



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Hopewell

Respondent: Derby Teaching Hospitals NHS Foundation Trust and Others

Heard at: Nottingham **On:** 8 February 2017 (Reading day)
9, 10, 13, 14 & 15 February 2017
(Hearing days)
16 February 2017 (Reserved Judgment)

Before: Employment Judge Hutchinson

Members

Mr R Jones

Mr W J Dawson

Representatives

Claimant: Ms C Dickinson, Sister

Respondent: Ms L Bairstow of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed. The claim is dismissed.
2. The claims of disability discrimination fail and are dismissed.
3. The claim for breach of contract in respect of notice pay fails and is dismissed.
4. The respondent has failed to pay the claimant's holiday entitlement and is ordered to pay to the claimant the sum of £504.35 by consent.

REASONS

Claims and Issues

1. The claimant presented her first claim to the Employment Tribunal on 27 November 2015. At that time she was still employed by the respondent as a theatre practitioner / staff nurse. She had started employment on

12 January 2009. Her original claims were of disability discrimination.

2. At that time the claimant was suspended and she was dismissed on 23 February 2016. That dismissal led to a second claim which was presented on 17 May 2016. This time her complaint was of;

- Unfair dismissal
- Disability discrimination
- Breach of contract in respect of notice pay
- Holiday pay

3. Apart from her employer, Derby Teaching Hospitals NHS Foundation Trust, who could only be responsible for the claims of unfair dismissal, holiday pay and notice pay, the claimant named a number of individuals as further respondents in respect of the disability discrimination claims. Those individuals were;

- (R2) Andrew Hall, the grievance appeal chair and suspending officer
- (R3) Siobhan McDonald, line manager and disciplinary witness
- (R4) Jonathon Sansome, team leader and disciplinary witness
- (R5) James Hender, disciplinary panel chair and dismissing officer
- (R6) Donna Brown, Divisional HR manager
- (R7) Michael Goodwin, case manager of disciplinary process
- (R8) Rebecca Turner, investigating officer

4. At the conclusion of the hearing we were able to resolve the issue of holiday pay and the tribunal was able to make a Consent Order in respect of that.

5. There had been a number of preliminary hearings. The claimant had sought leave to amend her claims and the respondent applied to strike out some of the complaints and/or for the tribunal to make a Deposit Order in respect of some of the allegations that she made.

6. At an open attended Preliminary Hearing on Friday 10 June 2016, my colleague Employment Judge Heap dealt with these matters. Employment Judge Heap attached to the Order a schedule of the claims that she allowed to proceed to the Hearing. These came under the following headings:

Failure to make reasonable adjustments;

These are further particularised in Schedule E

1. That the claimant should not have been required to carry out on-call duties as she was on 23 January 2014 (and as she was rostered to but which was later cancelled).
2. That she should not have been required to carry out general theatre duties and that she should have been placed on day case duties only.

Harassment related to the protected characteristic of disability

These are further particularised in Schedule F.

The claimant complained of the following matters:

1. The failure of Estelle Carmichael to deal with a grievance raised by her on 12 April 2014 and particularised in her letter of 18 June 2014.
2. Matthew Hallam leaving notes of a return to work meeting in a desk drawer where wage slips were also located and which was accessible to other members of staff in April/May 2014.
3. Matthew Hallam emailing a fraudulent ergonomic workplace assessment to the claimant on 6 June 2014.
4. Darren Gillott smirking whilst he was taking minutes of the claimant's answer to questions put to her at a grievance meeting on 8 May 2014.
5. Andrew Hall and Siobahn McDonald failing to make reasonable adjustments between 15 April 2015 and 11 September 2015.
6. Siobahn McDonald intimidating the claimant during a telephone call on 13 August by saying "are you refusing to go to theatres?"

Direct discrimination on the protected characteristic of disability

These are further particularised in Schedule G.

1. Siobahn McDonald and Jonathan Sansome made false allegations against the claimant of intimidating behaviour, threatening behaviour and verbal abuse by the claimant and her husband on 10 September 2015 because they wished to remove her because she suffered from a disability.
2. Andrew Hall and Jane Thomas suspended the claimant on 11 September 2015 to remove her because of her disability.

Victimisation contrary to section 27 Equality Act 2010

These are further particularised in Schedule H

The protected act complained of was the making of her grievance in April 2014. The claimant complained that she suffered the following detriments as a result;

1. Matthew Hallam, her line manager, placing her on a Performance

Improvement Plan (“PIP”) on 12 June 2014 and thereafter carrying on the PIP process.

2. Darren Gillott alleging to Matthew Hallam that the claimant had been rude to him on the telephone on 2 June 2014.
3. Lorraine Herd made a threat on 23 December 2014 that the claimant’s 6 month PIP would be reinstated if she appealed against the outcome of her grievance.

These were the disability discrimination claims that we were to deal with.

7. In dealing with these claims the issues for us were as follows’

Failing to make reasonable adjustments;

1. Did the respondent apply the provision criterion and/or practice (“PCP”) complained of in the schedule generally;
2. Did the application of any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled;
3. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lay on the claimant, however it is helpful to know the adjustments asserted as reasonably required and these were identified in the schedule;
4. Did the respondent not know or could the respondent be reasonably expected to know the claimant had a disability or was likely to be placed at the disadvantage set out above?

Harassment

In determining the issue of harassment we have to consider;

1. Did the respondent engage in unwanted conduct as set out in the schedule?
2. Was the conduct related to the claimant’s protected characteristic of disability?
3. Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
4. If not, did the conduct have the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
5. In considering whether the conduct had that effect we will take into account the claimant’s perception of the circumstances of the case

and whether it is reasonable for the conduct to have that effect.

Direct discrimination on the grounds of disability

In determining this we have to decide as follows:

1. Has the respondent subjected the claimant to the treatment set out in her schedule?
2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators?
3. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's disability?
4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Victimisation

The issues in respect of the victimisation claim are as follows:

1. Has the claimant undertaken a protected act as set out, namely by raising a grievance;
2. If there was such a protected act; has the respondent carried out any of the treatment set out in the schedule because the claimant had done a protected act?

Unfair Dismissal Claim

It is for the respondents to establish the reason for the dismissal and that it was a potentially fair reason as defined in section 98(2) of the Employment Rights Act 1996. The respondents rely on the claimant's misconduct.

If they are able to establish a potentially fair reason for dismissal the tribunal has to apply the usual test in such a case, namely;

1. Did the dismissing officer have a genuine belief that the claimant had committed the misconduct complained of?
2. Did he have reasonable grounds for that belief?
3. At the time that he formed the belief had there been as much investigation as was reasonable conducted by the respondents in all the circumstances of the case?

The ultimate test though is whether dismissal fell within the band of reasonable responses.

Breach of contract claim

8. It was agreed that the claimant was dismissed without notice. The question for the tribunal was whether they were entitled to do so. Did she commit a fundamental breach of her contract of employment?

9. At the commencement of the hearing I explained all this to the claimant who was being assisted by her sister, Miss Dickinson. There had been disputes about the bundle of documents and the claimant complained that she had not received all the documents and that the respondents had removed certain of her documents from the bundle. The tribunal dealt with this over the course of the hearing making sure at the start that the claimant had exactly the same bundle as the tribunal and considering any additional documents that the claimant wished to produce during the course of the hearing,

Evidence

10. The tribunal heard from the following witnesses, namely:

- Rebecca Turner, investigation officer for dismissal
- Darren Gillott, human resources officer and minute taker at the meeting with the claimant on 8 May 2014
- Lorraine Herd, divisional nurse for medicine / senior matron who dealt with the claimant's grievance at stage 2
- Michael Goodwin, general manager in the Surgery Business Unit and presenter of the management case at the dismissal
- James Hender, deputy chief operating officer at Burton Hospital and chair of the disciplinary panel who dismissed the claimant
- Neil Radford, interim divisional director, Medicine & Cancer Division and appeal officer regarding the dismissal
- Siobahn McDonald, lead practitioner and the claimant's line manager
- Andrew Hall, divisional director of Surgery Diagnostics and Anaesthetics, grievance appeal chair and suspending officer
- Jonathan Sansome, team leader and witness to the events of 10 September 2015
- Estelle Carmichael, director of workforce and operations and adviser to the claimant
- Matthew Hallam, theatre manager / lead practitioner and the claimant's overall line manager
- The claimant.

11. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle.

Credibility of the witnesses

12. There was much conflict of evidence. The tribunal was satisfied and preferred the evidence of the respondent's witnesses who gave evidence which

was consistent, particularly with the documents that were produced at the time. The claimant's evidence was not credible. She made some outrageous allegations against people employed quite often in senior positions within the Trust who in the tribunal's view had done all they could to try to assist her. The claimant was obsessed with a conspiracy that everyone was against her when the tribunal is satisfied there was no such conspiracy in this case. The respondents tried to accommodate the claimant but the claimant was very defensive and distrusted all those who tried to help her and made complaints about many people including her trade union representative. A particular example was where Estelle Carmichael who contacted her after the claimant had written to the chief executive and offered her support through the process. It is clear from the evidence that Miss Carmichael responded swiftly to any concerns that the claimant had but was then subjected to an allegation that she had harassed the claimant by failing to deal with her grievance. It was never her task to deal with any such grievance.

The Facts

13. The claimant is an experienced nurse and has worked for 25 years in the NHS. She commenced her employment with the respondents on 12 January 2009 as a theatre nurse. Her terms and conditions of employment are at pages 226-231 and her job description is at pages 231a-c.

14. Mrs Hopewell was originally employed in general theatres. From 1 January 2012 the claimant moved to day case theatres. Siobahn McDonald became lead practitioner in the day case theatres in October 2014 and was therefore the claimant's line manager from that period. As well as working in the day case theatre all the theatre nurses in that area also worked in general theatre.

15. We were referred to a number of policies and procedures that the respondent has, namely;

- Capability Procedure (May 2010) (pages 232-254)
- Capability Procedure (November 2014) (pages 255-279)
- Management of Health and Attendance Procedure (November 2015) (pages 280-338)
- Disciplinary Procedure (December 2014) (pages 339-372a)
- Grievance Procedure (August 2012) (pages 372b-372u).

16. It was not in dispute that the claimant suffered and still suffers from a disability namely that she suffers from pain and swelling in her knees and has done since 2011. She had a knee replacement in August 2014 and suffers from pain and discomfort to the present time.

17. The claimant was seen by occupational health on 18 April 2013 and a report of that date is at page 373. The report confirmed that the claimant was medically fit to work both in the day case theatre and general theatre with the following adjustments;

- She was not to push the patient trolleys to the wards

- She scrubbed for cases of around 2 hours or less and not longer cases
- She worked 9 hour shifts rather than 12 hours
- She should avoid standing for long periods

18. Following a further sickness absence suffering from chronic knee pain in November 2013, there was a further reference to occupational health. A report was given by David Sherwood-Jones, consultant occupational physician (pages 376-377). He confirmed that the claimant was fit to continue to work in both day case theatre and general theatres. His recommendations of adjustments were exactly the same as in the previous report. In his opinion she was fit to work in general theatre, subject to adjustments, but he then said in a rather contradictory fashion;

“Overall I think it would be beneficial for Janet’s medical condition affecting both her knees if she did not do the on-call and if she avoids working in general theatres.”

19. Chris Blunsdon, manager, wrote back to Dr Sherwood-Jones pointing this out on 18 December (pages 378-379) and Dr Sherwood-Jones response on 21 January 2014 (pages 380-381) provided no further clarification simply repeating what he had said in his earlier letter.

20. On 7 March 2014 Deborah McKinlay, who was a Sister and the claimant’s direct line manager at the time, had an informal conversation with Mrs Hopewell to say that she and other staff had concerns regarding her “negative attitude and lack of team working ethic”. Her email to Matthew Hallam who was lead practitioner and in charge of the Surgical Day Unit where the claimant worked referred to this (page 384). It was noted by Ms McKinlay that whilst the claimant was a very good scrub nurse and when in a positive frame of mind was a very popular member of the team, the concerns about her attitude needed to be addressed which she did by having that informal discussion. The claimant did not act in a positive way to that discussion as can be seen also in the claimant’s own note of the meeting at page 383. She referred to it as the “FIRST WARNING IN 25 YEARS.” It was not a warning. It was an “informal chat”.

21. From 2 April 2014 until 30 May 2014 the claimant was off sick. During her absence on, 12 April, the claimant sent an email to Mr Hallam raising concerns that medical advice was being ignored and that the time that she had had to spend on general theatre had directly led to her period of absence (pages 390-391). She complained that the suggestions made by Dr Sherwood-Jones had “not materialised”.

22. Chris Blunsdon the theatre manager wrote to Dr Sherwood-Jones again on 6 May asking for further clarification (page 393). This related to her ability to undertake general theatre work and the on-call duties.

23. Also on 6 May Mrs Hopewell went to see Mr Hallam in his office. There is a note of their discussion made by the Claimant at page 394. They discussed the need for her to have a full capacity assessment undertaken by Sarah Woodbridge, senior occupational therapist at the Trust. The assessor would be

able to review Mrs Hopewell in her actual place of work and determine exactly what she could and could not do. At the meeting Mrs Hopewell said that she had received the latest occupational health report from Dr Sherwood-Jones but she was not happy to release it. She said it was “contrived” and that was why she would not agree to its release.

24. Mr Hallam then arranged for the assessment to take place and the referral documentation is at pages 408-411 and was completed by Mr Hallam on 9 May 2014.

25. Mr Hallam held a meeting with Mrs Hopewell on 8 May to discuss the concerns raised in her email of 12 April. In attendance was also Chris Blunsdon, Darren Gillott, HR adviser and Surinder Gidda, the claimant’s Unison representative. Mrs Hopewell explained to the meeting about her knee condition and that she needed a full right knee replacement and a partial left knee replacement. They also discussed the reason for her absence and Mrs Hopewell said it was because she had been working in general theatre.

26. Mr Hallam summarised the reasonable adjustments recommended by Occupational Health in the report of 21 January 2014. He then explained to Mrs Hopewell the essential requirement for all day case theatre practitioners to spend some time in general theatre to keep their acute skills. He noted that there should be a minimum rotation of four weeks per year and the need for the increased skills set was becoming ever more important; in light of day cases dealing with more complex cases and in turn more emergency situations. It was also necessary for day case theatre staff to offer more regular assistance in general theatre on a daily basis if necessary rotated fairly amongst the day case team for when there were shortages in general theatre.

27. During the meeting Mrs Hopewell complained that it was the flooring in general theatre which was different to day case theatre which had caused the “flare-ups” in her knees. Ms Blunsdon had already been aware of this and had checked the position with Mr Ed Braisher, Health and Safety manager, and Skanska who had built and maintained the hospital building. It had been confirmed that the flooring in both theatres were of the same specification. Ms Blunsdon asked the claimant whether she had received a further report from occupational health and the claimant said that she had not. This contradicted what she had earlier said to Mr Hallam. He also asked whether it would assist to reduce her hours but the Claimant said she could not afford this.

28. There were no notes taken at this informal meeting but a summary of what was discussed was put in writing in a letter dated 3 June 2014 (pages 421-424). The claimant did take notes herself of the meeting at pages 395-400. It can be seen in the claimant’s notes that she confirmed that she was “happy to do an occasional half day i.e. weekends x 2 12-6pm, not 5 shifts in a row of 10 for off duty”.

29. In response to Ms Blunsdon’s email of 6 May Dr Sherwood-Jones wrote on 9 May (pages 406-407). The report was not sent to her at the time because the claimant would not consent to its release. In this report he does not say that the claimant is fit to work in general theatre. He says that she is fit to continue to work in day case theatre. He goes on to say;

“If the Trust can preferentially deploy Janet to Day Case rather than General Theatres, I hope this will reduce the risk of future flare-ups of Janet’s knee condition that may result in sickness absence.”

30. On 13 May Mrs Hopewell spoke to Mr Hallam saying that she had received a copy of that report and that she was unhappy with the content of it and would not consent to its release.

31. On 23 May 2014 the functional capacity assessment was undertaken (page 413) and Mr Hallam arranged a meeting with the claimant to discuss the contents of it on 10 June 2014 (also page 413).

32. On 2 June Mrs Hopewell telephoned Mr Gillott demanding the notes from the meeting on 8 May. Mr Gillott described the claimant’s attitude as being aggressive, sharp and abrupt and in his view “unacceptable”. Mrs Hopewell had followed up the call with an email stating “that I want them by 5pm today 2/5/2014”. She went on to say that if they were not forthcoming she would not hesitate to send a copy of the emails to the chief executive. Mr Gillott then forwarded this to Mr Hallam (page 418) complaining about her behaviour. Mr Hallam spoke with Mrs Hopewell about her attitude on that day and she explained that she had been upset and Mr Hallam explained that she needed to act professionally and respect others. The claimant apologised for her behaviour. This was confirmed in a note from Mr Hallam to Debbie McKinlay (page 419).

33. On 3 June 2014 Estelle Carmichael who was at that time Deputy Director of Workforce contacted the claimant. This was as a result of the claimant sending an email to Sue James, the respondent’s Chief Executive (page 425). Ms Carmichael was copied in to the letter of 4 June to Mr Hallam complaining about the contents of the letter of 3 June (page 426). Ms Carmichael offered her help asking her permission to raise the points that she had made about her occupational health report with the head of occupational health. Mrs Hopewell agreed and Ms Carmichael asked the head of occupational health to look into the situation.

34. On 4 June Mrs Hopewell sent an email to Mr Hallam (page 426) saying that she did not agree with the outcome letter from the meeting. She described it as “50% accurate”. Also on that day Mr Hallam received an email from Surinder Gidda (pages 430-431) to say that she was unlikely to attend the meeting and had now been arranged for 10 June as the claimant had complained about her following the meeting.

35. On 5 June Sarah Woodbridge sent a copy of her report simultaneously to Mr Hallam and Mrs Hopewell by email. The email is at page 438 and the report is at pages 439-444. The conclusion was as follows;

“Janet has a long term chronic knee condition which is aggravated by walking, standing and load handling. An issue has arisen whereby she is expected to work in general theatres for 2-4 weeks a year to help keep her clinical skills up to date. Janet feels that working in general theatre aggravates her knees and led to her recently taking leave. A review of the

theatres has revealed some differences in the distances walked through the length of a shift, but not a substantial amount. As this change of location is intermittent, it is therefore recommended that this difference can be managed by pacing and using a more central theatre, while continuing with a current workplace accommodations that are in place in day case.”

36. On 8 June the claimant sent an email to Ms Carmichael. It asked whether she felt that there was a conflict of interest for Ms Carmichael bearing in mind that her sister-in-law Rachel Loveridge was her manager. Ms Carmichael responded saying that there was no conflict and confirmed her role as being to “ensure that policies and procedures are carried out appropriately”. She also confirmed that she would “like to continue to offer support / assistance and guidance where I can for you”. That was her role.

37. On 10 June Mr Hallam met with Mrs Hopewell to review her underlying health conditions and discuss the functional capacity assessment report and its recommendations (pages 443-444). In attendance were also Darren Gillott, Chris Blunsdon and Surinder Gidda. Ms Gidda’s notes are at pages 466-467 and the letter from the Trust confirming the outcome of the meeting dated 24 June 2014 is at pages 486-493. The claimant had still refused to give her consent to the latest occupational health report being released. She described the report as “woolly” and had told OH not to release it. It was explained to her that clarification had been sought from OH as to whether the flooring could affect her knees as she described. They had checked with both Skanska and Health and Safety and they both felt there was no difference in the flooring.

38. In the meeting Mrs Hopewell said that she could only do a morning or afternoon at a time until after her knee replacement. Whilst Mr Hallam initially agreed to this Chris Blunsdon was not happy as she did not consider it enough to keep up the claimant’s skill set. That was all the claimant was prepared to do. She then also added that she did not consider she could do a late shift as it aggravated her knee. This had never been raised before. Mr Hallam and Ms Blunsdon considered the claimant should take her “fair share” of late shifts i.e. at least one late shift in a four week stint and with sufficient rest including her being rostered as having a day off the next day this should assist the claimant. The claimant was not happy with this proposal. Ms Gidda then spoke with the claimant and suggested that she should “trial” a late shift and if it aggravated her condition she could then contact Sarah Woodbridge for a further workplace assessment. The claimant then agreed to that proposal. They also agreed that all the other workplace assessment recommendations and the half day on general theatres until after the claimant’s operation would be put in place in the next rota.

39. When these matters had been resolved Mr Hallam brought to the claimant’s attention the issue of her attitude and that he was not happy with the way that she had been speaking with himself and Darren Gillott and that he had had complaints from other members of staff. Mr Hallam had also received complaints from Elena Czekalyski, an Assistant Practitioner, and Carol Sims, Senior Theatre Practitioner, (page 470) about the Claimant’s negative attitude. Mrs Hopewell was not happy about him raising this and Mr Hallam provided her with a letter inviting her to a meeting on 12 June under the Trust’s Capability Policy. He told her that he would be invoking the Trust’s Performance

Improvement Plan ("PIP") at the informal stage as her attitude was a cause for concern.

40. Following the meeting of 10 June, Mrs Hopewell wrote to Ms Carmichael on 11 June (page 473) complaining that Darren Gillott had been "smirking" whilst taking the minutes. She also accused him of shouting at her. On 12 June she complained to Ms Carmichael by email about the meeting on that day with Matthew Hallam (again page 473).

41. The meeting on 12 June was conducted by Mr Hallam under the Trust's policy and procedures for capability. The notes are at pages 475-7. He explained to Mrs Hopewell that a number of people had raised concerns about her attitude. He said that he would put in place a PIP for a period of six months with a review date in four weeks. A copy of the PIP is at page 472. He considered at the time whether to deal with the matter by way of the disciplinary procedure but had decided against it.

42. Mrs Hopewell wrote to Estelle Carmichael on 18 June 2014 (pages 481-483). Whilst the email was titled "grievance re; victimisation and unfair procedures" Ms Carmichael did not appreciate at the time that what the claimant wanted to do was to raise a grievance with her. Ms Carmichael's role as she had already explained to Mrs Hopewell was to try to assist her and it was not part of her role to deal with grievances. She arranged to meet with the claimant on 25 June but this had to be rearranged to 2 July. The meeting took place with Surinder Gidda also present. Mrs Hopewell produced a document entitled "outcomes of grievance" which is at pages 498-499. It set out eight desired outcomes that she was looking for as a resolution to her concerns. Ms Carmichael did not make notes of the meeting but used the document as an agenda for the meeting and they went through each of the eight points in detail. In the bundle there is in fact a ninth point stating that the claimant wanted a "written decision of the outcome of this grievance". We are satisfied with Ms Carmichael's evidence that this was not an item that was on the original note and that the claimant must have added this point to the note following the meeting. Ms Carmichael is clear that at no stage at the meeting did the claimant ask that there should be a written decision of the outcome of the grievance.

43. Ms Carmichael did not follow up the meeting with anything in writing as she believed it was informal and it was her understanding at the meeting that this was what the claimant understood also.

44. On 3 July the claimant sent a further email (page 500) saying that she had a further point to raise namely;
"9) Could I be guaranteed full pay for six months from my first knee operation"
She said as otherwise she would have to wait a year for the second operation and she said that she had lost one month due to aggravating her knee during a 10 hour shift pattern. Ms Carmichael told her that this was not possible. If she had raised 9 matters as she says in her evidence the question arises why she numbered this as point 9. This is corroboration of Ms Carmichael's evidence that there were only 8 points raised with her.

45. Ms Carmichael heard nothing further until 30 July 2015 when she received

a further email (page 508) requesting a response to her grievance “within the next 24 hours”. Ms Carmichael responded saying that Mrs Hopewell had not made it clear when they met that she was raising a grievance. She had understood that she had expressed concerns about the process that she wished Ms Carmichael to review. She offered a further meeting the next day to discuss matters (page 507).

46. There was a further email exchange on 31 July 2014 when the claimant said that she was not available to meet and suggested “a 15 calendar day extension 15/08/2014, if this is acceptable to you”. She confirmed that she was raising a grievance. Despite Ms Carmichael’s attempts to try to arrange a further meeting with the claimant to discuss her concerns Mrs Hopewell sent a further email stating that she wanted to pursue a grievance for victimisation and unfair procedure (pages 510-11).

47. On 4 August 2014 Mrs Hopewell wrote to Karen Martin, the HR director at the time raising a grievance (page 516). Ms Martin requested that Lorraine Hourd who was senior matron at the time deal with it. She wrote to the claimant on 19 August (page 524) saying that she had been asked to hear her grievance concerning Mr Hallam, Ms Blunsdon and Mr Gillott. The meeting was originally to take place on 4 September.

48. On 21 August the claimant had a knee operation and it was not until 5 November that the meeting could take place. Ms Hourd was accompanied by Jane Thomas, HR manager and the claimant was represented by Cheryl Burton from Unison. The notes of the meeting are at pages 544-554.
The matters raised were;

- That occupational health recommendations had not been adhered to
- She had been shouted at and smirked at a meeting
- Her return to work form was in an accessible drawer
- The receipt of a functional capacity assessment
- Incorrect meeting minutes
- Not offered representation at meetings
- Occupational health report requested and released without her consent
- She had been victimised and placed on a PIP
- There was a lack of confidentiality about her situation

49. Ms Hourd carried out investigation meetings between the 18 November and 24 November 2014 with the following;

- Darren Gillott
- Matthew Hallam
- Chris Blunsdon
- Estelle Carmichael
- Tracy Orlandi
- Sarah Woodbridge

The notes of the meetings are at pages 558-568d.

50. Ms Hourd met with the claimant on 22 December to provide feedback from

her investigation. Again the claimant was accompanied by her Unison representative. An outcome letter dated 23 December 2014 was sent to the claimant (page 586) and with it a copy of the action plan that they had discussed at the meeting (pages 590-600).

51. Ms Hourd's findings can be summarised as follows;

- There was no specific timetable as to when minutes and/or a follow-up letter should follow a meeting. This should be done within a reasonable timescale.
- The PIP was not in relation to the concerns the claimant had raised. It was to do with her attitude and behaviour. It was right that it should remain in place for six months.
- If a policy is provided to a member of staff it should be the whole policy and managers were to be reminded of this. Even so all policies were available on the Trust's intranet.
- It was not appropriate for the occupational health report from 9 May 2014 to be permanently moved from the claimant's occupational health file. Although this file would not be released without the claimant's consent. The claimant had been advised of this by occupational health in a letter dated 12 June 2014.
- Occupational health and functional capacity assessment recommendations had been and would continue to be followed.
- The claimant was to share information about her health and condition as she saw fit and any inappropriate comments from anyone should be reported immediately.
- There was no finding of victimisation.

52. The claimant was told of her right of appeal and on 28 December she did do so to Andrew Hall (pages 603-605). In the letter she said that she had," been lied to, had fraud committed against her and been threatened with blackmail if I appeal" against the decision. This appeal letter was sent to the wrong email address and was not received by Mr Hall. He did not receive this until 6 February when he received an email from Sue James, the Chief Executive, saying that the claimant wished to raise a grievance at stage 3.

53. The claimant says that Ms Hourd had threatened her that if she appealed the decision she would reinstate the six month PIP. In support of that contention she refers not to any discussion at the meeting but to an exchange of emails between Lorraine Hourd and Cheryl Byrne, who was then her Unison representative, on 23 December (page 588). As can be seen Ms Byrne asked for the name of the person that Mrs Hopewell should contact should she wish to appeal and Ms Hourd replied and said;

"If Janet is appealing this indicates that she is not happy with the decision, therefore we will have to delay any recommendations or amendments to the PIP until the appeal has been heard."

54. It can be seen from the email exchange that Ms Hourd was not trying to prevent the claimant from appealing or blackmailing her or threatening her that the six month PIP would be reinstated.

55. On 30 December Ms McKinlay referred Mrs Hopewell again to occupational health for an updated report. That report again from Dr Sherwood-Jones is dated 13 January 2015 and is at pages 608-9. The report says that the claimant was fit to work in day case theatres and made similar recommendations for adjustments as he had made previously. He said;

“Overall I think it would be beneficial for Janet’s medical condition affecting both of her knees if she did not do the on-call and if she avoids working in General Theatres.”

56. As soon as Ms McDonald saw the report she took the claimant off on-call duties and made arrangements for people to cover for the claimant. We are satisfied that she told the claimant about this.

57. In respect of the rotation onto General Theatre those working in Day Case have to spend a period of time in General Theatres, usually for one month a year split into two 2 week blocks. This was to ensure that staff kept up their acute skills. This was because Day Case theatres perform complex and more serious operations now.

58. On 1 April 2015 Mr Hall conducted the stage 3 grievance appeal. He was accompanied by Robert Simcox, HR manager and Mrs Hopewell was attended by Pam Shepherd, regional organiser of Unison. The notes are at pages 650-9. It was confirmed that there were seven points of her appeal, namely;

1. PIP-attitude
2. The return to work form stored in her unlocked drawer
3. Emails and alleged hidden texts
4. The functional capacity report by Sarah Woodbridge
5. Occupational health report 9 May 2014
6. Darren Gillott’s conduct in the meeting of 10 June 2014
Delaying tactics of receiving minutes of 8 May 2014 meeting
7. Raising a grievance with Estelle Carmichael on 18 June.

59. Mr Hall wrote to the claimant with an outcome of her grievance appeal on 13 April 2015 (pages 660-2).

60. He apologised for the distress and upset caused by aspects of the organisational process relating to the return to work form and the failure to deliver the full, signed off, occupational health report. He dealt with each aspect of the appeal and confirmed that the Trust was committed to make the reasonable adjustments necessary to allow her to undertake her duties as a theatre practitioner whilst recognising her health conditions. He noted that the following adjustments had already been put in place, namely;

- a. Not to push patient trolleys
- b. To undertake a case of 2 hours or less
- c. Where possible preference to be given to day case theatres
- d. On-call programmes limited to one month for the avoidance of long standing
- e. Avoidance of 12 hour shifts where possible

- f. Introduction of a long day / on-call followed by a day off.

He asked her to agree that that he could share their understanding with her line manager. He asked that this agreement should be sent to him in writing. He assured her that no record would be kept of the PIP. He would send her a signed copy of the Functional Capacity Assessment report. He said that he understood this had been a difficult time for her and he hoped she would be able to move forward.

61. On 18 April 2015 the claimant responded (page 664) stating that she disagreed with the reasonable adjustments that had been documented on the basis that they had come from reports prior to her receiving knee surgery and requested that the latest recommendations contained in the occupational health report of 13 January 2015 be instigated in full. She also disagreed with the minutes of the meeting and sent proposed amendments (pages 665-70).

62. On 20 April Mrs Hopewell wrote to Ms McDonald complaining that she had been discriminated against over her on-call as recommended by Dr Sherwood-Jones (page 670A-B). Ms McDonald wrote in response on the same day (page 671-2) that since she had received the letter from Dr Sherwood-Jones she had not allocated Mrs Hopewell an on-call. She also pointed out that whilst Dr Sherwood-Jones had made the recommendation that she should avoid working in General Theatre, Ms McDonald felt that if the particulars of his recommendations were followed i.e. not standing for longer than 2 hours or pushing trolleys combined with a placement and a centrally place theatre then participation in the weekend rota should not be detrimental with respect to her knees and it would meet the maintaining skills and knowledge requirement of the theatre practitioner's role.

63. She pointed out that aside from participating in the weekend rota there would be times when she would need to be deployed to General Theatre for an occasional shift. This would only be occasionally and she said that she would inform General Theatre of the occupational health recommendation and also those of the ergonomic assessment. She invited the claimant to meet with her to discuss the individual stress plan that she had completed.

64. On 12 May Mr Hall responded to the claimant's letter of 18 April. In that letter (page 673) he confirmed that certain actions would be put in place. One of those was;

“Do not do on-call and avoid working in General Theatres.”

He again asked her to confirm in writing that he could share this with the claimant's line manager, Ms McDonald, who believed at that time that the claimant could do occasional shifts in General Theatre as evidenced in her letter of 20 April. The Claimant did not respond to this letter until 16 June 2015 (page 675). She did not confirm that he could share the agreement with her line manager. Mr Hall then replied to this on 14 July 2015 (page 676). He confirmed that any arrangements were temporary whilst she recovered from knee surgery.

65. Mrs Hopewell had been allocated to work in General Theatre on Tuesday 4 August 2015 by Ms McDonald. On 3 August there was a discussion between

Mrs Hopewell and Ms McDonald. The claimant said that she had a letter saying that she did not have to do these duties and that management had sent Ms McDonald a copy of the letter regarding it.

66. Ms McDonald responded saying that she had not received such a letter, that it was her understanding that Mrs Hopewell would sometimes work in General Theatres including covering her turn on the weekend and bank holiday emergency theatre rota provided she worked in the centrally placed theatres and did not scrub for longer than 2 hours. As it transpired there was no longer a requirement for General Theatre staff on 4 August.

67. On Wednesday 5 August the Day case unit was contacted by Tracey Millward, a lead practitioner from General Theatre to say that she had been expecting Day Case staff including Mrs Hopewell to attend General Theatre 4 which was an emergency theatre to work and that Mrs Hopewell had refused to go telling Ms Millward that she had it in writing from management that she did not have to.

68. Ms McDonald asked Mrs Hopewell for a copy of the letter but she did not have it with her. Ms McDonald explained that as she understood it she would not be expected to work for a month at a time in General Theatre but would be expected to participate in the weekend and bank holiday rotas which involved working in General Theatres. In addition as there were times when day case staff were redeployed to General Theatres it was her understanding that this was also acceptable to Janet as long as it was not happening every day. The claimant said she was willing to do occasional weekends and bank holidays.

69. Ms McDonald explained that she would be seeking advice from HR regarding her not working in General Theatres during the week. She would be particularly asking what the implication for her contracted hours was if there were no lists in Day Case and all the staff redeployed to General Theatres.

70. On 11 August Ms McDonald wrote to confirm the contents of their meeting of 5 August (page 679a). The letter confirmed again that some working in General Theatre was an essential component of her job to maintain her skills and knowledge. It noted that she had agreed to participate in the weekend and bank holiday rotas working in the emergency theatre and that there would be times when she would be required to work in General Theatres due to day case staff being redeployed there. They had discussed a frequency of not more than once a week. Mrs Hopewell said that she preferred fortnightly.

71. She confirmed that with respect to the nature of any shifts worked in General Theatres that she would be allocated the emergency theatre and that her shift would be 6 hour half days.

72. She said that the information which she would be sharing with Lead Practitioners was that;

1. Mrs Hopewell would be participating in the weekend and holiday rotas
2. She would do occasional 6 hour shifts in General Theatre and the emergency theatre and that she would not be expected to scrub for

more than 2 hours.

73. On 13 August Mr Hall wrote to the claimant. He referred to the letter he had sent on 12 May and said that he was still waiting for her confirmation and agreement that he could speak directly with her line manager regarding the actions and reasonable adjustments discussed. He said that he was happy to support the occupational health advice that she did not do on-call and avoid working in General Theatres. He said that it had come to his attention that she had agreed to work on the emergency rota which takes place in General Theatres on weekends and bank holidays. That it was reasonable to request that she also undertake occasional work in General Theatres during core time when required to support the needs of the business (page 681).

74. On 12 August the claimant had been allocated to work in General Theatre and refused to do it. She told Jonathan Sansome, a Lead Practitioner that she had a letter stating that she should avoid working in General Theatres and that this claim exempted her from working there. In his note to Ms McDonald (page 682) Mr Sansome referred to the "uncompromising and quite aggressive" approach of the claimant. She was refusing to work in the General Theatre and said that she would send a written response to Ms McDonald's letter.

75. The claimant called Ms McDonald around midday on 13 August and said that she would not be attending General Theatre that afternoon. She was told that this was a fundamental part of her maintaining the required skills for the role but she replied that she would be speaking with her union representative and ended the call. A note of the call is at page 684. The claimant had not advised anyone on General Theatre that she would not be attending and this caused problems in the theatre because there was a minimum number of theatre staff required to attend theatre to allow for an operation to take place.

76. Later on that day Ms McDonald received an email from Tina Rains (page 685) informing her of two incidents involving the claimant that week. The first was on 10 August when the claimant said that she was rostered to work in General Theatre but that she had a letter saying she should avoid this and she would not therefore be going, and the second incident was the one on 13 August. The issue for Ms McDonald was that the claimant was acting in a most unprofessional way. She had not advised anyone that she would not be attending. There is a minimum number of staff required in theatre to allow operations to take place. She had put these operations in jeopardy by her behaviour.

77. Following these events Ms McDonald wrote to the claimant on 18 August explaining again the reasons why day case staff had to work in General Theatre (pages 689-690). By this time she had received the letter from Andrew Hall but she did not interpret the letter in the same way as Mrs Hopewell had. That whilst she was not to work in General Theatre for prolonged periods she was to do day case shifts to fulfil her requirements. She pointed out that refusal to work was unacceptable behaviour and she had failed to inform the relevant staff which showed a lack of regard for her colleagues.

78. The claimant wrote to Mr Hall on 18 August (page 688). It confirmed her understanding that she was no longer expected to work in General Theatre.

79. Mrs Hopewell did not respond to Ms McDonald's letter and on 9 September she wrote to Ms McDonald complaining that reasonable adjustments had not been complied with (pages 693-694). She attached the OH report dated 13 January 2015 and copies of her letters to Mr Hall. This letter was handed to Ms McDonald on 10 September. She said to Ms McDonald that if the adjustments were not in place by that afternoon she would seek legal advice as she regarded her "agreement" as having already been broken on 13 and 28 August 2015.

80. Ms McDonald and Mr Sansome both had theatre commitments and arranged to meet the claimant at 3pm on that day. It was fitted in amongst their theatre appointments. This was to clarify the claimant's position with regard to her work expectations.

81. Ms McDonald began the meeting by outlining the reasons for it and set out the fact that work in General Theatre was a requirement of the role. Within moments of saying this, the claimant stood up and left the room saying she would not continue the meeting without her union representative. Ms McDonald and Mr Sansome returned to their respective theatres.

82. At around 4pm that day Ms McDonald was approached by the claimant who informed her that she was leaving the department and returning with her husband in approximately 15 minutes. The claimant was threatening in her tone. Ms McDonald felt intimidated and contacted Mr Sansome who suggested they should contact security as a pre-emptive measure. He spoke to a security officer, Wayne Lenton, to make arrangements for security to be available if needed.

83. Shortly after speaking to security Mr Sansome was sitting in his office, at which point, the claimant walked into his office with her husband. They asked where Ms McDonald was and Mr Sansome asked whether the man with her was her husband and this was confirmed. Mr Sansome asked him to leave. Mrs Hopewell demanded a meeting with Ms McDonald together with her husband. She was told that this was not possible and he again repeated his request for Mrs Hopewell's husband to leave. He told them that this was a restricted area.

84. Mr Hopewell refused to leave and Mr Sansome said that he would have no choice but to call security. Mr Hopewell still refused to leave and when Mr Sansome telephoned security both of them did finally leave the office, although not the department.

85. Mr Sansome was really concerned about their behaviour and could hear the claimant shouting about being bullied as she went down the clinical corridor towards the theatres. She was shouting into the recovery room "I am being bullied out of my job".

86. Mr and Mrs Hopewell then reappeared and continued shouting and Mr Sansome repeated his request for Mr Hopewell to leave but they continued with the repeated accusations of bullying. Mr Sansome said that Mr Hopewell should not be in a restricted area and the claimant responded saying that he had a right to be there to speak up for his wife. Mr Hopewell was again asked to

leave but refused to do so. The incident could be heard by staff and also by patients who were close by.

87. Eventually security attended and the claimant's husband was directed away from the clinical area with the claimant following. The claimant then returned a few minutes later and continued shouting in an aggressive manner saying;

“You're trying to throw me out you're trying to get rid of me”.

Mr Sansome answered that he was not throwing her out, that she was supposed to be at work. She was supposed to be on shift until 6pm that day but had chosen simply to abandon her shift at 4pm to go and get her husband. The claimant finally left.

88. It is accepted by Mr Sansome that the claimant and her husband were not violent and did not use swear words but he says they were very aggressive in their tone and nature and there was lots of finger pointing, raised voices and coming close into his personal space. We are satisfied that he was threatened by the behaviour of Mr and Mrs Hopewell that afternoon. Later that afternoon he met again with Ms McDonald and they were joined by Jane Thomas, HR Manager and told her what had happened. She informed Mr Hall who went to see Mr and Mrs Hopewell. After speaking with them he said he need to establish what happened. He then established with colleagues what had happened and that an investigation would be required.

89. Mr Hall conducted a meeting with the claimant on the following day, 11 September, and suspended her on the basis of two allegations, namely;

- It was alleged that she had used verbal abuse, threatening and intimidating behaviour towards her line managers on 10 September and
- Had breached the Trust CARE standards.

The letter confirming her suspension was sent to her on the same day (pages 705-706).

90. Rebecca Turner was appointed as investigator. She was sent terms of reference in respect of her investigation (pages 707A-B). The claimant was again referred to occupational health for an assessment. The referral form is at pages 709-715.

91. Ms Turner interviewed the following;

- Wayne Lenton on 8 October 2015 (pages 730-732)
- Dan Fox on 9 October 2015 (pages 733-734)
- The claimant on 14 October 2015 (pages 738-746)

92. The witnesses Jonathan Sansome and Shiobahn McDonald had already written witness statements relating to the incident. Mr Sansome's statement is at pages 695-698 and Ms McDonald's statement is at pages 702-704. Mr Hopewell had also produced a witness statement (page 699) and Janet Hopewell's

statement prepared at the time is at pages 700-701.

93. Dr Sherwood-Jones saw the claimant on 12 October and his report was at pages 736-737. That report was sent to Andrew Hall on 27 October after the claimant had given her consent.

94. There was a delay in dealing with the investigation report. Mr Hall kept the claimant informed about these delays caused by problems in interviewing other witnesses. The final version of the investigation report was given to Mr Goodwin on or around 9-11 December 2015. The report is dated 21 December 2015 and is at pages 867-929. As can be seen the following witnesses were interviewed by Ms Turner between 29 September and 5 November;

- Siobahn McDonald -29 September
- Jonathan Sansome -29 September
- Kirsten Myles -5 October
- Ruth Gunn -5 October
- Kylie Fox -7 October
- Nargus Sadiq -7 October
- Wayne Lenton -8 October
- Deborah McKinlay -9 October
- Bronwen Morris -9 October
- Dan Fox -9 October
- Janet Hopewell -14 October
- Kerry Than -16 October
- Elena Czekalskys -5 November

The report set out its conclusions and recommendations which are at pages 924-929. The report was sent to the claimant by way of a letter dated 12 January. In that letter (pages 783A-B) the claimant was informed that the case would be heard by Mr Hender and that Mr Goodwin would present the management case. Jonathan Sansome and Elena Czekalskys would attend as witnesses. She was told that if she wished to call witnesses she should let them know.

95. During the course of this discussions continued with the claimant about her possible redeployment. This followed the receipt of the occupational health report which now said that the claimant could not work in General Theatre or on-call. At the meeting on 5 November 2015 the claimant was offered alternative redeployment in the Ophthalmology eye day case theatres, Kings Treatment Centre. The claimant declined that offer.

96. The disciplinary hearing was conducted on 23 February 2016 by Mr Hender who was General Manager of the Cancer Business Unit. Also in attendance as part of the panel were Donna Brown, HR manager, Division of Medicine and Cancer and Ian Davidson, Senior Nurse and professional adviser Surgery Business Unit. Mike Goodwin, General Manager of Surgery Business Unit presented the case and Rebecca Turner attended to present her report. They were also accompanied by Collette Ellis, HR adviser in the Division of Surgery Diagnostics and Anaesthetics.

97. The claimant attended with her union representative, Pam Shepherd, who was the regional organiser for Unison East Midlands. The notes of the hearing are at pages 788-811. It had been the claimant's intention to call her husband, Wayne Lenton, the security guard and Jonathan Sansome to give evidence on her behalf. Mr Lenton had been requested to attend but did not do so and a number of attempts were made on the day to seek his attendance. It was agreed that matters should proceed in Mr Lenton's absence. The panel heard evidence from the claimant who provided an amended statement at the hearing and also from Jonathan Sansome and Elena Czekalskys.

98. The claimant then read her own statement and was asked questions from the panel and Mr Goodwin. Mr Hopewell also gave evidence to the panel.

99. After hearing the evidence the panel adjourned and concluded as follows;

- "1. There was clear evidence of verbal abuse, threatening and intimidating behaviour towards the claimant's line managers on 10 September 2015. This behaviour had a significant impact on the staff present who felt unsafe and threatened. Patients had been exposed to the behaviour that was exhibited.
2. The Trust CARE standards had been breached towards Ms McDonald and Mr Sansome. The claimant had not fulfilled the expectations laid down by the organisation. She had not acted within the relevant standards of compassion, attitude and respect.
3. The claimant had brought her husband into a restricted area where he verbally abused and threatened the claimant's line managers. He had been asked to leave but refused to do so.

The panel was satisfied that the claimant had breached the following rules in respect of gross misconduct;

- Rule 1 – mutual trust and confidence
- Rule 7 – gross non-adherence of professional code of conduct, namely NMC Code of Conduct
- Rule 9 – verbal or physical abuse, assault, threatening behaviour, harassment or bullying and discrimination; and
- Rule 13 – breaching data protection of use of IT i.e. because Mr Hopewell was in a restricted patient area.

100. The panel considered the mitigating factors presented by the claimant relating to the alleged failure by the Trust to implement all the reasonable adjustments. It was claimed that her behaviour was borne out of frustration and that she had "no other avenue". The panel considered a letter from her GP which commented on her vulnerable state of mind.

101. The panel considered the non-attendance of Mr Lenton but decided that he had not witnessed any of the incidents and had arrived 4 or 5 minutes after the events. His evidence would not add anything to the case.

102. The panel was satisfied that the mitigating factors did not justify the claimant's conduct and that it amounted to gross misconduct and had fundamentally undermined the mutual trust and confidence in the employment relationship between the claimant and the Trust.

103. The panel considered other sanctions including lesser sanctions than dismissal. It was the panel's view that in the light of the very serious nature of the allegations, namely the threatening and abusive behaviour from both the claimant and her husband who should not have been in a restricted patient area and had been asked to leave and shown a flagrant disregard for this with the support of the claimant which had caused Trust employees to feel threatened and intimidated. The sanction of dismissal was in the panel's view appropriate. The claimant was told all this at the conclusion of the hearing and a letter was sent to the claimant on 25 February 2016 by Mr Hender (pages 814-817).

104. The claimant appealed against the decision by way of a letter of 2 March 2016 (page 818). This was acknowledged. The claimant's statement of appeal was dated 8 April and is at pages 820-825.

105. The appeal hearing was conducted on 10 May 2016. The panel comprised Neil Radford, interim Divisional Director for Medicine and Cancer, Khrishna Kallianpur, Divisional Nurse Director for Surgery Diagnostics and Anaesthetics, and Stella Salt, Workforce Transformation Manager. Mr Hender presented the case for the management and Mrs Hopewell attended with her union representative, Rachael Whitaker. The notes of the appeal hearing are at pages 831-848.

106. The appeal panel acknowledged that during the suspension and investigation process the Trust policy had not been adhered to in terms of the timescales. The investigation had taken 15 weeks rather than 4-8 weeks outlined in the policy. It was their view that it did not materially affect the outcome of a disciplinary hearing.

107. They considered each of the points of appeal, namely;

- Mitigating factors raised by Mrs Hopewell through her GP letter and others
- Failure to inform within 3 working days in writing the nature of the suspension
- The need to keep telephoning to find out if she was still suspended
- Failure to receive minutes and false statements
- No GP statement
- Failure to complete investigation in timescale
- Witnesses not attending the disciplinary hearing who had provided statements

108. The conclusion of Mr Radford and the appeal panel was that the decision to dismiss was reasonable in all the circumstances and therefore upheld the decision of the disciplinary panel. This was confirmed in a letter sent to the claimant on 13 May 2016 (pages 851-853).

The Law

Discrimination claims

Burden of proof

109. It is for the claimant to prove facts from which the Employment Tribunal could conclude in the absence of an adequate non-discriminatory explanation from the employer that the employer committed an unlawful act of discrimination (Wong -v- Igen Ltd [2005] ICR 931). The tribunal referred itself to section 136 of the Equality Act 2010 (EA). This provides;

“(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.”

So if the claimant proves a prima facie case, the burden of proof will shift to the employer to show that there was a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden will not shift. Guidance as to the shifting burden of proof was considered by the tribunal, taken from that given by Mummery LJ in Madarassy -v- Nomura International Plc [2007] IRLR 246.

Direct Discrimination

110. Section 13 EA provides that;

“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.”

111. In deciding whether an employer has treated a person less favourably a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the claimant (with the exception of the protected characteristic relied on) or a hypothetical comparator.

112. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. As per Amnesty International -v- Ahmed [2009] ICR 1450.

Failure to make reasonable adjustments

113. This claim is made under section 20 EA which provides as follows;

“(1) Where this act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable schedule

apply; and for the purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

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

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

114. In her submission Ms Bairstow referred us to a number of cases;

- Environment Agency -v- Rowan [2008] ICR 218. That case held that an Employment Tribunal must consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and what adjustments would be reasonable
- Copal Castings Ltd -v- Hinton EAT 0903/04 which held that "substantial disadvantage" is to be judged objectively. It must be judged on the true facts of the case.

Harassment

115. Section 26 EA provides as follows;

"(1) A person (A) harasses another (B) if;

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of;

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

The conduct complained of in order to constitute harassment under section 26 must relate to the protected characteristic relied upon by the complainant.

116. The tribunal referred itself to the case of Nazir & Another -v- Aslam [2010]

UKEAT/0332/09. We have to ask ourselves the following questions;

1. What was the conduct in question?
2. Was it unwanted?
3. Did it have the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?
4. Did it have the effect of doing so having regard to an objective reasonable standard in the perception of the complainant?
5. Was the conduct on the grounds of the protected characteristic relied upon?

Victimisation

117. Section 27 EA provides as follows;

“(1) A person (A) victimises another person (B) if A subjects B to a detriment because;

- (a) B does a protected act, or
- (b) A believes that B has done or may do a protected act

(2) Each of the following is a protected act;

- (a) bringing proceedings under this act
- (b) given evidence or information in connection with the proceedings under this act
- (c) doing any other thing for the purposes of or in connection with this act
- (d) making an allegation (whether or not expressed) that A or another person had contravened the act.”

118. In respect of the question of whether an individual has been subject to a detriment the tribunal has considered the guidance provided by the HRC code on employment and the question of whether the treatment complained of might reasonably be considered by the claimant concerned to have changed their position for the worse or put them at a disadvantage. An unjustified sense of grievance alone would not be sufficient to establish that an individual has been subjected to detriment.

119. If the claimant is able to establish that she has suffered a detriment she must also show that the detriment has been suffered because of the protected act. We will have to examine what motivated the employer’s conduct. Motivation need not be explicit or even conscious. Subconscious motivation will be sufficient to satisfy the “because of” test.

120. The claimant does not need to show that any detriment established was meted out solely by reason of the protected act relied upon. It will be sufficient if the protected act has a “significant influence” on the employer’s decision making as per Nagarajan -v- London Regional Transport [1999] ICR 877. If in relation to any particular decision the protected act is not a material influence or factor and this is only a trivial influence it will not satisfy the significant influence test.

See Villalba -v- Merrill Lynch & Co Inc & Others [2007] ICR 469.

Time Limits

121. Section 123 EA provides as follows;

“(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of;

- (a) the period of three months starting with the date of the act to which the complaint relates, or
- (b) such other period as the Employment Tribunal thinks just and equitable.

(3) For the purpose of this section;

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.”

122. Ms Bairstow referred us to the cases of;

- Hendricks -v- Metropolitan Police Commissioner [2002] EWCA Civ 1698 [2003]
- Aziz -v- FDA [2010] EWCA Civ 304.

Unfair Dismissal Claim

123. The claim is made under section 94 of the Employment Rights Act 1996 (ERA). Section 98 provides;

“(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show;

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it;

- (b) relates to the conduct of the employee.”

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer);

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.”

124. Ms Bairstow referred us to the leading case of British Home Stores Ltd -v- Burchell [1980] ICR 303. She referred us to the three stage test which is relevant to establishing the employer’s belief and the employee’s guilt. The questions the tribunal have to ask are;

1. Did the employer genuinely believe that the employee was guilty of the misconduct alleged?
2. At the time the employer formed that belief did it have in its mind reasonable grounds upon which to sustain it, and
3. At that stage had the employer carried out as much investigation into the matter as was reasonable in the circumstances?

125. Ms Bairstow also referred us to the cases that deal with the issue of “the range of reasonable responses”, namely;

- Iceland Frozen Foods Ltd -v- Jones [1982] IRLR 439, and
- Sainsbury Supermarket -v- Hitt [2003] IRLR 23.

The range of reasonable responses test applies both to the decision to dismiss and to the procedure by which that decision was reached.

126. Ms Bairstow then referred us to other cases, namely;

- Trusthouse Forte (Catering) Ltd -v- Adonis [1984] IRLR 382
- Roldan -v- Royal Salford NHS Foundation Trust [2010] IRLR 721
- Monji -v- Boots Management Services Ltd UKEAT/0292/13.

Our Conclusions

Failure to make reasonable adjustments

127. The requirement to undertake on-call work was part of theatre practitioner duties.

128. We are satisfied that this allegation relates only to two shifts, namely 23 January 2014 and 24 January 2015.

129. In respect of the 2014 shift it is not in dispute that the claimant had been rostered to work an on-call shift that day. The claimant had been rostered before her line manager had received the occupational health report dated 21 January 2014. The report itself gave recommendations as to how the on-call duties could be adjusted. In any event the claimant was removed from the roster and not

required to undertake her duties. We note that the issue was not raised at the time or indeed in the claimant's internal grievance.

130. In respect of the 2015 shift we acknowledge that the claimant was rostered onto that shift. The claimant had been absent from work between 21 August 2014 and 29 December 2014 having her knee replacement operation and recovering from it. Ms McDonald was the claimant's new line manager and she had rostered the claimant to work the on-call on 24 January. The roster was again completed in advance of the occupational health report which this time was dated 13 January 2015.

131. When Ms McDonald received the report the claimant's on-call roster was cancelled. There was therefore no failure to make reasonable adjustments because the claimant was never required to undertake on-call work.

132. The requirement General Theatre duties. It is the claimant's case that she should have not been required to carry out General Theatre duties and should have been placed onto Day Case duties only. It was the claimant's contention that the General Theatre work was "heavier" and the floor services in the General Theatres caused aggravation to her knees. The tribunal was satisfied that there was no evidence to support either of these contentions. The respondents had obtained independent evidence to confirm that the flooring specification was no different in Day Case Theatres to General Theatres. In any event the occupational health report that the tribunal have seen and we note that the opinion of 9 May 2014 was not released to the respondent until this hearing as to why the flooring should cause the claimant aggravation. The reports were contradictory with the occupational health report initially saying that the claimant was fit to undertake work in General Theatre and then later in this report saying that she should avoid it. Whilst the occupational health report is important it is not conclusive that the adjustment was reasonable.

133. The tribunal also had the benefit of the ergonomic assessment undertaken by Sarah Woodbridge in May 2014. That report dealt with the issue of the claimant working in General Theatres and the disagreement regarding the need for the claimant to work for 2-4 weeks each year within General Theatres to maintain her skill and competencies. Her complaint to Ms Woodbridge did not relate to the actual flooring. It related to the amount of walking in General Theatres which she said was more than in the Day Case Theatres.

134. Her conclusion was that the issues could be managed by pacing and using a more central theatre whilst continuing with the workplace accommodations that were in place in the Day Case Theatre. We are satisfied that subject to the adjustments that were put in place, namely;

- Working no more than 2 hours without a break
- Avoid working 2 consecutive days in areas likely to aggravate her symptoms
- Avoiding 12 hour shifts
- Not using certain of the General Theatres to avoid excessive walking

That she did not suffer a substantial disadvantage. In any event the claimant was

not even rostered to work in General Theatres until August 2015 and was only rostered to work once a week and the shifts rostered complied with all the other reasonable adjustments recommended. In respect of these shifts the claimant only worked one of them on 28 August 2015. She did not raise any issue about working that shift.

135. We are satisfied with the evidence that we heard from Ms McDonald that in their discussions the claimant accepted that she needed to work in General Theatres at some time. She could not expect to remain on Day Case theatres without updating her skills by undertaking General Theatre work. She agreed during these discussions in August 2015 that she would do weekends and occasional shifts of once a week. She did not say she would not undertake the work until later i.e. 18 August when she changed her mind. She did not say, we are satisfied, that she would only work in General Theatres until Andrew Hall confirmed her reasonable adjustments with Ms McDonald.

136. We are satisfied that the claimant must have realised that she could not continue to work in the Day Case Theatre if she did not agree to undertake General Theatre work and wanted preferential treatment by not having to do the General Theatre work. This is indicated by the fact that when it was established finally that she would have to be redeployed because she could not undertake the General Theatre work and therefore could not continue as a Day Case Theatre operative, that she refused the offers of redeployment made to her. At that time she changed to a position where she could in fact work in General Theatres.

137. We are satisfied in this case that there was no failure to carry out reasonable adjustments in respect of this provision criterion or practice. We are satisfied that once the adjustments had taken place the claimant was not placed at a substantial disadvantage and there was no further reasonable adjustment that was required. It was not reasonable for the respondent to exempt the claimant from working in General Theatres as she wished. It was necessary for her to be able to continue to undertake her work successfully as a theatre nurse.

Harassment

138. The failure of Estelle Carmichael to deal with her grievance. It is important to see the context of Estelle Carmichael's involvement with the claimant. She was not the claimant's manager and held a senior position with the respondents as Deputy Director of Workforce Management. She was asked by the respondent's Chief Executive to assist the claimant; not to hear her grievance. She had approached the claimant in early June 2014 to try to help her through the process. The complaint is that between June and August 2014 that her conduct amounted to harassment of the claimant. It can be seen from our findings of fact that the claimant repeatedly referred to Ms Carmichael for advice and support and that is what she received from her. She also volunteered to make enquiries with the head of occupational health when the claimant raised issues with the occupational health report.

139. We are satisfied with Ms Carmichael's evidence that she did not believe when she received the email of 18 June that she was required to undertake any form of investigation into a grievance. Her role with the claimant had been made

perfectly clear and the claimant knew that any grievance would be dealt with through her line management.

140. We are satisfied that whilst the title of the email was “grievance” Ms Carmichael did not appreciate the claimant was asking her to investigate her grievance at the time. In view of the amount of items the claimant was sending her we are not at all surprised.

141. Having received the email she met with the claimant on 2 July and they discussed all the matters that were in a document produced to Ms Carmichael called “outcomes of grievances”. We are satisfied that there was no ninth point as suggested by the claimant that she wanted a written decision of the outcome of the grievance. We are satisfied that it was simply an informal meeting and the claimant did nothing further after the meeting until 30 July when she wrote and required a response “within the next 24 hours”.

142. Whatever one thinks about the misunderstanding that there might have been about the note of 18 June, we are certainly satisfied that Ms Carmichael’s conduct was not such as to violate the claimant’s dignity and cause an intimidating, hostile, degrading, humiliating or offensive environment for her.

143. Matthew Hallam leaving notes of a return to work meeting in a desk drawer.

There is no evidence to support the claimant’s contention that Mr Hallam completed the form nor did he leave the form in the drawer. The claimant did not raise the issue at the time when the actual return to work interview took place and the full form was completed on 1 May. The claimant apparently found the form in the drawer which simply said that the claimant had a painful left knee. This was not confidential information that was being leaked to anyone. All the staff knew that the claimant had a painful left knee. There is no evidence that anyone else saw the form. Even more important is that there is no evidence that the issue amounted to conduct which violated the claimant’s dignity and created an intimidating, hostile, degrading, humiliating or offensive environment for her.

144. Matthew Hallam emailing a fraudulent ergonomic workplace assessment to the claimant.

The claimant’s contention in respect of this is incredible. There is no evidence to support a contention that Mr Hallam emailed a fraudulent ergonomic workplace assessment for the claimant. The evidence shows that Ms Woodhouse emailed the ergonomic assessment to the claimant at the same time as he sent it to Mr Hallam. The claimant at the time told Joanne Sherman that she had received an email copying the assessment. There is no evidence and we are satisfied that the claimant did not receive any “fraudulent” ergonomic assessment

145. Darren Gillott smirking whilst taking minutes of the meeting on 8 May.

The tribunal is satisfied and prefers the evidence of Darren Gillott that he did not smirk at the meeting. None of the other attendees at the meeting including the claimant’s own representative witnessed Darren Gillott smirking. When her representative would not support her in this contention and refused to make a statement in support of the allegation the claimant then complained about her union representative. Nothing was raised immediately either at the meeting or immediately thereafter.

146. Andrew Hall and Siobahn McDonald failing to make reasonable adjustments.

The claimant contends that the failure amounted to harassment. There was no harassment of the claimant in respect of this by either Andrew Hall or Siobahn McDonald. They both tried to agree reasonable adjustments with the claimant and their behaviour did not amount to harassment.

147. Siobahn McDonald threatening the claimant during a telephone call on 13 August 2015.

We are satisfied with Ms McDonald's evidence that she did not threaten the claimant during the telephone call. The claimant's own note of the conversation at page 683 makes no such suggestion. It was the claimant who called Ms McDonald and Ms McDonald merely asked whether or not the claimant was refusing to go to General Theatre. That is not a threat. Even less could it amount to harassment.

Direct Discrimination

148. Siobahn McDonald and Jonathan Sansome making false allegations on 10 September.

The tribunal is satisfied that Ms McDonald and Mr Sansome did not make false allegations. Both provided contemporaneous statements as to what they witnessed and we are satisfied that what they said then as now was consistent and truthful that the claimant and her husband had behaved in a threatening and abusive manner in a restricted area and Mr Hopewell had been asked to leave on a number of occasions but refused to do so. The claimant has not suffered any less favourable treatment and this did not relate to her disability.

149. The claimant's suspension by Matthew Hallam.

The claimant's contention is that the respondent wished to remove the claimant because she suffered from a disability. The tribunal does not accept this contention at all. The claimant was suspended (a neutral act) by Mr Hall because serious allegations had been made against her. We are satisfied that there is no evidence to support the claimant's contention that the respondent wished to remove her. Every effort was made to try to accommodate her and maintain her position working as a nurse in the Day Case theatre. Furthermore, there is no evidence that this was because the claimant suffered from a disability. All the evidence shows that her suspension had nothing to do with her disability other than that the claimant was unhappy about the adjustments and this had led to her behaviour on 10 September.

Victimisation

150. It is accepted by the respondent that there was a protected act by the claimant in respect of her complaint dated 12 April 2014 and in her bringing the Employment Tribunal proceedings on 27 November 2015. The treatment complained of are as follows;

1. Matthew Hallam placing her on a Performance Improvement Plan on 12 June 2014.

We are satisfied that the reason that Mr Hallam placed her on a PIP was

because of her conduct, attitude and behaviour and had nothing to do with her grievance that she had raised at the time. Mr Hallam having received the complaint on 12 April did all he could to assist the claimant inviting her to meetings, seeking clarification from occupational health and obtaining an ergonomic assessment. He tried to resolve the claimant's issues and working arrangements. The claimant had already received an informal warning about her attitude and behaviour and he had received further complaints regarding this from other staff members. He could quite justifiably have undertaken disciplinary procedures in respect of this but chose not to and hence the PIP. In any event we are satisfied that Mr Hallam was not aware that any complaint had been raised against him until his grievance interview with Lorraine Herd in November 2014. For these reasons the tribunal is satisfied that the claimant was not victimised.

2. Darren Gillott's allegation that the claimant was rude on 2 June 2014.

Having heard the evidence we are satisfied that Mr Gillott complained that the claimant was rude because the claimant was rude on 2 June 2014. At that time the claimant had not complained about him at all. This was only raised with Estelle Carmichael on 18 June. The claimant's email at the time demonstrates her tone and the issuing of an ultimatum and it was later accepted by the claimant that she had actually put the phone down on Mr Gillott. Mr Gillott we find did not make any complaint because of the protected act but because of the claimant's behaviour.

3. Lorraine Hourd threatening the claimant that if she appealed her decision she would reinstate the six month PIP.

The allegation is untrue. Lorraine Hourd did not threaten the claimant that she would reinstate the six month PIP. She had advised the claimant of her right of appeal at the conclusion of the stage 2 grievance meeting and in the outcome letter reiterated the arrangements for doing so in her email to the claimant's representative upon her request. As can be seen from the email she said that the recommendations made in the stage 2 grievance meeting would be delayed if the claimant appealed. There was no threat to reinstate the six months PIP. The allegation is untrue.

For the reasons outlined above all the claims of discrimination fail and are dismissed.

Unfair Dismissal Claim

151. We are satisfied that the respondents have established that the reason for the claimant's dismissal was her conduct, namely;

1. On 10 September 2015 in the presence of patients and staff in the day case unit she had used verbal abuse, threatening and intimidating behaviour towards her line managers.
2. She had breached the Trust CARE standards.
3. In breach of Trust policies she had brought her husband into a restricted area of the day case department where he had verbally

abused and displayed threatening behaviour towards the claimant's line managers. Despite him being asked to leave the claimant took him down the theatre corridor.

152. We are satisfied that Mr Hender and the disciplinary panel had a genuine belief that the claimant had committed the act of misconduct alleged. They had reasonable grounds for that belief in the form of the evidence from the witnesses who had observed the claimant and her husband's behaviour on that day particularly Mr Sansome and Ms Czekalskys.

153. There had been a thorough and reasonable investigation into the conduct of the claimant and her husband by Ms Turner. She had interviewed all the relevant witnesses and prepared an extensive report that was presented to the disciplinary panel.

154. The claimant was able to cross-examine both Mr Sansome and Mr Czekalskys at the disciplinary hearing which took a full day and was able to call evidence herself including her own. Whilst Mr Lenton the security officer was not at the hearing the tribunal is satisfied that it made no difference. It was not suggested that he saw the behaviour of the claimant and her husband which was what was relevant to the disciplinary panel. The fact that he said in his statement that he did not observe the claimant and her husband behaving unreasonably does not mean that they did not behave unreasonably before he arrived.

155. We are satisfied in this case that dismissal was well within the band of reasonable responses. The panel was satisfied that the claimant and her husband had been both threatening and abusive towards her line managers in a restricted area and refused repeatedly to leave the area which contained other staff and patients. The claimant's behaviour was unacceptable and amounted to gross misconduct. The panel did consider the claimant's mitigation and also alternatives to dismissal. A crucial factor in their decision was that the claimant showed no acknowledgement or remorse for her unacceptable behaviour. Her dismissal was therefore fair and her claim of unfair dismissal fails and is dismissed.

156. The provisional remedy hearing listed for 26 May 2017 is cancelled.

Employment Judge Hutchinson

Date 27.4.2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE