



EMPLOYMENT TRIBUNALS

Claimant: Miss. S. Dunn

Respondent: Sussex Community NHS Foundation Trust

Heard at: London South, Brighton

On: 18 and the 21-23 August 2017 24-5 August 2017 in chambers

Before: Employment Judge Sage

Members: Mr C. Wilby

Mr. J. Gautrey

Representation

Claimant: Mr. Tahzib of Counsel

Respondent: Ms. Stanley of Counsel

RESERVED JUDGMENT

1. The Claimant's claim for indirect discrimination is not well founded and is dismissed.
2. The Claimant's contract of employment terminated on the 31 March 2016 by effluxion of time. The Claimant's claim that the dismissal was an act of discrimination is not well founded and is dismissed.
3. The Claimant's claims for harassment set out in the list of issues in our decision at paragraphs 3.13(a) and (c) are well founded.
4. All other claims for harassment are not well founded and are dismissed.
5. The Claimant's claim for direct discrimination set out in paragraph 3.3(a)(ii) is well founded
6. All other claims for direct discrimination are dismissed.
7. The Claimant's claims for discrimination arising from a disability are not well founded and are dismissed.

REASONS

1. By a claim form presented on 10 June 2016, the Claimant brought complaints of disability discrimination. The Claimant maintained that she was subject to harassment, discrimination because of something arising out of disability, and indirect discrimination. The PCP is the of “refusing to acknowledge its own shortcomings in respect of discrimination and refusing to give training” and direct discrimination. The Claimant maintained that the Respondent on learning that she suffered from multiple sclerosis sent the Claimant to occupational health and on the 10 December Ms. Ford was alleged to have made comments to the Claimant about her disability that she felt amounted to harassment. The Claimant stated that the OH form also contained discriminatory comments. On the 15 December 2015 the Claimant was informed that she had been sent the “wrong contract” which was a fixed term contract ending on the 31 March 2016 (when she had previously been provided with a contract for 12 months). The Claimant raised a grievance and an appeal and although the Respondent offered to reinstate the Claimant into the post on a permanent basis, the Claimant was unable to return and treated herself as constructively dismissed on the basis that her dismissal was discriminatory. The Claimant claimed that the grievance process by failing to acknowledge or address the discrimination, perpetuated the relevant intimidating environment.

2. The Respondent defended the claims

Witnesses

The Claimant and for the Respondent we heard from:

Ms. Ford System Capacity and Flow Manager

Mr Godwin Recruitment Coordinator

Ms. Hampson General Manager and

Mr Balcombe Clinical Services Manager

The issues

3. These were agreed and provided to the Tribunal on the first day of the hearing.

Disability

- 3.1 The disability relied upon is multiple sclerosis. The Respondent admits that the Claimant was at the material time a disabled person within the meaning of the Equality Act 2010.

Dismissal

- 3.2 Was there a constructive dismissal for the purposes of section 39(7)(b) of the Equality Act 2010:

- (a) Did the Claimant resign?

The Claimant says that she resigned on or around 22 March 2016.

- (b) Did the Respondent:

- (i) Give the Claimant an amended contract on 15 December 2015 with a termination date of 31 March 2016;
- (ii) Fail to address the allegations of discrimination in the course of the grievance process;
- (iii) Fail to admit in the course of the grievance process that there had been any discrimination or wrongdoing;
- (iv) Fail to ensure Ms. Ford offered the Claimant an apology;
- (v) Fail to acknowledge the training provided to Ms. Ford was inadequate;
- (vi) Fail to inform the Claimant that Paula Ford and all staff would be given training;
- (vii) Inform the Claimant following the grievance that she would be “reinstated” under Paula Ford’s management; and
- (viii) Inform the Claimant that her extended contract would be opened up for general applications

The Claimant contends that the allegations at (b)(i) to (viii) amount to a breach of the implied term of mutual trust and confidence

- (c) If so, did this conduct constitute a fundamental breach of contract?
- (d) Did the Claimant resign because of this fundamental breach of contract?
- (e) Did the Claimant delay in resigning and so affirm the contract?

Direct discrimination – section 13 of the Equality Act 2010

3.3 Was the Claimant subjected to the following treatment:

- (a) On 10 December 2015 Ms. Ford made the following comments:
 - (i) She said that she was referring the Claimant to Occupational Health;
 - (ii) Ms. Ford suggested to the Claimant that she had been unable to do her previous job because of her multiple sclerosis;
 - (iii) Ms. Ford said to the Claimant that she could not see her computer screen well enough;
 - (iv) Ms. Ford asked the Claimant if she had memory problems; and
 - (v) Ms. Ford asked the Claimant if she had cognitive problems.;

- (b) On 11 December 2015 Ms. Ford completed a referral form for Occupational Health. The Claimant says that the entire contents of the comment section on the relevant referral form constitute direct discrimination.
 - (c) On 15 December 2015 the Claimant's contract was amended so that it had a termination date of 31 March 2016;
 - (d) In the course of the grievance and grievance appeal process:
 - (i) The grievance outcome letter failed to address the allegations of discrimination in her grievance dated 22 December;
 - (ii) There was no finding in the appeal meeting or appeal outcome letter that the Claimant had been discriminated against;
 - (iii) The grievance/grievance appeal did not find that the Respondent had always intended to give the Claimant a 12 month contract; and
 - (iv) The Claimant was told her contract would be opened up so that others could apply for the role.
 - (e) The Claimant was dismissed.
- 3.4 If so, does this constitute less favourable treatment because of the Claimant's disability?

3.5 The Claimant relies on a hypothetical comparator

Discrimination arising from a disability – section 15 of the Equality

Act

3.6 Was the Claimant subjected to the following treatment:

- (a) Ms. Ford completed a referral to Occupational Health. The Claimant relies on the contents of the referral form as constituting unfavourable treatment;
- (b) Ms. Ford refused to allow the Claimant to see the Occupational Health Referral Form when she requested to do so;
- (c) The Claimant's contract was amended on 15 December 2015 so that it had a termination date on 31 March 2016;
- (d) The Respondent did not uphold the Claimant's grievance at first instance or appeal stage;
- (e) The Claimant was told at the conclusion of her grievance that she would continue to be managed by Paula Ford;
- (f) The termination date in the Claimant's contract remained as 31 March 2016 following the outcome following the outcome of the grievance.
- (g) The Claimant was constructively dismissed

3.7 If so, was this unfavourable treatment?

- 3.8 If so, was this because Ms. Ford was critical of the Claimant's abilities and/or assumed the Claimant was unable to carry out her role?
- 3.9 If so, were Ms. Ford's criticisms/assumptions something arising in consequence of the Claimant's disability for the purposes of section 15(1) of the Equality Act 2010?

Indirect discrimination – section 19 of the Equality Act 2010

- 3.10 Did the Respondent apply the provision, criterion or practice ("PCP") of failing to acknowledge its own shortcomings in respect of disability discrimination?
- 3.11 Did this PCP put those who share the Claimant's particular disability at a substantial disadvantage?

The Claimant contends that the substantial disadvantage in this case was not having her grievance upheld.

- 3.12 If so, did this PCP put the Claimant at that particular disadvantage?

Harassment – section 26 of the Equality Act 2010

- 3.13 Was the Claimant subjected to the following conduct:

- (a) On 10 December 2015 Ms. Ford suggested to the Claimant that she had been unable to do her previous job because of her multiple sclerosis;
- (b) On 10 December 2015 Ms. Ford said to the Claimant that she could not see her computer screen well enough;
- (c) On 10 December 2015 Ms. Ford asked the Claimant if she had memory problems. or cognitive problems;
- (d) On 11 December 2015 Ms. Ford completed a referral form for Occupational Health. The Claimant was asked to particularise which conduct of the form constituted harassment. The Claimant said that all of the commentary section on the form constituted harassment; and
- (e) The Respondent's resolution of the Claimant's grievance and grievance appeal. In particular:
 - (i) The appointment of Annie Hampson to deal with the grievance appeal;
 - (ii) Failure to mention (during the grievance process) that Annie Hampson had advised Paula Ford on the Claimant's termination date;
 - (iii) Failure to interview Annie Hampson during the grievance process;

- (iv) Failure to provide the Claimant with copies of the timeline or any evidence during the grievance process;
- (v) The Respondent failed to address the Claimant's allegations of discrimination in the grievance outcome letter;
- (vi) Failure to find that any discrimination had taken place;
- (vii) The Respondent did not make a finding that the Claimant had originally been offered a contract for one year;
- (viii) The Respondent said the Claimant's manager would still be Paula Ford if she returned to work in circumstances in which the Paula Ford had not been given any training;
- (ix) The Respondent said that the Claimant would have to start the probationary period again and said that the Claimant's role would be opened up to other applications;
- (x) The Respondent suggested in the appeal outcome letter that an "*inconsistent timeline*" was due to the Claimant's confusion;

3.14 If so, was this unwanted conduct related to the Claimant's disability?

3.15 If so, did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the Claimant?

Time Limits

3.16 Did any of the acts complained of take place outside the time limits set out at section 123(a) of the Equality Act 2010?

3.17 If so, do these acts form part of conduct extending over a period so as to bring them within the time limits set out at section 123(a) of the Equality Act 2010?

3.18 If any of the Claimant's claims are out of time, would it be just and equitable to extend time?

Findings of Fact

These were agreed or on the balance of probabilities we find to be as follows:

4. The Claimant had worked for the NHS as a Nurse for a number of years and had worked in A & E and in many other wards for example renal in the Royal Sussex County Hospital. The Claimant had been diagnosed with multiple sclerosis 13 years previously.
5. The Claimant applied for the role as a Nurse Screener and the Tribunal were taken to the job advert at page 50 of the bundle and it was stated to be a fixed term contract. The Claimant told the Tribunal that although the advert stated that the role would involve making a telephone assessment of people referred to the service to ensure that they met the service criteria and the

successful candidate would “need to possess excellent communications skills and using your clinical knowledge obtain and triage the necessary information required”. The Claimant told the Tribunal that she was told that she was only to take down the referral and ask no questions and she felt that the job advert was not properly described. She accepted in cross examination that when she applied she knew it was a fixed term role. She also accepted that she was interviewed by Ms. Ford and notes showed at page 51 that Ms. Ford also knew that the role was for a fixed term and the Claimant accepted that during the interview there was no discussion of whether the role was permanent or fixed term. The Claimant also accepted that during the grievance and grievance appeal process she conceded that she was aware that the role was a fixed term (page 202).

6. The Claimant was successful at interview and she was offered the role in a telephone conversation with Ms. Ford and again it was Ms. Ford’s evidence the contract length was not discussed. However, Ms. Ford stated at paragraph 4 of her statement that she knew the post was funded by Operational Resilience Capacity Fund (“resilience funding”) and was aware this was due to end on the 31 March 2016 as her own post was funded in the same way. The appointment letter at page 65 made no reference to the position being of fixed term status and the contract that was attached made no reference to its fixed term status. The contract was at pages 66-72 and stated that the Claimant was subject to a probationary period of 6 months ending on the 6 June 2016 (page 69 at paragraph 10.3 of the contract). The Claimant was taken in cross examination to this contract and she was asked whether she thought she had been appointed under a permanent contract or if she felt that there was information missing and she replied that she thought it was a mistake but did not know where the mistake was and did not ask. She candidly accepted that she knew there was a mistake but did not consciously think anything of it as she said a **“mistake is a mistake”**. The Claimant accepted that she knew the mistake was that no termination date had been given on the contract.
7. The Claimant did not disclose her disability on her application form and did not tell her line manager Ms. Ford on the 7 or the 8 December 2015 but she had told others in the Department and spoke openly about her MS.
8. At the start of her employment on the 7 December she was given two weeks’ induction on the job. She felt that the first week of induction, which was being trained by a Nurse screener called Laila by shadowing her, was disjointed and was interrupted and felt that it was of poor quality. On the first day the Claimant told Ms. Ford that she had booked annual leave for the 1 April 2016 and it was put to Ms. Ford that she failed to tell the Claimant at this time that her contract was due to terminate prior to her annual leave and she replied **“I didn’t know the contract would end, it is normal to take annual leave dates in case the contract is extended, there was no guarantee that the contract would finish on the 31 March 2016”**. She clarified in cross examination that although that was the date that she was given, there was **“potential to extend”**.
9. On the 9 December 2015 Mr Godwin had picked up that the vacancy filled by the Claimant was fixed term but he did not have the end date for the contract. He emailed Ms. Ford asking for these details see page 87A of the bundle. This email was sent at 15.42. Ms. Ford could not recall speaking with Mr

Godwin on that day and it was her evidence that she did not speak with him until the 15 December 2015

10. The Claimant asked to see Ms. Ford on the 9 December to discuss her concerns about the quality of her induction, Ms. Ford stated that this meeting took place in the morning (see paragraph 12 of her statement). In this meeting the Claimant first told Ms. Ford of her disability and this is dealt with at paragraph 8 of her statement. The Claimant alleged that Ms. Ford had stated that she had noticed her 'limp' and that she favoured her non-dominant hand for certain tasks. It was put to the Claimant in cross examination that what Ms. Ford actually said to her was that she had noticed that she had difficulty with steps (paragraph 11 of Ms. Ford's statement) but the Claimant confirmed that the word she used was 'limp'. Ms. Ford in cross examination denied saying anything about a limp. The Tribunal noted that although this was raised in evidence in the hearing, this was not one of the issues before the Tribunal, which had been agreed prior to the hearing nor was this matter referred to in oral or written submissions. We therefore raise no adverse inference from these comments.
11. Ms. Ford was asked about this meeting in cross examination and she accepted that she did not ask the Claimant if she was having any difficulties in the role and the Claimant had raised no concerns in relation to her disability.
12. The Claimant at paragraph 9 of her statement stated that on the 10 December 2015, when she was told that she was being referred to OH, she stated that Ms. Ford had suggested that the reason she applied for the job was because she had been **"unable to do her previous job"** because of MS. Ms. Ford's evidence on this conversation in her statement at paragraph 18 was that she may have asked in passing if the Claimant was **"no longer able to do the role because of her condition"**, this comment was made when she ran into the Claimant after an allocation meeting, she said she made this comment in passing. She accepted that this comment could be viewed as seriously offensive and humiliating and she accepted that reflecting back this was accepted but it was not her intention. The Tribunal find as a fact that this comment was unwanted conduct and was humiliating to the Claimant and although not the purpose, it had the effect of causing a humiliating or offensive environment for the Claimant. The Tribunal also conclude that this was an act of less favourable treatment because of disability. We conclude that this comment or question was directly related to the Claimant's disability and called into question whether she had been "unable" to continue to perform her previous role, despite there being no evidence that this was the case. We conclude that Ms. Ford would not have posed the same question to a non-disabled employee on the fourth day of their induction programme.
13. The Claimant also stated that on the 10 December she was asked by Ms. Ford if she had memory or cognitive problems. It was the Claimant's evidence to the Tribunal that when this was said and she stopped Ms. Ford mid-word when she was starting to use the word cog(nitive); she replied that her disability did not affect her cognitive ability. This description was entirely consistent with the context of the discussion that took place in this meeting where Ms. Ford was asking a number of questions about the nature and effect of the Claimant's disability. The Tribunal also noted that the Claimant had consistently stated in her grievance email and in the grievance hearing

that this was said (page 102 and page 130). Although Ms. Ford denied she made this comment we conclude on the balance of probabilities that during the course of their discussion the question was asked. We conclude that this question, taken in context with the other comments made by Ms. Ford that day was sufficient to amount to unwanted conduct related to her disability that created a degrading and hostile environment for the Claimant. We conclude that it was reasonable for the Claimant to view these intrusive questions about her disability as amounting to harassment. Although we conclude that this was an act of harassment we do not consider that this is less favourable treatment because of a protected characteristic.

14. The Claimant was asked in cross examination whether Ms. Ford was wrong to ask if she could see the computer screen; the Claimant did not think this was inappropriate and it was fine to raise the matter and it was not an assumption about her disability as she assisted her in showing her how to make the screen bigger. Although the Claimant did not feel the comments about the screen were wrong she felt that as this was done on the day after comments were made on the 9 December she felt cumulatively they were harassing and she felt under pressure taking this comment (about the screen) together with comment about her memory. The Claimant accepted in cross examination that it was right for Ms. Ford to raise this issue if she felt that someone was having difficulties using the computer which the Claimant agreed but her complaint was how it was done. Ms. Ford in cross examination accepted that she raised this issue and she did not think it was anything to do with the Claimant's disability and she did not imply it, she told the Tribunal that **"the screen is difficult and I showed her how to enlarge it, it is difficult to follow and that was on the first day"**. She denied she asked the Claimant about her eye sight, she asked her if she could see the screen. The Tribunal conclude from the evidence that this was a reasonable question to ask and it was not based on an assumption about the Claimant's disability; it was a helpful suggestion to assist the Claimant familiarize herself with the complex computer screen. Although the Claimant told the Tribunal that she felt the comment was cumulatively harassing there was no evidence that this comment was unwanted conduct as it was accepted by the Claimant to be appropriate or that it related to her disability. This question cannot therefore amount to an act of harassment or to direct discrimination.
15. The Claimant was informed by Ms. Ford that she was being referred to OH and the Claimant told the Tribunal that she made comments **"alluding to my MS. and I gained the impression that she had made assumptions about me"** (paragraph 9 of her statement). Those assumptions were that she felt that the Claimant "couldn't see the screen well enough" and asked if she had memory or cognitive problems. The Claimant said she was upset by this and she felt that this was **"intrusive belittling and damaging to her self-confidence"** and that she began to feel harassed by Ms. Ford. When it was put to the Claimant in cross examination about her leaning across the screen, the Claimant replied it was because Ms. Ford was standing in the way.
16. It was put to the Claimant in cross examination that Ms. Ford had raised the issue of her handwriting and she had noticed the Claimant's difficulty with a pen and she had offered the Claimant her pen which had a larger barrel, which the Claimant accepted was offered and no adverse inference was raised from this incident. The Claimant did not feel that Ms. Ford was wrong to raise the issue but she felt that she was being watched.

17. Ms. Ford was taken in cross examination to the Claimant's contemporaneous note at page 191 of the bundle of her conversations on the 9-10 December 2015 and on seeing this she denied making any comment about a limp and could not recall making reference on the 10 December to a six month probationary period but accepted that she may have said it. Ms. Ford did not make notes of her conversations with the Claimant at this time.
18. The Claimant confirmed in cross examination that Ms. Ford was not wrong to refer the matter to HR or to OH, her only objection was the content of the referral form.

The OH Referral

19. The OH referral form was seen at pages 89-90 which was dated the 11 December 2015. The Claimant's objections to the reference was at paragraph 11 of her statement and in outline they were that Ms. Ford had made assumptions about her ability to carry out the role, referring to her MS. and to alleged difficulties in her mobility and weakness in her arm. She felt the comments were 'highly prejudicial and upsetting'. When the Claimant was taken to this in cross examination she told the Tribunal that she didn't think that she wrote this and she did not think that the reason for referral was prejudicial. The Tribunal conclude therefore that the Claimant was not advancing the argument that this comment was prejudicial or upsetting.
20. It was noted by the Tribunal that the OH form, completed by Ms. Ford referred to the contract as being fixed term for one year. Ms. Ford was asked about this in cross examination and she stated it was human error; she stated that she was thinking of the post "**in its entirety**". The Tribunal accept Ms. Ford's evidence as credible and consistent.
21. The body of the document at paragraph C was completed by Ms. Ford and outlined the difficulties that Ms. Ford had observed; she stated that "**it has become apparent to me that there are significant difficulties with the role that she is experiencing, which I have discussed with her. I have discussed my concerns with HR that her condition wasn't disclosed at the start of her employment with the trust**". Ms. Ford was asked about her reference to being concerned about the Claimant in the role and she explained that "**as line manager I have a duty to ensure that they have the right equipment**", she accepted however that she was concerned as some of the difficulties that she observed were related to her disability. Ms. Ford did not accept that when this referral was made she had not shared her views with the Claimant as her concerns were discussed on the 9 December but she said the Claimant did not agree that she had significant difficulties in the role. It was put to Ms. Ford that she made a number of assumptions when completing this form and she denied this was the case saying that her objective was to seek advice from OH for support and equipment to assist the Claimant. The referral form also stated that the Claimant had "**difficulty mobilizing**". The Claimant stated in cross examination that it was wrong to refer to this in the request for a report as OH found no mobilizing issue however she did not object to Ms. Ford raising it because it came back 'clear'. The Claimant clarified that it was not discriminatory to raise the matter on the form, it was Ms. Ford's perception that was discriminatory.

22. The OH form stated **“because of the weakness in her right hand she has to use the computer mouse with her left hand – because this is unfamiliar to her it is quite an awkward thing for her to do; she doesn’t have control of the mouse so computer work is difficult for her...”**. The Claimant told the Tribunal that she objected to this reference on the form because it was inaccurate, she told the Tribunal she had no weakness in her arm it was a dexterity issue, she stated that she was under the care of a number of doctors who could not discern a weakness in her arm. She also told the Tribunal that she was a gamer and she had no problem with her manual dexterity.
23. The OH form stated that **“[the Claimant] also needs to complete written documentation, some of which cannot be done on the computer, as she is right handed she is not able to grip the pen effectively to write clearly which is already proving to be a problem”**. She also commented that at times the role could be stressful and she stated that the Claimant had **“already highlighted to me that when she becomes stressed this can exacerbate her condition”**. Ms. Ford indicated that she required an urgent assessment of the Claimant and she was asked by the Tribunal why she had indicated that this was urgent and she replied that she wanted to review during the induction program and to look at equipment.
24. The Tribunal find as a fact that the contents of the form were based on the observations made by Ms. Ford of the Claimant at her workstation and on her mobility at work. Although the Claimant disagreed with the interpretation Ms. Ford placed on what she observed (for example the differentiation between manual dexterity and weakness), the recording of her observations together with the requirements of the role were necessary to obtain a comprehensive and focused OH report. We do not find the contents of this report to be less favourable treatment because of disability. As the Claimant did not object to an OH referral being made and perceived it as a positive step, the Tribunal do not conclude that the process followed or the contents of the referral form to be an act of direct discrimination. We also conclude on the facts that the OH referral does not amount to unfavourable treatment because of something arising from a disability nor does it amount to harassment.
25. The Tribunal note that the form at page 91 at paragraph F stated that the consent of the individual being referred was required in all but exceptional circumstances, the Claimant was not asked to sign or check the contents of this document before it was sent to OH. It was the Claimant’s evidence that she should have signed the form. Ms. Ford’s evidence to the Tribunal was that the person being referred had to agree to the referral but did not accept that this meant that the Claimant could see the contents of the form to confirm that it was accurate. She accepted that the form was not shown to the Claimant as they contained her observations on the Claimant in the role. In answer to the Tribunal’s question she assumed that she had the Claimant’s consent to refer her to OH as they had discussed the referral in the meeting. Ms. Ford told the Tribunal that she **“believed that process for having it signed is being looked at”** and she stated that they **“never normally get staff to sign them”**. Although this appeared to be evidence of bad practice (as accepted by Ms. Hampson and Mr Balcombe-see below) and it may amount to a breach of their policies there was no evidence that the reason why they acted in this way was because of the Claimant’s disability due to the Respondent’s evidence that this was regularly departed from.

- 26.** The Claimant at paragraph 12 of her statement told the Tribunal that she asked for a copy of the OH referral form but was refused and she was asked about this in cross examination; the Tribunal were taken to the file note made by Ms. Ford at page 91 of the bundle of their discussion on the 15 December 2015. The note recorded that the Claimant asked for a copy of this document but was not given a copy by Ms. Ford. Ms. Ford's evidence was that the Claimant was off sick shortly after the meeting and she was not around to hand it over and she was not in the office on Monday the 14 December. Ms. Ford accepted that the Claimant was in the office from the 11-16 December but she told the Tribunal she did not get time to do this. The Claimant stated that the first time she had sight of this referral was when she was shown a copy by OH she was also provided a copy of the form by Mr Balcombe. The Claimant was asked in cross examination whether she felt that this was an act of discrimination and she replied that she did not know what Ms. Ford was thinking. The Tribunal find as a fact that there was no evidence that Ms. Ford refused to provide the Claimant with a copy of this form, the note made by Ms. Ford stated that she would arrange for a copy to be provided and we accept her evidence that this was something she simply did not get around to. This cannot be equated with a refusal and this was denied by Ms. Ford in her statement at paragraph 30, she explained that the reason she did not send it to her after she went off sick was that she had been informed that the Claimant had raised a grievance against her and she felt it would be inappropriate for her to contact the Claimant directly. The Tribunal accept that this was a consistent and non-discriminatory explanation for not providing a copy of the OH form at the time.
- 27.** Ms. Ford accepted in cross examination that five days after the Claimant told her that she had MS she spoke to Ms. Hampson about the Claimant's contract (after receiving the email from Mr Godwin) to clarify the end date of the contract. It was put to her that she came to an agreement to terminate the contract early but she denied this was the case. Ms. Ford accepted that there was no document in the bundle that indicated that resilience funded posts ended on the 31 March 2016 however Ms. Ford did not get involved in contracting with the Clinical Commissioning Group (CCG). The Tribunal find as a fact that there was no causal connection between the Claimant disclosing her disability to Ms. Ford and the notification of the contract end date; these two events were entirely coincidental and not because of the Claimant's disability.
- 28.** The Claimant was informed by Ms. Ford on the 15 December that she had been given the wrong contract and was given a new contract which was the same, save from a termination date of the 31 March 2016 at paragraph 3.5 (page 74 of the bundle) and the fact that the job title stated that it was a fixed term contract. The Claimant was upset by this as she had not been told that her employment would end after 4 months and she had not been told this on the first day of employment when she had informed Ms. Ford that she had pre-booked annual leave on the 1 April 2016; she questioned why Ms. Ford had said nothing to her at that time. Ms. Ford denied that she selected the end date for the Claimant's contract, she stated at paragraph 32 of her statement that she was keen to retain her as the role had been difficult to fill.
- 29.** The Claimant was distressed at the news of the termination date of her contract and sent an email to Mr Godwin dated the 18 December 2015 (see

page 97 of the bundle) objecting to the change to a fixed term contract of only 4 months' duration and said she would not be signing it. She went off sick on the 18 December and did not return to work. At the time she went off sick she had worked for only 8 days. The Tribunal noted that the Claimant did not resign her position in response to the Respondent's change in contractual terms.

- 30.** On the 22 December 2015 the Claimant submitted a grievance about the events referred to above; she complained of harassment and referred to the events on the 9 and 10 December. The Claimant also confirmed in answers given in cross examination that on the 22 December she spoke to her union about all the issues in the case and received advice. She stated that it was her belief that the decision to issue her with a new contract to terminate on the 31 March 2016 was as a result of her divulging her MS to Ms. Ford. She claimed that the Respondent had failed to follow a proper procedure and unilaterally changed her contractual terms without consent (paragraph 17 of her statement). The Tribunal find as a fact that the Respondent unilaterally imposed the fixed term contract terminating on the 31 March 2016 and as a result the permanent contract that all parties agreed, had been issued in error, was terminated. The Tribunal also find as a fact that the Claimant's decision to raise a grievance reflected that she accepted the new fixed term contract and continued to use the internal procedures open to her as an employee, to voice her objections. She did not treat herself as dismissed by the imposition of the new fixed term contract.
- 31.** The Tribunal were taken to page 125 of the bundle which was an email dated the 4 January 2016 from payroll to HR stating that the Claimant's contract was recorded as a fixed term contract ending on the 31 May 2015 (sic). This document was put to Mr Balcombe by the Tribunal and he stated that he was not aware of this document and did not see the date. This document further reflected the considerable confusion about the termination date of the Claimant's fixed term contract.
- 32.** The Tribunal were taken to an email from Mr Balcombe dated the 5 January 2016 to HR (see page 127 of the bundle) where it was recorded that the Claimant was working on the ward as a Bank Nurse at RSCH and had told one of the patients that she was taking out a 'big grievance', he was advised to inform the Claimant to maintain confidentiality. There was no problem with the Claimant undertaking bank work as she was not being paid by the Respondent after the 21st and she was not claiming to be sick.

The Grievance hearing

- 33.** The grievance meeting was held on the 7 January 2016 and was chaired by Mr Balcombe. The Claimant was assisted by her trade union rep. The minutes were on pages 130-132. The minutes reflected that the Claimant went through her concerns about the training but she made it clear she had no grievance against Laila, her only grievance was against Ms. Ford. The Claimant accepted that Ms. Ford was helpful when she worked with her and she made quite a bit of headway with her induction. It was put to Mr Balcombe in cross examination that even though the Claimant complained about her induction, he asked no questions about this matter. He accepted in cross examination that he did not explore this with the Claimant.

34. It was put to Mr Balcombe in cross examination that the Claimant had referred to a contemporaneous note but he accepted that he did not ask to have sight of the note and had not seen page 191 before.
35. The Claimant stated that on day three Ms. Ford had informed her that she had **“noticed something about me, that she had noticed a limp and that I favoured my non-dominant hand”**. The Claimant then stated that on the 10 December Ms. Ford informed her that she was making a reference on OH which she accepted that she **“readily agreed to”**. The Claimant then told Mr Balcombe that after this Ms. Ford started to make comments such as “oh can you not remember things because of your MS.?” and “can you not do that because of your MS?” The Tribunal took into account this evidence to conclude that Ms. Ford had, on the balance of probabilities made the comments about the Claimant’s memory. Mr Balcombe accepted in cross examination that he did not ask Ms. Ford any question about the belittling comments
36. The Claimant then dealt with the contract issue and stated that she had informed Ms. Ford on her first day that she had two weeks leave booked on the 1 April 2016; she told the grievance meeting that Ms. Ford said that **“if she was good they would keep her on”**. She also stated that Ms. Ford informed her that there was a six month probationary period and it never occurred to her that the contract was due to end before the probationary period expired. The Claimant said that she felt “jumpy and nervous” when she was given the amended contract. The Claimant’s union rep said at the meeting that he felt that the issue of a new fixed term contract was direct discrimination because of disability as the contract was issued 2 days after she disclosed her medical condition to Ms. Ford. It was put to Mr Balcombe in cross examination that it was his view that this was ‘entirely coincidental’ and Ms. Ford was not responsible for issuing a new contract at this time and he replied that it was recruitment that sent out the wrong contract and that was why he took the view that it was a coincidence.
37. Mr Balcombe informed the Claimant that her role was funded under an initiative called Resilience and Capacity until the 31 March 2016 and there is a potential for an extension if new funding is received; he stated that the position could only be fixed term and that is what was reflected on the advert. He stated that recruitment issued the wrong contract. The union rep stated that he appreciated the time frames for the role and the budget. This section of the minutes was put to the Claimant in cross examination and she accepted that the role was funded in that way but disputed the length of the contract as she felt there were **“too many inconsistencies”** and felt that they would not go to all that trouble to train someone for a three month contract.
38. The Claimant was taken in cross examination to page 196 of the bundle which was the Vacancy Control Panel form to make the business case for funding for the role. The form was completed by Mr Balcombe in February 2015; the form had to be approved by three different senior managers (paragraph 4 of his statement). Mr Balcombe explained that the funding was for a year and the funds had to be spent in the financial year in which it was allocated and if the post was unable to start for 6 months, the trust would only have funding for the rest of the unexpired period (see paragraph 7 of his statement). He also explained that he was aware of the difficulties in recruiting into this post. Mr Balcombe told the Tribunal in answers given in

cross examination that unspent funding is retained by the CCG at the end of the year. He accepted that the Respondent had not disclosed any documents to explain how the funding worked but stated that this was Ms. Hampson's area of expertise. He explained that the funding from the CCG did not sit within the Trust's budget.

39. The Claimant accepted that this was a fixed term role for one year linked to resilience funding and the application was dated February 2015. It was put to the Claimant in cross examination that Ms. Ford, Ms. Hampson and Mr Balcombe all stated that the contract terminated on the 31 March 2016. The Claimant confirmed that she was not suggesting that there was a conspiracy and did not provide any evidence to suggest that their evidence was untrue, she confirmed that this was a matter for the Tribunal to decide. It was put to the Claimant in cross examination that the contract was due to start on the 1 April 2015 but they had been unable to recruit into the role although the Claimant did not accept this when put to her, the Tribunal were informed by Ms. Ford that they had been unable to recruit into the role prior to the Claimant's appointment. Ms. Ford told the Tribunal that she saw this form around the time of the grievance hearing in February 2016; she accepted that nowhere on this form did it state that the termination date of the contract was the 31 March 2016.
40. The Claimant told Mr Balcombe that the outcome she was looking for was an apology and an admission that **"this was discrimination"**. She also stated that she had lost faith in Ms. Ford and she could not return to that office.
41. Following the grievance meeting the HR manager Ms. Wesley emailed another person in HR on the 8 January 2016 (see page 135) asking for options in terms of outcome, despite the fact that no investigations had yet been carried out. The email stated that the Claimant was looking for an apology and an admission that discrimination had occurred but she stated that **"I feel we can show that she was not in fact discriminated against..."**. She asked whether the correct outcome was to try and repair the relationship or to try and redeploy the Claimant. Mr Balcombe was taken to this email in cross examination and it was his view that she was simply seeking advice. The Tribunal accept the evidence of Mr Balcombe that this was an email seeking advice and assistance and the view expressed by Ms. Wesley to repair the relationship was corroborated by the approach adopted by Mr. Balcombe to take steps to repair the relationship.
42. Ms. Ford produced a timeline for Ms. Wesley on the 12 January 2016 which was seen at pages 139-140 of the bundle. This was not sent to the Claimant prior to the decision being made.
43. The Claimant was taken to the OH recommendations dated the 18 January 2016 after an assessment carried out on the same day at page 154-5. The report concluded that the Claimant was fit to carry out the role. The Claimant accepted that the reasonable adjustments were identified in this report (of extra time to complete written work and typing and for grip adapters to be provided for uses at work). The Claimant accepted that it was not discriminatory for Ms. Ford to write what she observed however the Claimant felt that the stress came from Ms. Ford and not from the role. The Claimant did not object to the recommendation made by OH for there to be a stress risk assessment.

44. Ms. Ford was interviewed on the 1 February 2016 and the minutes of the meeting were at pages 162-4 of the bundle (the amended version was on pages 177-179). She told Mr Balcombe that on her first day she observed that the Claimant was **“having difficulties doing her role particularly computer work and she was using her left hand to type and use the mouse. She struggled with her hand writing and had difficulty holding a pen”**. She stated that she emailed HR and reported that she was **“having difficulty with her role and I was concerned about working on her own”**. She was advised to have a one to one with the Claimant which she did on the 9 December (which we have found as a fact above at paragraph 9). During this meeting the Claimant disclosed her medical condition and it was then Ms. Ford informed her that she was going to do an urgent OH referral; Ms. Ford stated that the Claimant **“raised no concerns”** at the time. She confirmed that she was told by Mr Godwin on the 9 December that the Claimant had been issued with the wrong contract and she had been asked for further details of the fixed term contract so the correct version could be issued to the Claimant. She could not recall whether she was informed of this before or after she had spoken to the Claimant.
45. It was noted on page 164 of the minutes that Ms. Ford told Mr Balcombe that they discussed the Claimant’s annual leave in April 2016 as a precautionary measure **“in case her fixed term was extended”**. She confirmed that she obtained the end date of the contract by speaking to Ms. Hampson who confirmed it was the 31 March 2016 because it was a resilience post. Mr Balcombe accepted in cross examination that he asked Ms. Ford no questions of the change in termination date of the contract or what she thought it was. He accepted that he did not speak to Ms. Hampson as he was **“aware of the length of contract from Ms. Hampson”**. He confirmed that he did not need to look into this matter as he was aware of the fixed term nature of the contract from the Vacancy Control Form which he completed.
46. The outcome was sent out on the 5 February 2016 see pages 183-184 of the bundle. The Claimant’s grievances were not upheld. He concluded that the referral to OH was a supportive measure and there was no evidence that Ms. Ford had breached any guidelines or policies when addressing health issues with her. He concluded there was no evidence of direct discrimination. Mr Balcombe told the Tribunal in answer to its questions that he had sent OH forms without the signature of the employees many times, he implied that the requirement for the form to be counter signed by the employee was regularly departed from.
47. Mr Balcombe concluded that the two events (her disclosure of her medical condition and the issue of a fixed term contract) were coincidental and not linked. He also concluded that as the post was resilience funded and it ran from the 1 April to the 31 March; recruitment sent out the wrong contract in error and he apologized for that error. However, he concluded that the Claimant was aware at all times that this was a fixed term contract and the change in contractual terms was required to correct an administrative error. He told the Tribunal in answers to cross examination that Ms. Ford did not issue the contract and it was sent out in error, there was no discrimination, he also disputed that Ms. Ford had any input into the termination date of the contract as it was his evidence that this was for the CCG. Mr Balcombe asked to arrange a date for her to return to work and recommended that a

mediation was set up to support her and Ms. Ford working together in future. It was put to the Claimant in cross examination that they were genuinely trying to resolve the situation however the Claimant replied that what she required was an **“apology and recognition of wrongdoing would be a proper solution, otherwise I wouldn’t be sitting here (in Tribunal)”**. There was no evidence before the Tribunal that the department responsible for issuing contracts had knowledge of the Claimant’s disability and there was no evidence that Ms. Ford had reached any agreement with recruitment (or with Ms. Hampson) about the termination date.

48. The Claimant was asked in cross examination whether the failure to uphold her grievance was discrimination and she replied that she could not answer and she did not know why they made the decision. The Claimant could provide no evidence to show that the grievance outcome did not go in her favour because of her disability or for a reason related to her disability. She accepted that Mr Balcombe took the matter seriously and did not brush it under the carpet. The Tribunal find as a fact that Mr Balcombe treated the grievance seriously and reached an outcome focused on building relationships with a view to the Claimant returning to work and repairing the relationship with Ms. Ford. This was consistent with the view put forward by Ms. Wesley. Although the Tribunal accept that he could have conducted a more detailed investigation on the facts, this did not suggest, and the Claimant has provided no evidence to suggest, that his failure to conduct further investigations was less favourable treatment because of her disability or for a reason related to her disability. The Tribunal also noted that this allegation was not pursued at the appeal by her trade union rep. We also conclude that a procedural inadequacy in the course of a grievance process cannot be equated with an act of discrimination. Although it has been suggested to us by the Claimant in closing submissions that an unfavourable outcome of a grievance can be said to be because of Ms. Ford’s assumptions about the Claimant’s ability to carry out the role, this was not supported by any evidence before the Tribunal. The Claimant’s grievances were distinct from the assertions made by Ms. Ford in the OH report and there was no evidence that Mr. Balcombe acted in a discriminatory manner in the conduct of the grievance or in the outcome reached.
49. The Claimant appealed the outcome of her grievance and this was seen at pages 193-4 of the bundle dated the 8 February 2016. The Tribunal were also taken to page 191. The appeal was on the grounds that she was not allowed to see the OH referral form produced by Ms. Ford and she described the contents as being “extremely inaccurate”. She also noted that the referral form stated that her contract was for a fixed term of one year however she was provided with a contract that terminated on the 31 March 2016. She stated that she had disclosed her disability on the 9 December and her contract was changed on the 15 December 2015. It was her understanding that **“fixed term generally means one year”** and she had no reason to suspect that it would be shorter; however, this was an assumption made by the Claimant and not supported by any evidence before the Tribunal. She also complained that no mention was made of Ms. Ford’s behaviour in the outcome letter and attached what she described as a contemporaneous note.
50. The Tribunal were taken to the email dated the 2 March 2016 at pages 201A-B which confirmed that the CCG had approved continuation funding for a number of the resilience funded posts, including the Claimant’s. The Tribunal

were taken to the sentence in the email which stated that **“the intention is for all of the above to go into baseline budget for the 2016/7 contract”** and it was put to the Tribunal that this meant that the funding was for a permanent post. The Claimant was taken in cross examination to this document and she accepted she had been told by Ms. Hampson (see below) that they had permanent funding for the post but the Claimant said that by the appeal stage she felt it was too late and she was unhappy that she would have to re-apply for the role. The Claimant denied that it was presumed she would get the role as she said that it was possible that someone else would get the post.

51. The appeal was conducted by Ms. Hampson and the Claimant was called to a grievance appeal meeting on the 8 March 2016 (see pages 202-6). It was put to Ms. Hampson in cross examination that she was not impartial because she had previously spoken with Ms. Ford about the end date of the Claimant's contract but she denied this saying they spoke about the end date of resilience funding and therefore the end date of all roles funded in this way. Ms. Hampson confirmed in cross examination that the person who decides on the length of contract is at Director Level (Deputy Finance). Ms. Hampson stated that she was impartial and the issue was about **“changing the end date after she disclosed her MS.”** Ms. Hampson confirmed that there were no documents that could attest to the contract ending on the 31 March. In re-examination Ms. Hampson told the Tribunal that if the funding had ended, the post could not be extended because this would be a matter for Director level at the Trust. The Tribunal find as a fact that Ms. Hampson was impartial as there was no evidence that she had any previous dealing in relation to the matters before her (i.e. in relation to Ms. Ford's behaviour to the Claimant and the Claimant's claim that she had suffered discrimination).
52. During the hearing, Ms. Hampson informed the Claimant that they had received confirmation that they had permanent funding for her post and the union rep indicated that he felt that this was 'great news' but asked about how the management structure would be managed in the interim. This is when mediation was discussed and alternative management for the Claimant would be in place during the probationary period.
53. The Tribunal noted that after third adjournment in the grievance appeal hearing (page 205) the Claimant was informed that the outcome was that the Claimant would be reinstated back into her role **“with all the caveats”** and they would **“keep the probation period”**, the Claimant did not object to having a probationary period; it was noted by the Tribunal that all parties agreed that there was a standard 6 month probationary period and the Claimant had only worked in the post for 8 days. It was noted that after the decision was delivered Ms. Hampson stated that she **“genuinely did not believe there was any intention by PF to discriminate against you but I accept that was how it was received. That's behaviour we can't have and will need to work on”**. The Tribunal conclude that this reflected that the Claimant's complaint of discrimination was considered and taken seriously and although it was not upheld, measures were put in place to address the Claimant's concerns and to improve the relationship. The Claimant was asked by Ms. Hampson in the appeal hearing what she considered to be her ideal induction and the Claimant was asked to email her with suggestions. She accepted in cross examination she did not provide a response to this question.

54. Ms. Hampson was taken in cross examination to the minutes of the appeal hearing at page 203 of the bundle where the Claimant refers to feeling harassed and belittled and to the treatment being **“horrificing and destroying”**. It was put to Ms. Hampson that the comments were an issue for the Claimant and she accepted that she didn’t go into it but she **“accepted that there was a conversation where the Claimant felt like that”**.
55. It was put to Ms. Hampson in cross examination that part of the Claimant’s appeal was that the OH referral was inaccurate; Ms. Hampson did not accept that it was inaccurate but accepted that this was the Claimant’s view. Ms. Hampson accepted that she conducted no investigation into this matter. She told the Tribunal that not all managers obtained the employees signature on OH form and stated that she was not condoning this practice. She accepted in cross examination that if an OH form was found to be inaccurate and had not been shown to the employee concerned, that could be offensive.
56. The outcome of the grievance appeal confirmed that they looked into **“getting an external mediator as we feel this is the best way forward”**. Ms. Hampson stated that Ms. Ford would **“stay as manager for the service for the foreseeable future. We can put in alternative management during the probation period but it’s PF’s team. You will be provided with someone different for supervision. We can’t take you out of the team”**. Ms. Hampson was asked about this in supplementary questions and she replied that she accepted that the relationship needed working on and that is why she put in buffer line management. The Claimant was asked in cross examination about this and she did not feel this addressed her concerns because Ms. Ford would still be in the office and **“she may come in to do some work”** and would still be based in the same office as her.

Grievance Appeal Outcome Letter

57. The outcome was in a letter dated 22 March 2016 at pages 207-9 of the bundle. In relation to the Claimant’s complaint about the wording of the OH report, she concluded **“I understand your feelings and perception on how this was managed, but I am satisfied that it was not Paula’s intention to discriminate against you in any way”**. She confirmed that the Claimant would be reinstated back into her role, keeping the probationary period and appointing a mediator. The Claimant was to have an interim alternative manager to support her during the probationary period and she would be provided with an alternative person to conduct supervision.
58. The Claimant was taken to the outcome letter to page 209 where it was stated that Ms. Hampson would ask Ms. Ford to apologise to the Claimant for the confusion caused arising out of the misunderstanding over the length of her contract which led her to feel discriminated against and it was put to the Claimant in cross examination that this showed the Respondent took it seriously and she accepted that that but she could not understand why she was not told from the outset. The Claimant was asked why she maintained that this finding was made due to her disability and she replied **“the date was suspicious, why wasn’t I told before, If I was told at the beginning I wouldn’t be here”**.

59. Ms. Hampson in cross examination accepted that the induction was insufficient and this was reflected in the outcome letter at page 209 where she stated that she did not feel that the Claimant received proper support and **“if you return, I will ensure you have a full induction/probation to support you in undertaking your role”**.
60. The Claimant in her statement at paragraph 27 stated that the grievance was further harassment and perpetuated an intimidating and hostile environment; the Claimant was asked about this in cross examination and she was not sure who wrote this paragraph in her statement, but told the Tribunal that her concern was that no one acknowledged the discrimination and **“no one said you may have a point”**. She accepted that she did not feel harassed during the process but said she did not do it for fun and **“she did not want anyone else going through what I went through”**. She also accepted that she did not feel that appointing Ms. Hampson was an act of harassment and she did not feel that the appeal outcome was an act of harassment.
61. The Claimant was taken to page 215 of the bundle which was her email of the 23 April 2016 sent to the Respondent after her return from holiday. She stated that she appeared to be in “limbo land” and she referred to her last unsigned contract that ended on the 31 March 2016 and was awaiting news from the Respondent and from her union. The Tribunal conclude that this email was consistent with the Tribunal's view that the contract terminated on the 31 March 2016 by effluxion of time and this was the view of the Claimant. This was also consistent with much (but not all) of the evidence before the Tribunal.
62. The Claimant was taken to this email and she told the Tribunal that she felt that if they wanted to keep her they would have sent her a new contract. In reply to this the Respondent wrote on the 25 April 2016 at page 210 of the bundle asking the Claimant to make contact with them to confirm her decision regarding her employment with the Trust as it was noted that the Claimant had not accepted the offer made in the grievance appeal hearing to be reinstated into the position on a permanent basis. The letter confirmed that she would be reinstated back into her role “with all the caveats” and putting in place mediation between her and Ms. Ford. The letter went on to state that if they did not hear from her by the 3 May 2016, the Respondent would review her continued absence as implying that she intended to resign or have resigned her position. She confirmed she did not reply to this letter as she had received conflicting advice from the union and her solicitor. The Tribunal find as a fact that although reference to reinstating the Claimant appeared to be inconsistent with our finding that the contract terminated on the 31 March 2016, this was due to the Respondent's continuing confusion as to the Claimant's contractual status at the date the letter was written.
63. The Claimant replied to this letter by an email dated the 27 April 2016 page 215A stating **“As I am not happy with the outcome, I am awaiting to hear from ACAS and Union solicitors, to see if I have a case for discrimination and therefore, Tribunal”**.
64. The Claimant told the Tribunal in answers to cross examination that her contract came to an end by Ms. Hampson's letter of the 22 June 2016 at page 217 which stated that her last day of service would be the 27 April 2016 which was the last day she made contact with them. She contended that she

was dismissed but she stated that it was never her intention to complain about **“how I was dismissed it was the way I was treated”**. The Tribunal find as a fact on all the evidence that the Claimant’s contract terminated on the 31 March 2016 by way of effluxion of time. Although this conclusion is inconsistent with the Claimant’s view that her last day of service was the 27 April 2016 (or as stated above in the issues that it was the 22 March 2016), we conclude that as there was no contract in force after her fixed term contract had terminated. The Claimant did not accept the offer of reinstatement therefore the termination date of the 31 March remained the termination date. Ms. Ford told the Tribunal in supplementary questions that the role was still vacant at the date of the hearing.

The Law

Equality Act 2010

Section 13 “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”

Section 15 “A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B’s disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim”.

Section 19 “A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s”

Section 26 “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”

Closing Submissions

These were oral and in writing and the written submissions were as follows (the oral submissions were in reply and were taken into account by the Tribunal but will not be replicated in this decision):

(a) The Respondent’s submissions **Harassment**

- 65.** Harassment is unlawful pursuant to section 26 of the EqA if it has the purpose or effect of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.
- 66.** The test of whether conduct has the specified effect is objective. The Claimant’s perception is relevant, but not conclusive. A Tribunal will consider the Claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have the specified effect (section 26(4) EqA).

67. Harassment is more than upsetting or unwanted conduct. In *Land Registry v Grant* [2011] Elias LJ noted that when considering whether conduct had the relevant effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment:

"Tribunals should cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught by the concept of harassment."

Variation of Contract

68. If an employer imposes radically different terms of employment, it may be that the employer has terminated the original contract and replaced it with another (see *Hogg v Dover College* [1990] ICR 39, and *Alcan Extrusion v Yates* [1996] 327).

Constructive Dismissal

69. This is a case in which the Claimant claims her constructive dismissal was an act of discrimination pursuant to section 39(7)(b)(2). The Claimant claims she resigned in response to a breach of the implied term of trust and confidence. The fact that an employer had committed unlawful discrimination does not necessarily mean that this conduct was a breach of the implied term (*Ahmed v Amnesty International* [2009] ICR 1450). The relevant legal test for constructive dismissal is one of contract. The Employment Tribunal should determine whether the employer's conduct is likely to destroy or seriously damage the relationship of trust and confidence which should exist between employer and employee (*Baldwin v Brighton and Hove City Council* [2007] ICR 680).

PROVISION OF NEW CONTRACT

70. This is a case in which the Respondent readily accepts that it made several errors. In particular, the Claimant was not informed, at either interview or offer stage, that her contract was due to terminate on 31 March 2016. This was an unfortunate error, and was understandably confusing and upsetting for the Claimant. The Respondent denies, however, that the Respondent's conduct was in any way connected to the Claimant's disability.
71. The Claimant relies entirely on circumstantial evidence. She notes the coincidence in timing and the failure of the Respondent to mention the claim before. In contrast, the Respondent's witnesses were able to give an authoritative account of why the Respondent had always envisioned that the Claimant's contract would terminate on 31 March 2016.
72. The evidence of Mrs Ford, Mr Balcombe and Ms. Hampson was that the Respondent had envisioned that the Claimant's contract would end on 31 March 2016, because that was the date of termination of the resilience funding. The Respondent's witnesses explained that the funding for the position ran for one year from 2015/16. Funds had to be spent by the end of the relevant year. The Tribunal is referred to the vacancy panel control form,

originally completed by Mr Balcombe [196] [LB/5]. The form, completed long before the Claimant was even interviewed by the Trust, noted that the position was a “STC” (short-term contract) and “*resilience funding linked to admission and DC team.*” Mr Balcombe says he completed the form in February 2015 [LB/5]. The form is dated “110215” (11 February 2015). This is entirely consistent with a role for which funding started on 1 April 2015.

73. When considered in detail, there was not a clear correlation between the Claimant’s disclosure of her MS. and the provision of a fixed-term contract. The change of contract was only prompted by the intervention of Andrew Godwin in HR [87A]. There is nothing to suggest that there would have been any change to the Claimant’s contract at all if the matter had not been flagged by Mr Godwin. The Claimant’s position can only be sustained if the Tribunal accepts that Mrs Ford, Mr Godwin, Mr Balcombe and Ms. Hampson all connived to vary the length of the Claimant’s contract. This is extremely unlikely.
74. In cross-examination, Counsel for the Claimant put that while the Respondent Trust had never intended to give the Claimant a *permanent* contract, a decision had been made to *reduce* the length of the Claimant’s contract (from a fixed-term contract of unspecified duration) once the Claimant disclosed her disability. Much was made of the fact that the Vacancy Control Panel Form referred to a “STC (short-term contract)” and not the relevant date of termination. There is nothing to suggest the Respondent intended to give the Claimant a fixed-term contract of any duration other than a contract ending on 31 March 2016.
75. On the other hand the Respondent’s witnesses have been consistent that the Respondent intended to give the Claimant a fixed-term contract terminating on 31 March 2016. Mrs Ford, Mr Balcombe and Ms. Hampson did not just consistent evidence on this point at hearing. They gave a consistent account of the reason for the change in contract length at the time. Mrs Ford explained that the Claimant’s post was “*only ever until 31/03/2016 as it is a resilience budget post*” in her notes for the grievance investigation meeting [166]. Mr Balcombe explained the reason for the shortening of the Claimant’s contract in the grievance meeting [131]. Ms. Hampson explained the reasoning in the grievance appeal meeting [204].
76. There is other corroborating evidence. Mrs Ford’s own position was resilience funded and was also due to expire on 31 March 2016 [PF/31]. The Claimant worked in the same team and her position was funded on the same basis. It is extremely unlikely that the Respondent had envisaged providing her with a different length of contract.
77. The Respondent also relies on the email dealing with extension of funding [201A]. The email deals with allocations, including allocation for the “*Admission and Discharge*” team in which the Claimant fell. The email, dated 2 March 2016, confirms that the CCG has approved continuation by way of funding for the 2016/17 financial year. This is entirely consistent with the previous funding ending at the end of the 2015/6 financial year (31 March 2016). The email stated that the funding for the “*Admission and Discharge team*” would go into the permanent budget. Ms. Hampson explained in evidence that this mean that the position would be permanently funded.

78. Mrs Ford accepted that she had made a note of the Claimant's holiday on 1 April 2016. In cross-examination the Claimant's Counsel suggested she would not have done this, had she known the Claimant's contract was due to end on 31 March 2016. Mrs Ford's evidence was that she had made a note of the date, because the contract might be extended [PF/9]. The funding for the Claimant's position was, of course, extended. Mrs Ford's explanation is entirely consistent with the way she was managing the service at this point. There was of course no guarantee at this point that Mrs Ford's own post as Systems Capacity and Flow Manager would be extended beyond 31 March 2016 [PF/31].

DETRIMENTS/HARASSMENT

How did the Claimant's contract terminate? Did the Respondent dismiss the Claimant? If so, when? Did the Claimant resign? If so, when?

Direct Discrimination – section 13 of the Equality Act 2010

79. The Respondent's submissions in respect of each allegation of direct discrimination is as follows:

Issue 3(a)(i): Mrs Ford said she was referring the Claimant to Occupational Health

80. The Claimant has disclosed to Mrs Ford that she suffered from MS. The Claimant accepted in evidence that she objected to the content of the Occupational Health referral form, but not the fact of the referral. Referral to Occupational Health is not less favourable treatment for the purposes of section 13 EqA.

Issue 3(a)(iii) Mrs Ford said to the Claimant that she could not see her computer screen well enough

81. In her witness statement the Claimant said Mrs Ford "*said she could not see the screen well-enough*" [C/9]. The Claimant accepted in cross-examination that Mrs Ford has asked if she could see the computer screen well-enough. Mrs Ford agrees that she did so. The Claimant accepted that she was squinting at the screen, but said that there could be multiple, non-discriminatory reasons why she was doing so.
82. Mrs Ford agreed. She said she did not know why the Claimant was squinting at the screen, but raised the issues as a responsible manager. This is self-evidently an appropriate issue for a line manager to raise. The Claimant accepted in evidence that Mrs Ford had actually shown her how to make the screen bigger. Mrs Ford's conduct was not less favourable treatment and was not a consequence of her disability.

Issues 3(a)(iv) and (v): Mrs Ford asked the Claimant if she had memory problems/cognitive problems

83. The Claimant says Mrs Ford made these comments. Mrs Ford denies that she did. The Tribunal is asked to prefer Mrs Ford's evidence.

84. This is a case in which both parties addressed the matter at the time. The Claimant alleged that Mrs Ford had made comments about her memory in her grievance. Mrs Ford specifically denied making comments about the Claimant's memory at the grievance investigation meeting [178]. The Tribunal will have to consider the quality of the evidence given by the Claimant, and Mrs Ford, and the plausibility of the two accounts.
85. Mrs Ford's evidence throughout has been consistent. She has been prepared to admit that she asked the Claimant in passing whether she had been unable to do a previous job, working for the Medical Assessment Unit (MASU) because of her disability [PF/18] (see paragraphs 27 to 29 below), when this might have appeared unhelpful to the Respondent.
86. The Claimant was told about the fixed-term contract shortly after she had disclosed her disability. It is easy to see how this might have given rise to suspicion on the Claimant's part. The Claimant said on several occasions in the course of cross-examination that had she been told that the contract was fixed-term in the first place, she would not have brought Employment Tribunal proceedings. The Claimant made no complaint about Mrs Ford's conduct until after she was told about the fixed-term contract. It is easy to see how the provision of a fixed-term contract might have coloured her memory and account of Mrs Ford's comments.
87. The Tribunal is referred to the list of issues. In the Claimant's claim she seeks to argue that almost every interaction Mrs Ford had with the Claimant concerning her disability constituted an act of discrimination. It was noticeable that the Claimant did not sustain all of these allegations in cross-examination. For example, the Claimant did not seek to argue that the *fact* (as opposed to the content) of her referral to Occupational Health constituted discrimination. She withdrew the allegation, made in her witness statement, that the *reasons* for the Occupational Health referral were "*highly prejudicial*" [PF/11].
88. The Claimant accepted various general statements put to her in cross-examination concerning an employer's responsibility to ensure an employee's well-being at work. She was less willing to accept that Mrs Ford might have a legitimate interest in ensuring her well-being at work. Her initial response, to questions about the appropriateness of Mrs Ford asking if she could see the screen well enough, was to say Mrs Ford should not have raised it, but should have given her time. She was asked about the appropriateness of a line manager asking if she could manage the steps into the building. She did not accept this was appropriate when there were no internal stairs to climb. The Tribunal is referred to the Claimant's refusal to accept the reasonableness of Mrs Ford's Occupational Health referral (see paragraphs 30 to 35 below).
89. The parties agree that Mrs Ford suggested that the Claimant took notes to help her learn about the computer systems. Mrs Ford said this had nothing to do with the Claimant's disability. She was simply suggesting ways the Claimant might learn the processes that formed part of her role. The Claimant's own evidence was that the systems were difficult to understand. The Claimant may well, in retrospect, have read more into Mrs Ford's comments than was actually there. This is the most plausible explanation of the Claimant's allegations about these comments about memory and cognitive ability. Mrs Ford herself suggested this at the time. In the grievance

investigation meeting on 1 February 2016 Mrs Ford said: "*I made no comments about her memory although I did suggest she make notes as there are a lot of processes in screening*" [178]. The comment did not constitute less favourable treatment and it was not because of the Claimant's disability.

Issue 3(a)(ii): Mrs Ford suggested to the Claimant that she had been unable to do her previous job because of her multiple sclerosis

90. At paragraph 18 of her witness statement Mrs Ford said the following: "*I recall that at some point during the time she worked at the Trust, Miss Dunn mentioned that she had previously worked at the Medical Assessment Unit (MASU) but had left some time ago. I may have asked in passing if she was no longer able to do that role because of her condition.*" The Claimant's immediately preceding role was a bank role (and not the role at MASU), but it is accepted that Mrs Ford asked the Claimant if she was no longer able to do a previous role at MASU because of her disability.
91. This comment did not constitute less favourable treatment. It is an obvious, but important point, that the Claimant's own perception, or anyone else's perception, of whether a comment is less favourable treatment, is relevant, but not determinative. The Tribunal must approach the question of whether a comment constitutes less favourable treatment objectively.
92. This was a question, but not a statement by Mrs Ford. The Claimant has made no allegation that it was said unkindly or in any particular tone of voice. The Tribunal should be wary of holding that any passing conversation in the work place about the effect of disability on the Claimant's work constitutes actionable disability discrimination.

Issue 3(b): The Claimant says the entire contents of the comment section on the Occupational Health referral form constitute discrimination.

93. The Claimant says the entire contents of the Occupational Health referral form constitute discrimination [89]. The Claimant's evidence was that the form included "*discriminatory comments and assumptions*" [C/9]. The Claimant was asked in cross-examination what comments she considered constituted discriminatory assumptions. She referred to the comment which stated she had "*difficulty mobilising and had weakness in her right arm.*"
94. A referral to Occupational Health suggests, by its very nature, that a manager is not making assumptions but seeking advice on the effect of any medical condition and any appropriate reasonable adjustments. In section F, Mrs Ford asked if the Claimant was fit to carry out the full range of duties relating to the normal job [89]. This is a standard question to Occupational Health. It does not constitute less favourable treatment. Mrs Ford asked whether the Claimant was covered by the Equality Act 2010, and asked if there were any aids of equipment, which might assist [90].
95. It is not clear if the Claimant argues that Mrs Ford could not have observed what she recorded on the referral form. In cross-examination, the Claimant accepted that Mrs Ford had seen her lean over to move the mouse. The contents of the Occupational Health report suggest that the Claimant said as much to Joyce Blundell (the occupational health advisor) [154]. Likewise the

Claimant appears to have informed Ms. Blundell that the mobility could be affected, causing her to limp, when she was particularly tired. In cross-examination she accepted only that Mrs Ford might have seen her being a bit slow on the stairs outside the Respondent's office.

96. It is not an assumption, and it is not less favourable treatment, for a line manager to write down something they have observed on an Occupational Health referral form. Mrs Ford, in the referral, had said it appeared to her the Claimant had difficulties using the mouse in her left hand [89]. Ms. Blundell did not consider that the Claimant was likely to have difficulties using the computer mouse [154]. This does not mean that Mrs Ford was wrong to record her observations or that Mrs Ford was wrong to make the referral. As Mrs Ford said, it is for the Occupational Health advisor to make any relevant recommendations concerning an employee's ability to carry out the role and any necessary reasonable adjustments.
97. In any case, this is not a case in which the Occupational Health advice would have been of no purpose. Ms. Blundell recommended that the Claimant use a grip on her pen [154]. She also recommended that the Claimant be allowed extra time to complete written tasks and typing when necessary [155]. The other section of the form, which the Claimant said in cross-examination constituted less favourable treatment was the statement: "*Sharman has already highlighted to me that when she becomes stressed this can exacerbate her condition*" [89]. Again Ms. Blundell recommended positive action suggesting that the Respondent carried out a stress risk assessment.
98. The contents of the Occupational Health form were not assumptions, nor did they otherwise constitute less favourable treatment.

Issue 3(c): On 15 December the Claimant's contract was amended so that it had a termination date of 31 March 2016

99. The Respondent agrees the Claimant's contract was amended so that it had a termination date of 31 March 2016.
100. The Tribunal is invited to find as a fact that the Claimant was issued with a new contract, because the issue of the original, permanent contract had been an administrative error. The Tribunal is further invited to find as a fact that the Claimant was given a contract terminating on 31 March 2016, because that had always been the intended duration of the Claimant's contract. The Claimant's contract was resilience funded, and this was the date of the expiry of the resilience funding.

Issue 3(d) In the course of the grievance and grievance appeal process:

- (i) The grievance outcome letter failed to address the allegations of discrimination in the Claimant's grievance dated 22 December;
- (ii) There was no finding in the appeal meeting or appeal outcome letter that the Claimant had been discriminated against;
- (iii) The grievance/grievance appeal did not find that the Respondent had always intended to give the Claimant a 12 month contract;

(iv) The Claimant was told that her contract would be opened up so that others could apply for her role.

- 101.** The grievance outcomes letter did not fail to address the allegations as alleged at issue 3(d)(i). Mr Balcombe's discussions with Ms. Ford included the contract length [162], the induction process [163] and Mrs Ford's alleged comments [163]. Both Mr Balcombe and Ms. Hampson went in to some detail responding to the Claimant's allegations concerning the contract length and responded to the other issues more generally [183 – 185] and [207 – 209]. It is important to view these grievance responses in context. Both Mr Balcombe and Ms. Hampson addressed the Claimant's grievance in a pragmatic manner aiming to encourage her return to work. Both Mr Balcombe and Ms. Hampson offered mediation. In addition Ms. Hampson offered alternative management support and supervision for the Claimant during her probation period.
- 102.** The Respondent accepts, of course, that the Respondent did not uphold the Claimant's grievance and did not find that the Respondent had always intended to give the Claimant a 12 month contract (issues 3(d)(ii) and (iii)). The Respondent does not accept that Mrs Ford's conduct constituted discrimination or that the length of the Claimant's contract was changed because of the Claimant's disability (see paragraphs 18 to 35 and 7 to 15 above). In the circumstances it is unsurprising that the Tribunal did not uphold grievances relating to these issues.
- 103.** However even if the Respondent was wrong in its failure to uphold the grievance, or even if the Respondent did not properly address the Claimant's grievance in the various outcome letters, that does not mean that these failures, on the part of Mr Balcombe and Ms. Hampson as grievance officers, constitutes acts of discrimination.
- 104.** The Tribunal should not ascribe any failures in the grievance process to the Claimant's disability. The Claimant in cross examination was unable to point to any feature of the grievance process, which suggested that Mr Balcombe and Ms. Hampson were motivated by the Claimant's disability.
- 105.** The manner in which the grievance officers approached the grievance suggests entirely the opposite. Mr Balcombe ensure that Mrs Ford had a copy of the grievance. He discussed the issues with her [162 – 163] and also considered timelines from Mrs Ford [139 – 141] and Val Flowers in HR [132A – 132B]. This does not suggest that Mr Balcombe was seeking to brush the Claimant's grievance under the carpet. He spent time responding to the Claimant's allegations.
- 106.** Mr Balcombe was keen to encourage the Claimant's return to work and undertook to arrange mediation. This was despite the fact that, at the time of the grievance outcome letter (5 February 2016), the Claimant was on unauthorised absence and was not being paid. The Respondent had not yet received confirmation that the funding for the Claimant's contract had been extended beyond 31 March 2016. These are not the actions of someone consciously or subconsciously motivated to dismiss the Claimant's grievance on account of the Claimant's disability.

- 107.** The Respondent makes broadly the same submissions in relation to Ms. Hampson. Ms. Hampson offered to arrange external mediation, and to arrange for alternative management support and supervision during the probation period [183 – 185]. Significantly she encouraged the Claimant to return to work, informed the Claimant that the funding had been extended and gave evidence that she fully expected that the Claimant would be successful in her application for the permanent post [AH/19]. Again these are not the actions of someone motivated consciously or subconsciously by the Claimant's disability. On the contrary, Ms. Hampson was taking practical and constructive steps to resolve the situation.
- 108.** The Respondent accepts that the Claimant was told that the role would be opened up to other applications. This was not less favourable treatment because of the Claimant's disability. Ms. Hampson was advised to take these steps by HR [AH/17]. The Claimant's union representative agreed with this approach [204]. Mrs Ford is another employee whose post was resilience funded. Her post was opened up for internal applications for one weeks, and she applied and was offered the permanent post [PF/31].

Discrimination arising from a disability – section 15 of the Equality Act 2010

- 109.** The Claimant says that the “something” arising from her disability for the purpose of the section 15 EqA claim was that Mrs Ford was critical of her abilities and/or assumed the Claimant was unable to carry out her role (issue 8). The Respondent denies this. The submissions at paragraphs 18 to 35 above are repeated.

Issue 6(a): The Claimant says the contents of the Occupational Health referral form constitute unfavourable treatment because of something arising from a disability.

- 110.** The Claimant repeats the submissions at paragraphs 30 to 35 above with the relevant modifications. The contents of the referral form did not constitute unfavourable treatment and the contents were not because of any criticisms or assumptions on the part of Mrs Ford.

Issue 6(b): Mrs Ford refused to allow the Claimant to see the Occupational Health Referral Form when she requested to do so.

- 111.** Mrs Ford did not carry out the alleged treatment. The Claimant asked to see the form in the meeting Mrs Ford had with the Claimant on 15 December 2016 [91]. Mrs Ford did not refuse to provide the form. She simply did not have time to do, as the Claimant did not come into work after 17 December 2016. The Claimant requested the form in the course of the grievance process, and was provided with it.
- 112.** Mrs Ford was cross-examined on her failure to ask the Claimant to sign the form. Her evidence was that she did not usually ask employees to sign the Occupational Health form. Mr Lee agreed that many managers did not ask employees to sign referral forms to Occupational Health. The form itself says that only in “*exceptional circumstances*” will a form be accepted unsigned [88 – 90]. The evidence of the Respondent's witnesses was that the language of the form simply did not represent the practice in the

Respondent Trust. The Tribunal should not infer that Mrs Ford's failure to provide the form in advance of submission or Mrs Ford's failure to ensure the Claimant signed the form were something arising from the Claimant's disability.

Issue 6(c): The Claimant's contract was amended on 15 December 2015 so that it had a termination date of 31 March 2016

113. The Claimant refers to paragraphs 7 to 15 above. The Claimant's contract was not amended because of something arising from the Claimant's disability.

Issue 6(d): The Respondent did not uphold the Claimant's grievance at first instance or appeal stage

Issue 6(e): The Claimant was told at the conclusion of her grievance that she would continue to be managed by Paula Ford

Issue 6(f): The termination date in the Claimant's contract remained 31 March 2016 following the outcome of the grievance

114. The Respondent notes that Ms. Hampson said she would put in alternative management support for the Claimant following the probation period [208].
115. The outcome of the Claimant's grievance was not connected to any criticisms or assumptions of Mrs Ford arising from the Claimant's disability. The Claimant repeats paragraphs 38 to 45 above with the necessary modifications.

Indirect Discrimination – section 19 of the Equality Act 2010

116. The Respondent did not apply a PCP of failing to acknowledge their own shortcomings in respect of disability discrimination. There has been no evidence in this case as to how the Respondent approached or would approach any other allegation of disability discrimination brought by any other employee. The indirect discrimination claim must fail on this point alone.

Harassment – section 26 of the Equality Act 2010

Issue 13(a): Mrs Ford suggested to the Claimant that she had been unable to do her previous job because of her multiple sclerosis

Issue 13(b): Mrs Ford said to the Claimant that she could not see her computer screen well-enough

Issue 13(c): Mrs Ford asked the Claimant if she had memory problems or cognitive problems

117. Mrs Ford did not make the comments at issue 13(c). It is accepted she made the comments at issues 13(a) and (b), but these do not constitute harassment. Paragraphs 18 to 29 above are repeated with the necessary modifications.

Issue 13(d) The Claimant says the contents of the referral form constitute harassment.

118. The contents of the referral form do not constitute harassment. Paragraphs 30 to 35 above are repeated with the necessary modifications.

The Occupational Health referral was filled out by Mrs Ford for the purpose of seeking Occupational Health advice. In terms of its effect, the Respondent denies that viewed objectively the contents would have had such an effect so as to meet the definition of harassment.

Issue 13(e): The Claimant makes various allegations of harassment relating to the Claimant's grievance

119. These allegations are lengthy, and it is not necessary to reproduce them within these submissions.
120. Some of the allegations appear to be nothing more than procedural criticisms of the management of the grievance (issues 13(e)(i) – (iv)). The Respondent does not accept these procedural criticisms, but in any case procedural flaws do not meet the threshold for harassment. The Claimant accepted as much in cross-examination.
121. Some of these allegations deal with the outcome to the Claimant's grievance (issues 13(e)(v)-(ix). The Respondent repeats the submissions are paragraphs 38 to 45 above with the necessary modification. A decision in respect of the Claimant's grievance is not *itself* necessarily related to the Claimant's disability. In any case the Claimant was not, by her own choice, in the work place when she received the grievance outcomes. It is difficult to see how a rejection of the Claimant's grievance meets the threshold for harassment.
122. The allegation at issue 13(e)(x) is difficult to understand. The issue is: "*The Respondent accepted in the appeal outcome letter that an "inconsistent timeline" was due to the Claimant's confusion. The Claimant has given no evidence as to this alleged instance of harassment.*"

DISMISSAL

The original contract

123. The Respondent did not intend to provide the Claimant with a permanent contract on 4 December 2015. However the Respondent accepts that the original contract was, in law, a permanent contract [73 – 80].

Effect of the revised contract

124. The Respondent's position is that following the provision of the revised contract dated 15 December 2015 the Claimant's contract terminated on 31 March 2016.
125. The Respondent accepts that the Claimant made it clear that she did not agree to the proposed variations. Nevertheless the Respondent argues that following the provision of the new contract the Claimant's employment was terminated on 31 March 2016. There are three alternative "routes" to this outcome, which the Respondent argues in the alternative. The first analysis is that the new contract was imposed by the Respondent on the Claimant.
126. Alternatively by providing the new contract the Respondent in fact gave the Claimant notice of termination of the original contract. The Respondent

was, in effect, informing the Claimant that his original contract of employment would terminate on 31 March 2016. The only difference between the two contracts is paragraph 3.5 dealing with the Claimant's fixed-term [74]. This did not constitute a breach of contract. The Claimant's contractual notice period on 15 December 2015, under the terms of the old contract, was one week [68].

127. Finally, and in the alternative, the provision of a new contract constituted a dismissal and imposition of a new contract (per *Hogg v Dover College*), which then terminated by reason of its fixed-term.

128. There is no analysis that is consistent with all the material facts in this case. There appears to have been considerable confusion at the relevant time. However the Respondent's submission that the Claimant's contract terminated by reason of its fixed-term on 31 March 2016 is the most consistent with the parties conduct at the relevant time. Mr Balcombe and Ms. Hampson clearly viewed the Claimant's contract as a fixed-term contract terminating on 31 March 2016 at the time of the grievance process interaction. Ms. Hampson proposed to "*reinstate*" the Claimant into her fixed-term role, before inviting her to apply for the extended permanent contract. The Claimant conduct is not inconsistent with this analysis. She did not have a clear view of her contractual position at the relevant time. The Tribunal is referred to emailed dated 23 April 2016 [215]. Here she refers to herself in limbo land with "*no contract etc. The last (unsigned) finished the 31st March.*"

Dismissal

129. The Claimant has claimed her dismissal was an act of direct discrimination and discrimination arising from a disability (issues 3(e) and 3(g)). The Tribunal will need to consider whether provision of the new contract constituted an act of discrimination. This will depend on the Tribunal's findings as to why the Claimant was provided with the new contract.

Constructive Dismissal

130. The Claimant argues that the original permanent contract provided on 4 December 2016 continued until she resigned by the email 27 April 2016 [215A]. If the Employment Tribunal considers the Claimant's contract original permanent contract continued, the Respondent disputes the Claimant's analysis that she resigned on 27 April 2016. There is nothing in the email dated 27 April 2016 terminating the contract.

131. The Claimant's constructive dismissal case is based on breach of the implied term, as set out at 2(b)(i)-(viii) of the list of issues. In the Claimant's oral evidence she placed particular focus on the fact the grievance outcome did not find that had done anything wrong, and the fact that they hadn't agreed that Ms. Ford needed training. The Claimant's focus, in oral evidence, was on the grievance outcome.

132. The Respondent makes two simple points in written submissions. This is a disability discrimination case. The Respondent is only liable for a constructive dismissal if it is an act of discrimination. This means the Claimant must have resigned in response to a breach of contract which was itself an act of discrimination. Secondly, that not every case of discrimination will necessary

constitute a breach of the implied term. The Respondent will respond further orally, on sight of how the Claimant puts her claim of constructive dismissal.

Time Points

- 133.** The Claimant notified ACAS of a potential claim on 27 April 2016. ACAS issued an Early Conciliation Certificate on 12 May 2016 [1]. The Claimant presented the ET1 on 10 June 2016 [2].
- 134.** Claims relating to acts that took place before 28 January 2016 are, on the face of it out of time. The allegations relating to Mrs Ford's conduct all relate to conduct that took place before 28 January 2016.
- 135.** The Tribunal will need to determine the rest of the Claimant's claims to determine before it can determine whether it is open to the Claimant to argue that the claims concerning Mrs Ford's conduct are in time, as they are part of a continuing act which should be treated as done at the end of the relevant period within the meaning of section 123(3)(a) EqA. Mrs Ford was not an actor in any allegation of discrimination post-dating 28 January 2016.
- 136.** In the alternative the Tribunal will need to determine whether it is just and equitable to extend time under section 123 EqA. It is for the Claimant to say why time should be extended. The Claimant confirmed in cross-examination that she had had union assistance as early as 22 December 2015.

Conclusion

- 137.** The Tribunal is asked to reject all of the Claimant's claims.

The Claimant's Closing Submissions

Direct Discrimination (s13 EqA 2010)

Relevant Law

- 138.** It is possible for an employer to directly discriminate because of some stereotypical assumption about the people possessing the characteristic in question. Per Royal Bank of Scotland plc v Morris UKEAT/0436/10 at ¶133:

"However, the fact that the Tribunal took the wrong route to its conclusion does not mean that the conclusion itself was wrong. We have considered whether we need to remit "issue 3.1" to the Tribunal for reconsideration. We are satisfied that we need not do so. In our view we are in as good a position as the Tribunal to reach a conclusion on the basis of its unchallenged findings of primary fact. The relevant findings are in fact very stark. Mr Arnett made a comment to the Claimant to the effect that he was alleging racial discrimination. Crucially, the Claimant had said nothing to provoke that comment. It must follow that Mr Arnett said what he did as a result of an assumption – or, to use another word, the application of a stereotype: "he is a black employee complaining about his treatment by a white colleague – he must, or at least may, be alleging race discrimination". In our view, on the Tribunal's factual findings, Mr Arnett must have been motivated by some such assumption; and it follows that his comment was made on racial grounds."

- 139.** The subjective motives of an alleged discriminator are irrelevant in determining a claim for direct discrimination. Per O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School [1997] ICR 33 at 47:

(4) In our view, the distinction made by the Tribunal between pregnancy per se and pregnancy in the circumstances of this case is legally erroneous. The Tribunal may have been led to draw such a distinction as a reflection of the perceived subjective motives of the governors advanced by them in their submissions. The 1975 Act requires the industrial Tribunal to decide a case of sex discrimination by having regard to the question whether the treatment complained of was on the ground of sex, not by having regard to the subjective motives of the alleged discriminator. (Consideration of motives is to be avoided.)

Submissions

10th December 2015

- 140.** The Claimant ('C') contends that on 10th December 2015, she was subjected to the following less favourable treatment by Paula Ford ('PF'):

- 140.1. PF suggested that the reason why C had left her previous job was because she was unable to continue because of her MS.;
- 140.2. PF suggested that C could not see her computer screen well enough;
- 140.3. PF asked C whether she had memory problems.;
- 140.4. PF asked C whether she had cognitive problems.

- 141.** There is a factual dispute about what was said by PF during the conversation on 10th December 2015. C's account is to be preferred to PF's:

- 141.1. C's account is supported by her contemporaneous note of the conversation [191]. PF made no such note. It was not suggested to C during XX that her contemporaneous note was fabricated or false.
- 141.2. C's account of PF's comments fits with the tone and nature of PF's comments in the OH referral that she made on 11th December 2015 (see below).
- 141.3. PF's comments towards C on 10th December 2015 were made the day after C had told PF about her MS.
- 141.4. Notably, the first allegation set out above concerning the 10th December 2015 conversation is admitted by PF: PF admits within her witness statement that she asked C whether she had left previous job due to her disability (see paragraph 18 of PF's w/s). PF admitted in XX that she asked C this question, suggesting it was merely a 'passing comment'. She accepted in XX that she had no evidence as to the reasons why C left her previous job and accepted that the comment may have had the effect of humiliating and offending C. C contends that - given that PF had no

evidence about why C left her previous job – the question could have only been the product of an assumption that PF had made about C.

141.5. C was a straightforward and credible witness under XX. C's credibility and truthfulness is evidenced by the fact that in December 2015, C wrote to R volunteering the fact that she had been overpaid and asking about how she should repay the monies given to her in error. See [126]. By contrast, it is submitted that PF's answers during XX were at times, evasive and defensive, with PF often suggesting at convenient points that she couldn't remember the content of past conversations.

142. The reason why C was subjected to the less favourable treatment listed above was because of her disability:

142.1. PF's comments demonstrate that she had formed a stereotypical view of C's abilities, which was evidenced again in the OH referral that PF made (see below).

142.2. There is no evidence of other staff – not suffering from MS. – being subjected to the treatment that C experienced. Most likely, staff without disabilities would not have been subjected to the same treatment by PF in that they not have carried a label such as 'MS.' or some other condition, about which PF would have made assumptions.

11th December 2015

143. C claims that the contents of the OH referral form and the process by which it was sent off amounts to less favourable treatment:

143.1. PF's comments within the referral form indicate that she had formed her own clear view of C's ability to do the job [89]:

"...it has become apparent to me [PF] that there are significant difficulties with the role that she [C] is experiencing"

143.2. The referral form reads as a list reasons why, in PF's view, C is not able to do the job. PF does not ask, within her written text in the form, about whether reasonable adjustments are necessary and, if so, which adjustments could be helpful. The focus is on C's ability to do the job, with PF's own view clearly stated.

143.3. PF refused to allow C to see the OH referral form before it was sent off. The form was therefore not signed by C – this, despite the fact that the following is clearly stated at the bottom of the form [90]:

Section F: Consent of individual being referred

This section must be signed by the individual being referred and only in EXCEPTIONAL circumstances will a referral form be accepted unsigned ...

144. The reason why C was subjected to the less favourable treatment listed above was because of her disability:

144.1. PF's comments within the referral form demonstrate that she had formed a stereotypical view of C's abilities.

15th December 2015

145. On 15th December 2015, C's contract was amended so that it had a termination date of 31 March 2016.

145.1. The advertisement for C's job stated that the contract was 'fixed term' but it did not state the end date [50].

145.2. At no point during the interview process was the question of the end date of the contract raised with C.

145.3. C's initial contract was a permanent one; it was not fixed term and did not state an end date [65-72].

145.4. On commencing employment, C was aware that the contract was fixed term but did not know how long the term was for.

145.5. On 9 December 2015 C met with PF and informed her of her intention to take annual leave in April 2016. PF did not raise anything with C about the fact that her contract was due to end on 31/3/2016.

145.6. It was on the morning of 9 December 2015 that C informed PF that she suffers from MS.

145.7. Later that day (9 December 2015), AG emailed PF to ask about the end date of C's fixed term contract so that he could issue a revised, corrected contract. C accepts that the fact that Mr Godwin asked about the end date of the contract that same day was merely a coincidence and was not an act of discrimination.

145.8. On 14 or 15 December 2015, PF informed AG that the end date was 31 March 2016. It is about the choice of this end date that C complains. C contends that the end date was chosen to be 31 March 2016 because of the fact that the C had MS. and/or the assumptions that PF had made about the C's ability to undertake her role.

145.9. On 15 December 2015, AG emailed C a new contract [73–80] with an end date of 31 March 2016 [96].

146. The reason why C was subjected to the less favourable treatment listed above was because of her disability:

146.1. C contends that PF, in discussion with Anna Hampson ("AH"), set an end date of 31 March 2016 because of PF's perceptions about C's disability and its impact on her ability to carry out her work.

146.2. R has stated that C's position was a 'resilience post' for which (so far as R was aware in December 2015) funding would end on 31 March 2016. C accepts that the role was resilience funded but does not accept that the fact that C's job was resilience funded implied that it was required to end on 31 March 2016.

146.2.1. R has provided no documentary evidence of the same. Resilience funding is provided to the Trust by the Clinical Commissioning Group ('CCG'). If there really was a CCG

requirement that the funding for C's role would end on 31 March 2016, one would expect to find that requirement set out in writing.

146.2.2. The evidence that the R *has* provided undermines the suggestion that C's contract was required to end of 31 March 2015. Resilience funding appears to work by way of the CCG allocating certain sums to different teams [201B]. It doesn't specify end dates for different roles within those teams – that being a matter for the Trust to determine.

146.2.3. In her witness statement, AH says as follows: '*On 2 March 2016, NHS Brighton and Hove Clinical Commissioning Group agreed to fund the Admission and Discharge team which included the B8a team lead, band 6 nurses assessor and a band 5 Nurse Screener post on a permanent basis (pages 201A-201B). The band 5 Nurse Screener post was the post filled by Miss Dunn. This meant we could include the funds in our budget for the coming year and appoint to this post on a permanent basis (pages 195-199).*' A careful reading of [201A – 201B], however, indicates that there was nothing stated there about permanent funding. The reality must be that decision about the length of the nurse screener contract were for the Trust to make. AH accepted the same in XX. Though C's job was resilience funded, there was no requirement for it to end on 31 March 2016 set by the CCG.

146.2.4. AH and PF's evidence on the content of the 14th December 2015 is not consistent: PF says in her witness statement that she '*called [AH] and she confirmed that 31 March 2016 was the end date for the fixed term role as it was a Resilience post...*'. AH stated during XX that, during the conversation with PF, she did not speak about the end date of the fixed term post at all; all that she said was that the resilience funding ended on 31 March 2016. AH accepted in XX that the fact that resilience funding ended on 31 March 2016 did not necessarily mean that C's role had to terminate on 31 March 2016.

146.2.5. At [125] there is an email from Paul Carey, Payroll Clerk, stating the following: '*Sharman has been set up in ESR from 07-DEC-2015 on a fixed term contract until 31-MAY-2015 as per the new starter paperwork*'. It is submitted that this is likely a mistake and should read '*31-MAY-2016*' instead of '*31-MAY-2015*'. This is further evidence that – despite R's contention to the contrary – C's contract was not always due to terminate on 31 March 2016 from the start.

146.2.6. If the contract was set to expire on 31 March 2016, this would have been included in the advertisement for the role.

147. PF's assertion that she knew from the start of C's employment that C's contract was due to end of 31 March 2016 cannot be correct:

147.1. On her first working day, 7 December 2015, C was informed by PF that she was subject to a 6-month probationary period. This matches clause 10.3 in C's original contract of employment [69]. PF repeated the fact that C was on a 6-month probationary period during the conversation between C

and PF on 10th December 2015. PF denies in her witness statement discussing C's probationary period with her however she accepted in XX that she 'may' have told C on 10th December 2015 that C was on a 6-month probation period. By contrast, during the XX of C, it was evidenced that C's recollection of being told this was clear.

147.2. If PF had known that C's contract was due to end on 31 March 2016, she would have raised this with C when C informed PF of her intention to take annual leave in April 2016.

147.3. When completing the OH referral form, PF stated that C was on a '*Fixed term post for 1 year- currently on 6 month probation period*' [88].

147.4. Crucially, the R's own evidence is contradictory as between different witnesses and reinforces the conclusion that PF did not originally know that the contract was due to end on 31 March 2016:

147.4.1. AG states in his witness statement that after he realised that he had made an error by sending C a permanent contract, he wanted to issue a new contract with the correct details for the fixed term.

147.4.2. Accordingly AG contacted PF to ask her for confirmation of the expiry date for the fixed term. AG states in his witness statement (at ¶6) that '*Ms. Ford stated that she was aware that the contract was for a fixed term but did not know exactly when it was due to end*'.

147.4.3. This contradicts PF's assertion that she knew from the start that C's contract was due to end on 31 March 2016 (see, for example, at ¶4 of PF's statement).

Direct arising from disability (s15 EqA 2010)

148. C maintains that she was subjected to the following unfavourable treatment:

148.1. PF made a referral to OH, the contents of which were inaccurate and filled with assumptions that PF had made about what C was and wasn't capable of;

148.2. PF refused to allow C to see her OH referral form when she requested to do so;

148.3. R attempted to amend C's contract on 15 December 2015 so that it had a termination date on 31 March 2016;

148.4. R did not uphold C's grievance at first instance or on appeal;

148.5. C was told at the conclusion of her grievance that she would continue to be managed by PF;

148.6. The grievance process did not overturn the decision by R to impose an end date of 31 March 2016 on C's contract;

148.7. C was constructively dismissed.

- 149.** In relation to the question of whether the unfavourable treatment took place as a matter of fact, C makes the following submissions:
- 149.1. The contents of the OH referral are at [89]. When read with the OH report at [154], it is clear that the referral was a product of PF's assumptions about C and was inaccurate in its assessment of her capacity. C, of course, does not object to an OH referral being made in principle – but such a referral should have been accurate in its contents and made after proper consultation as to the same with C;
- 149.2. It is common ground that PF did not show C to OH referral. PF states that that she intended to do so but didn't have the opportunity as C was off sick from 17 December 2015. However, the OH referral was completed on 11 December 2015. Excluding the weekend, PF had 4 days to show C the referral. Even after C was off sick, the referral could have been scanned and sent to C. It is common ground that after the referral was sent to OH, C met with PF on 15 December 2015 and asked to see a copy. Again, PF did not show her a copy that day, nor the following day. C submits that it would have taken a matter of minutes to show her the referral. The reality was that PF was refusing to allow C to see the referral without saying as much. PF had no convincing explanation in XX as to why the referral was not shown to C, simply suggesting that the referral was 'urgent' on the basis that OH are slow at processing referrals;
- 149.3. It is not in dispute that C's contract was amended on 15 December 2015 so that it had a termination date of 31 March 2016;
- 149.4. It is not in dispute that C's grievance was not upheld at first instance or on appeal;
- 149.5. It is not in dispute that C was told at the conclusion of her grievance that she would be continue to be managed by PF;
- 149.6. It is not in dispute that the grievance process did not overturn the decision by R to impose an end date of 31 March 2016 on C's contract;
- 149.7. As to whether C was constructively dismissed, see below.
- 150.** C submits that the treatment referred to above was because of something arising in consequence of C's disability: namely the assumptions that PF had made about what C could and could not do:
- 150.1. As to the OH referral, it is clear that its contents were the product of assumptions that PF had made about C;
- 150.2. Most likely, PF did not allow C to see the OH referral because she was aware that she had made assumptions about C that C would not agree with;
- 150.3. For the reasons already explained above (see the discussion above concerning direct discrimination), C maintains that R attempted to amend her contract so as to impose an end date of 31 March 2016 because of the assumptions that PF had made regarding C's capacity;
- 150.4. As discussed below, during the grievance process (both at first instance and on appeal) R failed to properly investigate C's complaints. The assumptions that PF had made about C's abilities were therefore not

identified and remedied during the grievance process. As a result, the unfavourable outcomes of the grievance process can, in effect, be said to be 'because of' PF's assumptions about C's ability to carry out her role;

- 150.5. C's constructive dismissal was (as discussed below) in large part attributable to the assumptions that PF had made about C's ability to carry out her role.

Indirect discrimination (s19 EqA 2010)

- 151.** In its handling of C's grievance at first instance and on appeal, R failed to acknowledge its shortcomings in respect of disability discrimination. The shortcomings of the first instance grievance were as follows:

- 151.1. It is clear from C's grievance that she had essentially three complaints: i) that her induction was inadequate; ii) her treatment by PF – specifically, the comments that PF had made about her; iii) the shortening of her contract to 31 March 2016.

- 151.2. Lee Balcombe ("LB") did not ask C any questions about the induction during the grievance meeting; he did not probe at all nor did he try to find out from C what induction (if any) she had received. In the grievance outcome letter [183], the question of the induction is not addressed at all. This was accepted by LB in XX;

- 151.3. As to C's complaint about her treatment by PF, again, LB did not during the grievance meeting ask any questions about the comments C alleged PF had made. C mentioned at [130] that she had made a contemporaneous note about her treatment by PF. LB did not ask for a copy. This was confirmed in XX. On 1 February 2016, LB met with PF in connection with C's grievance. Nowhere does LB ask PF what her account is in relation to the comments C alleged PF to have made on 10 December 2015. Moreover, in the grievance outcome letter [183], LB completely fails to address C's allegations regarding her treatment by PF. When challenged during XX as to whether he was, in reality, in a position to come to a view on whether harassment had taken place or not, LB's answer was '*possibly not*'.

- 152.** The shortcomings of the grievance appeal process were as follows:

- 152.1. From C's appeal letter it is clear that she had three complaints on appeal: i) the inaccuracies in the OH referral, ii) the shortening of her contract to 31 March 2016 and iii) her humiliating treatment by PF.

- 152.2. Firstly, and notably, it had been AH with whom PF had spoken on 14 December 2015 to decide the end date of C's contract. It was after that conversation that took place between AH and PF on 14 December that R's recruitment department were notified of the end date and C was issued with a new contract. AH was plainly, therefore, not an impartial individual suitable to hear the appeal – she was implicated in the very matter which C was complaining about. The conclusions that AH reached on this issue therefore lack credibility;

- 152.3. It appears that AH did not turn her mind at all to the question of C's treatment by PF. The minutes of the appeal hearing are at [202]. AH did not ask C any questions about her treatment by PF. The appeal outcome letter

is at [207]. The allegation of humiliating treatment by PF is not mentioned in the outcome letter at all.

- 152.4. As regards the OH referral, during the appeal hearing AH did not explore at all what the reasons might have been for C not being shown the referral and/or why it was so inaccurate. All that is said regarding the referral in the outcome letter is [208]: '*[PF] referred you to OH on the basis of the advice she sought from HR as she was concerned that you had some difficulties in your role. I understand your feelings and perception on how this was managed, but I am satisfied that it was not Paula's intention to discriminate against you in any way*'. No explanation is provided as to why PF did not show C the form before making the referral. C's grievance in relation to the OH referral therefore remained unanswered.
153. Taken cumulatively, the way in which R dealt with the grievance at first instance and on appeal amounted to a refusal to investigate and acknowledge its shortcoming in relation to disability discrimination.
154. R has at no point suggested that its handling of C's grievance was any different to how it would handle the grievances of those who are not disabled. R's practice, in other words, would apply to persons who are not disabled.
155. R's handling of the grievance and appeal put C at a disadvantage in that her grievance was not upheld. Additionally, R's practice of failing to investigate and/or acknowledge its own shortcomings in respect of disability discrimination would put others who are disabled at a particular disadvantage when compared with those who are not due to the simple fact that those who are not disabled – unlike those who are disabled – are not likely to be the victims of disability discrimination.

Harassment (s26 EqA 2010)

156. The conduct that forms the basis of C's harassment claim is as follows:
- 156.1. PF's comments to C during their meeting on 10 December 2015:
- 156.1.1. PF's suggestion to C that she had been unable to do her previous job because of her MS.;
- 156.1.2. PF saying to C that she could not see her computer screen well enough;
- 156.1.3. PF asking C whether she had any memory or cognitive problems;
- 156.2. The inaccuracies in the OH referral form and the fact that C was not given the opportunities to see the form.
- 156.3. R's resolution of the grievance and grievance appeal. In particular:
- 156.3.1. The appointment of AH to deal with the grievance appeal;
- 156.3.2. The failure to mention to C during the grievance process that AH had advised PF on C's termination date;
- 156.3.3. The failure to interview AH during the grievance process;

- 156.3.4. The failure to provide C with copies of the timeline or any evidence during the grievance process;
- 156.3.5. R's failure to address C's allegations of discrimination in the grievance outcome letter;
- 156.3.6. R's failure to find that any discrimination had taken place;
- 156.3.7. R's failure to find that C had originally been offered a contract for one year;
- 156.3.8. R's decision that C's manager would still be PF if she returned to work in circumstances in which PF had not been given any training;
- 156.3.9. R's decision that C would have to start the probationary period again and C's role would be opened up to other applications.

157. C avers that all of the above was unwanted conduct related to C's disability and had the purpose or effect of violating her dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for C.

158. As discussed above, there is a factual dispute as to what was said to C by PF during the conversation on 10 December 2015. The reasons why the Tribunal should prefer C's account of what took place are set out at Paragraph 4 above. If the Tribunal finds that the comments set out above were, as a matter of fact made, there can be little doubt that they had the effect of violating C's dignity and creating an adverse environment for her. As regards PF's suggestion to C that she had been unable to do her previous job because of her MS., PF admitted during XX to making this statement and accepted that the effect of such a statement could have been to humiliate C.

159. Addressing the factors in s26(4):

159.1. C stated unequivocally in her evidence that she found the treatment set out at Paragraph 19 above offensive and degrading;

159.2. As regards the overall circumstances of the case: this was not a one-off incident of harassment; the unwanted treatment extended over several weeks, starting with comments from PF, extending to an inaccurate OH referral, followed by a complete failure within the grievance and appeal process to address the issues that C complained about.

159.3. It was reasonable for the conduct to have this effect on C. As will have been evident from C's attitude during cross-examination, C is not an individual who is hyper-sensitive or prone to exaggeration. She was a straightforward and honest witness.

Jurisdiction

160. C's early conciliation notification was received by ACAS on 27 April 2016. ACAS issued the EC Certificate on 12 May 2016. Thus, all discriminatory acts relied on that took place on or after 28 January 2016 are unquestionably in time.

161. As regards acts that took place before 28 January 2016:

161.1. It is C's primary case that these form a continuing act of discrimination, which terminated with C's constructive dismissal on 27 April 2016;

- 161.2. In the alternative, C avers that it would be just and equitable to extend time.
- 162.** In support of its contention that the acts complained of form a continuing act of discrimination, which terminated with the C's constructive dismissal on 27 April 2016, C relies on the following:
- 162.1. Hendricks v Metropolitan Police Comr [2003] ICR 530 makes clear that the focus on inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice but rather on whether there was an ongoing situation or continuing state of affairs in which C was treated less favourably;
- 162.2. In the present case, the actions complained of clearly form part of an ongoing situation and/or a continuing state of affairs. This was not a case of distinct, isolated acts of discrimination:
- 162.2.1. The acts took place in short succession: the principal acts – PF's treatment of C and the circumstances of the OH referral, together with the attempt to change C's contract – took place in mid-December. What followed was a grievance process that concerned those very acts of discrimination and which was itself discriminatory;
- 162.2.2. The same individuals were involved in the various acts complained of: PF was clearly involved both in the discriminatory comments made to C, together with the OH referral as well as the decision to change C's contract end-date; similarly, AH was involved in the decision to change C's contract end-date and dealt with the grievance on appeal.
- 163.** In support of its contention that it would be just and equitable to extend time, C relies on the following:
- 163.1. Firstly, and most notably, C was pursuing an internal appeal against the acts of discrimination that took place in December 2015. The appeal outcome was communicated to C on 22 March 2016, however C was on leave from early April onwards and did not therefore have a chance to reply until her return. On returning, C acted very promptly: on 27 April she wrote to R resigning from her post [215A]. On the same day, ACAS received its early conciliation notification [1];
- 163.2. Second, assuming the Tribunal finds that there is no continuing act, the earliest act complained of by C would be less than 2 months out of time. In all the circumstances, C is not asking for a long extension of time;
- 163.3. Third, there was no real prejudice to R in having to defend the December claims – these, in any case, form the basis of the complaints that the grievance process dealt with.
- 163.4. Fourth, C would have no other remedy regarding the acts of discrimination that took place in December if C's complaints were time-barred.

- 163.5. Fifth, C's evidence during XX was that she did not receive clear advice from her union representatives regarding her employment status and when, if at all, she should bring a claim.

How did the C's contract with R come to an end?

164. There is an issue concerning how C's contract with R came to an end. As acknowledged by R in its opening note, the contractual position is complicated. C's case does not stand or fall on the precise manner in which C was dismissed.

165. The basic facts are as follows:

- 165.1. The role that the C applied for was advertised as a fixed-term post, though the length of the post was not specified;

- 165.2. The only contract that C signed was a permanent contract;

- 165.3. On 15 December 2015, R issued C with a fixed-term contract with an end date of 31 March 2016. C refused to sign this contract. The C's evidence (at Paragraph 13 of her witness statement) is that she would never have signed a contract with such an end-date.

166. R contends that the best interpretation of the facts is that C was dismissed by way of a fixed-term contract due to expire on 31 March 2016. C avers that such an interpretation is inconsistent with:

- 166.1. The fact that C's clear evidence is that she would never have signed a contract with such an end-date;

- 166.2. The letter from R to C dated 22 June 2016 accepting a resignation by C on 27 April 2016.

167. It is submitted that the best interpretation of the facts is that C was employed on a fixed-term contract of one year duration, from which she resigned by way of her email dated 27 April 2016 [215A]. It is C's case that at the point at which C joined R, PF's understanding – despite her suggestions to the contrary – was that C was employed on a 1 year fixed-term contract with a 6 month probation period. PF recorded the same when filling the OH referral form [88].

168. In the alternative, C was employed on a permanent contract, from which she resigned by way of her email dated 27 April 2016.

169. It is C's case that the termination of her contract amounted to a constructive dismissal for the purposes of s39(7)(b) EqA 2010. The following acts of R – each discussed above – amounted to a fundamental breach of the implied term of trust and confidence in C's contract of employment and entitled C to resign:

- 169.1. R's giving C an amended contract on 15 December 2015 with a termination date of 31 March 2016;

- 169.2. R's failure to address the allegations of discrimination in the course of the grievance process;

- 169.3. R's failure to admit in the course of the grievance process that there had been any discrimination or wrongdoing;

- 169.4. R's failure to ensure that PF offered C an apology;

- 169.5. R's failure to acknowledge that the training provided to C was inadequate;

- 169.6. R's failure to inform C that PF and all staff would be given training;
- 169.7. R's informing C following the grievance that she would be reinstated under PF's management;
- 169.8. R's informing C that her extended contract would be opened up for general applications.

Decision

The unanimous decision of the Tribunal is as follows:

- 170.** The first matter before the Tribunal is whether the Claimant's claim is in time. Both parties in their submissions agree that any act that occurred prior to the 28 January 2016 is out of time. We have found as a fact that the acts which we have concluded amounted to direct discrimination and/or harassment all occurred on the 10 December 2015. The issue for the Tribunal is whether this is a one off act or a continuing act. We have been referred to the case of *Hendricks v Metropolitan Police Commissioners* [2003] ICR 530 and we conclude on all the facts that although the acts alleged all occurred on the one day, there was a continuing state of affairs which involved the escalation of the matter via the grievance process. This process was ongoing until the 22 March 2016. We conclude therefore that the claim is in time. Even if we are wrong about this, we also conclude it would be just and equitable to extend time in this case as the Claimant was seeking an internal resolution in the case. We also took into account that no injustice was caused to the Respondent by allowing the claim to proceed and they had no difficulty defending the claims pursued.
- 171.** The next issue for the Tribunal is how the contract terminated. Although there were a number of contradictory facts we have concluded on the balance of probabilities that the Claimant's contract of employment terminated on the 31 March 2016 by effluxion of time. Although this was contradicted by subsequent correspondence sent by Ms. Hampson we have concluded that this was a misunderstanding of the correct contractual status and was not evidence that a contract was in existence after that date. This view appeared also to be consistent with the Claimant's understanding of the facts.
- 172.** It is the Claimant's case that the imposition of the revised contract terminating on the 31 March 2016 was an act of direct discrimination or an act of discrimination arising. We have found as a fact that there was no nexus between the Claimant disclosing her disability and the communication from Mr Godwin indicating that the wrong (permanent) contract was issued to her. This was an error that was accepted by the Claimant to be a mistake, there was no evidence before the Tribunal that had a non-disabled person commenced employment after being appointed to a fixed term position and it had been discovered that the wrong contract had been sent in error, we conclude that the same approach would have been adopted. There was no evidence to suggest that the manner in which they dealt with correcting their error amounted to less favourable treatment because of disability. We have also seen no evidence to suggest that the fixed term contract that was issued to the Claimant on the 15 December 2015 was discrimination arising from disability and there are no facts before the Tribunal to suggest that this was the case.

173. Even if we are wrong on this point and there was a dismissal, we conclude that the Claimant has failed to show that she resigned in response to a fundamental breach. She confirmed to the Tribunal that she had no complaint about how she was dismissed and failed to identify any fundamental breach that would justify the decision to treat herself as dismissed. She conceded that Mr Balcombe treated her grievance seriously and did not brush it under the carpet, the Claimant could provide no explanation as to why she felt that the grievance process was an act of discrimination or discrimination for a reason related to disability. Similarly, the appeal process dealt with the Claimant's complaints and reached a conclusion on all the points raised, she did not indicate that the appointment of Ms. Hampson or her conduct amounted to an act of discrimination. The Claimant resiled from the accusation made in her statement at paragraph 27 that the process itself was harassment and there was no evidence before us that suggested it was anything other than a reasonable process conducted in accordance with the Respondent's policies and procedures. The Claimant also accepted in cross examination that Ms. Hampson took the matter seriously and it was noted by the Tribunal that even though the outcome was not what the Claimant was looking for, the process was fair and reasonable and could not amount to a breach of the implied term of trust and confidence. The Claimant's complaint of constructive dismissal is not well founded on the facts.

174. The Tribunal now turn to the Claimant's claim that she was subjected to harassment on the 10 December 2015 by Ms. Ford; we have made findings of fact about this above at paragraphs 11-16. The first issue is whether the conduct alleged took place and we have concluded that Ms. Ford's comment about the reason she left her previous role (see above at 11-12) took place as alleged and Ms. Ford conceded that this comment was unwanted and could be viewed as seriously offensive and humiliating even though she stated that it was made in passing. We have found that this comment had the effect of causing a humiliating or offensive environment for the Claimant and she was offended by it. We accept however that it was not Ms. Ford's purpose to do so. We also conclude that in all the circumstances of the case it was reasonable for the Claimant to view it as such and therefore conclude that the claim for harassment on this point is well founded.

175. The Tribunal also considered whether this comment was capable of amounting to direct discrimination as set down in the Claimant's submission. We have concluded that the comment made by Ms. Ford was an act of less favourable treatment because of a protected characteristic. It was a direct question asked about the Claimant's disability in a way that suggested a negative stereotypical view of someone who had been unable due to her disability to perform her previous role. There was no evidence that this was the case. We conclude that the reason why the question was asked was due to a negative and ill-informed stereotypical view and was less favourable treatment because of disability. Although we have applied the "reason why" test we also have conducted the same exercise using a comparator. We conclude that an appropriate comparator would be a qualified nurse of 26 years' experience who had been appointed to the role, we questioned whether a non-disabled employee in the same position as the Claimant would have been asked whether she had been "unable" to do her previous job only on the fourth day during the induction process. We conclude that a non-

disabled comparator would not have been asked this question and therefore this comment is less favourable treatment because of disability and amounts to direct discrimination.

- 176.** On the same day, the Claimant alleged that Ms. Ford referred to the Claimant's memory or cognitive problems and we have concluded that the Claimant's recollection is to be preferred on this point. The Tribunal also accept that taken cumulatively these comments (together with our conclusion reached on the matter at paragraph 174 above) was sufficient to amount to unwanted conduct that related to her protected characteristic and the effect was that it created a belittling and intrusive environment which we conclude is sufficient to amount to create a hostile environment for the Claimant. As this conversation also included a discussion about Ms. Ford's decision to make a referral to OH, the Claimant had good reason to feel that Ms. Ford had formed the view that she "was not up to the job" (paragraph 9 of the Claimant's statement). The Claimant was entitled to view these comments made on the 10 December as unwanted and to take them as being negative and hostile to her for a reason related to her disability and it was reasonable for the Claimant to view them as such. The Claimant's claim for harassment in respect of the comments made by Ms. Ford on the 10 December is therefore well founded.
- 177.** However, the Tribunal do not find that the question asked by Ms. Ford as to whether the Claimant could see the screen well enough could amount to harassment. We refer to our findings of fact above at paragraph 13. The Claimant conceded in cross examination that it was appropriate to raise this matter and it resulted in Ms. Ford assisting the Claimant in adapting the screen to make it easier to read. The Claimant conceded that Ms. Ford was right to raise this issue with her. We concluded on all the facts that this was not unwanted conduct related to the Claimant's disability therefore this claim must fail. The Tribunal also note in the Claimant's closing submission that this is pleaded as direct discrimination, we conclude that this claim must also fail because there was no evidence that this was an act of less favourable treatment because of disability.
- 178.** The Tribunal now turn to the issue of whether the fact of the OH referral and the referral form amounted to an act of less favourable treatment and we conclude that it was not. We concluded that the OH referral was a supportive measure designed to establish whether reasonable adjustments were required and whether special equipment should be provided. As a result of the OH referral a couple of adjustments were recommended. The Claimant did not object to the referral being made, her only objection was to the wording adopted by Ms. Ford as the Claimant felt the observations were inaccurate. We found as a fact that this was based on her observations and were not acts of less favourable treatment because of disability. This head of claim is not well founded and is dismissed.
- 179.** Turning to the issue of the failure to obtain a signature and/or consent to make the OH referral, we have found as a fact that although good practice, it was regularly departed from and we accepted that we heard consistent evidence from Ms. Ford, Mr Balcombe (see above at paragraph 46) and Ms. Hampson to this effect (see above at paragraph 55). There was no evidence that failure to obtain written consent was an act of direct discrimination.

- 180.** In relation to the claim that Ms. Ford “refused to allow the Claimant” to see the OH referral form, we have found as a fact that this claim is not made out on the facts and we refer to paragraph 26 above. Ms. Ford failed to provide a copy when asked however her reason for failing to send the Claimant a copy after she went off sick shows a credible and non-discriminatory reason. A copy of the OH form was provided to the Claimant by Mr Balcombe on 19 January 2016.
- 181.** The Tribunal then turn to the final issue in relation to paragraphs 3(d) (i) to (iv) in relation to direct discrimination; paragraphs 6(d) to (f) in relation to discrimination arising from disability and harassment at paragraphs 13(e) (v) to (x). All claims relate to the conduct and outcome reached by the grievance and appeals managers. We have found as a fact that the Claimant made no complaint about Mr Balcombe in the manner that he conducted the grievance hearing and no complaints were made about Ms. Hampson. The Claimant confirmed that she no longer contended that the grievance process was harassment (see above at paragraph 60) and it was never her intention to complain about how she was dismissed; her only complaint was about the way she was treated (see above at paragraph 64). As the Claimant has failed to show any facts to support her claim that the grievance process and the outcome was an act of direct discrimination (and there was no evidence to support this before the Tribunal), this head of claim is dismissed. Although the Claimant did not agree with the outcome, there was no evidence to suggest that the Respondent reached this conclusion because of her disability. Although at the hearing and appeal stage they did not uphold her complaints of discrimination, they acknowledged there was a problem and took steps to have interim buffer management and apologized to the Claimant for the contractual errors made in relation to her contract. They also asked for Ms. Ford to apologise to the Claimant for any distress caused and arranged for a mediator to work on improving their relationship. This was not an employer who was brushing matters under the carpet; they took steps having heard the grievance, to provide support to the Claimant.
- 182.** There was also no evidence that the way in which the grievance was conducted and the conclusions reached were discrimination arising from disability. We do not conclude on the facts that the manner in which it was handled amounted to less favourable treatment and therefore this head of claim must fail.
- 183.** It was noted in relation to harassment that the Claimant was no longer pursuing the issues in relation to Ms. Hampson at paragraphs 13(e)(i) to (iv) and we repeat our conclusion in relation to paragraphs (v) and (vi) that discrimination had not taken place and “failing to address” the Claimant’s allegations of discrimination cannot amount to harassment as there was no evidence that this conduct was related to the Claimant’s disability. There was also no evidence that this amounted to a violation of the Claimant’s dignity and no evidence that it created an intimidating hostile or degrading environment. Although the Claimant disagreed with the outcome there was no evidence that the conclusion reached amounted to an act of harassment. The issue at paragraph 13(e) (vii) stated that the Respondent “did not make a finding that the Claimant had originally been offered a contract for one year”, this claim was not supported by any facts before the Tribunal and at best was a presumption made by the Claimant.

- 184.** The issues at paragraph 13(e)(viii) and (ix) in relation to the Claimant having to work with Ms. Ford and having to “start the probationary period again” were again matter was not explored by the parties in the hearing and the Tribunal heard no evidence to support the claim that this was an act of discrimination. The Claimant on the facts before us was not being returned to work directly for Ms. Ford; a buffer manager was to be appointed and her supervision would not be conducted by Ms. Ford. The evidence did not suggest and the Claimant did not contend, that she would be line managed by Ms. Ford. The Claimant’s complaint in evidence was that Ms. Ford would “be in the office” (see above at paragraph 56). There was no evidence to suggest that this was an act of harassment. The requirement for the Claimant to start her probationary period again was not unwanted conduct because of her disability, the Claimant had herself complained about the poor induction and had only served for 8 days out of a total probationary period of six months. The requirement to serve a probationary period was not an act of harassment and there was no evidence that the Claimant viewed this as unwanted conduct. Although the Claimant also complained that the permanent position would have to be “opened up to other applications” this was standard practice and again there was no evidence that this was unwanted conduct related to the Claimant’s disability. These claims being unsupported by any facts are not well founded and are dismissed.
- 185.** Turning to the claim for indirect discrimination we first have to identify the provision criterion or practice “PCP” applied by the Respondent, the Claimant states that it is “failing to acknowledge its own shortcomings in respect of disability discrimination”. There was no evidence before the Tribunal that this was a PCP that was applied by the Respondent. Secondly there was no evidence of how the Respondent would approach grievances raised by others claiming discrimination. The Claimant accepted in cross examination that she had no evidence of how other grievances had been dealt with. As there was no evidence before the Tribunal that the PCP was applied or of disparate disadvantage, this claim must fail.
- 186.** As we have found in the Claimant’s favour in respect of a number of individual allegations of discrimination, this matter will now be listed for a remedy hearing. However, the parties are invited to explore whether this matter can be dealt with without the need for the matter to be listed for a further hearing. The parties are given 28 days from the date of promulgation of this decision to see if they are able to come to an agreement. If that is not possible, they are invited to make a joint application indicating the length of hearing and the number of witnesses required to attend. The Tribunal orders that once the hearing date is set, the parties are to agree a joint bundle 42 days before the hearing date. The Claimant is to produce an updated schedule of loss to the Respondent within 14 days of this decision. Witness statements dealing with remedy are to be exchanged 14 days before the hearing.

Employment Judge Sage

Date 25 August 2017