley face]

Perhaps the instruction should have been that if he phones us we should say GOOOOOOOOOAWAYYYYY [followed by the registrant's name]*!!!"*

The Claimant's other colleague responded to that by saying,

"*Haha, just went to order a toasty so catching up on the chat.*

Wow, can't believe he even turned up, what a nut bar."

23 On 10 July the Claimant was absent sick for one day. The reason given for his absence at a return to work meeting was that his back injury had been exacerbated by a physiotherapy session the previous day as a result of which he had been unable to move. He and his manager discussed flexibility in start and finish times to avoid rush hour travelling as he said that standing on the tube made it worse.

24 On 21 August the Claimant saw his GP and the dosage of co-codamol was increased. He saw his GP again on 1 September as the pain had not improved and the doctor suggested that he tried Tramadol.

25 In September 2014 the Claimant applied for a Casework Support Manager role. The role reported to the Director of Fitness to practice and had five Casework Support Officers reporting to it.

26 The Claimant was absent sick for one day on 15 September 2014.

27 On 16 September 2014 an advanced DSE assessment was carried out to see if changes could be made to the Claimant's workstation or tasks to reduce the pain and discomfort. The assessment made a number of recommendations which included a chair with a higher back, raising the desk by 5 centimetres, avoiding prolonged periods of sitting, regular postural breaks and rotating tasks.

29 In a report dated 29 September 2014 the Occupational Health physician noted,

"*He tells me that he has occasional back pain and that travelling on the tube with the inherent crowding and jostling causes him considerable discomfort. He uses*

analgesic medication to dull the pain but is not treating the underlying condition at the present time. He states that he is able to manage at work but is keen to return to full fitness and undertakes his sporting activities again." and

"His current general state of health is very good but his ongoing discomfort from the prolapsed disc in his thoracic spine is what is causing him difficulties at the present time."

There was no reference in that report to the medication having any negative side effects. The physician said,

"*If it were possible for him to work from home it would be useful should he have an acute exacerbation of symptoms."*

30 On 12 January 2015 the Claimant asked his line manager whether he could work from home either one day a week on a regular basis or on the occasions when he was unable to commute to work because of his work but was able to work from home. Having sought advice from HR she decided to allow him to work from home one day a week (on Wednesdays) on a trial basis for three months.

31 In about May 2015 the Claimant's line manager noticed that he often worked long hours and spoke to him about it. He informed her that he was on new medication which affected his concentration and hence he needed more time to do his work.

32 The Claimant was absent sick from work because of his back pain from 1 June 2015 to 26 April 2017. During that period he was paid 75% of his salary under the Respondent's Group Income Protection policy.

33 On 13 August 2015 the Claimant's Consultant Rheumatologist first diagnosed the Claimant as possibly suffering from chronic pain syndrome.

34 In a report dated 20 August 2015, the Occupational Health Physician advised that the Claimant was unfit to work at that stage and that he was likely to come under the remit of the disability legislation. She continued,

"*Adjustments to consider would include a graduated return to work, home working where possible, flexible working hours, managing any sickness absence due to the chronic pain as disability related and allowing him to attend any medical appointments for the condition should they fall within the working day.*

I would expect that with completion of the pain management program he will improve sufficiently to be able to return to work, but he is liable to a higher rate of sickness absence than his colleagues who do not suffer from this health condition. His performance, were he to return to work at this point, would be impacted by ill health but one would expect that once he has improved and completed a graduated return to work he will be able to meet expectations."

35 Following the diagnosis of chronic pain syndrome the Claimant was referred for physiotherapy and in January 2017 for pain management rehabilitation. The Occupational Health physician saw the Claimant on 8 February 2017. In his report dated 13 February he stated that one of the main concerns that the Claimant had

raised was that the pain relief medications had affected his memory and condition and that that had been a problem since the end of 2014. The physician advised,

> "*It does seem that his medical symptoms of chronic pain syndrome are proving difficult to control, so the prognosis for complete resolution must be guarded and his tendency to have further episodes is likely to remain. Hopefully with further management and pacing techniques, he may find he can manage them better, but this is by no means guaranteed."*

He said that he was hopeful that the Claimant might be able to commence a phased return to work in four to six weeks' time and advised that it would be useful for him to start off with working from home as an interim measure and to have flexibility around individual deadlines and size of caseloads. He thought that there was a reasonable prospect that the Claimant would be able to return to his usual role within the fullness of time. He concluded that Occupational Health would be happy to see the Claimant again four months after he returned to work if the Respondent thought that that would be helpful.

36 Upon receipt of the report HR had discussions with the Claimant's managers as to whether working from home would be feasible. The response was that they could certainly support working from home two days a week and that that could be stretched to three days in exceptional circumstances and if indicated by Occupational Health. On 6 March the Respondent arranged for a home workspace risk assessment to take place. The assessment took place on 16 March.

37 On 23 March 2017 Keith McKay, the Claimant's line manager at the time, held a meeting with him to discuss how the Respondent could successfully facilitate his return to work. The Respondent agreed to buy a laptop desk for the Claimant to use at home and to purchase a second laptop for him so that he would not have to carry one with him to and from work. The Claimant was asked about the effect of medication on his concentration and he replied the problem was with the ability to focus as a result of which it would take him longer to write reports. It was agreed that the Claimant would have a phased return to work which would involve him working two days a week (one in the office and one from home). In the first week he would work three hours each day and for the next three weeks three and a half hours per day. The situation would be reviewed at the end of week four. After the phased return to work the Claimant would be permitted to work from home two days a week. The Claimant was advised that a phased return to work was limited to six weeks and if the Claimant was not able to work full-time after that he would need to consider part-time working. Reasonable adjustments agreed were provision of time for exercising/ stretching, latitude regarding case management deadlines (although the department's key performance indicator regarding overall case timeliness could not ab adjusted) and home working and hours. Mr McKay said that he saw the first two adjustments as being "diminishing" adjustments, i.e. the need for them, or their extent, should decrease in relation to any improvements in the Claimant's health. The Claimant was advised that he could use the 60 days' annual leave that he had accrued during his absence or, if he preferred it, the Respondent could buy back some of that.

38 The laptop desk was ordered on 27 March.

39 On 4 April 2017 the Claimant responded to Mr McKay's letter setting out what had been discussed at the meeting. He corrected a few minor inaccuracies and queried a couple of matters. He concluded the letter by saying,

> "*Finally, I just wanted to say thanks again for your understanding of my situation and the disability. Needless to say the last few months have been horrific for me, but the support and understanding from the GDC has been incredibly appreciated."*

40 The Claimant had inquired about his pay during his phased return to work. On 6 April 2017 HR advised him that he could be paid full pay for six weeks for a phased return to work but that would lead to the Group Income Protection payments ceasing. Alternatively, the Respondent could pay him for the hours that he worked and the insurers could continue to pay him 75% pay for the hours that he did not work. If he did not think that he would be able to return to full time working after six weeks, the latter option would be more beneficial for him.

41 The Claimant returned to work on 26 April 2017. HR asked for weekly updates of the number of hours he worked so that payments from the Respondent and the insurers could be calculated. Prior to the Claimant's return Mr McKay advised his colleagues of his return and said that he was sure that they would all help him settle back into the department and support him in getting up to speed with the changes that had occurred in his absence. He arranged for refresher training and a brief induction to be provided to the Claimant on his return to work.

42 On 10 May Mr McKay informed HR that he had met with the Claimant and things were going well. He said that the Claimant felt ready to take on a couple of straightforward cases and was well enough to increase the days worked to three days a week. HR advised that the phased return could continue beyond six weeks as the Claimant was still being supported by the Group Income Protection.

43 On 31 May 2017 L, the registrant who had been the subject-matter of the emails which the Claimant had forwarded to his ex-colleagues in July 2014, made a Subject Access Request to the Respondent for full and total disclosure of all documents held by the Respondent with respect to himself and all matters connected with him in any way that were retained by the Respondent.

44 In the middle of July HR started to prepare a referral to Occupational Health for the Claimant to be seen in August. HR asked Mr McKay whether he wanted to add anything to the draft referral letter. He responded,

> "*I don't think there is too much to add to the referral letter.* [A's] *return to work has been v. successful in many regards; he has built up his hours, and workload, slowly but steadily and successfully reintegrated into the team and role. He is performing a reduced volume workload but is otherwise performing all the functions expected of a caseworker, and he shows a natural aptitude. His concerns about his ability to concentrate and mental sharpness have not manifested (thus far at least), but I think we both probably share a concern about when, if ever,* [A] *will be able to complete two days of work back-to-back and whether commuting to, and out from, the office in the rush hour will ever be feasible."*

45 On 3 August Luke Whiting, the Respondent's Information Governance manager, flagged up with the relevant business managers certain documents that he had seen when dealing with L's SAR request, that had concerned him. He flagged up a number of documents to John Cullinane, the Respondent's Head of Casework Progression. He considered that the majority of them might not be particularly serious in themselves. He continued,

> "*There is, however, an email chain between a caseworker and two people working at the royal college of physicians training board which should cause real concern. It seems to me that the caseworker might have worked their* [sic] *previously and this is a conversation between friends. As I read it, the conversation begins with the caseworker forwarding his friends confidential information about* [L]*. In the conversation that follows* [L] *is discussed in an inappropriate way. Almost all of this exchange is disclosable."*

46 Mr Cullinane responded on the same day and set out the action that he proposed to take in respect of the other matters. In respect of the email chain he said,

> "*The second matter, re the external conversation, is much more serious. The first thing that springs to mind is that this is actually a DSI* [Data Security Incident] *and should be reported as such, even given the length of time. We should probably apologise for that to* [L] *too*. *I cannot help but think that this must have been a breach of whatever data security policy we had at the time (assuming we had one?) – and, on my reading, a really blatant one at that – that it does fall into conduct territory. As such, I suggest I pass this to Keith to investigate properly and to take whatever action is necessary at the end of that investigation."*

47 Occupational Health saw the Claimant on 7 August 2017 but HR did not receive a copy of that report until after 21 August. The OH physician said that the Claimant had reported that his concentration was affected by the medication that he was taking. That did not affect the complexity of the work that he was able to undertake but affected the speed at which he was able to work. At that stage the Claimant was working from home two days a week (6.5 hours each day) and one day from the office (working 4 hours). She suggested that, if the Respondent was able to support it, his hours should be increased gradually over the next two to three months to enable him to get to full-time working. She also said that the Claimant found the commute particularly difficult and, if operationally feasible, consideration should be given to allowing him to work permanently from home for the next two to three months and possibly in the longer term. She also suggested that his workload be increased gradually over the next two to three months.

48 Mr Cullinane passed the matter on to Mr McKay and on 9 August Mr McKay forwarded the email chain in question to an HR Advisor (Rebecca Watkins) and asked her for her thoughts as to the severity of the incident. She responded that she had spoken to someone called Sara who had said that in the past, in similar circumstances, they had issued an informal warning to remain on the employee's file for 6 months. She suggested that he should meet with the Claimant to get his take on it and to issue him with a warning if he felt that that was warranted. If he was looking at potentially issuing a formal sanction they would need to conduct a full investigation**.**

49 At 14.19 that afternoon Mr McKay sent an email to Mr Cullinane. He said that he had spoken to HR, Mr Whiting and the Claimant. He set out the advice that HR had given about previous similar incidents. He said that Mr Whiting was certain that the Claimant's actions would be in breach of the relevant information governance policies and IT acceptable use code that was in force at the time. Mr Whiting's view was that while the content of the data breach was not at the most serious end of the scale (i.e. they had not lost multiple sets of sensitive personal data) the nature of the breach was significant and damaging. He said that the Claimant was contrite and embarrassed and nervous. He concluded that his view, given the examples of gross misconduct provided in the policy, the damage that the incident would cause the Respondent, and considering their expected staff behaviours, an informal warning would be insufficient and they would need to proceed with the formal process. He asked Mr Cullinane whether he was content with that approach.

50 At about the same time he sent an email to the HR advisor. He said that he was waiting to her from Mr Cullinane as to whether he would be satisfied with an informal warning. He said that his view was that formal action was needed and explained why that was the case. Mr Cullinane responded the following morning that he agreed with Mr McKay's proposed approach. Mr McKay informed HR that they were both agreed that that the conduct involved was potentially gross misconduct and, therefore, needed a formal investigation.

51 On 10 August 2017 Lisa-Marie Roca, the Respondent's Principal Legal Advisor, sent an email to the Executive Management Team to update them on the steps that had been taken in response to L's SAR. She said that they had already disclosed three large files and were about to send the final bundle which would include a number of internal emails where the tone of the correspondence was not professional and/or the language used by members of staff was inappropriate and one email where information regarding L had been forwarded to a friend/former colleague working at a different organisation. She said that the last email was being treated as a DSI (Data Security Incident) and that they would need to write to L and to apologise for the DSI.

52 On 15 August Mr McKay invited the Claimant to a disciplinary investigation meeting on 23 August 2017. He told him that the allegation was that the Claimant had allegedly forwarded a confidential work email to external recipients and engaged in unprofessional communication about a registrant, in breach of data protection and confidentiality, potentially bringing the GDC's name into disrepute.

53 Ian Brack, the Respondent's Chief Executive, was away from the office from 3 to 21 August and did not see Ms Roca's email until his return to the office on 21 August. He sent an email to her and the Executive Management team in which he said,

> "*I am unhappy to read that internal emails have referred to a registrant in an unprofessional or inappropriate manner, and am* ***most displeased*** *to see that a staff member has deliberately created a DSI. This is completely unacceptable behaviour from a member of GDC staff and I want to know what disciplinary action has been taken."*

54 The Claimant produced a written submission for the meeting on 23 August. He began by saying,

"*First and foremost I'd like to apologise unreservedly for forwarding the email concerned externally to two friends, and for engaging in the unprofessional exchange that followed.*

It was my error, albeit a completely unintentional oversight, in not removing the registrant's name from the original email, and I completely acknowledge that. In fact, forwarding any internal email is inappropriate, and is categorically not something I would normally do; so, frustratingly, I cannot explain why I did so on this occasion."

He then set out why he thought he might have done so. He had not been with the Respondent for long at the time and thought that it was probably the first time that he had heard of the existence of the habitual and vexatious contacts list and that he was overly keen to share what he thought was a useful idea with his former colleagues. He said that there had been no malice to the subsequent unprofessional exchange concerning the registrant's surname. His colleague had made a silly light-hearted pun relating to the similarity between the registrant's named and signature tune from an old football TV show and he had regrettably reciprocated with a similar pun. He said that he sincerely regretted the stupid exchange and assured the Respondent that he definitely would not be making the same oversight in the future.

55 The disciplinary investigation meeting took place on 23 August. It was a short meeting. The Claimant apologised again and said that he had worked for regulation and the public sector all his career and prided himself on being careful with data. It had not been his intention to disclose the confidential information. The Claimant said that he could not recall whether he had had any training on data protection or data governance when he started and he could not recall having had any training on IT policy**.**

56 On 23 August HR sent the Occupational Health report to Mr McKay.

57 On 24 August Mr McKay sent the first draft of his report to Rebecca Watkins in HR and asked her to let him know if they felt that any sections needed amendment. The report began with a short introduction (three paragraphs) which set out the facts giving rise to the investigation. Mr McKay then set out in some detail his findings. In doing so he divided the allegation against the Claimant into the following four parts -

(i) He had forwarded a confidential work email to external recipients;
(ii) He had engaged in unprofessional communication about a registrant;
(iii) He had done the above in breach of data protection and confidentiality; and
(iv) His actions could potentially bring the GDC's name into disrepute.

He concluded that each part of the allegation was established and gave his reasons for so concluding. He then set out a number of mitigating factors. He said that in the investigatory interview the Claimant had been unclear as to whether he had received any data governance training when he started in post and had been clear that he did not receive any training in relation to IT security policies. He also said that his personal observation of the Claimant as his line manager was that he was a professional and conscientious member of staff and, in his opinion, the incident was out of character and seemed unlikely ever to be repeated. He concluded that there was a strong case that the Claimant had committed an act of misconduct and that it

was possible that he had committed an act of gross misconduct and that the matter should progress to a disciplinary hearing. He was satisfied that the issue was not so insignificant so as to warrant informal sanction only. There were four appendices attached to his report – the email chain, notes of the disciplinary investigation meeting, the Claimant's written submission and the email from HR about how similar incidents had been dealt with in the past.

58 Rebecca Watkins was out of the office and the matter was dealt with by Jennifer Parker and Sara Cairns (HR Manager). On receipt of the draft report Ms Parker asked Mr McKay whether he had checked to see whether the matter had been logged as a Data Security Incident (DSI) and whether L had been informed of the DSI. On the same day Mr McKay asked Luke Whiting whether the matter had been logged as a DSI and the score/rating ascribed to it. Mr Whiting responded,

> "*It scored 9 (a significant incident) which is based on the calculation of the type of data disclosed, the number of people disclosed to, the number of people the data is about, whether the person it was disclosed to was under a professional obligation or contract which would necessitate confidence, and whether the information was recovered.*
>
> *I have to be clear though, I have no category/weighting for someone deliberately/intentionally sending information to someone who has no right to see it. It is the deliberate nature of this act which makes this so serious and, along with the behaviour exhibited in the emails themselves which compounds the deliberate breach, a matter of serious misconduct."*

59 On 30 August Mr McKay thanked Ms Parker for forwarding to him the OH report which he considered to be "useful". He said that they could continue to build the Claimant's hours and caseload slowly and that he would have a conversation with his manager to see whether the Claimant's working from home could be increased to three days a week.

60 On 4 September Ms Parker emailed Mr McKay a copy of the Claimant's training record which showed that he had attended a Data Protection Act and Information Security induction on 8 May 2014 and asked him to include that information in his report.

61 Mr McKay amended his report to include the information about the Claimant's training and logging of the DSI. He then sent a further draft of it to HR on 7 September 2017. Sara Cairns and Jennifer Parker reviewed the report and suggested certain amendments that Mr McKay should make. The majority of the changes involved adding material to the background section. It set out in detail the communications between Mr Whiting and senior managers about the discovery of the emails, the steps taken by the Respondent to deal with the fallout from it and the Respondent's communications with L about the matter. They suggested that these communications should be included in the appendices. They included Ian Brack's email of 21 August. Other than a couple of trivial matters, there were no changes to the sections setting out Mr McKay's findings and conclusions.

62 Mr Mckay made it clear that he was unhappy and uncomfortable with that approach. He said that he had real concerns that the report was being expanded beyond a disciplinary fact-finding matter regarding staff conduct into a report

concerning the subsequent management of the DSI and organisational response. His view was that they were not relevant to proving the allegations. He was also very concerned about adding material which would imply that a decision had already been made regarding the Claimant's actions; he was worried that that would undermine the independence of his investigation and direct the discretion of any subsequent hearing.

63 Ms Cairns assured him that the outcome had not been predetermined and that it would be down to the hearing manager to decide whether a sanction was appropriate. She said that she thought that it was necessary to include in the investigation report information about the DSI report and the impact that the Claimant's conduct had had upon the GDC as that was relevant to the allegation of bringing the GDC into disrepute. She suggested meeting further with him to discuss the changes but made it clear that they were their suggestions but it was his investigation.

64 On 12 September Mr McKay sent Ms Parker an amended copy of his report. He said that all the additions made by HR, bar the adding of one appendix, had been accepted. There was subsequently a dispute about including as an appendix the email exchange between Mr McKay and John Cullinane on 9 August 2017 which referred to HR advice about how similar matters had been dealt with previously. Mr Mckay said that he wanted to include it as he had to be happy that that his report was fair and transparent and included all background materials that he considered relevant. HR's view was that advice given before the matters was investigated and all the facts were known was not helpful in a fact-finding investigation. Following a meeting with HR Mr McKay sent them an email and said that given their "strong advice" he had decided to remove it. In the final report Mr McKay's conclusion that there was a possibility that the Claimant had committed an act of gross misconduct was changed to there was a "strong" possibility that he had committed an act of gross misconduct. There is nothing the documents to indicate that that was a change suggested by HR.

65 On 4 September Mr McKay sought his line manager's approval for the Claimant to work from home three days a week. His line manager approved it on 15 September.

66 The Claimant was invited to attend a disciplinary hearing on 19 September. He was sent a copy of the investigation report and the Respondent's disciplinary policy. He was advised of his right to be accompanied and was warned that if the allegation was substantiated it might result in disciplinary action up to and including dismissal being taken against him.

67 The disciplinary hearing was conducted by Gurvinder Soomal, Executive Director Registration and Corporate Resources. He was a member of the Respondent's Executive Management Team. The Claimant produced a written submission for the disciplinary hearing. He repeated some of the points that he had made in his earlier written submission. He was profusely apologetic and contrite. He accepted that his actions had been rash, ill-considered and had shown a complete lack of care and appreciation for the data in the original email and he fully understood the embarrassment that it had caused the organisation and the time and effort that had been spent in limiting the damage caused. He maintained, however, that it had not been a deliberate act and he had not deliberately disclosed confidential information.

He referred to his health and said that since his initial injury in 2013 he had been in constant severe pain 24 hours a day as a consequence of which he had had to take a number of extremely strong pain-killing medications. He continued,

> "*Unfortunately, one of the main side-effects suffered is occasional loss of concentration and the ability to focus. I have no way of knowing if this had anything to do with the email of 2014 but I wanted to mention that it certainly could have been a factor at that time given that I was really struggling to deal with balancing the pain and medication at work."*

He also set out the actions which he was taking to ensure that the error was never repeated.

68 At the hearing Mr McKay summarised the findings and conclusion of his report. The Claimant was given the opportunity to question him and to add anything he wished to add to his written submission. Mr Soomal asked the Claimant a number of questions. He sought the Claimant's consent to review his Occupational Health reports to see whether there was anything in them to support what the Claimant said about the effect of his medication on him. The Claimant gave his consent. Mr McKay said that although he was not there as a witness, he wished to add something. He said that as the Claimant's line manager he endorsed what the Claimant said about it being out of character. He said that he was a diligent member of staff and the last person he would have been expected to be involved in the emails. He also said that the data protection culture had changed over the years and the high standards and expectations applied in 2017 might not have been the same in 2014.

69 After the hearing Mr Soomal saw the Claimant's Occupational Health reports of 2014 and 2017 (the Claimant provided a copy of the latter). He noted that the September 2014 report made no reference to loss of concentration as a symptom of his disability, but that the 2017 report did. That report, however, said that it had been a problem since the end of 2014. Having considered all the evidence he concluded that the Claimant's actions in July 2014 were not attributable to a slip in concentration. He concluded that the allegation was substantiated and that the Claimant's conduct amounted to gross misconduct. The misconduct and its potential impact was such that the Respondent no longer had the trust and confidence required in the Claimant carrying out his role as a caseworker. He concluded that the Respondent was entitled to dismiss the Claimant without notice. However, because the incident had occurred in 2014 and had only recently come to light, the Claimant had taken a number of actions to prevent it happening again and because the Claimant's health might make it difficult for him to find work immediately, he decided initially that he would dismiss the Claimant with two months' notice. He advised HR of his decision and the reasons for it. HR suggested that he should seek legal advice as they said that it would be unusual to dismiss an employee who had conducted gross misconduct without notice. Having sought legal advice, Mr Soomal decided to dismiss the Claimant with immediate effect but for the Respondent to make an exceptional payment of two months' pay in lieu of notice.

70 Prior to finalising his decision, Mr Soomal clarified with HR what disciplinary action had been taken in respect of other previous data breaches within the Respondent. In doing so, he established that there had never been a previous data breach which resulted from someone within the Respondent deliberately and knowingly sending something, which was confidential to the Respondent, to persons outside the

Respondent. Previous data breaches had arisen as a result of employees making mistakes in the carrying out of their duties such as sending something to the wrong person by mistake. The Claimant's data breach had not occurred in the course of him carrying out his duties. He had deliberately sent the confidential data to persons outside the Respondent. To make matters worse, he had then engaged in the unprofessional exchange in which there had been jokes relating to the registrant's name.

71 That accords with the documentary evidence before us of the logging of other Date Security Incidents. In respect of almost all the matters recorded the incident has been described a "human processing error" leading to data being disclosed in error. It is correct that some of them have a higher DSI rating that then Claimant's data breach. As Mr Whiting explained in his email of 30 August to Mr McKay, the DSI scoring takes into account the type of data disclosed, the number of people the data relates to, the number of people to whom it was disclosed, whether they are obliged to keep it confidential and whether the information was recovered. It does not measure an individual's wrongdoing or culpability.

72 Mr Soomal communicated his decision to the Claimant verbally by telephone on 22 September and the letter setting it out and the reasons for it was sent later to the Claimant on the same day. The Claimant was advised of his right of appeal.

73 The Claimant appealed on 28 September 2017, specifically against the severity of the sanction imposed. He indicated that he would provide further submission. On 18 October 2017 the Claimant's GP provided a letter in which he said,

> "*From his records, in July 2014,* [the Claimant] *was taking Naproxen, Amitrypiline and Co-Codamol. Some of these medications may cause side effects of confusion, drowsiness and fatigue."*

74 On 17 November 2017 L presented a claim in the Employment Tribunal against the Respondent. One of his complaints was a complaint of race and disability discrimination relating to the email exchange between the Claimant and his former colleagues in July 2014.

75 The Claimant's appeal was heard on 11 January 2018 by Ian Brack. The Claimant submitted a written submission for that. His sole ground of appeal was that the sanction imposed was not fair and proportionate for the following reasons – His act had been a genuine oversight and not a premeditated act, it had been an isolated mistake and totally out of character, the breach was on the low end of the scale, the reputational damage was low, it had occurred nearly four years ago during his probationary period, he had sincerely apologised and shown genuine remorse for the error, his health and medication at the time of the error and that he had been treated differently from all the others who had been responsible for date breaches since 2015. In respect of his health and medication the Claimant said,

> "*Around the time of the breach in July 2014 I've now discovered that I had just moved over to significantly stronger medication than I was on previously (my GP confirms the side effects* [in the letter of 18 October 2017]. *Whenever a new Opioid of this strength is started the side effects are normally even more severe during the first few weeks. Therefore, this unquestionably affected my*

concentration and judgment at that time, even if I may not have been conscious of it at the time."

He said that there had been 300 hundred data breaches from January 2015 to 19 October 2017 and that in only three of those cases had the employees concerned been given a disciplinary sanction and in each case it was only an informal warning. The severity of his breach had been rated as 9 out of 30. In 87 cases, where the rating had been higher, they had received no sanction or an informal warning.

76 At the appeal hearing Mr Brack asked the Claimant precisely when around the time of the data breach his medication had changed. The Claimant said that **"***it was within a couple of months."*

77 Mr Brack sent the Claimant his decision on 17 January. He dismissed the appeal. He dealt in detail with all the arguments that had been advanced by the Claimant in support of his appeal. I do not intend to repeat them all here. Mr Brack said that he considered the Claimant's judgment in engaging in the email exchange to be significantly flawed. He continued,

"*I find it particularly surprising that you did not consider that the presence of an individual on a list of habitual and vexatious contacts was an indicator that* ***particular*** *sensitivity should be attached to references to those individuals. I accept that forwarding the original email was a thoughtless rather than a malicious act. Indeed, I consider the entire exchange to have been thoughtless. That is, in a nutshell, the problem; you did not think through the consequences of what you had done until long after the event. And even now, on the basis of your appeal submission, I do not think that you fully recognize why the email exchange exposed the GDC to needless reputational risk."*

Whilst he accepted that the GDC's data security culture had greatly changed since 2014, he did not accept that there had been a fundamental change in the standards of behaviour and judgment expected of regulatory caseworkers and his conclusion was that the Claimant's behaviour did not meet the standards at that time.

78 As far as the effect of medication was concerned his view was that a lapse in concentration would not explain the email exchange in question and he, therefore, focused on the issue of what impact, if any, the medication had on the Claimant's judgment. His approach was that he would have to be satisfied that there was clear evidence that the medication could affect his judgment and that it had significantly impaired his judgment in this case or that a change in medication could have a serious impact on his judgment and that such a change had occurred before the email exchange. The 2014 report did not support what the Claimant said in his grounds of appeal. The GP's letter referred to some of the side effects which <u>might</u> be caused by the medication. It did not refer specifically to any impact on judgment. Nor did it refer to the implications of a change of medication or when such a change occurred.

Conclusions

Disability discrimination

79 We considered first the Claimant's complaints about the Respondent failing to consider and investigate his contentions about the effect of his disability and/or the medication he took for it on his behaviour at the time of the alleged misconduct (issues 2.8 – 2.11). These are pursued as a section 15 complaint and complaints of failure to make reasonable adjustments. It is difficult to understand how they are said in law to amount to either of those complaints. In respect of the section 15 complaint, the failure to investigate what he said about the effects of his medication is said to be the unfavourable treatment. In order to establish the claim the Claimant would have to prove that the unfavourable treatment was because of something arising in consequence of his disability. He has not identified any such disability-related cause for the unfavourable treatment. In respect of the failure to make reasonable adjustments claims it is difficult to see how the practices relied upon by the Claimant put him at a substantial disadvantage in comparison with persons who were not disabled. The Claimant has not given any evidence of how they put him because of his back problems at a substantial disadvantage in comparison with others who were not disabled.

80 In any event, we do not accept that the Respondent failed to consider and investigate what the Claimant said about the effects of his disability and/or the medication he took for it upon his conduct. The Claimant did not say anything about his disability or the medication having had any impact upon his conduct when Mr McKay spoke to him about it on 9 August 2018 or in the course of the investigatory interview on 23 August 2018 or in the written submission he presented at that interview. The Claimant first raised it in the written submission he presented at the disciplinary hearing on 19 September. Even at that stage the Claimant did not positively assert that either his severe back pain or the strong medication that he was taking had caused him to act in the way that he did. What he said was that one of the main side-effects of the medication was occasional loss of concentration and the ability to focus and that it could have been a factor at the time (paragraph 67 above). Mr Soomal investigated and considered that. He sought the Claimant's consent to view his Occupational Health reports and read the reports of 29 September 2014 and 21 August 2017 in order to see whether they supported what the Claimant had said. Having investigated and considered what the Claimant had said, he concluded that the Claimant's actions in 2014 were not attributable to a slip in concentration (paragraph 69 above).

81 At his appeal the Claimant submitted a letter from his GP which stated that some of the medication that he was taking in July 2014 might cause confusion, drowsiness and fatigue (paragraph 73 above). In his written submission the Claimant said that he had recently discovered that around July 2014 he had moved to significantly stronger medication and that that had unquestionably affected his concentration and judgment (paragraph 75). Mr Brack investigated and considered that. He asked the Claimant when the medication had changed and took into account the Claimant's answer (paragraph 76). He concluded that a lapse in concentration would not explain the email exchange. Having considered the medical evidence he concluded that he was not satisfied that the medication had significantly impaired the Claimant's judgment or that any change in medication before July 2014 had done so.

82 Those claims fail because the Respondent did not treat the Claimant unfavourably as alleged by him and it did not apply to him the practice which he claimed that it did. Even if he had the claims would have failed for the reasons set out at paragraph 79 (above). In those circumstances, it was not necessary for us to consider whether the Claimant was disabled in July 2014.

83 We then considered the complaints of disability discrimination in respect of the Claimant's dismissal (paragraphs 2.5 – 2.7 above). The issue, in essence, for those complaints is whether the Claimant's back problems and/or the impact that that had had upon his ability to carry out the full range of his duties contributed in any way to the decision to dismiss him. The Respondent had been aware of the Claimant's back problems and of its impact on his ability to work from as long ago as September 2014 when it first carried out a DSE assessment and referred him to Occupational Health. The issue of working from home sometimes was first raised in September 2014. In January 2015 the Claimant asked whether he could work from home one day a week on a regular basis and the Respondent accommodated that. The Claimant was absent sick from work for nearly two years because of his back problems. No attempts were made to terminate his employment because of his long sickness absence. The Occupational Health report of 20 August 2015 made it clear that if and when the Claimant returned to work he would be liable to a higher rate of sickness absence. It also set out a number of adjustments which would need to be considered. That report did not prompt the Respondent to take any action to terminate his employment. When the Claimant as ready to return to work his managers agreed that he could work from home two days a week and a home workspace risk assessment took place to facilitate that. It agreed to buy a laptop desk for the Claimant to use at home and a second laptop for him. The Respondent agreed a phased return to work for him and advised on how it would be most beneficial for him to be paid during that period. Three months after returning to work the Claimant was still not working full-time but no one raised any concern about it. His manager was very supportive and was positive about his return in July. HR decided to make a referral to Occupational Health in July to seek further advice because the Claimant had been back at work for nearly four months. HR received the Occupational Health report on 21 August and sent it to Mr McKay on 23 August. Throughout that period the Respondent was fully supportive of the Claimant; there was a willingness to put into place whatever adjustments were needed to enable him to work; no threats were made to terminate his employment and no steps were taken to do so.

84 The process that led to the Claimant's dismissal began on 3 August when Mr Cullinane became aware of the email exchange and said that he would pass it to Mr McKay to investigate. By 10 August Mr Mckay and Mr Cullinane had decided that there needed to be a formal investigation of the matter. The process commenced on 15 August when Mr Mckay invited the Claimant to an investigation meeting.

85 It is clear from the above that the decision to start the disciplinary process stemmed from the email exchange of July 2014 being sent to the Claimant's managers and not from any of his health issues. The health issues had been going on for nearly three years and the Respondent had not taken any steps to terminate the Claimant's employment but had been very supportive. Nor did the decision have anything to do with the Occupational Health report of 7 August because HR and Mr McKay did not see that until after the disciplinary process had started.

86 We then considered whether there was any evidence from which we could infer that the Respondent dismissed the Claimant because of his disability or the consequences of that disability. We considered whether there was any evidence that the Respondent treated the Claimant less favourably than it treated or would have treated others in similar circumstances. The Claimant relied upon a hypothetical comparator, i.e. someone who had behaved in the same way as he had but who did not have his disability and the consequence that flowed from that. He did not, rightly in our view, rely on the employees who had been involved in the incidents logged as Data Security Incidents. They were not appropriate comparators because their circumstances were materially different from his for the reasons set out at paragraph 70 (above). There was no evidence from which we could infer that someone else, who had done what the Claimant did but did not have his back problems, would have been treated any differently. It is clear from all the evidence before us that senior management regarded the matter as very serious and the Claimant's back condition and the effects of that played no part in the decision to dismiss him.

Unfair Dismissal

87 The Claimant was dismissed because he had, in breach of data protection and confidentiality, forwarded a confidential work email about a registrant to external persons and had then engaged in unprofessional communication with them about the registrant and in doing so had potentially brought the GDC's name into disrepute. That is a reason related to conduct. It was not in dispute that the Claimant had sent the emails which gave rise to the complaint and he accepted from the very outset that that forwarding an internal email was inappropriate and he should not have done. In those circumstances, the amount of investigation required was limited.

88 In investigating the matter the Respondent interviewed the Claimant, checked whether the matter had been logged as a DSI and how it had been scored, checked what training the Claimant had received on data protection and information security, looked at what the fallout had been and what steps the Respondent had taken to mitigate the damage and looked at the Claimant's Occupational Health reports. We were satisfied that when Mr Soomal dismissed the Claimant he believed that the Claimant was guilty of the misconduct, he had reasonable grounds upon which to sustain that belief and that he had carried out as much investigation as was reasonable in all the circumstances.

89 We then considered whether in all the circumstances the Respondent acted reasonably in treating that as a sufficient reason for dismissing the Claimant. The Claimant contended that it did not because:

(a) It dismissed him for matters with which he had not been charged – bringing the Fitness to Practice Directorate into disrepute and breaching the implied term of trust and confidence;
(b) HR interfered improperly with the investigation report and altered its content with the result that it was not balanced and impartial;
(c) The Respondent failed to investigate whether his medication had impacted upon him at the time of the alleged offence;
(d) Dismissal was not within the band of reasonable responses; and
(e) Mr Brack was not impartial.

90 The Claimant was not dismissed for bringing the Fitness to Practice Directorate into disrepute or because he had breached the implied term of trust and confidence. He was dismissed because he had done the acts set out at paragraph 87 (above). The effect of his acts was to bring the Fitness to practice directorate (which is part of the GDC) into disrepute and to destroy the Respondent's trust in him to carry out his role which involved handling sensitive data.

91 HR advised Mr McKay of further areas he should look into, such as whether the incident had been logged as a DSI and the training which the Claimant had had. Those were clearly relevant matters and needed to be looked into and included in the report. Thereafter, the majority of changes and inclusion of material suggested by HR related either to the steps that had led to a disciplinary investigation taking place (the discovery of the email exchange and senior management's reaction to it) or to the effects of having to disclose the email exchange to the registrant. Those were material and it was right and fair that they should be made available to the Claimant and to the person dealing with the disciplinary hearing. We do not consider that it was inappropriate to suggest including Mr Brack's email – his statement that it was unacceptable for a GDC employee to deliberately create a DSI is not controversial and he inquired about what disciplinary action had been taken; he did not express any view as to what disciplinary sanction should be imposed. Nor was it inappropriate to suggest that HR's advice about how "similar" incidents in the past had been dealt with should be removed for the simple reason that it was incorrect. The previous incidents were not similar and to suggest a sanction based on that would have been wholly misleading. In any event, these were all suggestions made by HR and it was ultimately Mr McKay' s decision whether he made the changes. The other significant point about the investigation report is that, other than a couple of trivial changes, HR did not suggest any changes to the sections dealing with Mr McKay's findings and recommendations. The investigation report was thorough, balanced and impartial.

92 We have already concluded that the Respondent did investigate what the claimant said about the impact of his medication on his actions (see paragraphs 80 and 81 above). We do not accept that Mr Brack was not the appropriate person to hear the appeal because of what he had said in his email. We have found that there was nothing contentious in what he said. Even if any of the above was in some way not correct or proper, we do not accept that it amounted to a procedural flaw which renders the dismissal unfair.

93 The Claimant's primary argument in support of the contention that dismissal was outside the band of reasonable responses was that others who had been involved in more serious Data Security Incidents had been treated far more leniently. For the reasons given by Mr Whiting (paragraph 58 above) and Mr Soomal (paragraph 70) we agree that what the Claimant did is not the same as what those individuals did, and that what he did is far more serious and culpable. Having considered all the evidence, we find that dismissal was within the band of reasonable responses and that the Respondent acted reasonably in treating the Claimant's misconduct as a sufficient reason for dismissing him.

Wrongful Dismissal

94 Finally, we considered whether the Claimant's conduct for which he was dismissed amounted to gross misconduct. We concluded that it did for the following reasons. The Respondent is a national regulatory body and it handles confidential

sensitive data relating to a large number of dental professionals and their patients. The Respondent's members and the members of the public have to be confident that the Respondent will protect their data and keep it confidential and will treat them with respect. The Claimant had worked in a regulatory environment before he joined the Respondent and was fully aware of the importance of data protection. It was a term of his contract that he would not disclose any confidential information relating to the affairs of the Respondent to a third party and that he would protect the sensitive personal data entrusted to him and would report any loss of information to his line manager. He had received training in data protection and information security. He knowingly and deliberately sent confidential data about one of the Respondent's members to two external persons. Having done so, he and those persons made jokes about the individual in question and made offensive remarks about him. It was a serious error of judgment with potentially serious consequences. He did not report the matter to anyone or take any steps to remedy the situation.

Employment Judge Grewal

Date 14 January 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

Date 14 January 2019

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FOR THE TRIBUNAL OFFICE