EMPLOYMENT TRIBUNALS

Claimant:	**Mrs Amanda McCarthy**
Respondent:	**Worcestershire Acute Hospital NHS Trust**
Heard at: Birmingham	**On: 12-15 June & 8 August 2017 (Tribunal only)**
Before: Employment Judge Cocks	**Members: Mrs B E Hicks Mr G A Murray**

Representation
Claimant: Miss S Staunton Counsel
Respondent: Mr M Islam-Choudhury Counsel

RESERVED JUDGMENT

The judgment of the Tribunal, on liability only, is:

1. **The claims for age discrimination, a failure to make reasonable adjustments and indirect disability discrimination are dismissed upon withdrawal by the claimant;**

2. **The claim for unfair dismissal fails and is dismissed;**

3. **The claim for disability discrimination succeeds;**

4. **A remedy hearing will be held to determine compensation.**

REASONS

1 We heard evidence, by way of witness statements supplemented orally, from the claimant and from Mrs Delyth Davies (HR Manager), Miss Alison Hall (Matron) and Mrs Emma Innes (Matron) for the respondent. We had an agreed bundle of documents, and reference to pages in this judgment, are to pages in that bundle.

2 As a preliminary matter, the age discrimination and reasonable adjustments claims had previously been withdrawn and are dismissed upon withdrawal. At the conclusion of the Hearing on 15 June, the claimant also withdrew her indirect disability discrimination claim. Therefore, the remaining claims for the tribunal to determine are unfair dismissal, direct discrimination because of the protected characteristic of disability, discrimination arising from disability and harassment under the Equality Act 2010.

The Issues

3 The parties agreed a list of issues at the start of the hearing. We do not reproduce it here but followed it in reaching our conclusions.

Findings of Fact

We make our findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

4. The claimant was employed from 3 December 2001 as a specialist Band 7 diabetes nurse. The claimant has Multiple Sclerosis (MS). The respondent accepts she was a disabled person at the material time and that it had full knowledge of her being so during her employment. The claimant describes the effects of her condition as reduced mobility, tiredness, reduced concentration, poor dexterity and that she finds it difficult to cope in busy situations and environments.

5. At page 154, we have seen a list of the claimant's sickness absences over the course of her employment. Those absences have been for predominantly short periods except in 2010 and 2014 into 2015.

6. We have been taken at some length, in cross examination of the claimant, to the background and the history of adjustments being made for her in the past. This history is not particularly relevant as it forms no part of the claimant's claim. That is about events which occurred at the end of her employment. However, the background is relevant to a limited extent as it goes to setting the context for those later events. The claimant was cross examined by Mr Islam Choudhury, because of an allegation she made about an adjustment made. Namely, that the respondent had only provided a mobility scooter reluctantly. The fact is, however it was done, an adjustment was made which assisted the claimant in doing her job. The claimant also said she had not been well supported because of her disability after 2010. She later qualified this, when cross examined, to say that her physical needs were dealt with but she was not supported emotionally and psychologically. Whatever the claimant felt, and it is of very limited relevance to us, the respondent did make adjustments for her. For example, we know that she was not able to do the same amount of work as her colleagues and this was not an issue for the respondent.

7. As we see from the bundle, there were a number of referrals to Occupational Health. One major issue for the claimant during the period 2010 to 2014 was the requirement to work at split sites (pages 73 to 82). This came about because funding had been cut which had previously enabled the claimant to work full time in Worcester only. As a result, initially she had to do 2 days a week in Worcester and 3 days a week in Redditch. She found this very difficult for a combination of her condition and emotional issues. She requested that she worked at Worcester full time. That was not feasible for the respondent as the claimant at that particular time was limited on what she could do clinically and she did not have the necessary skill-set for them to find further work for her in Worcester. As we see from the correspondence and Occupational Health Reports from this period, somewhat of an impasse was reached and this continued for some time. The claimant took advice and sought assistance from the RCN. It is noted that when the claimant felt she needed representation and assistance - she sought it.

8. A compromise was eventually reached whereby the claimant worked 2 days per week in Redditch and her travel time was included in her daily hours. If we look at the position on adjustments, they were clearly made for the claimant although perhaps not as quickly as she would have liked.

9. In 2013, two referrals had been made by Mrs Innes to Occupational Health. We see one in May 2013 (91-92). This followed a period of supervised working in February 2013, which had come about because of concerns over decision making by the claimant. The referral form set out the problems identified and wanted to know if they caused or linked to the claimant's condition (91). We are not going into the details of what occurred in 2013, other than to say the claimant was going through a bad period with low mood and depression. Occupational Health had identified this as being secondary to the MS (page 99). What is significant is that the meetings about the performance concerns which were held with the claimant during that year, were with Mrs Innes and Mrs Davies. They were involved in the later matters. The claimant accepts that there were two periods in 2013 of supervised practice and one where she was supernumerary. There is nothing in the Occupational Health reports which states that her MS was deteriorating. What the Occupational Health reports show from this period is that the concentration difficulties, decision making and communication problems identified were due to the low mood and depression.

10. By 2014, Occupational Health was touching upon ill health retirement or redeployment as options but the claimant did not want these and it was felt they were not options to be looked at at that time. There had been a flare up of the MS symptoms (page 102A). This was not described as a deterioration of the claimant's condition but as a relapse. It coincided with a significant period of time on sick leave from November 2014 to May 2015, (154).

11 As we see at page 102C, the claimant returned to work and was reporting that she had good support from management and colleagues. In December 2014, she told the Occupational Health Physician that she appreciated all the help she had received. There was no suggestion of any further adjustments needing to be made and, indeed, after her return to work in May 2015, the claimant had little time off until 4 May 2016. For the best part of a year, the claimant worked with the adjustments that had been made, took little sick leave and there were no performance concerns or referrals to Occupational Health by management, other than a routine follow up 6 months after a review on 1 June 2015 (102C).

12. Although there were no managerial concerns about her performance, the claimant herself felt she would be able to manage better if she was able to reduce her hours. She had not been able to do this previously for financial reasons. She found out that she could retire and return on reduced hours, after discussions with colleagues in the Department who had already done so. She had a meeting about this with Mrs Davies on 14 October 2015. The claimant had already openly discussed the possibility of doing so in the Department and all her colleagues were aware of her plans, including Matrons Hall and Innes.

13 We have no notes of the October meeting, but Mrs Davies says that she came over to the Department and saw the claimant informally. The claimant says that they had a discussion about her retiring and returning to work on part time hours. Mrs Davies denies that she knew about the claimant wanting to return and says they only discussed retirement. This does not accord with the claimant's evidence and what is in the agreed chronology. It is unlikely, bearing in mind what the claimant was openly talking about doing, that she wouldn't have told Mrs Davies about her intention to return to work after retiring and we find that she did do so. Again contrary to what is in the chronology, Mrs Davies says the claimant told her she had obtained the AW8 form but did not have it with on her on that occasion. She was apparently told to call Mrs Davies when she had the form with her and the claimant did not follow up on that offer. The claimant says that she had not obtained the form at that time, and indeed only did so in April 2016. She disputes Mrs Davis' version of this meeting.

14 Although there is a dispute about what was discussed in the meeting, we have confined ourselves to findings relevant to what we have to decide. The meeting was some considerable time ago, no notes were kept by either side and it would not be surprising if both recollections were hazy after this length of time. Having told Mrs Davies of her plans, the fact is that the claimant was not told about the Flexible Working Opportunities Policy (FWOP) or the appendix 7 to that policy. This needed to be completed to enable the claimant to return to work after retiring. Mrs Davies, in her evidence, took us through the relevant procedures and what needed to be done to be able to come back after retirement. The flexible retirement options are contained in the Flexible Working Opportunities Policy document at pages 194 – 218. The claimant, whatever Mrs Davies knew, was not made aware of the FWOP or about the need to complete appendix 7. The claimant was told about the AW8 form by Mrs Davies, she had not already obtained it. Neither party was entirely reliable in their recollection of the meeting. We do accept that Mrs Davis offered extra advice and help and the claimant did not follow up on the offer.

15 The claimant told us that she had a meeting with Mrs Innes early in 2016. Mrs Innes accepts that there was a brief meeting in early 2016. Although she does not state it was to discuss a return to work, that is how it was put by Mr Islam-Choudhury to the claimant in cross examination. The claimant was not challenged about what she says of that meeting. Mr Islam-Choudhury moved quickly on to what the respondent alleges, about there being a meeting with Miss Hall in February or March 2016. As a result, we accept the claimant's evidence about the meeting in early 2016 with Mrs Innes. The claimant told Mrs Innes about wanting to retire and return. In any event, by now this was common knowledge in the Department. It is highly unlikely she did not talk to Mrs Innes about her wish to return to work part-time after retiring. The response from Mrs Innes was a positive one. She asked the claimant about her proposed working

pattern. The claimant says that Emma seemed pleased and would get the "ball rolling" in respect of her returning to work. There was a discussion about the AW8 form and Mrs Innes said she would obtain a copy for the claimant. This fits with the claimant being sent the AW8 form in the internal post on 13 April 2016.

16. The claimant was told by Mrs Innes, with regard to her returning to work and her hours, to leave "the rest to her". The claimant recalls that Mrs Innes told her that she would be able to approve the part time hours and they would negotiate a working pattern closer to the time. Again, and we accept the claimant's evidence, nothing was said at this meeting about the FWOP, completing appendix 7, the need for approval from the vacancy control panel in addition to agreeing a working pattern with managers. Mrs Innes simply told the claimant she would talk to Miss Hall about it. We are satisfied that whilst the claimant was telling everyone she wanted to come back, no one in early 2016 had told her about the appendix 7 form or the flexible working policy.

17. Miss Hall told the tribunal that although there had been an informal discussion in early 2016, she and Mrs McCarthy met in February or March 2016, for a more formal meeting. This is a major area of dispute between the parties: the claimant says this meeting did not happen at all.

18 Miss Hall says that the meeting was at the claimant's request and was not suggested, or initiated, by her. She says it was a more formal meeting than the earlier conversation, it was not lengthy but she explained to the claimant the process she would need to follow in order to retire and return. In particular, Miss Hall recalls explaining to the claimant that it was necessary for her to complete the Flexible Retirement Application Form (appendix 7) of the Trust's Flexible Working Opportunities Policy if the claimant wished to return to the Trust's employment following her retirement. In reply to a question from the tribunal, Miss Hall changed her evidence. She told us that she had told the claimant there was a further form to fill in, but had not specifically mentioned appendix 7. Miss Hall tells us that there was a provisional discussion about the number of hours per week that the claimant might return to work, if her application for a return was accepted. Miss Hall says she explained to Mrs McCarthy that it was likely they would be able to accommodate her request for reduced hours, namely, 22.5 per week. She also says that the claimant understood that a formal request in writing on the Form needed to be submitted and that it would have to be reviewed by the Vacancy Control Panel who would either agree or decline the request.

19 There are no notes of the meeting which was, according to Miss Hall's evidence, more than just an informal one. It was not followed up, as is standard practice, with a letter. We find it strange that Miss Hall can remember significant details of that meeting, some considerable time after it is meant to have occurred, but could not recall much of her later discussions with Mrs Innes about the drug issue, which was a serious matter. Nor could she recall very much about the discussions she had with Mrs Innes before and after the meeting Mrs Innes had with the claimant on 4 May.

20 On the balance of probability, and for the reasons we set out, we prefer the evidence of the claimant that this meeting did not occur. The claimant was adamant that it did not happen at all. In light of what we have stated already, the respondent needed some evidence to show that the claimant had been made aware of the FWOP and the need to complete appendix 7. What is abundantly

clear is that by the time the claimant came to complete the AW8 Form for the Pension Service, she was not aware of the need to fill in appendix 7, or indeed any other form. The AW8 form itself, being a Pension Service Form, does not refer to any Trust form needing to be completed.

21 As the claimant pointed out to us, if she had known about the appendix 7 form, she would have completed it. As she put it: "Why wouldn't I?" She could not afford to retire fully and had made her wishes to return to work after retirement entirely obvious to everyone, including her managers. The claimant was not informed of the need to complete appendix 7 and if she had been made aware of that need she would have done so. Further weight is added to this by the fact that Mrs Innes had told Mrs McCarthy that she would take care of the return to work matter. Furthermore, when the claimant and Miss Hall met on 13 April, for Miss Hall to complete her part of the AW8 Form, no enquiry was made of the claimant as to whether she had competed the Appendix 7 form or reminding her to do so.

22 This was a small department; both managers fully knew what the claimant's intentions were in respect of return to work after retirement; they had told her there was no problem with returning part-time; and she had not changed her position. In such circumstances, it is highly likely that a manager assisting an employee in completing one form would enquire about the completion of another required form. It is clearly important, if you do want to return, to complete it and both managers (from their dealings with other staff who had taken this route) knew so.

23 We know that the claimant was sent the AW8 Form in the internal post around 13 April 2016. The Retirement Process FAQS on page 114-115 set out the procedure to be able to claim retirement benefits. This document is a Trust document. In essence, these state that you need to submit an AW8 Form and your manager (at the same time) must complete a Leaver Form. . Although it makes reference to retire and return it makes no reference to the FWOP. There is nothing in these FAQs about filling appendix 7, or there having to be a referral to the Vacancy Control Panel.

24 The AW8 Form is at pages 138-153. Mrs McCarthy completed all but one of the relevant sections for her to do. On page 142, we can see that she ticked that she will be re-employed in the NHS after retirement and that the re-employment will begin on 1 August 2016. This is a further indication that Mrs McCarthy was not aware of the FWOP as, if she retired at on 31 July, she would not have been permitted to commence work on 1 August because there needed to be a gap in her employment. Like the retirement FAQs sheet, the claimant could not have known from the AW8 what the Trust's own FWOP requirements were. Likewise, all references to websites (for instance -pages 114-115) again make no reference to the FWOP or appendix 7 to that Policy.

25 After completing all the parts the claimant believed she had to complete (but in fact had forgotten to complete the declaration on page 149), she took the AW8 to Miss Hall. There is a section of the form for a manager to complete. It was a requirement for the manager to submit a Leaver Information Form at the same time as the AW8 Form was completed and submitted. It was also necessary for the manager, if someone was returning to work, to complete a new Starter Form (115).

26 It is not surprising, looking at the FAQs sheet or the AW8 form itself that the claimant could not have known about Appendix 7, unless she was told about it. The AW8 does not alert someone to the Appendix 7 Form, but then that is a Pension Service document. However, the FAQS sheet was the Trust's own document and there is simply no reference to the FWOP or the need to complete Appendix 7.

27 The meeting the claimant had with Miss Hall on 13 April was not a proper meeting. Miss Hall completed her section of the AW8 form (116). The claimant had already completed her sections (albeit not fully). Miss Hall photocopied and certified the necessary documentation to accompany the AW8 Form. The meeting was an entirely administrative one. It was not to assist the claimant in completing the form as the claimant had already done her bit. We do not accept the claimant's contention that Miss Hall approved the AW8 form, but we know from her evidence that she had seen Part 8.2 of the form and the claimant's proposed return to work. It is extraordinary that she did not remind the claimant about the need to complete the Appendix 7 form, or ask where it was.

28 In some circumstances, a manager might think such a matter should not be enquired into, as it was a personal one. However, on seeing the form that the claimant had just completed, showing that she was going to return, and in light of her openness in talking about her plans, we do not accept there was a need to be sensitive about the matter. Mrs McCarthy had been completely upfront and consistent about what she wanted to happen, and thought was going to happen following her conversations with both Matrons.

29. As at 13 April, there was no reason why the managers had cause to go back on their positive attitude earlier in the year to the claimant returning to work part-time and telling her they would have no problem with her doing so.

30 Which brings us to events in late April 2016. Although the claimant believes that the drug error incident occurred earlier, the report of the incident completed by another Specialist Nurse (Marie Cavaciuti) states it occurred on 25 April 2016 (186). Shortly after the incident, Miss Hall was informed by member of the diabetes team that a drug error had been made by the claimant. At this point there was no formal report, but Miss Hall spoke to the claimant about the error on the same day she was told about it. This is not in dispute between the parties. The claimant accepts that it was an error on her part which should not have occurred. In brief, what the claimant had done was to repeat a prescription error made by a junior doctor and she had not picked up the mistake.

31 Miss Hall was aware of previous prescribing errors by the claimant, which had led to her undergoing a period of supervised practice and support in 2013. She was also aware that the error had not caused harm to the patient, but pointed out it was not because the error was not a serious one but the consequences to the patient had not been serious on this occasion.

32 The claimant was on sick leave from 28 April to 3 May. Mrs Innes recalls having two meetings with Miss Hall about the claimant – one immediately after the meeting on 4 May and one just before she left the respondent's employ. At this later meeting she asked Miss Hall to call the claimant (who was on sick leave) as she had not done so by the time she left. Mrs Innes does not refer to a meeting prior to 4 May, but Miss Hall does. Mrs Innes told us that she can recall

a discussion only about the drug matter. She does not recall what Miss Hall does about talking about the claimant's health getting worse.

33. On the balance of probabilities, we accept Miss Hall's evidence about that meeting at the end of April/beginning of May. It is of a piece with the return to work meeting on 4 May, as the claimant's health and their view of it deteriorating was in both managers' minds. There was a discussion between Miss Hall and Mrs Innes before 4 May about the drug error. It is clear from that the managers considered it to be a serious matter, as it affected the ongoing safety of patients as well as potential reputational damage for the claimant and the respondent if further errors occurred. Miss Hall and Mrs Innes were sufficiently concerned that if the claimant was making serious errors they needed to consider what role she was going to play in the coming weeks, or to restrict her duties so that patient safety was protected. They talked about whether or not they felt the claimant would be able to justify her competency and fitness to practise to the NMC when her revalidation came up again. They also discussed what appeared to them to be the claimant's deteriorating physical health. We did not fully understand the reference by Miss Hall to seeing a decline or deterioration in the claimant's health. The claimant had been back at work and there had been no recent performance issues with her, up until the prescribing error. Miss Hall explained to us that she was referring to a long deterioration over time. She did not believe there had been a sudden deterioration around the time of the drug mistake. No decision had yet been taken about the drug matter and whether it should lead to disciplinary or capability action, as it had not yet been fully investigated.

34 The claimant returned to work on 4 May 2016. Miss Hall was on holiday and it fell to Mrs Innes to conduct a return to work interview with her that day. This should have been a formal return to work meeting under the Sickness Absence Policy and Miss Innes accepted that. At page 229 we were taken to the flow chart under that Policy. As the claimant had met or was approaching a Trust trigger, the return to work meeting should have discussed: "issues, consider Health and Wellbeing Service referral, agree improvement is required and set review period". That then leads into: "If underlying health condition identified, refer to process for managing sickness".

35 The claimant had no warning of what the meeting was to be about. She was not informed of any right to be accompanied and no notes were taken of the meeting. Although it was treated informally, it should have been a formal one. There was no discussion around a referral to the Health and Wellbeing Service as suggested in the procedure. The claimant thought she was going to informal catch up meeting after a few days sick leave. She had attended such before on returning from sick leave. She told Mrs Innes that she had made a speedy recovery from her flare up of MS the previous week, when her legs had given way because of her condition.

36 As it transpired, the meeting could not have been further from an informal catch up meeting. There is not much factual dispute between what the claimant says was discussed and Mrs Innes' letter following that meeting. However, there are some significant differences. Mrs Innes stated that she was of the impression that the claimant's health was deteriorating which was affecting her mobility and decision making. The claimant was not told this impression was based on her legs giving way on her the previous week or the drug error. The claimant was told about colleagues and the consultant having concerns about her

performance but was not told, as we were by Mrs Innes, that these concerns were only about the drug incident. No other details were given to the claimant. As the claimant puts it, in her view of the meeting, the drug error issue came second. That is reflected in Mrs Innes' letter on page 103-104. She does not state that the concerns of colleagues and the Consultant are only about that matter. As the claimant saw it, she was being told she was not fit to do the job, her condition was deteriorating, she could not cope with the pace of work and new technologies, and there could be problems with NMC requirements. She believed that people had been talking about her behind her back. Not a surprising conclusion to reach after she had been told about her colleagues raising concerns about her decision making.

37 Mrs Innes puts it that the meeting was a mutual discussion. Her letter reflects that position. We do not find that it was a mutual discussion with the claimant agreeing with what was being said to her. The claimant had attended with no warning of what was coming. The first thing that was raised was about her deteriorating health, despite it having just been discussed that she had now made a good recovery from the previous week's flare up. Mrs Innes told her that she believed her health was deteriorating and that it was affecting her mobility and decision making.

38 We find that the claimant was shocked, belittled and humiliated by what was said to her at the meeting. We accept her evidence that when faced with what was said by Mrs Innes, the claimant had been so shocked and upset she was unable to say much and was tearful. Faced with being told that a view, not substantiated by any medical evidence, was being taken that her health was deteriorating and affecting her mobility and decision making; that people had concerns about her, including the Consultant, without being told what the concerns were; and the other matters we set out above, it is highly likely that she would have been upset from quite early on in the meeting and unable to respond fully, or at all. It is noticeable that in the past the claimant, when she had had difficult meetings, such as in 2013, was represented and her representative spoke for her. The claimant considered that she was deprived a voice. We agree that she had been deprived of having a voice at this meeting.

39 Therefore, we do not accept Mrs Innes' evidence that this was a mutual discussion throughout and that the claimant was happy to go on to sick leave and then fully retire. In the context of an informal return to work meeting, talking about her health and performance issues was going to be intimidating for Mrs McCarthy. When pressed about the claimant being told her condition was deteriorating when she had just come back and was well to work, Mrs Innes accepted that it might well have been degrading for her.

40 In re-examination, Mr. Islam-Choudhury asked Mrs Innes: "Could anything you said at that meeting be regarded as degrading or humiliating. The reply was: "I don't believe so, when I talked about it, it was with the best of intentions. I had no intention to degrade or humiliate the claimant, Mrs McCarthy." However, Mrs Innes went on to say: "looking back in the cold light of day, if that's what she felt, I cannot dispute that".

41 The claimant did not voluntarily go along with a suggestion that she went on to sick leave. She felt she was being told to do so and had no alternative. The claimant was scared of what would happen if she did not get signed off, having been told to go on to sick leave. There is no doubt that the

claimant felt intimidated and distressed by the content and tone of that meeting. Indeed, the tone of the meeting, although not fully reflected in the letter which followed it, can be sensed in the letter. Mrs Innes accepted that at the end of somebody's career to receive such letter could be seen as hurtful. There was no thanking the claimant for her long service or to contact her about a leaving do. We fully accept the claimant's evidence that she felt humiliated and unvalued. She felt she had been treated very unfairly and unkindly by an organisation which was supposed to be a caring institution.

42 The idea that this was a mutually agreed outcome is simply not credible. The claimant had no option. She was told to go on sick leave and that she would retire on 31 July.

43 The claimant gave evidence that she was under the impression that she was being told that she should not return to full time working and she was to remain on sick leave until her retirement, but she still believed she would come back to work part time in August. She says she thought Mrs Innes had doubts about her being able to carry out her role full time, but that no such concerns would be expressed if she was doing part time hours.

44. The second meeting between Mrs Innes and Miss Hall occurred after Mrs Innes' meeting with Mrs McCarthy. Miss Hall was on leave but had come in for a 'leaving do'. They met after the event. It must have been significant for the managers to discuss it, bearing in mind Miss Hall was on annual leave. In cross examination, Miss Hall told us that when she learnt from Mrs Innes that the claimant was going to be off for 3 months it was not a big surprise to her. At first she said this was because of the claimant's previous long periods off sick. When it was put to her that the claimant had just returned to work after only 2 days sick leave, she repeated that it was not a surprise but denied this was because she had discussed the claimant going onto sick leave previously with Mrs Innes.

45 The tribunal finds this odd. The claimant had just returned to work and had given no indication that she was going to need sick leave for 3 months. It is more likely that the managers had discussed what was to happen before the meeting on 4 May. As we know, following the drug investigation, it is likely that the claimant would have been taken down some capability or disciplinary route. Whatever their motivation to protect her from that, the meeting was carried out in such a heavy handed way by Mrs Innes that the claimant was so shocked and upset by it, she did not show her husband the letter of 5 May for a month.

46 The claimant was informed around 10 May that she had not signed the AW8 Form which had been submitted in mid-April. It was returned to her. She signed it on 16 May and it was re-submitted by 17 May (149). It is put by the respondent that if the claimant had not intended to retire; when this form was returned to her it was the ideal opportunity for her to withdraw her application and not to go ahead with the retirement. It is said that this is evidence that the claimant always intended to retire on 31 July and she did not change this intention at any point, even after the meeting on 4 May. This fits with the claimant's evidence in cross examination, which varied from that in her witness statement and which we deal with below.

47 Mrs Innes left the Trust's employment on 31 May 2016. Her letter confirming the meeting held with the claimant on 4 May 2016 is at pages 103-104. It is not an entirely accurate resume of the meeting, as it states:

> "As you have already applied for retirement, we both concluded that this is an option that would be best placed to support your needs. We have agreed that it is appropriate for you to remain off sick until your retirement date of 31 July 2016."

As we have already found, this was not a mutual agreement but one imposed on the claimant by Mrs Innes.

48 Feeling she had no other option, the claimant went to see her doctor on 5 May and obtained a Fitness for Work Certificate (179). The claimant told her GP that she had had a relapse of MS but in reality was very upset, distressed and anxious about what had happened the previous day. She describes feeling devastated and in shock. A later report from her GP is at page 110A. This sets out what was discussed on 5 May. Whilst the claimant accepts much of it is what she reported to the doctor, it does record her distress and shock at that time. The letter also supports what the claimant told us about being so distressed that it was difficult for her to decide whether to oppose the decision that had been taken.

49 The claimant's witness statement says that she expected to go back part time on the 1 August and believed someone would get in touch about her doing so. Her evidence in answers to questions from the tribunal, and in re-examination were somewhat different. She made it clear to us that she could not go back to work after 31 July. As she said:

> "When I thought about it, and the fact that people were talking about me, these things don't happen overnight. Why was it not raised earlier? I felt very humiliated and unwanted. I felt I couldn't rightfully go back to work in that atmosphere and I was not wanted."

50 Even in re-examination, the claimant reiterated that whilst an investigation would have enabled her to clear her name, the complaints she thought had been made (from what Mrs Innes told her), and people talking about her, led to her say:

> "I couldn't really go back and work with those people."

This position is supported by her not wanting the consultant at her leaving do, not because she disliked him but because she felt embarrassed about how he might view her.

51 There is no doubt from this later evidence that the claimant had made up her mind to retire on 31 July. She felt unable to return to work again. That decision was patently caused by what happened on 4 May. We note that up until then the claimant had returned to work, needed to maintain a good income and fully intended to return to work on a part time basis.

52 The claimant, when she felt able to do so, contacted various people for advice. She obtained help from Shaunee Irving, an RCN representative. It was at the claimant's instigation, via Miss Irving, that a meeting was held with HR present. Mrs Davies' notes of the meeting are at page 106A. We accept her evidence that Miss Irving had asked Mrs Davis for an exit interview with the claimant. Miss Hall attended the meeting.

53 Although the meeting on 22 August was held some 3 weeks after the claimant thought she should be returning to work, this was not the main thrust of the meeting. It is not recorded in Mrs Davis' notes and indeed the claimant herself stated: "Don't want to come back." We understand this was in response to a question asked of the claimant as to whether she did want to return. This fits with her later evidence to us.

54. The claimant complained strongly about the meeting on 4 May. The note of Mrs Davies' and the letter confirming the meeting (pages 109-110) support her evidence to us about what was said at that meeting. Namely: complaints had been made from colleagues and the Consultant, and that Mrs Innes had advised her to go on to sick leave and then retire. There was a discussion about Mrs Davies enquiring if an ill health retirement pension could be applied for. Again, this fits with the claimant's evidence that she was not prepared to return to work again. It was agreed that a retirement party would be held. In fact, the claimant was not entitled to an ill health pension as she had already been awarded her age pension.

55. Although there has been some debate around the P45 being dated for the end of August 2016, it is not relevant for us to deal with this matter as it has always been the position of both parties that the claimant would retire on 31 July 2016.

The Law and Submissions

56 As the Hearing concluded at the end of the evidence, the parties agreed to submit written submissions for the tribunal. We have received full written submissions, with accompanying case law, from both parties together with their responses to the other party's submissions. We have taken these into account and refer to them where it is appropriate to do so. We are not reproducing the submissions in any detail but have considered them in our deliberations and reaching our judgment.

57 The relevant law to be applied by the tribunal is:

57.1 Unfair dismissal

s. 95 Employment Rights Act 1996

Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)--

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if--

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

s. 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

.....

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

57.2 Disability Discrimination

s.13 Equality Act 2010 - Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex--

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

s.15 Equality Act 2010 - Discrimination arising from disability

(1) 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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

s 26 Equality Act 2010 - Harassment

(1) A person (A) harasses another (B) if--

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

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

(i) violating B's dignity, or

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

(2) A also harasses B if--

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if--

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--

…..

disability;

…….

57.3 The tribunal has been referred to the following case law by the parties and we have considered it, where relevant to do so, in our determinations:

Shamoon v Chief Constable of the RUC [2003] IRLR 763

Madarassy v Nomura International Plc [2007] IRLR 246

Trustees of Swansea University Pension & Assurance Scheme v Williams [2015] IRLR 885

Pnaiser v NHS England and Coventry City Council [2016] IRLR 170

*Pendleton v Derbyshire CC [*2016] IRLR 580

Conteh v Parking Partners Ltd [2011] EqLR 332

Richmond Pharmacology v Dhaliwal [2009] IRLR 336

Portsmouth NHS Trust v Corbin [2017] UKEAT/0163/16

*Sandle v Adecco UK Ltd [*2016] IRLR 941

Accedo Group UK and Ireland v Gregory & anor [2015] EAT

London Borough of Islington v Ladele [2009] IRLR 154

Nagarajan v London Regional Transport [2000] 1AC 501

We have not set out all the case law the claimant has referred us to as the omitted ones, such as *Bahl,* are well known to the tribunal as they set out important principles. We have taken into account those principles as set out by the claimant in her skeleton argument.

Conclusions

58. In analysing the facts as we have found them in accordance with the relevant legal principles and case law, we have largely followed the list of agreed issues set out above. However, where we have departed from it, we set out our reasons for so doing.

Unfair dismissal

Was the claimant dismissed?

59. The claimant submits that the unfair dismissal claim is premised on the claimant being dismissed by not being allowed to continue working on a part time basis after her retirement date. She relies on *Sandle* and *Gregory* as authority that communication of a dismissal can be by conduct. The claimant says that she was dismissed in the meeting of 4 May when she was simply told to go on to sick leave and retire on 31 July. The claimant says, in addition to this, the failure to tell the claimant about the Appendix 7 Form amounted to communication of her dismissal. The claimant says that this communication should be seen in the light of the circumstances namely, what was said to the claimant at that meeting and a leaver form being completed stating 'no employment', there being no conversation about her coming back to work on a part time basis, and the lack of contact from the respondent during the sick leave. It is put that the respondent's intention to dismiss the claimant can be inferred from all the circumstances of the case.

60. The tribunal reminded itself of section 95 of the Employment Rights Act 1996 and the definitions of dismissal for the purposes of an unfair dismissal claim. The tribunal does not see how the present situation fits within any of the categories of an actual dismissal by the employer, a constructive dismissal or the expiry and non-renewal of a fixed term contract. We agree with the respondent that an agreed termination or resignation is not a dismissal.

61. The reason we say this is that the claimant had submitted her AW8 Form, the application for retirement in mid April 2016, some weeks before the meeting of 4 May. The respondent says that an unequivocal decision to retire was made before 4 May and the claimant did not change that decision when she had the opportunity to do so, when the AW8 form was returned to her on 10 May. On the contrary, she signed and returned it.

62. There can be no doubt that whilst the claimant had made an unequivocal decision to retire, it was on the basis, at the time she initially made that decision, that she would return to work part time after 31 July. However, the fact that the claimant wanted to retire and return does not change the fact that she voluntarily terminated her contract with effect from 31 July 2016. The claimant's position that the AW8 Form is not a termination of the contract of employment is not tenable. It is clear from the documentation we have seen that a Leaver Form is completed, that a new starter form will need to be completed and there needs to be a gap in service. On page 120, in the AW8 Form itself, paragraph 8.2 refers: "'Will you be re-employed in the NHS after retirement from this job", to which the claimant has ticked 'yes'."

63. It is clear that the Retire and Return Scheme requires a termination of the existing employment and for an employee to be re-engaged on new employment, in order to be able to take their pension and return to work. It is new employment, not a continuation of the existing contract (which was voluntarily terminated by the claimant). Whilst accepting the respondent's submission that there was no concluded agreement that the claimant was to return to part time working, we deal with this later on in our conclusions.

64. There was clearly no express dismissal by Mrs Innes at the meeting on 4 May. There could be no inferred dismissal from the respondent's actions then or thereafter, as the claimant had already shown her intention to terminate the contract of employment in order to be able to take her pension.

65. Further, from the respondent's Flexible Working Policy (213) the 'Retire and Come Back' option was the one the claimant wished to take. Whether or not the claimant had seen this policy is irrelevant. It was clearly the option she wanted, rather than the other 2 options, 'wind down' and 'step down', both of which lead to retirement being deferred.

66. Therefore the conclusion of the tribunal is that the claimant by completing and submitting the AW8 Form, was terminating her contract of employment. There was no clear agreement that she would return to work part time after 31 July 2016, therefore there was no dismissal under the definitions contained in section 95 ERA. Even if we accept the submission that the failure to allow the claimant to return on a part time basis was the communication of a dismissal, the claim for unfair dismissal must fail as continuity of service is not preserved under the Retire and Return scheme and the claimant would not have had the requisite service for unfair dismissal. We have considered the claimant's submissions on the question of continuity, and the point that the break in service would be one day, but that is premised on there being an agreement that the claimant was to return, and would have done so, on 1 August. There are two findings relevant to that. The first is that there was no concluded agreement. The second is the claimant's evidence that she decided, after the meeting on 4 May, she could not return to work for the respondent because of the way she had been treated. Therefore, the claim for unfair dismissal fails and is dismissed.

<u>Discrimination arising from Disability</u>

67. In order to succeed with this claim, the claimant must establish that she has suffered unfavourable treatment and that such treatment is because of something arising in consequence of her disability. *Pnaiser,* in a review of recent authorities

(at para 31) sets out, in detail, the proper approach to be taken by the tribunal. We summarise the following principles. The tribunal, looking at all the evidence before it, must identify whether there has been unfavourable treatment. It must determine what caused that treatment. It must decide whether that treatment is because of something arising in consequence of the claimant's disability, even if only in part. There may be other reasons for the treatment but the something arising in consequence of the claimant's disability must have a significant influence and so amount to an effective reason, or cause, of the treatment. At that point, the burden will shift to the respondent to show that any unfavourable treatment was a proportionate means of achieving a legitimate aim or that it had no knowledge of the claimant's disability. Clearly in this case, lack of knowledge is not relevant.

68. Unfavourable treatment is not defined in the Equality Act but the EHRC Code of Practice on Employment states that it means the disabled person: "must have been put at a disadvantage" (paragraph 5.7). The EHRC Employment Code indicates that unfavourable treatment should be construed synonymously with "disadvantage". As paragraph 5.7 goes on to say: "Sometimes unfavourable treatment may be less obvious, even if an employer thinks that they are acting in the best interests of a disabled person they may still treat that person unfavourably".

69. There is no requirement for a comparator in this claim. The tribunal takes particular note that there may still be unfavourable treatment even if an employer thinks they are acting in the best interests of the disabled person, as indeed Mrs Innes so believed.

70. We deal first with the unfavourable treatment issue and the specific allegations set out by the claimant. Although we have found that the claimant was not dismissed, for the purposes of her unfair dismissal claim, she was clearly subjected to unfavourable treatment in that she was not to return to part-time employment. Irrespective of whether there was a formal offer of part time work, the reality of the situation was that Mrs Innes was making it abundantly clear at the meeting on 4 May that the claimant was to fully retire on 31 July. She knew that the claimant wanted to return, yet that was not raised at all with Mrs McCarthy.

71. The claimant had not gone through the formal process to apply for part-time working because she had never been told about it and, as we have found, could not have known from any of the documents available to her. That is why she did not fill in Appendix 7. Regardless of that, the respondent's managers knew the claimant intended to return to work. Mrs Innes told us she was aware of that fact. The claimant had told Miss Hall, and submitted the AW8 Form (which Miss Hall had seen) which showed she wanted to come back to work. Despite this knowledge, nothing was said at the meeting on 4 May by Mrs Innes about the claimant returning to work. She was to stay on sick leave until her retirement.

72. It is put by Mr Islam Choudry that the claimant herself had not raised the question of coming back part-time. The claimant knew that Mrs Innes was aware that she wanted return to work, had told her previously it was unlikely to be a problem and to leave it to her. By the time of the meeting on 4 May that was not an option discussed or put to the claimant. It is not surprising, in light of the nature of that meeting, that Mrs McCarthy did not raise it. The claimant was being told, in effect, you cannot do the job any longer and you are to stay on sick leave

until you retire. She was upset and shocked. Indeed it was after that meeting that she made the decision that she could not return to work for the respondent at all. Had it been a normal return to work meeting, it is very likely that the claimant would have continued at work and made enquiries as to what her hours would be when she returned to work after her retirement. She thought she had put the process into motion by completing the AW8 Form and had spoken to her managers about returning to work after retirement. She had received a favourable response from them.

73. That situation changed significantly after the 4 May meeting. It is not so much the failure of the respondent to offer part-time work to the claimant; it is more about a management perception that the claimant was not up to doing the job because of her condition and the actions that flowed from that view. This was triggered by the drug error and clearly it was this matter which brought things to a head for Mrs Innes and Miss Hall and informed heir view that the claimant was no longer fit to do her job. This is given support by Miss Hall's completion of the Leaver Form on 10 May in which she states the claimant was not returning to work.

74. No performance procedure was followed by the respondent regarding the performance concerns alleged at the meeting on 4 May 2016. This did not happen because the claimant had been told to go on to sick leave until she retired. The tribunal sees it more as the action of telling the claimant to go on to sick leave, when she was fit to work, as being the unfavourable treatment rather than not taking her down the performance procedure route. The claimant points out that it would have given her an opportunity to clear her name. Aside from this, it is hard to see how not being taken down a performance procedure could be seen as unfavorable treatment.

75. The failure of the respondent to refer the claimant to OH, before a determination on her ability to remain at work was made, must amount to unfavorable treatment. Assumptions were made about the claimant's health which can only, at best, have been informed by historical occupational health reports rather than a current one.

76. The failure of the respondent to offer part time work to the claimant is dealt with above.

77. The failure of the respondent to inform the claimant that completing the AW8 Form was not the right way to ensure a return to work part time hours and/or a failure to notify the claimant of the correct policy to follow to return to work part time. As our findings of fact show the claimant was not told about the AW8 Form not being the way to return to work after retirement. Nor was she told about the flexible working policy and Appendix 7. We do not accept Miss Hall's evidence about this. We do not know why the claimant was not told about the correct procedure. The managers knew about the required procedure as they had advised other staff members.

78. The tribunal draws an inference from this unexplained failure that the respondent's managers, following the drug error, did not want the claimant to return to work but to retire fully because of their perception of her health problems. The tribunal concludes that the drug error incident triggered the discussion about the claimant's health problems, all of which arose from her

disability, and it was this view which informed the decision that she would go on to sick leave and not return after retirement.

79. As we have stated, the managers made an assumption about Mrs McCarthy's current health. She was not referred to Occupational Health before that meeting on 4 May. Their view was that the claimant's performance was being adversely affected again, as it had been in 2013 to 2014, by her MS. Miss Hall told us there was no recent deterioration in the claimant's health. If the managers had not known that history, it is highly likely that they would have taken the claimant down a capability/conduct route in relation to their concerns. This would have led to an Occupational Health referral if health problems were suspected as being behind performance issues.

80. Paragraphs 13(f) to 13(i) in the list of agreed issues could clearly amount to unfavourable treatment but the tribunal considers these are more suitably dealt with under the harassment claim.

81. 13(j) is the allegation that the claimant was told to stay off sick (without any medical evidence supporting this at the time) until 31 July. Whatever Mrs Innes' intention at that meeting to protect the claimant from disciplinary or capability procedures being taken, to tell the claimant to go on to sick leave for nearly 3 months was unfavourable treatment. The claimant was prevented from working, had to obtain a sick note in circumstances where it should not have been necessary and was being told, in effect, we think you are not well enough to do your job irrespective of what you yourself feel. Compelling the claimant to go onto sick leave is linked to the failure to obtain an Occupational Health Report before reaching the decision she was not fit to work. The only conceivable reason that Mrs Innes was able to tell the claimant to go on to sick leave was that she knew the claimant's disability would provide her with the opportunity to be able to obtain a sick note from her GP and enable her to obtain sick pay for that period.

82. Was such unfavourable treatment as found "because of something arising in consequence of her disability?"

83. The perceived poor performance of the claimant was that she was operating at 50% performance compared with other Band 7 nurses and that she had made the drug prescribing error. This has to be seen in context, namely that previous errors had led to supervised working, a view that the claimant might have difficulties revalidating herself with the NMC, and a perception of her health difficulties around mobility, memory, decision-making, concentration and her struggling to keep up with the pace of work and technology.

84. Mrs Innes' letter at page 103/104 is based entirely on the manager's perception of the claimant's health rather than what the claimant had said or any recent Occupational Health report. It is clear that the problems which had led to Mrs Innes telling the claimant to go on to sick leave before retirement were health ones which arose directly from her disability of Multiple Sclerosis. Mrs Innes had no medical evidence. There had been no referral to Occupational Health to support these views. The claimant had been at work for a continuous period prior to her two day absence. The letter alone shows that Mrs Innes' actions were taken because of health matters arising from the claimant's multiple sclerosis.

85. The respondent submits that the treatment of the claimant was a proportionate means to achieve a legitimate aim. That legitimate aim, as it is put

to us, was to ensure that nurses act safely, that their own and patients' safety is not put at risk and that employees are appropriately managed to ensure so. The tribunal's conclusion is that whilst that might be a legitimate aim, the respondent's actions were not proportionate in order to achieve that aim.

86. As Pnaiser v NHS England and Coventry City Council shows the threshold at which the burden of proof shifts to the respondent, in relation to discrimination arising from disability, is low and the test applied should not be confused with that for direct discrimination. Further, the tribunal accepts the claimant's submission that the respondent has not adduced any evidence to support what is put forward as a legitimate aim. We accept the claimant's submission that there is no evidence to support that the treatment accorded to the claimant was proportionate. Particularly where the respondent's witnesses have accepted there was no excuse not to follow the respondent's procedures and policies. A proportionate means of achieving the legitimate aim in respect of managing the claimant and ensuring the safety of staff and patients would have been to follow the policies and procedures in place to deal with capability and disciplinary issues.

87. At the time of the meeting on 4 May, the drug error investigation had not been completed. A view was formed, presumably on knowledge of what had occurred in the past, that the incident was linked to the health problems the claimant had arising from Multiple Sclerosis. There was no evidence at that time to support such a view. The claimant had not said it was, nor had Occupational Health linked the error to the claimant's health.

88. It is not accepted by the tribunal that the claimant had conceded she was not able to carry out her role safely. The decision not to subject the claimant to disciplinary or capability processes was based significantly on a management decision that the performance issue was health related. Whilst the motivation not to take the claimant down that route may have been well intentioned, it was not done with the claimant's consent. As the risk of repeating ourselves, she was simply told to go on sick leave and to retire on 31 July.

89. The argument that because the claimant was on sick leave meant no further action needed to be taken is a circular one. Having been told to go on to sick leave, it is disingenuous to suggest that it was no longer necessary to follow process because the claimant was on sick leave. It was not for genuine health problems that the claimant was signed off sick. In fact she had been fit to return to work on 4 May, at which point she was told she was to go on to sick leave.

90. The tribunal therefore concludes that the claimant was treated unfavourably for reasons arising from her disability. The respondent has not shown evidence that what we have found happened was a proportionate means of achieving a legitimate aim. Had the claimant returned to work from 4 May, there is no doubt that procedures may well have followed which might have resulted in her not being allowed to come back part time, but following proper process such as the referral to Occupational Health, finding out more about what had caused the error and taking the claimant through the respondent's procedures. That would have been a proportionate means of achieving the aim put forward. None of that happened.

Harassment

100. Did the respondent engage in unwanted conduct related to disability and did that conduct have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her? The claimant relies on the conduct and comments made by Mrs Innes on 4 May 2016 and in her letter of 5 May. They were manifestly unwanted by the claimant. The tribunal does not conclude that the comments made by Mrs Innes had the **purpose** of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It is clear to us that Mrs Innes did not intend to cause offence, humiliation or to violate the claimant's dignity. We are in no doubt that her intention was to protect the claimant from the consequences of being taken through the disciplinary or capability procedures. That said, we conclude it is the manner in which she went about doing so which meant her conduct and comments had the **effect** of violating the claimant's dignity, and of creating a hostile, humiliating and offensive environment for her.

101. We have taken into account Mrs McCarthy's perception of that meeting. We have also taken into account her evidence about how she felt during the meeting itself and afterwards. She was upset to the extent that she was barely able to say anything. She was tearful. She did not tell her husband about the letter she received after the meeting until a month later. She reported to her doctor at the time how upset and distressed she had been. Because she had been told that the Consultant had complained about her, she did not want the Consultant to come to her retirement party. She was so distressed and upset that her intention that she wanted to return to part time work changed. There can be no doubt, in the light of all this evidence, that the claimant's perception was that her dignity had been violated and that the work environment was now hostile and humiliating for her. She knew that a view was being taken that because of the effects of her disability upon her, she was not fit to work and that this view had been formed in the face of her presenting herself at a return to work meeting as fit to return and in the absence of any up to date medical evidence.

102. Furthermore, her reaction to what had been said and done by Mrs Innes must be seen in the context of how the working environment had been for her before that meeting. She worked as part of a team and had done so for a long time. It was clearly a close and supportive group of people. There had been performance issues in the past but they had been sorted satisfactorily and were well in the past. The claimant's wish to return part time after retirement had been met with a positive response from her managers. Aside from the drug error matter, which had only been briefly discussed with her by Miss Hall, Mrs McCarthy was not aware of any concerns about her health and adverse effects on her work performance before she went to that meeting.

103. As our findings of fact show, we have accepted the claimant's evidence about that meeting and the effects it had on her. Further, we conclude that her perception was an entirely reasonable one to hold in the circumstances. She thought she was going to a "catch up" or return to work meeting. She had no one with her. The reality was that she was confronted with statements that staff and the Consultant had concerns about her; her health was clearly worsening; it was being said to her, in effect, her memory was so poor she could not remember nor was able to explain her decision making in the drug error; she was not keeping up with the pace of work; she was not able to cope with new technologies; and

whether she would be able to meet the NMC health requirements. In different circumstances, these issues around the claimant's performance and her health could well have been legitimate ones to raise with her. For example, if the claimant had expressed concerns about her health herself; there had been an investigation into the drug error; a capability procedure had been followed and, most importantly, there was recent medical evidence supporting Mrs Innes' viewpoint. But to confront the claimant in the way she was at that meeting must amount to harassment, namely that the respondent had engaged in unwanted conduct related to the claimant's disability which violated her dignity and created a hostile and humiliating working environment for her.

Direct Disability Discrimination

104. The detriments claimed by the claimant under this head of claim are the same as those claimed, and found by us, as unfavourable treatment for the discrimination arising from disability head of claim. We have dealt with the allegations at paragraphs 8(f) to 8(i) in the list of issues as more appropriately dealt with as harassment and found for the claimant under this head of claim. They cannot be both acts of harassment and detriments, applying s212(1) Equality Act.

105. In view of our findings and conclusions in respect of the unfavorable treatment in the discrimination arising from disability claim, the tribunal, having found that the claimant has been discriminated against because of the protected characteristic of disability, has not gone on to determine the direct discrimination claim. We consider that it is not necessary for us to do so. However, if the parties wish us to determine that particular head of claim, perhaps for remedy purposes, then the tribunal will do so, provided reasons are given as to why it is necessary.

Wrongful Dismissal

106. The tribunal is not entirely clear as to whether such a claim has been validly made. It is not a claim in the ET1, nor listed as such by Employment Judge Johnson in his Order of 2 March 2017. It does feature in the agreed list of issues and the respondent's submissions but not in the claimant's. The question about this, however, may be an academic one in view of our findings about there having been no dismissal by the respondent. As a result there can have been no breach of contract by the respondent in not giving notice or a payment in lieu of notice.

_____

Employment Judge Cocks

_____

Dated 27 October 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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27 October 2017
FOR EMPLOYMENT TRIBUNALS