EMPLOYMENT TRIBUNALS

Claimant: Mrs P Whitburn

Respondent: Royal Devon and Exeter NHS Foundation Trust

Heard at: Exeter **On:** 18, 19, 20, 23, 24, 30 & 31 January 2017
3 February 2017
3 & 26 May 2017 (in chambers)

Before: Employment Judge Housego
Mrs M Corrick
Mr T Slater

Representation
Claimant: In person
Respondent: Mr S Wyeth of Counsel

RESERVED JUDGMENT

1. The Claimant was unfairly constructively dismissed by the Respondent.

2. The Respondent is ordered to pay to the Claimant a basic award of £2723.15.

3. No compensatory award is made.

4. The Respondent failed to provide itemised payslips for every pay period when the Claimant was employed by the Respondent.

5. The other claims of the Claimant are dismissed.

REASONS

The allegations

1. These are set out in Annex 1.

The law

2. The claim for constructive dismissal is admitted, and so there is no need to set out the relevant law. There is also a claim alleging discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5

(work) of the EqA. The Claimant alleges direct disability discrimination, indirect disability discrimination, discrimination arising from a disability, failure by the Respondent to comply with its duty to make adjustments, harassment, and victimisation.

3. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person (P) has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.

4. As for the claim for direct disability discrimination, under section 13(1) of the EqA 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.

5. As for the claim for indirect disability discrimination, under section 19(1) of the EqA 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. A provision criterion or practice is discriminatory in these circumstances if A applies, or would apply, it to persons with whom B does not share the characteristic; it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts, or would put, B at that disadvantage; and A cannot show it to be a proportionate means of achieving a legitimate aim.

6. As for the claim for discrimination arising from disability, under section 15(1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. This 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.

7. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

8. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

9. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence or information, or making a false allegation, is not a

protected act if the evidence or information is given, or the allegation is made, in bad faith.

10. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

11. The remedies available to the tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the Respondent in relation to the matters to which the proceedings relate; may order the Respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate recommendation. In addition the tribunal may also award interest on any award pursuant to section 139 of the EqA.

12. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation.

13. We have considered the cases of Environment Agency v Rowan [2008] IRLR 20 EAT; Archibald v Fife Council [2004] IRLR 651 HL; Project Management Institute v Latif [2007] IRLR 579 EAT; , in respect of sickness policies Royal Bank of Scotland v Ashton [2011] ICR 632 EAT; Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley [2012] EqLR 634 EAT and Rider v Leeds City Council EqLR 98 EAT]. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

14. The provision requiring payslips is in the Employment Rights Act 1996 at section 8, and for remedy at section 11.

Evidence

15. The Tribunal perused substantial documentation provided by the parties and heard oral evidence from the Claimant and from her husband, and from Ms G Husbands, Ms J Morris, Ms E Knowles and Ms P Bridson.

16. The management of the hearing included breaks morning and afternoon and a full hour every lunchtime. The Claimant was able to have comfort breaks whenever she asked. The hearing was scheduled for no more than 2 full days at a time without a day's rest for Mrs Whitburn. Mrs Whitburn felt unable to attend the hearing on Thursday and Friday the first week and the hearing then resumed the following Monday. The Tribunal was able to conclude the hearing without rushing Mrs Whitburn, but this used up the deliberation days built into the schedule, hence the delay in this decision as a chambers day was needed, and by reason of the members' other commitments that was not possible immediately. Mrs Whitburn requested the RD&E to make its submissions orally so that she could consider them and prepare her own written submissions. Counsel for the RD&E agreed to this and made oral submissions on the last day of the hearing. That the RD&E made oral

submissions meant that Mrs Whitburn was able to hear them. She specifically requested this in preference to the RD&E also providing written submissions. It was agreed that the RD&E might provide a response to the submissions of Mrs Whitburn, and they did. As Counsel made his oral submissions I explained to the Claimant the points being made so that the Claimant could fully understand what was being said. My notes of hearing record what I explained and when. In the interests of clarity I have not set them out in the note of the Counsel's submissions which is annexed to this decision.

Submissions

17. A note of the submissions of Counsel for RD&E is at Annex 2.

18. The submissions of Mrs Whitburn are in Annex 3.

19. The response to those submissions is at Annex 4.

Facts found

20. Mrs Whitburn worked as a ward clerk for Royal Devon and Exeter hospital. She worked there from 23 November 1987 until her resignation on 16 January 2014 (although RD&E paid her until the end of March 2014). Her contracted hours were a total of 5 a week, on Saturdays and Sundays. She received a 44% enhancement to her hourly rate of pay for Saturdays, and an 88% enhancement for Sunday. This meant that by the time she left the RD&E she was paid £92.31 a week for 5 hours work.

21. The weekend ward clerk looked after 4 wards. During the week there was a ward clerk for every ward. Her work was to book in patients, and keep their records up to date.

22. In 2002 Mrs Whitburn was diagnosed with post viral syndrome and/or ME. The exact diagnosis is not relevant, but the effect is that Mrs Whitburn is frequently unable to function to a level necessary to attend work, and this becomes apparent to her only on awakening.

23. She had previously been diagnosed with depression: this is not relevant to her claims. Separately, in 2010 Mrs Whitburn developed a worsening of a back/leg problem, that caused her difficulty sitting. On 06 August 2010 Mrs Whitburn raised this with her then manager Tim Pithers. After a year or so, he referred her to Occupational Health, after a return to work on 17 June 2011 after a back related absence from work.

24. It is accepted by RD&E that the ME and the back/leg issues are both disabilities. There is no issue with the date of knowledge, save as to the back/leg problem. As to ME the RD&E accept that they knew in May /June 2007. Mrs Whitburn says she told them in 2002. The Tribunal finds the RD&E are correct. There is no record of it. Given Mrs Whitburn's comprehensive claims, had it been as she said there would be evidence of it. It is inconceivable that Mrs Whitburn would have told a manager in 2002 and then not referred to it for 5 years. Mrs Whitburn stated that depression was not an issue for her after July 2008. It was in July 2011 the RD&E became aware of the leg/back problems of Mrs Whitburn.

25. In 2007 Mrs Whitburn did not attend work on a variety of occasions, but did not call in sick. No one noticed for a while, as she did not work every weekend, and worked alone. When this was noticed disciplinary action was taken. Mrs Whitburn said this was a result of disabling ME or depression. The RD&E ceased disciplinary action and referred Mrs Whitburn to Occupational Health. As there was limited

management support on a Saturday, on the recommendation of Occupation Health, on return to work on 01 October 2007 after extended ME related absence, management agreed that Mrs Whitburn could work on a Wednesday instead of a Saturday. She would do routine administration work then, instead of being a ward clerk. Although this was lower grade work, and although it would not attract the Saturday enhancement of 44%, the RD&E continued to pay her at that rate, throughout, for the next 8 years. She continued with the Sunday work, when the work was much less than on a Saturday, and so not the problem for Mrs Whitburn that she found Saturdays to be.

26. At about this time, in 2007, Mrs Whitburn raised a grievance about the disciplinary process, that was resolved, and which she states was a protected act (because it was related to disability) and which she states is the reason she was, she says, victimised in 2012.

27. Mrs Whitburn suggested that she could come to work later on a Saturday: but in her absence through sickness the RD&E had tackled waiting lists by elective surgery on Saturdays: the patients needed to be booked in on arrival at as early as 07:30 am. Mrs Whitburn said that the nurses could do that, as they would be there, and she could do other work when she arrived later in the morning. The RD&E said that would not work - when there was a ward clerk there that was what the ward clerk did, and the nurses had other things to do, and plainly it would not wait. They did not accept Mrs Whitburn's response, that there were 2 weeks in 3 when she was rostered so 1 in 3 when there was no ward clerk, so they could cope as they did on the 1 in 3 when she was not there. This was because there was alternative rostering, and that a ward clerk was important at the start of the day: if they had to manage 1 in 3 without one, that was no reason to manage 2 in 3 without a ward clerk.

28. The work on a Sunday was less busy. There were no patients booked in for surgery until Sunday evenings, when Mrs Whitburn did not work. She continued with her Sunday hours.

29. In any event Mrs Whitburn preferred not to work Saturdays in summertime, as she and her husband own a caravan, kept in Cornwall, which they let out in the summertime. She and her husband go down to the caravan on Saturday mornings in order to effect the changeovers.

30. Mrs Whitburn was off sick a very great deal. The RD&E has a policy that says disability related absence should be recorded separately from other sickness absence, but has no means of doing so. It uses something like the Bradford score as a trigger for action through sickness. Mrs Whitburn was never subjected to any formal management process arising from her very extensive sickness absence.

31. Mrs Whitburn asked for a special chair. She asked for one like that of a colleague. It was obtained for her, but after a while she found it was not suitable after all. An Occupational Therapist made a recommendation on 20 July 2012, when the appellant was off sick and it was implemented. This took a little while, and Mrs Whitburn remained absent from work (though fit to work) and was paid, as there was no chair until it was in place on 15 August 2012. Mrs Whitburn was not happy that others used her chair (although she needed it only 5 hours a week) and so it was locked away in a cupboard when she was not there. Mrs Whitburn objected that it was sometimes difficult for her to get access to that cupboard.

32. Mrs Whitburn wanted to have a space to collect her thoughts if the work got too much for her while at work. She then needed some "time out". Management agreed to this, and allowed her to use the surgeons' spinal library. Mrs Whitburn did not find this acceptable as the surgeons came into the library and spoke to one another, so that it was not fulfilling the function.

33. In her oral evidence Mrs Whitburn accepted that by February 2013 all adjustments had been made that could have been made.

34. Mrs Whitburn suggested that she should come to work as and when she was able, and work on her own in a filing room (the POC administrative centre). Management did not agree to this: there was an issue with lone working, and it was not acceptable for her to come in as and when she wanted. Nor would there be any certainty as to when the work would be done.

35. Mrs Whitburn indicated that she was troubled by having a high rate of sickness absence, and that was not necessary, as she was able to work days other than Wednesday and Saturday, and would like to make up the day lost to sickness on another day, so that it would not count as a sickness day at all. Management agreed this, but it did not work out, as the very first time the appellant was off sick and rearranged the day, she was also sick on that rearranged day: the manager decided the whole thing was completely unworkable. If she could not work the rearranged day it was a day off sick.

36. When told this, on 07 July 2013 Mrs Whitburn went off with stress, and never returned to work, resigning on 16 January 2014 giving as the reason that she had not received the payslips she should have got. Shortly before this RD&E had decided to convene a meeting that would lead to the commencement of the capability process relevant when there was extended absence, Mrs Whitburn having been absent for more than 6 months by this time.

37. After going off sick in July 2013 Mrs Whitburn said that she was not well enough to be contacted, and would let management know how she got on. She specifically requested management not to contact her. She later complained that she was left abandoned by management who had not been in touch with her to tell her how much she was missed, and generally to ask after her.

38. After 07 July 2013 Mrs Whitburn requested payslips. The pay office got very confused about how to pay her, because of the 44% and 88% enhancements. It is, as Mrs Whitburn points out, very simple in fact: she got that pay whatever hours she worked and if she worked none at all. The pay office did not understand this, and failed to give her payslips (though she did get paid, though not always entirely the correct amounts at the correct times). After she left the RD&E the RD&E paid her an extra £1100 or so to the end of March 2014, not taking the point that she had resigned in January 2014, but paying her until the end of March 2014. This was because on receipt of her letter of resignation management had asked her to reconsider, treating it as a letter of grievance, and so did not process her as a leaver for 2 months.

39. Shortly before Mrs Whitburn resigned, and to her knowledge, RD&E had convened a meeting that was to consider the implementation of the capability procedure in respect of the absence of the Claimant, who had been absent for over 6 months. That would inevitably, and shortly, have led to the termination of the employment of the Claimant for that reason. Her sickness absence record over the last 8 years would have made that a fair dismissal.

<u>The claims of the appellant</u>

40. These are listed in a schedule. The Tribunal has considered that the Claimant has not met the <u>Igen v Wong</u> test to shift the burden of proof to the Respondent in any of the claims. If that burden had shifted the Respondent would have met it.

41. The claims fall into categories. The first are alleged failures to make reasonable adjustments. There is nothing in any of these claims. Mrs Whitburn agreed in answer to questions from the Tribunal that by February 2013 everything had been done that she could wish for. Her objections were that these had taken too long, and that the ability to work days when she was off sick on a later date had been withdrawn.

42. Taking the delay point first, there were some delays, for example in the provision of a second chair. That was not for any reason other than that it took that length of time to get it. There was no disadvantage to Mrs Whitburn as she was able to work, but did not as there was no chair, and was paid in full.

43. The RD&E said that it was not possible for the Claimant to roll forward a day's sickness for a second time. This was not unlawful discrimination. The RD&E had gone far further than was reasonable. It was unrealistic to expect the RD&E to permit an employee to work when she was able, with days moved at no notice. That was exemplified on the first occasion it was tried: Mrs Whitburn was ill on the reorganised day. She was now into the next week of work. How long was she to be able to carry it forward? What about the work she would have done if at work?

44. If one sets the situation out in its constituent parts the complete unreasonableness of what Mrs Whitburn was demanding is apparent. She went off sick, never to return, when the RD&E said that when she was sick, on a day that she had arranged to come to work to replace a day when she was sick, she had to take that day as sick leave, and not roll it forward again, when it would run into the next week's work. She only ever worked 2 days a week. If she could not manage 2 days in any given week it would be 3 days the next week. If she was off for 2 successive weeks of 2 days that would be 6 days due by the 3rd week. So would she then work 3 days a week until she made it up? What if she was sick again in any of the weeks before she had made up the days? Was she to have a bank of days she owed the RD&E to make up when she could? How large could that bank of days be? But in fact RD&E said that she could make up days lost to sickness "by agreement". This necessarily has the prospect that there might not be agreement. The double roll forward was such a case. It was entirely reasonable of the RD&E not to agree a second roll forward. That refusal was the cause of Mrs Whitburn going off sick for the last time.

45. This might be described as a PCP or an adjustment. But to require that the rearranged day had to be taken the next week or booked as sickness is at least as far as anyone could think a reasonable adjustment would need to be: even that was not enough for Mrs Whitburn. As Emma Knowles was alleged to have said (the "social club" allegation) she wanted to attend when it was convenient to her. The adjustment offered was that by agreement (the words are important) Mrs Whitburn might work a day when she was off sick another day. Not to agree a further roll forward is, in the judgment of the Tribunal within that adjustment. Even Mrs Whitburn said that she was not asking to work whenever she felt like it - though what she was demanding comes very near to that).

46. The fact of the matter is that the RD&E allowed Mrs Whitburn to continue to work on terms that suited her: which was to work whenever she felt able (but not on Saturdays in summer when she wanted to look after her caravan). She would be paid at 44% or 88% above the rate for the job when she worked in the week, and even though she would do only basic admin work then.
47. The matters Mrs Whitburn describes as PCPs are largely not PCPs but adjustments to her standard conditions to her advantage by reason of her disabilities, with which she did not wholly agree at the time.

48. Mrs Whitburn's next categories are victimisation and harassment. There is nothing in these claims either. Mrs Whitburn said that one manager, Emma Knowles said to her in exasperation *"This is not a social club"*, when Mrs Whitburn wanted to work a day

to suit her in the week, to be determined on the day she came in. On the balance of probabilities it is entirely likely that Ms Knowles said such a thing, in the circumstances. Mrs Whitburn has an ego centric view of the world, but the Tribunal did not think her untruthful. This was not harassment or victimisation. Mrs Whitburn complains that Occupation Health was told information they did not need to know: on another occasion she complained that Occupational Health had not been told enough. Mrs Whitburn complained that she was offered early retirement and did not want it and then the matter was raised again. Since early retirement on medical grounds is usually (especially in the health service) on very advantageous terms it is impossible to see this as a detriment. That Mrs Whitburn may have said she was not interested once did not mean it was harassment to see if she might be interested in it at a later date.

49. Mrs Whitburn objected that while off sick from July 2013 she was not contacted by management to see how she was. When asked what should have been done, Mrs Whitburn said that she should have been told how much she had been missed and to ask how she was. She had previously written emails to the RD&E to say that she was too ill to deal with correspondence, that she was awake at night and asleep in the day, did not want to be troubled and would let them know how she was getting on. When asked to explain how these two were reconcilable, Mrs Whitburn said that she did not want to be troubled with process, but expected there to be pastoral care. The Tribunal did not find this an attractive argument: it was probably a genuine answer, and an example of the unidirectional view of Mrs Whitburn, which can be summarised as the RD&E having all the obligations to accommodate her every need or wish because it was disability related, without any cognisance of their position. A further example of that was the introduction of elective surgery on Saturdays in order to reduce waiting list times. Mrs Whitburn was off on long term sick leave at the time. She objected that she was not consulted about this. She is a 5 hours a week ward clerk in a big hospital. It did not affect her hours of work in any significant way.

50. That the RD&E wanted to monitor her work was entirely understandable. Her absences had come to light as she had not turned up for work and not told anyone, and been paid. Her sickness absence was so large that monitoring was entirely justified. Calculation of her sickness absence in full weeks when she was only working 2 days a week was not harassment or victimisation. She suffered no detriment. If she was not at work on either of the days in a week when she was due to work, that is a week's absence even if she was due to work Saturday and Sunday and was ill, but was not ill Monday to Friday.

51. Complaints said to be victimisation such as holding a meeting without prior notice and being told that it might be necessary to start the capability procedure and to canvass the possibility of early retirement are not victimisation or S15 matters. The meeting in question was an informal meeting, not a disciplinary one. The asserted failure to provide notes of meeting related to manuscript notes which were subsequently turned into a typed note, and destroyed. The typed notes are not said to be inaccurate. Perhaps the manuscript notes should have been retained, but even if so it is not victimisation or S15 disability discrimination to have destroyed them. It was nothing to do with discrimination, or Mrs Whitburn, but working practice. There has never been a refusal to provide anything. Mrs Whitburn may have needed to ask on occasion, and when she did she was provided what was asked.

52. Other complaints are of failure to advise of various things, categorised as victimisation. Change in line manager is one such, or not notifying the outcome of a meeting in December 2013. Mrs Whitburn complains that she was victimised by not being told that she had a long service award (25 years on 23 November, and so at about that time) and a shopping voucher. It was at work awaiting her return. She had said that she did not want to be disturbed at home. She complained about everything: it was entirely understandable that RD&E staff put it in a drawer to await

her return, and overlooked it when the absence became extended. Most of the absences of Mrs Whitburn in recent years had been short. It was not done to victimise her, and nor is it S15 discrimination.

53. The allegation that the RD&E failed to contact the Claimant typifies the Claimant's view of the world. She told the RD&E that she could not sleep at night, and was often asleep in the day. She was so affected by her ME that writing the simplest email took a long time, and she had to pick her time to try. She could not cope with emails or phone calls, and she did not want any. She would update them as to her condition when she felt able. They did not contact her, at her request. Had they done so there would inevitably have been an allegation of harassment or bullying. Instead the Claimant complains that the RD&E failed to comply with its pastoral duty of care, and were not telling her how much she was missed and how important her work was. She says this is different to contacting her for the management of sickness absence. This is unrealistic. She had asked not to be contacted. No one could manage a person with such views to that person's satisfaction. This attitude permeates all the Claimant's claims. Because she has a disability her view is that the entire organisation has to be geared to cope with her every need. If they do not there is S15 detriment, or S19 indirect discrimination, or S13 direct discrimination, or S23 harassment. The Claimant overlooks that the obligations of the Respondent are limited to what is reasonable in all the circumstances.

54. There are other allegations of indirect discrimination, such as criteria for monitoring her case. It needed monitoring. Constructive dismissal is said to be indirect discrimination. It is not a provision criterion or practice.

55. The Tribunal found an overview of the facts to be far more instructive than over emphasis on the immense detail in the paperwork. If ever there was a case where there is a danger of not being able to see the wood for the trees this would be it, had the Tribunal focussed on the trees rather than the wood.

56. All the claims under the Equality Act for disability discrimination are dismissed. The Respondent allowed the Claimant to do whatever she wanted, and did whatever she asked, and paid her enhanced rates for doing lesser work at times when she was contractually entitled to no pay enhancement, and put up with a sickness record that no employer could be criticised for treating as a reason to end employment (disability related or not).

57. It really is not a reasonable adjustment for an employee to expect the employer to allow the employee to come to work when she feels she is able to do so, to cancel on the morning of a rostered work day and reschedule, as of right, to give the employee permanent access to her own personal "break out" space to use as and when she wishes, and to give her sole access to a chair (or to provided her with her own individual storage for it) when she worked 5 hours a week as a clerk. A hospital is a hugely complex organisation, and there are limits to how accommodating it can be expected to be. The Respondent went far further than ever the Claimant might reasonably have expected, and did so for years.

58. In so far as claims are about allegedly discriminatory policies they fail as whatever policies or trigger points there may be, no detrimental action was ever taken against the Claimant by reason of sickness absence. That the RD&E was not able to record disability related absence separately from other sickness absence as its policy required does not give rise to any claim by the Claimant as there was never any form of performance management of the appellant by reason of absence (or for anything else, save for not turning up for work and not telling anyone, right at the beginning, which the Respondent dropped as soon as the Claimant said that it was disability related).

59. The claims about ill health early retirement cannot succeed, as this was to offer to explore whether an advantage was available to the Claimant. The Claimant enjoyed the social side of work and did not want this: that does not make it discrimination to ask Occupation Health to consider whether it could apply to her. She asserts that it was harassment to repeat the offer. When referring again to Occupational Health in circumstances such as those of the Claimant it was nothing other than sensible to check the position.

60. The claims to harassment and victimisation cannot succeed against the background of an employer doing far more than any one (other than the Claimant) would think reasonable, and doing so for years. There was no intention to (or effect of) causing the Claimant loss of dignity or other hurt. They did all they could to help her. In so far as there is any matter which took too long, or where there was a failure to do anything, this was entirely down to operational matters. For example getting a special chair took a few weeks. In the scheme of things this was not too long: if it was that was not a matter of discrimination. At worst it might be asserted to be inefficiency. Problems with payslips were admin matters with people who had no connection with the Claimant. If that matter was not chased up as the Claimant (and the Respondent) would have liked, then that has to be put into the context of a million and one other things to be done. It was not discriminatory. And while the dignity of everyone at work has equal importance, it has to be borne in mind that the Claimant worked 5 hours a week, latterly doing much routine administration. Any organisation has to prioritise. It is not discriminatory that she was not always at the top of the list of priorities.

61. The claim to have been victimised in 2012 by reason of a grievance raised 5 years beforehand (and given how over accommodating the RD&E had been in the 5 years since) is not credible.

62. While RD&E concedes that the Claimant was entitled to resign over a breach of a fundamental term of the contract, it is highly significant that RD&E had convened a meeting with the Claimant that was the precursor to the instigation of the capability procedure that would inevitably have led to the dismissal of the Claimant for capability reasons.

63. Given these findings of the Tribunal the question of out of time issues is not determinative. Taken at their highest, these claims do not succeed. It was necessary to determine the facts to determine the discrimination claims that were not out of time, such as constructive dismissal.

64. However the Tribunal also considered the Respondent's claim that many of the claims were out of time. The Claimant agreed, in answer to question from the Tribunal, that by February 2013 there was nothing that she wanted done that had not been done.

65. That means that all the claims for reasonable adjustments are out of time, as that is nearly a year before she left. For that reason also, at that point (February 2013) there was nothing for the Claimant to complain about. She did not go off sick until July 2013: more than 3 months later. The decision not to allow the Claimant to roll forward a sick day for a second time was not part of any sequence of events. All claims before the start of May 2013 are out of time.

66. The Claimant was off sick from July 2013 until she left in January 2014. All the claims for other matters before July 2013 are out of time for this reason also (as well as that in paragraph 65).

67. The Claimant complains that during that period of sickness absence the Respondent did nothing: therefore it is logically impossible for anything done before she went off

sick to be a containing act (the complaint about lack of pastoral care has no merit and could not join the claims into a sequence). The complaints about payslips are unconnected with anything that went before and are simply administrative matters. The long service award was oversight. The allegations set in the period of sickness have no merit and do not form any part of a sequence.

68. The Tribunal does not think it would be just and equitable to extend time. Most of the discrimination claims of the Claimant therefore fail as out of time. If they were not out of time they are dismissed on their (lack of) merit.

69. There was no right to payslips, holiday pay or sick pay subsequent to the ending of the employment by resignation on 16 January 2014. The Claimant was ordered to pay a deposit as a condition of continuing with a claim that the effective date of termination was later, and did not do so. Accordingly the Tribunal finds that date to be the effective date of termination. While the Respondent made payments past that date, the money was not pay (as the employment had ended) and so there can be no entitlement to payslips.

70. In so far as a comparator is required the Tribunal have had to apply a hypothetical comparator, which would be a person with no disability but who had a very poor attendance record, with a mixture of extended absences and repeated and frequent daily absences without notice.

71. The Tribunal accepted the submissions of Counsel as a thoughtful analysis of the issues and largely agreed with them.

72. Summary: The Claimant had a very poor long term sickness absence record. After a long history, by February 2013 the Claimant was satisfied with everything that was done for her (save that the surgeons would talk in their library so that it was not quiet all the time). The Respondent agreed that, by agreement on a case by case basis, she could roll forward a day when she was off sick in order to work another day, and so not take the first day as sickness absence. When she was sick on a re rostered day the Respondent said that it could not be rolled forward again. That was a reasonable thing to say. It was not to withdraw that adjustment but to implement it. The Respondent was not obliged to agree to the request of the Claimant to roll forward days off sick, as the adjustment required their agreement. Their refusal on this occasion was reasonable. It was this that prompted the Claimant to go off sick, never to return. She resigned and claimed constructive dismissal over payslips, soon after she was notified of a meeting to consider her extended absence, the end of which was not in prospect. That meeting, with her sickness absence, would have soon led to the ending of her employment through that process being followed.

Remedy

73. Failure to provide payslips. It appears this is limited to the payslip for January 2014, the Tribunal having decided that there was no entitlement to pay and so no entitlement to a payslip for February and March 2014. The Tribunal so declares and does not make any monetary award.

74. Unfair dismissal: Mrs Whitburn is entitled to 12 weeks' pay in lieu of notice, upon her resignation accepted as constructive dismissal. She has been paid 10 weeks, from 16 January 2014 to 31 March 2014. Her entitlement is therefore 2 weeks pay, at £92.31 a week = £184.62. However in submissions Counsel for the Respondent told the Tribunal that the Respondent had agreed and paid a figure of £1300 for the first 3 claims in the first ET1 and so no award is made.

75. Mrs Whitburn is entitled to a basic award of 1 ½ weeks' pay for each of 19 years and 1 week at 1 week's pay. 29 ½ x £92.31= **£2723.15**.

76. Mrs Whitburn is still off work. There is no prospect of her being fit for work, over 2 years after leaving the RD&E. RD&E had not taken any step to end her employment by reason of sickness. It is not conceivable that they would not have dismissed her by now. The process was about to start. Loss of statutory industrial rights implies that are statutory rights to be acquired. Mrs Whitburn is unlikely to be obtaining statutory rights and so it would not be just and equitable to order a payment for loss of non existent statutory rights.

77. Any award that might otherwise be in prospect would be reduced to zero as a *Polkey* reduction. While the Respondent has accepted that the resignation was by reason of the payslip issue, and not by reason of the imminence of the capability process being implemented, the documents clearly show that this was now about to be followed. Mrs Whitburn would have been dismissed for capability reasons shortly after she resigned.

78. Mrs Whitburn was running out of any entitlement to pay, having been off work from 13 July 2013. There is no proved loss of income. Therefore it is not just and equitable to make any compensatory award, as there is no evidence of loss.

79. There would have been loss of holiday pay in the notice period. At page 1107 Mrs Whitburn calculates this at £235.26. The RD&E say it is £181.25. Counsel for the Respondent said in submissions that a figure of £1300 had been agreed and paid for the first 3 claims in the first ET1 of which this is one, and so no award is made. If it has not been paid the Tribunal assess it at £235.26, as the cost of arguing the difference will exceed it.

80. If either party considers that any financial aspect is not arithmetically correct, or that the Tribunal has not properly understood the £1300 agreed to be paid to Mrs Whitburn by RD&E they are invited to apply, with full reasons, for the Tribunal to review that part of the decision.

_____

Employment Judge Housego

_____

Date 14 JUNE 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19 JUNE 2017

.....

FOR EMPLOYMENT TRIBUNALS

Annex 1 - Claimant's schedule of claims

Alleged act	Nature of act	Types of discrim	Relevant date	Relevant disability	Discriminator	Protected act
1. (paragraph 13 of ET1	PCP requiring that I work set hours/set days/fixed roster	Indirect / S15 / RA	Continuous from 1st October 2010 to end of employment	All - individually and cumulatively	The Respondent	
2. (paragraph 14 of ET1)	PCP of recording days not contracted to work as sickness absence	Indirect / S15 / RA	continuous from 2002 to end of employment	All - individually and cumulatively	The Respondent	
3. (paragraph 15 of ET1)	PCP of recording/treating all disability related absences like normal sickness absences	Indirect / S15 / RA	continuous from 2002 to end of employment	All - individually and cumulatively	The Respondent	
4. (paragraph 16 of ET1)	dismissed as out of time on 31 October 2014					
5. (paragraph 17 of ET1)	PCP that I had to work weekdays upon return to work in 2007	Indirect discrimination / reasonable adjustments	26 July 2007 - 18 December 2007	Depression/anxiety and ME	The Respondent	
6. (paragraph 18 of ET1)	Discriminatory remarks in response to request for reasonable adjustment	S15/harassment	01 October 2007	Depression/anxiety and ME	Emma Knowles (in her capacity as Manager)	
7.(paragraph 19 of ET1)	Withdrawn					
8. (paragraph 20 of ET1)	Failure to advise of management change/maintain supportive contact	S15	Between 27 April - early June 2012	Back/leg pain	The Respondent	

Alleged act	Nature of act	Types of discrim	Relevant date	Relevant disability	Discriminator	Protected act
9. (paragraph 21 of ET1)	Failure to take prompt action to facilitate my return to work	S15	Between 21 May - 4 July 2012	Back/leg pain	The Respondent	
10. (paragraph 22 of ET1)	Holding an unannounced management / HR meeting with me at which I was warned of possible disciplinary action or dismissal and advised to consider ill health retirement	S15 / victimisation	27 June 2012	Back/leg pain and all disabilities cumulatively	The Respondent	1. (Grievance of 6 December 2007)
11. (paragraph 23 of ET1)	Disclosing personal information without my knowledge or consent	S15 / harassment / victimisation	28 June 2012	Back/leg pain and all disabilities cumulatively	Tracey Raymond (in her capacity as HR advisor)	1
12. (paragraph 24 of ET1)	Asking OH if I qualified for ill health retirement without my consent	S15	November 2012	Back/leg pain and all disabilities cumulatively	The Respondent	1 and 2 (email of 3 July 2012
13. (paragraph 25 of ET1)	Isolating and marginalising me during disability related absence	S15 / harassment / reasonable adjustments	Between 8 October - 14 December 2012	ME and all disabilities cumulatively	The Respondent	1 and 2
14. (paragraph 26 of ET1)	Struck out					
15. (paragraph 27 of ET1)	Failure to take prompt action to facilitate my return to work	S15 / victimisation / reasonable adjustments	Between 3 December 2012 - 30 January 2013	ME	The Respondent	1,2 and 3 (meeting on 14 December 2012

Alleged act	Nature of act	Types of discrim	Relevant date	Relevant disability	Discriminator	Protected act
16. (paragraph 28 of ET1)	Isolating and marginalising me during disability related absence	S15 / victimisation / reasonable adjustments	Between 15 December 2012 - 16 January 2013	ME and all disabilities cumulatively	The Respondent	1,2 and 3
17. (paragraph 29 of ET1)	Refusal to provide me with notes of formal case management meeting	victimisation / reasonable adjustments	14 January 2013 to end of employment	ME	The Respondent	1,2,3 and 4 (email of 14 January 2013)
18. (paragraph 30 of ET1)	struck out					
19. (paragraph 31 of ET1)	Application of 3 new PCPs only to me	Direct / indirect / S15 / harassment / reasonable adjustments	continuous from 3 April 2013 to end of employment	ME and back / leg pain	The Respondent	1,2,3 and 4
20. (paragraph 32 of ET1)	Failure to provide payroll with accurate pay information	S15 / harassment / victimisation	April 2013 to 27 June 2013	ME and all disabilities cumulatively	The Respondent	1,2,3 and 4
21. (paragraph 33 of ET1)	PCP of making unilateral assessments about my health and welfare	indirect / S15 / harassment / reasonable adjustments	continuous from on or around 3 April 2013 to end of employment	ME and back / leg pain	The Respondent	1,2,3 and 4
22. (paragraph 34 of ET1)	Failure to provide payslips at the time of each pay day	S15 / harassment / victimisation	24 May to 27 November 2013	ME and all disabilities cumulatively	The Respondent	1,2,3 and 4
23. (paragraph 35 of ET1)	Failure to provide requested information about pay / sick pay	S15 / harassment / victimisation	continuous from 30 May 2013 until end of employment	ME and all disabilities cumulatively	The Respondent	1,2,3 and 4
24. (paragraph 36 of ET1)	Failure to provide payroll with accurate pay information	S15 / harassment / victimisation	continuous from July 2013 to end of employment	ME and all disabilities cumulatively	The Respondent	1,2,3 and 4

Alleged act	Nature of act	Types of discrim	Relevant date	Relevant disability	Discriminator	Protected act
25. (paragraph 37 of ET1)	Failure to provide payroll with accurate pay information	S15 / harassment / victimisation	continuous from July 2013 to end of employment	ME and all disabilities cumulatively	The Respondent	1,2,3 and 4
26. (paragraph 38 of ET1)	Application of new PCP restricting when I could work	Direct / indirect / S15 / harassment / victimisation / reasonable adjustments	continuous from July 2013 to end of employment	ME and back / leg pain	The Respondent	1,2,3 and 4
27. (paragraph 39 of ET1)	Isolating and marginalising me during disability related absence	S15 / harassment / victimisation / reasonable adjustments	Between 7 July 2013 to 10 January 2014	ME and all disabilities cumulatively	The Respondent	1,2,3 and 4
28. (paragraph 40 of ET1)	Failure to provide payslips at all	S15 / harassment / victimisation	August and September 2103	ME and all disabilities cumulatively	The Respondent	1,2,3 and 4
29. (paragraph 41 of ET1)	Failure to advise me of a change in sick pay entitlement	S15 / harassment / victimisation / reasonable adjustments	September 2013	ME and all disabilities cumulatively	The Respondent	
30. (paragraph 42 of ET1)	struck out					
31. (paragraph 43 of ET1)	New PCP defining criteria for monitoring and management of my case	indirect / S15 / harassment / victimisation / reasonable adjustments	continuous from on or around 4 November 2013 to end of employment	ME and back / leg pain	The Respondent	1,2,3 and 4
32. (paragraph 44 of ET1)	Failure to notify me of outcome of management meeting about my pay	S15 / harassment / victimisation / reasonable adjustments	continuous from 7 December to present	ME and all disabilities cumulatively	The Respondent	1,2,3 and 4
33. (paragraph 45 of ET1)	Failure to make appropriate reasonable adjustments	failing to make reasonable adjustments	continuous from November 2002 to end of employment	All - individually and cumulatively	The Respondent	1,2,3 and 4

Alleged act	Nature of act	Types of discrim	Relevant date	Relevant disability	Discriminator	Protected act
34. (paragraph 46 of ET1)	Constructively dismissing me	Direct / indirect / S15 / harassment / victimisation	date resignation tendered 10 January 2014 but date resignation accepted and contract terminated 10 March [as drafted - 16 January at hearing] 2014	All - individually and cumulatively	The Respondent	1,2,3 and 4
35. (additional act added by agreement)	Failure to advise me of or give me a long service award and voucher	S15 / victimisation	between 7 July 2013 and present	ME and all disabilities cumulatively	The Respondent	1,2,3 and 4

Annex 2 - oral submissions of the Respondent

There are some authorities quoted, but there are so many allegations that many cases may be relevant. It is to the advantage of the Claimant to hear the submissions and have time to respond. The facts are largely not in dispute. There are some disputes about whether those facts are discrimination, but not about what happened. The Respondent relied on the experience of the Tribunal and the engagement of the witnesses.

This was akin to a jigsaw puzzle, and only when putting in the last piece can the whole picture be seen. If the case was dealt with in segments there was a danger of missing the overall picture - what really happened and what discrimination could have happened.

The submissions first cover what the Tribunal has to look at it, then the law, then apply the facts to the law.

The first ET1's first 7 heads were liability. It stated that there was:

1. contractual breach in June 2013;
2. arrears of contractual sick pay July 2013 to January 2014
3. holiday pay for the same period;
4. 12 weeks notice pay;
5. no wage slips May - November 2013;
6. constructive dismissal;
7. wrongful dismissal (in effect the same as 4 - notice pay);

the rest were remedy matters-

8. injury to feelings
9. injury to health (not continued);
10. aggravated damages;
11. costs.

In the second ET1, the claim was:

1. arrears of holiday pay to January 2014 - the same as in first claim (the appellant not claiming up until the end of March 2014 - page 84);
2. arrears sick pay from January to March 2014;
3. January to March 2014 wage slips - EJ Goraj dealt with that. The date the employment ended had to be 16 January 2014 as the Claimant had not paid the deposit that had been ordered as a condition of being allowed to continue with claims relating to asserted employment past that date not received till then. The Claimant had taken the pragmatic view and did not pay.
4. There was still a claim for January - March 2014 wage slips

As to the effective date of termination, if the appellant was trying to reopen that date there were some problems for her. It was not pleaded as discrimination in the 2nd ET1.

If the Claimant said that any date later than 16 January 2014 was in some way the Respondent electing not to accept resignation - Gaze -v- Society General applied. When it came to constructive dismissal that was at the election of the employee. It could not be otherwise than the date of election. Either the Claimant elected to accept the breach on16 January 2014, or there was no breach and the Claimant was not entitled to accept it. But why would she want to say other than 16 January 2014, because if so there was no claim for constructive dismissal, as the dismissal, if to be pleaded successfully had to precede 27 January 2014 which was the date of the first claim.

If there was no constructive dismissal then there could be no discrimination for it: the Respondent was happy to await the written representations of the Claimant on the point.

There was a claim for 2 payslips not provided in time for January and March 2014.

The second claim was for January - March payslips, and holiday pay to 16 January 2014.

The first, second and third claims in first ET1; the Respondent had agreed the £1300 odd with the Claimant.

The extra had been written off. The Respondent took no point of set off point about money paid after 16 January 2014.

1, 2 and 3 of first claim had therefore been settled: or at least there was no award due in respect of them.

1 and 2 of second claim had also gone, and there was just the payslip issue left.

There was a failure to provide notice claim in both claims - point 5 in claim 1 and point 3 in the second.

S8(1) of Employment Rights Act 1996, the right to an itemised pay statement, covered post employment pay as if relates to the pay date. For the payslip for March a declaration was sought. It was an administrative oversight. The Claimant would say that it was discrimination. Trish Bridson and Greer Husbands both instructed the payroll department to send the payslips. There was no reason to send some and not all. It was clear this was oversight.

As to remedy, there was a choice of remedy. S12(3) provided for a declaration but also the option for a monetary award in certain circumstances set out in S12(4). Such award should not exceed unnotified deductions. This was 13 weeks before the application. No monetary award should be made. The Tribunal had a discretion and should decide not to exercise discretion to order an award. This was a technical slip, and the Respondent was not trying to evade a responsibility - the payslips were in the workplace and not sent to the Claimant.

Further, and a mandatory reason why there should be no monetary ward was because this would amount to double recovery. The claims for unauthorised and unlawful deductions claims had been paid - S26 Employment Rights Act 1996 so provided, and S12(4).

S12(4) only applied to deductions from 28 October 2013 by reason of the date of the first ET1. The only one she had not got was October 2016 (see page 965) and she got that by 18 December 2013 (968 / 989). For January 2014 the Claimant was paid on 27 January 2014. By December 2013 the Claimant had received those for October - December 2014. The Respondent queried March 2014.

Notice and wrongful dismissal, claims 4 and 7 on the first ET1. These were for 12 weeks pay (claim 4) and wrongful dismissal (claim 7).

It was conceded this was constructive dismissal and so there was entitlement to12 weeks notice, at full contractual rate by reason of S88(1)(b) of the Employment Rights Act 1996 and Swift v Pergandum and Pratt - if off sick an employee was entitled to full notice pay.

This would be gross pay. That had not been worked out by the Respondent and the Claimant would have to put in her claim. Tax and national insurance would be payable that it would be the net amount that would be awarded.

There were 2 remaining matters. There were the discrimination claims, as well as the supplementary claims - constructive UDL and the substance of the discrimination.

This was not the most scintillating of topics. Without wishing to sound contentious there were so many allegations, that it was a scattergun approach. Counsel would cover everything, but there was a lot of law relating to S15 of the Equality Act, knowledge and reasonable adjustments.

Counsel would cover first reasonable adjustments, then S15, then indirect and claims of harassment separately. Some of the claims straddled the introduction of the Equality Act even if in time.

The claims for continuing acts, apart from the Equality Act 2010 new discrimination provision of S15, which recovered position post Malcolm. Indirect discrimination did not apply to disability - transitional provisions applied.

Reasonable adjustments - S20 of Equality Act 2010 applied. The Tribunal would have to look at part 3 scheduled 8 paragraph 20.There had to be knowledge of the disability and of a substantial disadvantage suffered by the Claimant.

The Respondent did not know (or could not reasonably be expected to know) that this employee had a disability and would be at a substantial disadvantage for a provision criterion or practice (PCP) or needed an auxiliary aid.

Therefore there was no knowledge that a chair would resolve the substantial disadvantages the Claimant said that she suffered.

In terms of reasonable adjustments, there were 3 legal points to make:
1 Would an adjustment actually alleviate a substantial disadvantage?
2 Was it reasonable to make adjustment?
3 Did the Respondent have knowledge that the adjustment would resolve matters?

In Environment Agency -v- Rowan Serota J in the EAT said that there must first be established that there was a PCP. Secondly it must be shown that an auxiliary aid was required. The end step was the identify of a non disabled comparator (although there was not much need for that here), and then the nature and extent of the substantial disadvantage needed to be considered before deciding whether any given adjustment was reasonable.

Many matters had been raised, but this could be looked at globally. Then the second case, heard in the Court of Appeal, Griffiths -v- Secretary of State for Work and Pensions and the judgement of Elias LJ. There he corrected the law . The case involved a lady with chronic fatigue syndrome who had 60 days off in a row. The sickness policy provided for 8 days sickness before the policy set out steps to take. There was a warning for excessive absence. The appellant said that she should not have given a warning and that the Respondent should have extended the triggers by 12 days to get to 20. That was a reasonable adjustments case not a S15 case. The EAT said apply the same considerations to all and there was discretion. It would be not be right to throw out the blind person but not the pet owner. It can be trigger for reasonable adjustment too - paragraph 27 of that judgment said so. It could be S15 or S19 indirect discrimination.

No point about knowledge was taken - if the Claimant could not win on S15 she could not get home on S19.

In April 2007 it was agreed that the Claimant was disabled for some purposes. Paragraph 30 of *Griffiths* was relevant about PCP, which was a requirement to attend work at a level of frequency to avoid warnings and dismissal. Paragraph 31 refers to an employee who complained about the application of the policy, and not the policy itself.

However the Claimant complained about the policy. Her issue was whether the policy was justified.

In *Buchanan* recently, the question of the justification of a policy and a PCP was about how they are applied. In *Seldon* the case arose because the Claimant was actually required to retire - this claim was about a trigger point for consideration, not about what was done.

That was the real issue - what action, if any, was taken when a trigger point was reached? Paragraph 35 of *Griffiths* was very important as to what was reasonable, and whether to disregard disability absence. The Claimant said that the RD&E could not distinguish between disability / none disability absence but as there was no substantial disadvantage to her - there was no negative action taken against her. Being on sickness monitoring is not detriment as it could be to advantage ad could lead to warning but could also enable assistance.

If it was a disadvantage it could be objectively justified, and was. Absence on this scale should be properly managed and the first part of that was to monitor it - see paragraph 75 onwards of *Griffiths* That was terminal for allegations 1-3.

In *Griffiths* paragraph 52-68 the *O'Hanlon* point was dealt with - whether it was reasonable to reduce pay sick level is objective justified and it was not a reasonable adjustment to pay more than non disabled sick pay.

The next case was Swansea University v Williams. He went from full time to part time then retired, but then got a pension on his part time work, not his full time earnings. It could not be unfavourable where less favourable. Mr Williams got an advantage as got ill heath early retirement, which no one could get if not disabled.

"Unfavourable" was different to *"detriment"* and to *"less favourable treatment"*.

S15 - *Pnaiser* was the most recent authority. Knowledge of disability: there did not have to have knowledge that it will cause the detriment in a S15 case. It was causation that was relevant.

The Tribunal should look carefully at S15 - in the EqA - a person A discrim against B if unfavourable treatment and A cannot show this was a legitimate means of achieving a lawful aim. The Respondent did not plead a lack of knowledge defence.

What was the causation in this case? In *Pnaiser* Simler P said look first at what is the unfavourable treatment complained of, then what was the reason for it - the something for that treatment, then did that reason arise in consequence of that disability.

The Tribunal might ask whether the link was too remote - *cf* Baroness Hale in *Malcolm*.

Longstaff J in the *Basildon and Thurrock* case, which predated *Pnaiser*, said there was a 2 stage test to causation. First find the reason for the treatment (and did that arise in context of disability) and if it was a dismissal caused by absence, did the absence cause the unfavourable treatment.

Longstaff J said this could be done the other way, and the order does not matter - why was the person treated in way alleged - was that because of something arising from the disability, or did disability have a particular consequence that caused the detriment?

As an example the payslips - the Claimant says that this was something unfavourable: not having payslips. The question had to be asked as to whether the failure arose as a

consequence of something from the disability, or as a S13 direct discrimination claim if was done because the Claimant is disabled?

The Claimant was both absent and disabled and did not receive payslips, but this was an admin error.

In the *Hodgkinson* case Eady J said that the subjective element is important, as it is the cause. That had relevance to this case. In *Pnaiser* the reason was in the mind of the employer. There can be more than one reason in a S15 case.

The Claimant was absent from work. She could have collected the payslips. Was that the reason why? No, it was because trust did not send them. The absence was connected with disability but the Claimant not getting them was not by reason of the disability. The chain of causation was segmented. It was not right to say there was absence and no payslips and the one caused the other and it was all caused by disability. The cause of the absence of the payslips - error - was a novus actus interveniens (a new intervening act).

The problem with the payslips was just that they were not supplied. There is no S15 claim just because the absence that meant that they needed posting was by reason of disability.

If there was dismissal, absence through sickness and disability there could be a link. But that was not the test. If she was at work she would have collected her payslips (they were prepared). The issue was that they were not sent to her and that was not related to disability. That was an admin error. There had to be a direct line of causation between what happened and the disability.

The *Basildon* case, at paragraphs 26 - 27 , 31 and 34 and 36 - 38 was instructive, and contrast the example at paragraph 41 - *Houghton* there was no bonus as a warning had been given, and he was absent for disability. There can be links in the chain. Paragraph 43 also was relevant.

That was S15 - *Hodgkinson* paragraphs 24 - 26 & 31 - 35 the payslips were an example - see Eady J as to why was allowed - Occupational Health and informal assessments.

For S19 indirect discrimination the only difference was knowledge. A PCP assumed substantial disadvantage and whether it was objectively justified unfavourable treatment. For S19 it was unlikely that it was discrimination, as a comparator similarly absent.

No comparator was needed in a S15 claim.

No evidence was given by the Claimant of a comparator. It would have to be hypothetical probably. The S19 comparator was difficult as ME affected different people in different ways. Some were better in the morning before they got tired. This was not homogenous.

The Claimant had back problems in past. This was not such as to need a change of chair. It was hard to see how she could show same manifestation, back problems, to require a chair or same symptoms at any given time. This was not so for an employee blind or with hearing impairment. The Claimant could not meet the group disadvantage requirement of S19 indirect discrimination.

The statutory evidence is paragraph 4.13 of the guidance, which requires the group to be reliable, and in the Claimant's case it was not.

So far as the claim for S26 harassment was concerned, nothing was done with purpose of violating the dignity of the Claimant. It might be recalled that the Claimant wanted

summer Saturdays off to tend to her caravan in Cornwall. Perhaps going fishing was a better example. Did the effect of what was done amount to harassment?

There were objective and subjective elements to this as to the effect on the Claimant, as for the Disability Discrimination Act 1995 also. Would a reasonable person consider this harassment? No, was the inevitable answer.

As to protected acts, a grievance 4 years before? On the balance of probabilities this was not made out. The Claimant relied on a protected act that was a grievance raised in 2007 - in 2012. This was an astonishing and incredible claim.

The S13 claims - there was no evidence that the Claimant was treated badly because of a bad back or ME. No fewer than 11 different arrangements had been made. That was not the action of an employer looking at direct discrimination. It got nowhere near to shifting the burden of proof to the Respondent. On the face of it did they discriminate? No. They went far too far to accommodate the Claimant. They were almost fearful of ending up in a Tribunal and did everything she asked - and ended up here anyway.

S123 - time - anything prior to July 2013 is out of time, because she went off sick then, never to return.

There was a meeting and email about reasonable adjustments 14 January 2013 then a meeting on 24 January 2013, a letter on 07 February 2013 and 08 February 2013. In answer to questions from the Tribunal the Claimant had accepted that by then there was absolutely nothing more that she wanted. This must mean the claim for reasonable adjustments cannot succeed. Anything before February 2013 is a year before she left and well out of time.

Asked what she had to say about the period after February 2013, the appellant said there was nothing about which she was in dispute, unless it be adjustment to the sickness policy, when *Griffiths* applied. Anything before that was out of time.

The presumption was against an extension of time even though is the just and equitable ground that applies and not the reasonably practicable test. It would be wrong for the Claimant to be able to claim. The Claimant had Union representative throughout, and Emma Knowles comment, if made, was relevant to the situation.

Next the application of the law to the facts.

First the out of time point - before June / July 2013 everything was out of time. (A5 and A6 as in the schedule.)

Weekday working started in 2007. The Claimant was back on Sundays in January 2008. This was not a disadvantage.

A6 not disability related This was before the Equality Act 2010, and so S15 did not exist. The test for harassment was the same but this was not harassment. It had neither the intention or effort of violating the dignity of the Claimant. There was a hyper sensitivity here. It might be thought curt or insensitive but not a violation of dignity.

Emma Knowles as not the Claimant's line manager after 2010 and left trust before the Claimant did . The claim involving her must be out of time, and there were different and unconnected people involved. This could not be a continuous act or a series of actions: there was no connection.

All that could be said was that all was linked as it was all work related. That was not a link. There had to be a continuing act.

The Claimant was not treated unfavourably in any way - far from it - or detrimentally - she was treated with kid gloves.

Allegations 8, 9 and 10 - by August 2012 a new chair was in place. There was no breach of duty. By 10 August 2012 the matter of a chair was resolved. Failure to provide reasonable adjustments is when someone failed to do what they should. The Claimant could not get beyond that starting point.

Allegations 10-13, 15, 16, 20 & 29 all out of time obviously. There was a generic point on all of them. It was not conceded that there was a continuing act.

As to reasonable adjustments, there needed to be substantial disadvantage. There was not, related to a disability.

Tim Pithers was looking into what to do about the chair. The Claimant said that there must be something wrong. It is not that the RD&E can click its fingers or wave a magic wand and investigate and resolve it immediately.

The Claimant put her case that on the one hand that it should have been done sooner, but also said that RD&E should get a chair like Joy Bradley's chair. It seemed ok she said. They were not to know at the time that the Claimant would not like that chair: it was the one she asked for and seemed reasonable to provide it and they did. That the Claimant later said this was not the reasonable adjustment she needed was the Claimant looking with hindsight: and that was not required.

As to knowledge, the Claimant agreed to working weekdays. It was not a disadvantage when she wanted it, but then she changed her mind.

There was a pay enhancement for non Saturday working. The RD&E was not obliged to do any such thing. That killed off the S13 claim.

The RD&E was not treating her less favourably, and it was quite to the contrary. There was only limited back pain absence by reason of no special chair, and she was paid for it. So what was the disadvantage? Pain at work? Would a chair alleviate that pain? There was no evidence.

In April 2012 onwards the Claimant took time off, saying her back would not let her work without a special chair. In so far as the extended sickness absence may have impacted on her sick pay entitlement for the following year there was no financial loss as this was part of the £1300 now agreed. The most she could say was that she was deprived of the sociality of work. She did not suffer any pain by reason of any delay in getting a new chair, as she did not come to work (but was paid).

Occupational Health were involved in July 2011 (Joy Bradley). That the Claimant now said this was the wrong chair not their fault, as RD&E had done what they had been requested.

After the new chair was requested in December 2011 Mrs Whitburn was off sick until April 2012. Then she returned briefly and was then off again. Occupation Health advice was sought, and a recommendation made on 20 July 2013. The second chair was then obtained in 20 calendar days, on 10 August 2013. This unfavourable treatment overlapped with the S15 claims.

Allegation 8 is about supportive contact. There was no unfavourable treatment viewed objectively - *Williams* - that was not treated unfavourably. Yes, they could have been on phone more, and taken flowers, but that they did not is not unfavourable treatment.

The Claimant says that the RD&E did not comply with their own policy and that the Claimant says that is unfavourable treatment. It is objectively justified. They do not have the capacity to give such attention for all employees. They did keep in touch with her, and the policy does not require deep pastoral care, just contact.

In any event the claim was out of time from July 2013. More, the Claimant had said that she could not cope with phone or meetings. If she had been contacted it is certain that she would now be saying that she was being harassed by contact from RD&E. The suggestion that there was a difference between the pastoral care that she was entitled to, and sickness absence management is not sustainable, and there was no explanation as to how the RD&E should have known that was what she wanted, when she was saying she would contact them to tell them how she was, when she felt able to do so.

Allegation 13 is that the Claimant was marginalised. She went to Occupational Health in October 2012. There is a balance to be struck. There is not going to be contact every 5 minutes, and in November the Claimant said that she was too unwell to meet, and Greer Husbands tried to find adjustments.

Allegations 15 and 16 were not made out, as RD&E was trying to find ways to get the Claimant back to work.

Allegation 10 - there was no unfavourable treatment. The Claimant has asked for no contact before returning to work. When they meet her the Claimant said that this was an unannounced management meeting. Tracey Edwards said that they did not have to provide the Claimant with the moon on a stick and that was what upset her at the meeting, - not any unfavourable treatment for there was none. This was no more that an adverse reaction to a reality check. Setting out the possible or likely outcomes of extended absence could not be discrimination.

Allegations 11 and 12: there is no disadvantage to the Claimant in an ill health retirement. There is a level of scrutiny and criticism by the Claimant that is not justified. She complained that enquiry was made about ill health nearly retirement. Many would be delighted. It was not offered, but a preliminary enquiry as to whether it might be possible.

Failure to provide notes - there was no disadvantage. There was a meeting on 14 December 2013. Pages 792-3 were provided. The Claimant said these were not accurate, in that they did not, she says, record all her criticism.That was not a disadvantage. Later, in emails, she said what should be in them. She was not deprived of any information, and the RD&E knew exactly what she wanted recorded from that meeting.

Allegation 19 was an alleged failure to make reasonable adjustments - 3 new PCPs from the Occupational Health referral terms. This was not direct discrimination.

In order to be a reasonable adjustments claim there was an objective test. The view of both sides should be ignored. It was the view of the Tribunal that counted. It was for the Tribunal to decide, taking into account the service need. There was no obligation to create jobs for people. Redeployment was required only if there was a service need to be met by that redeployment.

The Tribunal should look at 03 April - allegation 19 - when the Claimant was absent, and said that she would make up that day lost to sickness on 08 April. This was not understood. She said that she was not demanding that she worked when she wanted but that was the effect of what she said.

She said that she said she wanted to work on Saturdays, and that being deprived of that was detriment. For a very long period she worked no Saturdays, and said that this was

not convenient to her because she had to go and look after her caravan in Cornwall. How could it be a disadvantage that she did not work on Saturday? It had to be that she was saying that she could come in when she wanted, and that was not a reasonable adjustment.

The Claimant was not being candid. She want to come when she wanted. It was not unfair of Emma Knowles to say come in Saturday. It was quieter on Saturdays. She was paid a supplement to work Saturdays but was objecting to doing so. This amounted to the Claimant saying the days she wanted to work.

Allegation 20: pay problems. The allegations merged so that there was some repetition. It was accepted that problems arose because of the adjustments. What caused this was administrative error, not disability. It was not disability related, nor did it arise from disability. The people in the payroll team could not get their heads round what she should be paid.

The June hours were not in until July, but the Claimant said that was 44% and 88% increase all the time. The only way this could be pleaded would be direct discrimination, but this was human error, not in consequence of, or connected with, being disabled. It could occur anytime to anyone who changed shifts. Just as with the payslips there was no disability causation.

Allegations 21-25, 28-29 and 32: allegation 21 was factually not made out. There were several referrals to Occupational Health. This was something an employer did have to think about.

Allegation 26: there was no evidence that there was a refusal to allow an opportunity to make up shifts. The problem was that the Claimant had missed one shift and then the next, replacement, shift a few days later. It could not be unreasonable for the employer to say that the Claimant could not keep rolling sickness forward to make up later.

If it was unfavourable it was a PCP and objectively justified as certainty required. It could be in breach of duty to the Claimant to allow her to roll up days in this way given her uncertain health.

Allegation 26: it could be a claim for reasonable adjustments or a S15 claim not to be allowed to make up time. *Griffiths* applied and the claim must fail. It could not be a reasonable adjustment to be allowed to make up time for an indefinite period. The provision was objectively justified.

Allegation 27 was not made out. The Claimant said she was marginalised, but her emails said (or necessarily inferred) that contact was not sought (and was not welcome). In correspondence with Greer Husbands it was clear there was to be Occupational Health assessment, and [at 904] Greer Husbands had specifically said that the Claimant should contact her if there was need. The Claimant never did.

Allegation 31 was not made out. A new PCP to monitor her support was said to be to her disadvantage. But the Occupational Health referral set out what RD&E were doing [948]. They were to keep a close eye on the support being given to the Claimant. As the Claimant was being very unrealistic and making great demands on the Trust this was entirely understandable. She said that they were getting at her, but it is clear that they were doing all that they could to help her. She had been paid much more than she was entitled to under her contract, for years.

Allegation 33 was a catch all, a repeat of reasonable adjustments claims. The chronology provided by the Respondent set out over 5-6 pages 11 adjustments. There were lots of chunks of absence that could never have been addressed by “making up” the time.

RD&E never issued any warning about absence and never commenced a formal procedure. There never was any disadvantage.

As to S15, there was no disadvantage. RD&E accommodated the Claimant to as far as possible and beyond. Everything they had done was objectively justified.

First, RD&E needed to be able to plan cover for wards and demands for the real time environment of a hospital. Even filing can't be done when the Claimant felt like it. The files relate to patients and need to be up to date. Nurses need to know what support they are going to have. This could not be done the day or week before. There has to be planning for when she there and not.

Secondly there was a duty to look after the Claimant's own welfare. She had lots of sickness and she wanted to make it up when she wanted when she felt like it. That could lead to overload for her.

Thirdly, the Claimant had to fit around others. Their work needed planning.

In September 2013 the Claimant went to half pay. That was not S15 unfavourable treatment: and was justified - *Griffiths*.

Finally, the Tribunal should look at February 2013. She had got all she could want, including making up time later. This was said to be not when she wanted but when agreed. It was not when she wanted but when it was agreed. Even so the attendance of the Claimant was not reliable after this. Mrs Whitburn was absent through ME for a long time, and all was then in place.

Trish Bridson not obliged to offer this, as it was an ME episode. While the Claimant said the absence was triggered by not being able to roll forward a second time this could simply be a coincidence in time. She did not say that at the time, and it was a self evidently reasonable thing for RD&E to do.

All these adjustments still did not result in reliable attendance. The Claimant could not work reliably whatever adjustment was made.

Constructive dismissal - if the Tribunal was with Counsel there was no disability discrimination so that constructive dismissal could not be for a discriminatory reason. RD&E had carried out all that it could in a reasonable period. There could be no S15 claim and all the actions of RD&E were objectively justified.

There was a resignation over pay issues. The timing was important. The real reason was that she resigned was that Mrs Whitburn could not provide regular attendance where trust policy [908] and that meant that would be it the capacity process, with likely dismissal at the next case management meeting.

There was nothing more RD&E could do other than for Mrs Whitburn to ring up when she was able to work and ask if they needed anyone. Since Mrs Whitburn did not know until she awake whether she was able to work that was not a workable outcome, and not in Mrs Whitburn's mind. She was a salaried employee. Even she denied that she wanted to be able to come in when she wanted. The process would inevitably have concluded that this was unsustainable and to terminate Mrs Whitburn's employment.

The Claimant has not recovered and has had no employment since. The Tribunal was entitled to use hindsight. The Claimant did not get another job and was still affected. The RD&E conceded on a pragmatic basis as an express term about pay and payslips was breached. Despite all the mitigation about complexity of her pay, the RD&E had not got to grips with the payslip issue. In law the was a fundamental term (*Cantor Fitzgerald*).

The Trust was under resourced, but it should have been done. It was not disability related. They did not pay her properly, and so this was a constructive dismissal, and it was not argued that it was not unfair.

To conclude the Tribunal should so decide if it agreed. There was no discrimination. The Tribunal should order a basic award and notice pay. A *Polkey* reduction was appropriate. This was an industrial jury's findings. How would this impact on unfair dismissal? The Tribunal could resolve this without a remedy hearing.

Annex 3 - written submissions of Claimant (copied and pasted from the original emailed in)

CASE 1401067/2014 & 1400422/2014 (combined)
between
Pamela Whitburn (Claimant/Appellant)
and
Royal Devon & Exeter NHS Foundation Trust (Respondent)
Submissions of the Claimant

The authorities referenced in these submissions are either leading authorities or have been referenced and provided by R and therefore C is not submitting any authorities. C also relies on the relevant Code of Practice wherever applicable to her case.

Burden of Proof

1) C submits that she has met the the required test as set out in Igen & Ors v Wong [2005] EWCA Civ 142 of showing a prima facie case of discrimination in respect of all allegations and all relevant alleged different forms of discrimination for each alleged act/omission so that the burden of proof has shifted to R to show that there was no discrimination or, where applicable, that the act of discrimination was justified.

2) C submits that there is no requirement for her to prove intention to discriminate on the part of R (or its employees when acting on R's behalf) because discrimination can be conscious or unconscious and that R must show that the relevant acts or omissions were 'in no sense whatsoever' discriminatory against C.

3) C submits that R subjected her to continuous and/or repeated acts of discrimination between 2007 and 2014 and that they have failed to show justification and/or that that these acts were not discriminatory pursuant to the DDA or EQA as applicable. C further submits that absent a satisfactory explanation or justification by R the Tribunal must find that the act/omission was discriminatory (para. 15.34 of Code of Practice)

Continuing Acts

4) C submits that each and every allegation of discrimination she has made against R is in time because they were all part of a “continuing discriminatory state of affairs” as described in Hendricks v Commissioner of Police of the Metropolis [2002] EWCA Civ 1686* . This continuing state of affairs existed throughout the period of her claim and included a) an environment in which the relevant managers and most HR advisors who dealt with C's case had no, or totally inadequate, training or instruction from R in the relevant law on disability discrimination, R's duty as an employer or the proper way in which reasonable adjustments should be assessed or decided upon, b) no system or procedure for ensuring that all relevant information related to the management of disabled employees was communicated/passed on when line management or HR advisor involvement changed over time, c) no system in place for the majority of the relevant period to distinguish disability-related and non-disability related absences in the absence record and d) no, or totally inadequate systems in place to ensure HR advisors had access to/were alerted to the full management history of employees with long-term disabilities, e.g. adjustments needed/requested, those made or refused (and the reasons) and the specific details of all agreed adjustments.

5) C submits that by failing to have any disability policy at all in respect of their employees and failing to provide/implement adequate relevant training, systems or procedures, R continually failed to prevent discriminatory acts or omissions in relation to the management of C as a disabled employee.

Because of this continuing failure a succession of different managers and/or HR advisors acting for R made decisions which were discriminatory/detrimental to C and/or failed to make various appropriate reasonable adjustments to remove or reduce the substantial disadvantage caused to C by various PCPs.

6) C also submits that all of the alleged acts or omissions were done on behalf of R and in accordance with R's policies and practices, even if done by different individuals. Even in respect of Allegation 6, those remarks made by Emma Knowles were part of the justification for refusing C's request for an adjustment of flexibility to make up lost shifts and Emma Knowles had R's interests in mind when she made them, not her own. Further C submits that PCPs can include informal policies and one-off decisions or actions, as per paragraph 6.10 of the Code of Practice.

The Allegations

7) Allegation 1 – the PCP requiring C to work set days/set hours was causing her disadvantage even before 2007 because of the gradually increasing adverse effects of her disability of ME but until September 2007 she had no knowledge of the DDA or an employer's duty (pgs 261/2). However because the timing of the hours C worked in her role as a peripatetic ward clerk had been left to her to decide when the role was created in 1999, and because the service provision was only 5 hours per weekend shift in circumstances where all the wards she covered had need of such a service during the entire day, C at least had a little flexibility to vary the timing of her shift if necessary with no adverse effect on the service provided to the wards.

8) On 1st October 2007 when C first asked Emma Knowles for an adjustment of flexibility so that she could try to make up hours lost due to ME-related absences, not only was that adjustment request improperly instantly refused without consideration of any factor other than R's business needs, but C was also informed that she had to work strictly to her rostered times (i.e. the shift times originally chosen by C).

9) This PCP caused C substantial disadvantage throughout the period of this claim because she had difficulty complying with it. C submits that for any employee who has a disability like C's where the effects are fluctuating, variable and unpredictable and which results in relatively frequent but mostly very brief periods of inability to work, this PCP puts or would put such disabled employees at a substantial disadvantage compared to either non-disabled employees or those with a disability that does not have such effects. C submits that R cannot even justify applying a PCP of fixed hours to all employees because employers are required to consider and permit flexible working in certain circumstances.

10) C submits that even though the PCP could not have been causing that disadvantage when she was absent from work from July 2013 onwards, it still would have put her at a continuing disadvantage when she had returned to work, which until 14 November 2013 was what C still had hope of doing, and which R also clearly hoped C would do, as demonstrated by their actions after receiving C's resignation letter in January 2014.

11) The disadvantage to C included a far worse sickness absence record than for other non-disabled employees, or for employees with different disabilities to C, the stress and adverse effect on her health of being kept subject to formal absence review and monitoring, the stress and worry of repeatedly being required to make 'significant improvement' in attendance and the ever present risk of possible progression to further action and dismissal. This occurred throughout C's management by Emma Knowles and Tim Pithers between 2007 – 2012 and the detriment continued in June 2012 by being warned of likely further action and risk of dismissal by Tracey Raymond of HR and by efforts by R (without C's knowledge or consent) in September 2012 and November 2013 to find out if C would qualify for ill-health early retirement.

C's higher than normal absence record also caused her disadvantage and detriment from June 2012 onwards when C's management completely changed and along with it also the treatment of C and attitudes towards her.

12) Even though C's allegations of indirect discrimination and discrimination arising from disability are valid causes of action only from 1 October 2010 (commencement of EQA), because this PCP caused substantial disadvantage to C throughout the whole period of her claim, R also had a duty under both the DDA and EQA to make reasonable adjustments during all of the claim period. This PCP is therefore also relevant to C's Allegation 33 – failure to make reasonable adjustments throughout the claim period.

13) C submits that despite purporting to agree to make the necessary adjustments in respect of this PCP during meetings between 14 December 2012 and 7 February 2013, the evidence in this case proved that R did not take the steps necessary to implement the agreed adjustments and in fact deliberately imposed new PCPs on C which had the effect of rendering the supposedly agreed adjustments ineffectual and some key elements of the agreement inoperative or void. C addresses these actions further below in relation to various other allegations.

14) C's weekend role was to provide a very basic service to 4 wards (subsequently 3) on an 'as required' basis but with priority given to Durbin ward (trauma) because of their 24 hour emergency admission function but because patients were being admitted to that ward on an unplanned and continuous basis, whether C was available to that ward e.g. in the morning, during lunchtime or the afternoon made no difference in terms of the minimal clerical service that ward received. Additionally, from early 2007 onwards, that 5 hour peripatetic weekend clerical service was not provided to any of the wards on the 1 in 3 weekends/Sundays C did not work, or during her annual leave or sickness absence. Consequently, which weekends C worked also made no difference in terms of the minimal 'out of hours' clerical service any of the wards received.

15) Further, C's peripatetic weekend role was different to the role of weekday wards clerks. Unlike the weekday ward clerks, C was not responsible for 1 specific ward, was not required/expected to be present on any ward at any particular time /for any particular period and was not required/expected to be available exclusively to any ward for administrative duties relevant to their flow of patients. R therefore did not have to 'plan' for certainty or continuity of cover for a ward in respect of C's weekend role as they did for the weekday ward clerks, contrary to R's assertions.

16) Even when C was moved from a Saturday shift to a Wednesday shift on the wards in 2009, no cover was provided for the 1 in 3 Wednesday afternoons C was not rostered to work or when she was absent due to annual leave or sickness and so there was no planning for service needs or cover applicable to her Wednesday shifts on the wards either, contrary to what R has suggested. Further, the main purpose of C's suggestion in December 2012 that she be moved to a basic 'back office' role for her Wednesday shift was to eliminate, for those shifts, any possible obstacle to her being able to make up those shifts as and when she was able to because her role as an 'extra pair of hands' in the administrative centre doing filing or other basic tasks could be done at any time and did not involve any considerations of service need or absence cover whatsoever.

17) C submits that in all the facts and circumstances of her case, including in particular the facts relevant to her role and working patterns, it would have been been wholly reasonable and quite simple to allow C the fullest possible flexibility to make up shifts missed due to disability and thus enable her to attend work as often as possible and to be able to avoid the significant disadvantages and detriments to which she was subjected. C submits that the adjustment plan purportedly agreed to by R as at 7 February 2013 would have significantly removed or reduced the substantial

disadvantage caused by this PCP, had R actually taken the required steps to put it in place and ensure that it achieved its objective.

18) C submits that such an adjustment plan could and should have been implemented when she first requested it in 2007. Instead whenever C made the request or reminded R that such an adjustment was needed she was either totally ignored or her request was immediately refused on the sole basis of 'service needs'.

Allegation 2

19) As with Allegation 1, this PCP was applied to C throughout the period of her claim and placed her and others whose disabilities had similar effects on their ability to work at a substantial disadvantage compared to non-disabled employees or those with disabilities that did not have the same effects as C's disability of ME. Because of the variable and unpredictable nature of ME, the pattern of relatively frequent but mostly brief disability-related absences C had to take and the particular nature of her work pattern, this PCP of including non-working days as sickness absence resulted in an absence record that appeared to show weeks of absence at a time when the only actual absence from work was for one or two shifts.

20) If employees are unwell during periods when they are not contracted to work this cannot be 'absence from work'. An employee cannot be considered 'absent' for days/periods when s/he was never due to work anyway. C recognises that an employer may have a health and safety interest in knowing how long an employee suffers from a particular ailment, injury or infection etc. but that does not justify counting as sickness absence whole periods when an employee was not actually absent from their job.

21) In C's case and applying R's justification for this policy, if she was sick for e.g. 4 days in the middle of one of the 10 day periods when she was not contracted to work, she should have been required to report that sickness for it to be treated as 'absence', but this was never required of C. Why, therefore, was she repeatedly recorded as 'absent' from work for long periods when 1 actual day of sickness absence was followed by one of those 10 day non-working periods during which she was still unwell for a time.

22) C submits that this PCP caused her substantial disadvantage by negatively impacting on how R calculated her entitlement to sick pay and how she was managed in relation to sickness absence and in relation to opinions formed by managers and HR about the extent of C's absence record and her ability to do her job, such as the conclusion reached by Tracey Raymond of HR on 27 June 2012, who, having 'reviewed' C's absence record for the first time, clearly viewed C as someone who had repeated substantial absences from work and was therefore a significant drain on R's resources and a likely candidate for dismissal, and whose best option was therefore to take ill-health early retirement.

23) Similarly, in September 2012 and November 2013, Trish Bridson and then Greer Husbands, two managers relatively new to C's case and totally unfamiliar with the facts, again clearly took the view that C's absence record warranted R making enquiries for itself as to whether C could be 'retired' under the NHS pension scheme. These enquiries were not made on C's behalf or for her benefit because before they were made C had already expressly indicated to R (in Trish Bridson's presence) that she did not want to retire and saw no need to do so. These enquiries were made with a view to exploring ways to manage C out of her job.

24) C submits that R could and should have made a reasonable adjustment to the application of this policy in C's particular case so that unless she was sick for more than 1 actual contracted shift in a row, single day actual absences from her duties were recorded as such, regardless of whether or not she was also unwell on non-working days. At the very least, C submits that R should not have recorded as 'absence' any

days falling within the 3 weekly recurring 10 day periods when she had no contractual obligation to work. This would not have completely eliminated the substantial disadvantage but it would have at least made a significant difference to her absence record and the adverse impression this gave to personnel who were ignorant of C's disability history and the full facts of her case. C submits that this PCP cannot be justified because there are other ways in which R could have monitored the health and fitness of their employees without implementing a system which adversely misrepresented certain disabled employees who had frequent but short-lived actual absences from their job as having much longer absences than was the case.

Allegation 3

25) C submits that the substantial disadvantage caused to C by this PCP is obvious from the facts of her case. R asserted throughout C's employment and again in these proceedings that disability-related absences were 'taken into account' when managing C, but as shown by the evidence, between 2007 and 2012, both Emma Knowles and Tim Pithers included all disability-related absences (which were the majority) when repeatedly determining that C had exceeded R's Bradford Score limits or the trigger points under their revised sickness absence management policy from 2010 onwards and when constantly requiring C to attend formal sickness review meetings, repeatedly imposing expectations on her to 'improve her attendance' and repeatedly warning her that failure to do so could lead to further action, including dismissal.

26) C submits that the fact that R did not actually advance C's case to such disciplinary action and/or dismissal does not mean there was no disadvantage. This constant pressure on C to 'improve' her attendance and the constant risk of dismissal was very stressful for C and had an adverse impact on her health which in turn increased her rate of absence because stress increases or prolongs ME symptoms. If C did not have the disability of ME with its particular effects on her ability to work she would not have been subject to this pressure, or the stress and worry of constantly being formally monitored or the increased and constant risk of disciplinary action and dismissal. C's non-disability related absences were no more frequent or prolonged than for the average employee.

27) R may have taken C's disability 'into account' when deciding whether or not to move to further action under its policies, but that would not have prevented the disadvantage or detriment described above, or the additional substantial disadvantage and detriment which occurred when new management and HR advisors became involved in C's management from mid-June 2012 onwards and saw a record of absences that made no mention whatsoever of disability. What disability-related absences could any managers or HR advisors new to C's case 'take into account' when making decisions about C's employment if the record did not show any?

28) Tim Pithers did not take C's disability-related absences due to chronic back pain 'into account' when expressing his opinion on 1 June 2012 that C was not 'fit' for her job. (pg684) He did not even refer to C's history of back pain as a disability, despite having the requisite knowledge of the history and adverse effects and did not record it as such in any of his communications, OH referrals or on R's sickness absence monitoring system. Tracey Raymond did not take C's disability-related absences 'into account' in June 2012 before informing C that her 'poor attendance' was a drain on R and that she could be facing dismissal. Neither Trish Bridson nor Greer Husbands took C's disability-related absences 'into account' when they made referrals to OH in September 2012 and November 2013 in which they represented C's absences as just frequent 'sickness' and implied by their characterisation of the facts that R had gone out of its way to help an employee who was regularly 'sick' for significant periods and just not fit for her job.

29) If these managers had taken C's disability-related absences 'into account' from 2012 onwards there would have been no need for the totally inappropriate meeting

sprung on C in June 2012 or what was said to C during it, no need to twice ask OH if C would qualify for ill-health early retirement and no need to repeatedly keep requiring C to attend OH appointments when the action required from R was already known to them. R's failure to record C's disability-related absences separately or distinctly from non-disability related absences and their repeated refusal to make an adjustment of discounting an agreed proportion of disability-related absences appropriate to C's circumstances were causal factors in several of R's other discriminatory acts or omissions and this in turn caused substantial disadvantage and detriment to C, including adverse effects on her health and adversely affecting the attitude and behaviour of various managers towards her and increasing her risk of dismissal.

30) C submits that R cannot justify this practice of not recording or treating disability-related absences separately and/or differently. R must have considered at one time that these absences should be distinguished in their record because their sickness absence policy in operation between 2006 – 2010 required this to be done and again from 2012 this requirement was reintroduced.
However, R did not have adequate procedures or training in place to enable managers to identify disability in the first place and clearly did not have adequate procedures or training in place to ensure that such absences were recorded as disability-related even when the policy provided for it, because C's absence record does not show a single disability-related absence between 2007 and 2014, despite the fact that the overwhelming majority of her absences were due to disability. (pgs 219/220)

31) Further the relevant Code of Practice expressly states at para. 17.2 that "employers are not automatically obliged to disregard all disability-related sickness absences, but they must disregard some or all of the absences by way of an adjustment if this is reasonable" (C's emphasis) C was consistently told by Tim Pithers (in the presence of an HR advisor) that this could not be done because R's sickness absence policy did not mention or allow for such an adjustment or because all employees had to be treated 'fairly' and 'consistently'. C submits that this is a clear indication that R did not provide adequate training or appropriate systems to their managers or to their HR advisors in respect of the duty to make reasonable adjustments and what factors needed to be considered.

32) C submits that if R had really fully considered C's repeated requests for an adjustment to make up hours lost due to disability and after weighing all the factors had decided this was not a reasonable adjustment to make, they could and should have made the adjustments relevant to Allegations 2 and 3 as an alternative way of reducing the significant detriment and disadvantage caused to C by these 3 PCPs collectively.

33) C submits that the case of Griffiths v The Secretary of State for Work And Pensions [2015] EWCA Civ 1265 relied upon by R is not really relevant because C has not included an allegation in this case that R should have raised the trigger points but that they should have recorded and treated disability-related absences separately/differently so that some could be disregarded when deciding if formal monitoring or warnings to improve attendance or further action with a risk of dismissal was required, and also that they should have been recorded differently so that any manager or HR advisor would get a clear picture of which absences were disability-related. Whether this would have involved raising the trigger points or achieving the objective by some other action was for R to decide.

34) In any event, the Griffiths case confirmed that adjustments could be made to sickness absence policies in an appropriate case and that case is not the same as C's because the Claimant in that case wasn't complaining about the policy itself whereas C is, because R's policy made no allowance for disability apart from the vague and ambiguous mention of taking disability 'into account' which none of the managers or HR advisors involved with C understood as allowing for disability-related absences to be disregarded.

35) Further, the Claimant in Griffiths was asking for substantial further adjustments to a policy which already allowed for increased trigger points in circumstances where she had lengthy absences. Until late 2012 C had not had any lengthy absence due to ME and the absence after July 2013 was significantly prolonged by work-related stress and anxiety caused by R's actions. C submits that her usual length of absence due to ME was for one or two actual shifts and so even disregarding just one absence now and then would have made a significant difference to the level of monitoring and risk of disciplinary action and dismissal she was constantly under.

36) C submits that R's duty to make reasonable adjustments in respect of these 3 PCPs extended throughout the period of C's claim and therefore R's continuous failure to make them were continuous acts of omission.

Allegation 5

37) This decision was made by R on 26 July 2007 during a formal investigation meeting to decide if C should face disciplinary action for unreported (disability-related) absences. Because of the circumstances C agreed to this decision under duress and also because Emma Knowles advised C that the purpose of the change in working times was to provide C with support that could not be provided at weekends.
However, as shown by the evidence, C did not receive any support that was relevant to her mental health. Emma Knowles' assertion that the support consisted of being able to talk to her or to the ward supervisor Jessica Roach if C felt overwhelmed by symptoms of her depression/anxiety episode does not pass muster as justification for this decision because C had little to no relationship with Emma Knowles and had never met Jessica Roach until she was placed under her supervision from 1 October 2007.

38) C submits that even if this had been the true purpose of the decision, there is no feasible rationale for removing an employee with such an impairment from a working environment and staff that she is used to/has some relationship with to an environment that is busier/more stressful and then expecting her to confide in a manager who had shown no empathy or understanding of the relevant health condition or to another staff member who is a stranger to that employee.

39) Working her normal shifts in a familiar environment and with staff she was used to posed no disadvantage to C in respect of her disability of depression/anxiety and even if it had, the decision to have C working weekdays instead did not remove any disadvantage but instead caused significant detriment to C. The circumstances in which C was placed caused her condition to deteriorate to the point where she had to take further sickness absence in November 2007 because of work-related stress and anxiety, whereas she had been steadily improving prior to her return to work. C was also caused financial detriment because she had not been told that R was characterising this move as a 'redeployment' for which they did not protect pay, as subsequently explained to C as the reason for the reduction in pay she experienced.

40) C submits that what this decision was really about was to enable R to monitor whether C attended for work for her rostered shifts because they did not trust her. This was clear from the requirement placed on C by Jessica Roach that C had to report to her at the beginning and end of each shift, something she had never been required to do in over 19 years with R. C submits that R made a discriminatory assumption that the effects of C's impairment on her that she had experienced between February – April 2007 at the worst point of her depression/anxiety episode would continue to have the same effects (with the same results) after C returned to work in October. Further evidence of the continuation of this discriminatory assumption about the effects of C's disability was the requirement imposed on C by Tim Pithers between 2009 and 2012 that she had to confirm her attendance on Sundays by internal email.

41) C submits that there was no basis for this assumption because the OH advisor had suggested in her report of 21 June 2007 (pg 246) only that C might have further sickness absence in the future if her symptoms increased again, not that she was again likely to fail to disclose such absence. Further, C's GP had declared her fit to work and neither C nor the OH advisor had suggested that she was still experiencing the severe anxiety and panic attacks that had been the cause of the undisclosed absences.

42) C submits that the relevant PCP here is a decision to alter an employees hours/days of work/tasks and working environment in order to provide supervision/support. C submits that for non-disabled employees or those with disabilities having different effects than depression/clinical anxiety, moving an employee from an environment and colleagues/staff they are familiar with to a different, busier environment and placing them under supervision by management they do not know well or at all would not be likely to be detrimental to the health of such employees but in relation to depression/anxiety such changes can have very adverse effects. Further, employees normally paid at the same rate as for the altered hours/days would not suffer any financial detriment.

43) C submits that the reason behind this PCP to make her work weekdays was also an operative factor in the 18 month period of detriment and disadvantage which followed, during which R continued to try to prevent C from fully returning to her normal role. C submits that there were 2 reasons why it suited R's purposes not to make the required reasonable adjustments in respect of the altered Saturday shift/duties so that C could return to her normal role/shifts.

One was that it was convenient to misrepresent the facts and the response of R's OH advisor to their suggestion that C was in need of 'support' as an excuse to alter her hours and duties to what Emma Knowles considered a better use of C's time without having to go through any formal consultation, redeployment or redundancy process. The other reason was that R wanted to be able to monitor C's attendance because of the assumption that she might not turn up for her shifts if no management was present. C submits that both reasons were either based on or justified by this false and discriminatory assumption about the effects of C's impairment of depression/anxiety.

44) From sometime in mid 2007 a ward clerk service was introduced for 4 hours each Saturday morning from 7.30am for the purpose of booking in patients to the Day Case Unit due to the introduction of a new Saturday operation list. This was introduced and implemented without C's knowledge whilst she was on disability-related sickness absence and was first notified to C on 12 October 2007 as a change to her role. This had been implemented without any consultation with C, contrary to the terms of her contract and was a fundamental change to her peripatetic role and duties since 1999.

45) Instead of making appropriate adjustments so that C could continue working on a Saturday, R moved C around from working Sundays only every week during 2008 to working weekdays again at the end of 2008/early 2009. Each of these changes caused detriment to C, either in relation to the effects of her ME or due to a significant loss of her pay. Emma Knowles suggested in her evidence that C was moved from working Sundays back to weekdays in Autumn 2008 because of 2 absences and that the decision was because she believed a lack of 'support' was affecting C's attendance, but as established by the evidence, the relevant absences at that time were not related to C 's disability and so the 'support' would have made no difference.

46) C could not work the now earlier Saturday shift of her altered role because of the effects of medication but R refused to make adjustments so that C could continue working on Saturdays (which was a better environment for her) on the sole basis of service needs. However, C submits that R did not attempt to properly consider or consult on C's suggestions for how this adjustment could be made with minimal effect on service provision or the workload of the nurse, as explained by C during these proceedings.

47) C submits that she established during her questioning of Emma Knowles that patients are admitted to R's hospital without the presence of ward clerks at all times of the day and night and in various departments of R including A&E and also, significantly, the wards C covered at weekends, including the trauma ward. C submits that R failed to show why it was so crucial that a ward clerk had to be present when patients arrived for planned surgery on a Saturday morning and why the admitting nurse could not perform the initial administrative checks, as occurred frequently elsewhere, with C arriving later and performing the rest of the clerical service.

48) C submits that, having had experience of booking patients in for years and knowledge of what extra work was placed on nurses if a ward clerk was not present at the time of admission, any burden on the nurse was negligible and therefore making an appropriate adjustment so that C could continue working all of her hours in the best possible environment in terms of the effects of her depression/anxiety and/or ME far outweighed any negligible inconvenience to the nurse.

49) Alternatively, if the Tribunal determines that such an adjustment was not reasonable in all the circumstances, C submits that the compromise arrangement offered to C in March 2009 of working her Saturday shift on a Wednesday but at a protected pay rate could and should have been offered to C when she returned to work in October 2007.

Working a weekday shift still caused C some disadvantage because of the different environment but the additional adjustment of flexible breaks went a long way to addressing this. C submits that if this package of adjustments had been offered in October 2007 she would not have suffered the adverse effect on her mental health in late 2007 or the stress of constantly being pressured to work the early Saturday shift during 2008. She also would not have had the added difficulty of again being required to work all of her hours during weekdays in late 2008/early 2009 or the associated losses of pay that occurred.

50) Paragraph 45 of C's ET1 includes the failure to make appropriate adjustments in relation to Allegation 5. C submits that the compromise arrangement agreed in March 2009 was a reasonable adjustment to the PCP in Allegation 5, allowing the purported 'support' to be available to C on Wednesdays but reducing the disadvantage and detriment by returning C to her normal rostered Sunday shifts and duties and maintaining her normal pay. C therefore submits that R failed to make the required adjustment for 18 months and in doing so caused C significant detriment.

51) C submits that this allegation is also linked to Allegations 19, 21, 26 and 31, as explained later in this submission and is therefore in time.

Allegation 6

52) C submits that Emma Knowles' response to her request for a reasonable adjustment to make up shifts lost due to disability-related absence, i.e. that R was “not a social club” 'and that C could not just turn up for work when she “felt like it'” was clearly degrading, humiliating and offensive. C submits that any reasonable person would be offended by such a response to a disabled person who was merely seeking a reasonable adjustment. C submits that this response was also clearly capable of violating a disabled person's dignity in the circumstances, and that it did so.

53) Further, this was unfavourable treatment because of something arising from C's disability. The effects of C's ME meant that there were some days when she was not able to work and others when she could. Consequently, this part of R's justification for refusing the requested adjustment was unfavourable treatment arising from the particular effects of C's impairment.

54) C submits that this allegation is closely linked to Allegation 1 (requirement to work fixed shifts/days) and Allegation 33 (failure to make reasonable adjustments), both of which continued throughout C's claim period. This allegation is therefore in time.

Allegations 8, 13, 16 and 27

55) C submits that these allegations are all similar and closely linked and are therefore all in time.
C submits that R's sickness absence policy required managers to establish and maintain regular supportive contact with employees who were on long-term sickness absence and that in the circumstances of C's case this was particularly important.

56) In respect of Allegation 8, R had known for a long time that C's ability to work had been substantially adversely affected by the lack of a suitable chair and for many months that the first chair provided to her was unlikely to be, and in fact not, suitable for her. C had also advised R on 16 May 2012 that she was getting anxious about the work situation. (p671)

57) C submits that any reasonable employer would have recognised that where a disabled employee was being prevented from returning to work because of a prolonged failure to make a required reasonable adjustment and was becoming anxious about the situation it was particularly important to keep the employee regularly updated on progress and to reassure her that prompt action was being taken. C submits that in these circumstances it was also important to ensure that when management responsibility for C changed this was communicated promptly to her so that she knew who was dealing with the issue and that the new manager fully understood the situation and the action required.

58) C submits that the failure to maintain regular contact with her and to notify her of the change in management was unfavourable treatment because the negative attitude formed by R was because of C's continuing absence from work and continuing requests for a suitable chair when R considered C to be just unfit for her job. Both Tim Pithers and Trish Bridson wrongly assumed that R had done everything they should and C submits this resulted in a disinclination to maintain regular supportive contact with her. C submits that this failure to contact her or promptly inform her of the new management also caused her detriment, as illustrated by Allegations 9, 10 and 11.

59) In respect of Allegation 13, C submits that given the history of C's case, including the delays and/or failures by R to implement required adjustments and the allegations made by C in her email to Tracey Raymond of 3 July 2012, it should have been obvious to R that it was important to maintain regular and supportive contact with C during her disability-related absence between October – December 2012. C submits that even if this was not obvious to R, their OH advisor had told them that they should reassure C in their report of 17 October 2012 (pg766).

60) However, C submits that as with the situation relevant to Allegation 8, despite knowing, or reasonably being expected to have known that C's absences were due to a disability, those managing C had formed the opinion that she was just unfit for her job and so a drain on R's resources. C further submits that because access to C's personnel file was given to all these new managers now involved in her case from 2012 onwards but they were not informed of the full disability-related history, a general view had been formed that she was a troublesome, difficult employee who made unwarranted complaints and allegations. C submits that because of these negative attitudes towards her, contact with her was kept to a bare minimum.

61) C submits that this was both unfavourable treatment because of negativity towards C's because of her continuing absence from work when R considered C to be just unfit for her job and also victimisation because of the allegations of discrimination C

had previously made, which those managers had plenty of opportunity to learn about as they 'reviewed' C's personnel file, which according to Greer Husband's evidence they all did. The detriment caused to C was loss of confidence in her position as a team member and as an employee. This made returning to work more difficult than it should have been.

62) Similarly, in respect of Allegation 16, C's continued absence was because she had to wait for R to make appropriate reasonable adjustments but those tasked with considering the adjustments (Trish Bridson and Samantha Kelley) were not told that this was urgent and a EQA case, or that C's case was a high risk one for R. C submits that they were also clearly not told that in light of the history of C's case and the allegations of discrimination she had repeated during the meeting on 14 December 2012, keeping in contact with C during this process was important. C submits that those managers were therefore not disabused of their negative attitudes towards her.

63) C submits that given that R's evidence throughout this case has relied on the apparent need and desire of the relevant managers to follow and comply strictly with R's policies, there is no feasible explanation, other than negativity and/or apathy towards C, for why the policy was not followed in respect of maintaining regular contact with her. C submits that the failure to maintain supportive contact on this occasion was both unfavourable treatment and victimisation for the same reasons as for Allegation 13 and caused the same detriment.

64) Also with respect to Allegation 27, R's only explanation for failing to follow their own policy requirement of maintaining regular supportive contact was that C had indicated at the start of her period of sickness absence in July 2013 that she did not feel able to discuss her employment situation over the phone. C submits that it is clear from C's email of 30 July 2013 (pg908) that she was referring to serious conversations about her employment/absence situation, not normal supportive telephone contact. C specifically referenced the cognitive problems she was experiencing at that time and her concern that she could not manage to “absorb and process information”, “formulate responses/opinions” or “make decisions” if “discussing matters” on the phone.

65) C submits that even if R assumed she was referring to any kind of person-to-person contact at that time they obviously did not maintain that view throughout C's absence (contrary to what was asserted by Greer Husbands) because by 19 September 2013 it had been decided to invite C to a formal case management review meeting. (pg 931)
C submits that since R obviously considered C capable of attending a formal management meeting in September it is just nonsensical to assert that they still considered her incapable of participating in normal regular supportive phone calls.

As with the other similar allegations, C submits that this failure to maintain supportive contact was both unfavourable treatment and victimisation and for the same reasons and caused the same detriment.

Allegations 9 and 15

66) These allegations are closely linked to Allegations 1, 2, 3, 8, 13, 16, 27 and 33 are therefore in time.

67) C submits that in relation to both of these periods of sickness absence, R knew from the start what adjustments and actions were needed to enable her to quickly return to work but instead of promptly putting the required adjustments in place, C was forced to remain absent from work and to attend yet more rounds of unnecessary OH appointments and formal review meetings and was subjected to an inappropriate suggestion that she should consider ill-health early retirement, warnings about

disciplinary action and possible dismissal and inappropriate and unnecessary disclosure of her personal, work-related and medical information to an OH physiotherapist.

68) C submits that in relation to Allegation 9, even the referral to OH made by Tim Pithers on 27 April 2012 was unnecessary because C had already informed him long before then that the chair provided for her was unsuitable, so what was needed was an assessment of C's chair requirements by a suitably qualified professional. R could have therefore simply asked OH in April to refer the matter to their physiotherapist, which was what finally occurred in July. There was no need to subject C to an intimidating and distressing unannounced management meeting on 27 June 2012 or any of the totally inappropriate comments or warnings that were made at that meeting, or for much of what was said during that meeting (and C's distress) to then later be disclosed to the physiotherapist. R's failure to ensure these managers and the HR advisor knew about C's relevant disability history and the history about the need for a suitable chair is no excuse.

69) R made a point in their oral submissions of emphasising that it took 'only 20 days' to provide C with a suitable chair. However, R first knew in November 2011 that the chair first provided for her was unlikely to be suitable and by 25 April 2012 at the latest (pgs 669/70) they knew that a different chair was required. Therefore since it took R 'only 20 days' to acquire a suitable chair for C, she could and should have been back to work at least by 20 May, the day her 'may be fit' Fit Note was issued.

70) C submits that as with Allegations 8, 13, 16 and 27, this failure to take prompt action was unfavourable treatment because of negative attitudes formed by R because of C's continuing absence from work and continuing need for a suitable chair when R considered C to be just unfit for her job.

71) This allegation is linked to Allegations 2, 3 and 33 because during this enforced prolonged absence R was continuing to fail to make the required adjustments, continuing to treat periods when C was not contracted to work as sickness absence and continuing to fail to record the absence as disability-related, resulting in detriment in relation to sick pay entitlement and C's absence record which in turn affected the attitudes and treatment of management towards her.

72) In respect of Allegation 15, again R had known for years which PCPs were placing C at a substantial disadvantage and what adjustments were needed to remove or reduce those disadvantages and again R's failure to ensure relevant disability-related information, communications and management actions were passed promptly to new managers is no excuse.

73) C submits that there was no need for the formal sickness absence review meeting held on 14 December or for R to wait until then before implementing the appropriate adjustments. A simple phone call or email to C after receipt of notice that she was fit to return with suitable adjustments from 3 December 2012 would have provided C's manager with any information that could not have been gleaned from a careful review of her personnel or HR file.

74) Further, R's attempts during December 2012/January 2013 to look for other roles for C was their idea since apart from her request to do basic 'back office' tasks on a Wednesday instead of working on the wards C had not requested any move to a different role. As evidenced by what was finally agreed on 7 February 2013, R's time spent looking at entirely different roles was an unnecessary and ineffectual exercise.

75) C also submits that OH advice is only necessary where an employer is unsure if a particular employee has a disability but when the evidence is clear or OH has given an opinion as to likely disability, it is not the OH advisor who knows best what a particular

employee needs by way of adjustments but the employee him/herself. It is also not the responsibility of the OH advisor to say whether a particular adjustment is or may be reasonable. That is for the employer to decide, after considering all the relevant factors and the particular facts of the case.

76) C submits that there was sufficient information already within R's knowledge or readily available to them to have started taking the necessary steps as of 3 December 2012 to implement appropriate adjustments so that the significant disadvantages caused to C by the relevant PCP(s) were removed or reduced. C submits that had they done so she could have returned to work several weeks sooner than she actually did. There was therefore no justification for either of these delays.

77) C submits that as with Allegations 8, 9, 13, 16 and 27 this was both unfavourable treatment because of negativity towards C because of her continuing absence from work and continuing requests for reasonable adjustments when R considered C to be just unfit for her job and also in relation to Allegation 15 was victimisation caused by conscious or unconscious negativity towards C because of these circumstances and the allegations of discrimination C had previously made, which those managers had plenty of opportunity to learn about as they 'reviewed' C's personnel file. This caused the same detriments as for Allegations 8, 13, 16 and 27.

78) Allegation 15 is also linked to Allegations 1, 2, 3 and 33 because during this enforced prolonged absence R was continuing to fail to make the required adjustments to the PCP in Allegation 1, continuing to treat periods when C was not contracted to work as sickness absence and continuing to fail to record the absence as disability-related, resulting in detriment in relation to sick pay entitlement and C's absence record, which in turn affected the attitudes and treatment of management towards her.

Allegations 10, 11 and 12

79) These allegations are linked to Allegation 9 because they were actions taken in connection with that allegation. They are also linked with Allegations 1, 2, 3 and 33 because it was R's failure to implement the appropriate reasonable adjustments in relation to Allegation 1 and/or Allegations 2 and 3 and their failure to have provided a suitable chair for C prior to June 27 2012 that led to these actions being taken. If they had done so, C's absence record would have looked quite different, C would not have still been absent in June 2012, it would have been known that that absence was disability-related and due to the failure to address the chair issue promptly when C had indicated many months previously that the first chair provided was not suitable and none of these managers or the HR advisor new to C's case would have formed the view that C was unfit for her job and a drain on R's resources, or that early ill-health retirement enquiries should be made by R or that C was likely to face disciplinary action and possible dismissal.

80) C submits that Allegations 10, 11 and 12 were all unfavourable treatment of her because of negativity towards C because of her continuing absence from work and continuing requests for reasonable adjustments when R considered C to be just unfit for her job.

81) In relation to Allegations 10 and 11 it was also victimisation caused by conscious or unconscious negativity towards C because of these circumstances and the allegations of discrimination C had previously made, which those managers had plenty of opportunity to learn about as they 'reviewed' C's personnel file.
The detriment caused by this victimisation was distress and loss of confidence as a member of the team and as an employee.

82) C submits that Allegation 11 was also very clearly humiliating and offensive to her, as shown by C's email complaint to Tracey Raymond on 3 July 2012 (pgs 700/704)

and that it was reasonable for C to feel humiliated and offended by the unnecessary disclosure of personal and work-related details and C's distress to a person who did not need to know any of those details. C submits that the subject matter and contents of this email were related to her disability of back pain and that this was therefore harassment.

Allegation 17

83) C submits that the reason R did not provide C with a full and accurate record of what was said during the formal sickness absence review meeting on 14 December 2012 was because C was angry and frustrated in that meeting, because she again made allegations, whether or not express, that R had been discriminating against her for years by failing to make required reasonable adjustments, and because Janet Morris the HR manager acknowledged R's failings. C submits that because C had already made such allegations in her grievance in 2007 and again in her email to Tracey Raymond of HR in July 2012 (which Janet Morris acknowledged in her oral evidence was brought to the attention of higher HR management), a decision was made by someone to not record this further allegation.

84) C submits that the evidence showed that HR, including Janet Morris, kept written notes and 'progress logs' of such meetings and there were various such documents in the bundle but no HR record at all of this significant and serious meeting! C submits that only two explanations for this are possible – either a full and accurate record was not made, or it was but has not been disclosed to either C or the Tribunal. C submits that either way this points to only one conclusion – that C was not provided with an accurate record because it was yet more evidence that could support a Tribunal claim by C which R clearly wanted to avoid, as evidenced by their actions after C's resignation and by the internal warnings made by higher management/HR in January 2013 (after receipt of a further such allegation by C) that her case was high risk for R and had to be handled properly.

85) R could not hide C's allegations made in July 2012 and January 2013 because they were made by email but they could keep C's verbal allegations of 14 December and Janet Morris' acknowledgement out of the record and they did so. C submits that it couldn't be clearer that this failure to provide C with an accurate record of that meeting was an act of victimisation which continued up to and beyond C's resignation. This allegation is therefore in time. C submits that the failure to provide her with an accurate record of what was discussed during this meeting was clearly a detriment because it put her at a disadvantage in relation to any future disability-related discussions with R and for seeking a remedy in tribunal proceedings.

Allegations 19, 21, 26 and 31

86) C submits that these are all PCPs applied to her, and only to her, after she returned to work on 31 January 2013 and after she had been led to believe that R had made the package of adjustments purportedly agreed during the meetings on 24 January and 7 February 2013.

87) Allegation 19 was the 3 PCPs applied to C on 24 April 2013 that a) she could not make up shifts on Saturdays, b) she could not do so during evenings and c) she was required to report every day until she made up a missed shift to say whether she was fit to work the shift on that day. In relation to a) and b), R's explanation for these PCPs when they were applied was that there would be no 'support' available.

C submits that what R really meant by this was that there would be no managers present to make sure C turned up and completed a shift and that this was the result of the continuing discriminatory assumption that C was still prone to 'anxiety levels' of the sort that resulted in C's unauthorised absences in early 2007.

88) C submits that the fact that this false and discriminatory assumption was still continuing is evident from the 'concern' expressed by Trish Bridson in her OH referral of 24 September 2012 (pgs 754/6) about C working on Sundays without management 'support' and the reference to C's 'anxiety levels'. C submits that since she had experienced no such 'anxiety levels' since early 2007, had not had any associated absences since then and had not talked about or exhibited any such symptoms, this false and discriminatory assumption about the disability C was suffering from was actually based on long-past effects of a different disability of depression/clinical anxiety.

89) C submits that as paragraph 3.17 of the Code of Practice makes clear, direct discrimination can occur if a person is wrongly perceived as having a particular protected characteristic (discrimination by perception) and in relation to disability the relevant characteristic is not disability in general but the particular type of disability a person has. C submits that in this case, C was wrongly perceived as still suffering from clinical anxiety/panic attacks when she had not suffered from that disability for years. Alternatively there was a similar false assumption in relation to the occasional effects of the cognitive impairment C sometimes experienced as a symptom of her ME and a total disregard for the fact that such effects of C's ME had been successfully managed for years by taking breaks when she needed to.

90) C submits that the new and contradictory explanation for these 2 PCPs suggested by Greer Husbands in her oral evidence, that they were applied because of health and safety concerns is just not credible because as discussed during the hearing, various of R's employees, including Annie Down, a secretary who worked in the PEOC administrative centre, the out of hours central records clerk and C herself worked or spent considerable time alone in environments like the PEOC administrative centre and no such health and safety restrictions were applied to those other employees or to C in those circumstances.

91) Further, there was no explanation as to why it was felt that there were particular health and safety concerns about C that meant she could not work alone, when the A&E department was a short walk away, nurses were on the next floor and the administrative centre had phones in almost every room. C submits that this effort to steer the evidence away from 'support' was telling. Further, R's attempts to suggest that C had indicated she needed 'support' in the form of the presence of management during her shifts is just contrary to the evidence.

92) As to the PCP that C had to phone in every day to say whether she was able to work, until she made up a missed shift, this was not part of R's sickness absence policy, was not applied to any other employee that C was aware of and had never been applied to C in her previous 25 years with R. C submits that this PCP was applied to C only because again R had a false and discriminatory assumption that C was suffering from an impairment that caused 'anxiety levels' that could result in C not turning up for work or not completing her shift and therefore R decided that tight control should be kept on C's rescheduling of shifts. C submits that the PCP of having to report every day was designed to put pressure on C to make up the shift within a few days.

93) Each of these PCPs cancelled out important elements of the reasonable adjustments purportedly previously agreed to by R – the opportunity to make up hours during Saturdays or evenings if needed and the agreement that C could make up shifts during the same week or during the month. C submits that these PCPs were imposed on C because of her disability or perceived disability and were therefore all direct discrimination. They were also or alternatively imposed on C because of a perceived need to monitor and or control C's attendance because of effects of symptoms that arose or were assumed to arise from her disability.

94) C also submits that the imposition of these PCPs on her was hostile, humiliating and offensive conduct which violated her dignity as a disabled person because she was

assumed to be prone to effects and behaviour that were not a feature of her disability of ME and because it was clear to C that R did not trust her.

95) C further submits that the application of these PCPs to her was also victimisation caused by conscious or unconscious negativity towards C because of the allegations of discrimination she had made both recently and in the past, as viewed by managers new to her case who were uninformed about the full history of her disability case and management but had looked through her personnel file and just saw C as someone who was troublesome, difficult and not fit for her job. The detriment caused by this victimisation was loss of confidence as a member of the team and as an employee and a substantial impediment to C being able to work as much as possible.

96) In respect of Allegation 21, C submits that it is clear from the evidence that from April 2013 onwards, i.e. from when C first tried to make use of the supposedly agreed adjustment arrangements, decisions were made by managers and/or HR at different times to severely restrict the scope of the adjustments and that these were made without consulting with C and without providing reasonable explanations. C submits that these decisions were initially made by individual managers or HR advisors who were not properly informed about C's disability case or the purportedly agreed adjustments and their purpose. C submits that this was due to R's failure to properly take all the necessary steps (including any relevant adjustments to the applications of policies) so that the adjustments were actually in place.

97) However, by November 2013 these separate decisions had been adopted by R as a management position, justified by reference to alleged requirements of R's sickness absence policy and by an alleged concern for C's health and welfare at work and, curiously, also outside of work. C submits that as at 4 November 2013, as set out in the OH referral made on that date, the PCPs imposed in Allegations 19 and 26 were formally adopted by R as their position in relation to C's request for appropriate reasonable adjustments to remove or reduce the disadvantages caused by the PCP requiring C to work fixed hours/days.

98) C submits that the adoption of this position in November 2013 was confirmation that R had not made the required adjustments and now did not intend to do so. C submits this is clear because if they had made the adjustments and a provision of the sickness absence policy was an impediment to achieving the aim of the adjustments they would have also made an appropriate adjustment to the policy itself. Similarly, if they had intended to make the adjustments but had concerns about C's health and welfare they would have discussed these with her and tried to find some way of dealing with such concerns. C therefore submits that 4 November 2013 is the date on which R again decided not to make the relevant required adjustments in relation to Allegation 1 and 14 November was the first date on which C had knowledge of this decision, when she received a copy of the OH referral.

99) C submits that these unilateral decisions allegedly about her health and welfare were applied only to her and were because of her disability or perceived disability and were therefore all direct discrimination. They were also or alternatively imposed on C because of a perceived need to monitor and or control C's attendance because of effects of symptoms that arose or were assumed to arise from her disability.

100) C also submits that these decisions were offensive to her and violated her dignity as a disabled person because she was not consulted or informed that these matters were even being discussed or considered and no expert medical opinion was sought when deciding that C should be prevented from making up shifts as much as possible because it was supposedly harmful to her. C submits that any reasonable person would be offended by actions which clearly demonstrated that their employer did not trust them, including an employee such as C who had failed to report absences for one

relatively brief period in a 25 year employment history but for a reason connected with a particular disability that had not affected her for years.

101) In respect of Allegation 26, this was the PCP imposed on C on 10 July 2013 that if she had missed more than one shift due to disability, all of the time had to be recorded as sickness absence. R acknowledged in their response to this allegation in the Scott Schedule that this conversation took place.
C submits that this PCP was applied only to her and that again it was to exert control and pressure on C to make up time very quickly or not at all because R did not trust C and assumed that she would somehow abuse the flexibility by letting time drift and then claiming that she had turned up and worked at a time when no management was around to witness it.

102) This PCP again cancelled out key elements of the purportedly agreed adjustment arrangement – that C could work some or part of missed shifts and take the rest as sickness absence or split the hours over different days, as suited C's needs. C submits that the effect of the PCPs applied in Allegations 19 and 26 was to remove the element of flexibility from the adjustment arrangement to such an extent that C would only rarely be able to make up lost shifts.

103) C submits that for the same reasons as for Allegation 19, this PCP was direct discrimination, and/or discrimination arising from disability and also victimisation and harassment. The detriment caused by this victimisation was loss of confidence as a member of the team and as an employee and a substantial impediment to C being able to work as much as possible.

104) In respect of Allegation 31, this PCP relates to the monitoring/management criteria referenced in the OH referral of 4 November 2013 which R had decided was necessary and which was relied upon as justification for applying the PCPs in Allegations 19, 21 and 26. C submits that what R actually meant by the statement in that document that a 'close eye' had to be kept on the 'support' provided to C was that her attendance at work had to be closely monitored. C submits that it was clear from the oral evidence of Greer Husbands about wanting to 'keep on top' of the situation, her instruction to Trish Bridson and Jill Skinner on 5 April 2013 that R needed to be 'on this like a hawk' and her querying what Sundays C had worked (pg 864) that the focus of the 'close eye' was not 'keeping on top' of whether the adjustments had been properly implemented in accordance with the agreed criteria but on checking if and when C worked, particularly with respect to Sundays. C submits that it is instructive that on the same day as Greer Husbands persuaded C not to try to make up the shift missed on 3 April at the weekend she was also querying what weekends C had worked since returning to work.

105) As to the new criteria that the 'support' provided to C should always be 'appropriate, reasonable and fit for purpose', C submits that again the focus of this criteria was not on whether the reasonable adjustments were implemented properly and achieving their purpose in removing and reducing the relevant disadvantages to C but on whether the monitoring of C's attendance and control on when she was to be permitted to work was sufficient and 'fit for [R's] purpose'. C submits that decisions to remove key elements of an adjustment that were essential to the central aim of the adjustment (flexibility to take account of a fluctuating/variable disability) and invoking alleged requirements of a sickness management policy to restrict that key element cannot possible be intended to make that adjustment 'fit for purpose', 'appropriate' or 'reasonable'.

106) Further, if the concern was about whether R was providing actual support that was appropriate in the circumstances with regard to C's health and welfare, C submits that R has produced no evidence of how they determined that C's health and welfare could suffer if she made up shifts according to the purportedly agreed adjustment

arrangment. C submits that the whole point of those elements of flexibility was so that C could make up shifts if and when her health allowed it or not, as the case may be and so the adjustment was already tailored to take account of C's health and welfare.

107) C submits that for the same reasons as for Allegations 19, 21 and 26 this PCP was direct discrimination, and/or discrimination arising from disability and also victimisation and harassment. The detriment caused by this victimisation was total loss of confidence in R and the realisation that they would continue discriminating against her.

C further submits that the false and discriminatory assumptions about her disability related to these allegations is the same as for Allegations 5 and 6 and they are therefore closely linked.

Allegations 20, 22, 23, 24, 25, 28, 29 and 32

108) C submits that the repeated and linked failures of R to provide her with pay-related information and payslips and to investigate her sick pay entitlement and what she was being paid between April 2013 and January 2014 and beyond was not due to 'clerical error' as R asserts. As established in the evidence, C provided R with ample information about her pay entitlements and what she believed was being done wrong for R to have sorted out her pay very quickly. In respect of the repeated underpayments of sick pay between July 2013 – January 2014, R had all the necessary information including completed timesheets by 31 July 2013 (pgs 918/20).

109) Further, there was no reason for any 'confusion' or difficulty arising from the continuation of the reasonable adjustment made in 2009 that C would receive Saturday enhancements for Wednesday hours because this did not constitute a change to the pay arrangements and in any event, since it had been agreed that this reasonable adjustment would continue, this meant that R should have taken all necessary steps following the meeting on 7 February 2013 to ensure that all relevant employees and the payroll department knew what had to be done to ensure the adjustment was in operation. Since R did not do this they failed to make and/or maintain this adjustment and this failure continued throughout the rest of C's employment and also in respect of the calculation of C's accrued holiday pay paid to her in March 2014.

110) As regards the failure to provide C with payslips at the correct time it is no defence that C was on sickness absence. There are always employees absent from work when their pay is due, either on annual leave or sickness absence and the ERA 1996 makes no provision for payslips to be provided late in such circumstances. R could simply have posted each payslip to C as they eventually did for some of them. However, contrary to R 's assertions, C never received a payslip for either August or September 2013 or for March 2014 and no payslip was provided on time.

111) Further, C submits that these omissions weren't due to ignorance of the situation. C repeatedly made requests to Greer Husbands, Trish Bridson or Jill Skinner (who was responsible for providing accurate PEOC pay information to payroll) between April and December 2013 and Greer Husbands represented to C on 28 October 2013 that she was investigating the issues and would get back to C the next day (pg 934) and she also copied Trish Bridson into emails with instructions for action by Trish. Additionally Greer also represented to C that a management meeting was taking place on 7 January 2014 to complete those investigations, a meeting which very clearly never took place.

112) C submits that the only action needed by R was to advise payroll of the correct basis on which C should have been paid (which C had provided) and request that they recalculate her pay entitlement for the relevant period, taking account of the 2009 reasonable adjustment and the relevant sections of the NHS Agenda for Change provisions. R could then have made a lump sum special payment of the arrears, as had

happened (promptly) on a few previous occasions over the years when C's pay had been wrong.

113) C submits that all of these acts were unfavourable treatment because of negativity towards C's because of her continuing absence from work and continuing queries and complaints about pay-related matters when R considered C to be a troublesome, difficult employee, unfit for her job and just a drain on R's resources and on the relevant managers' time. C submits that the comment made by Greer Husbands on 7 October 2013 (pg 933) when faced with having to deal with C's case again is indicative of the attitude towards C and C submits that this attitude was clearly shared by the other new managers who were involved in her management from mid 2012 onwards. C submits that there is no other plausible reason why her requests for information and/or remedial action regarding her pay were not dealt with and some emails totally ignored, and similarly no plausible reason why she did not receive her payslips on time or at all or advance notice (as was required by R's sickness policy) of a reduction in her sick pay on 16 September 2013.

114) C submits that in respect of allegations of unfavourable treatment, the 'something' arising from disability does not have to be the only reason for the act, but needs only to be a 'more than minor or trivial' part of the reasons. (Pnaiser v NHS England & Anor [2015] UKEAT 0137_15_0412 (already cited by R) para. 31.b). C submits that the relevant 'something' here was the fact that C was again 'sick' from work in circumstances where the relevant managers, being ignorant or insufficiently informed or aware of the requirements and duties under the EQA (which had not been complied with), viewed C as unfit for her job, troublesome and not worth the extra time and effort in providing her with pay information and payslips or in sorting out the pay issues that had arisen because of the consequences of her disability-related absences and a disability-related adjustment to her pay.

115) C submits that all of these acts were also victimisation caused by conscious or unconscious negativity towards C because of these circumstances and because of the allegations of discrimination C had previously made, which those managers had plenty of opportunity to learn about as they 'reviewed' C's personnel file. C submits that the detriment caused to her by these acts of victimisation is obvious. Further, C submits that these acts of ignoring her queries and issues and failing to deal with them were humiliating and offensive to her because she knew that they were done because of perceptions of her that were related to the effects and consequences of her disability.

Allegation 33

116) As set out in paragraph 45 of her ET1, C submits that R repeatedly failed to make the appropriate reasonable adjustments 'to remove or reduce the disadvantage and/or detriment caused by any and all of the formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications, provisions, ‘one-off’ or discretionary decisions (PCPs) of R' relevant to the act in Allegations (as subsequently numbered in the Scott Schedule) 1 – 5, 13, 15 – 19 , 21, 26, 27, 29, 31 and 32. C submits that in respect of many of these allegations she has specifically identified the appropriate reasonable adjustment(s) in her relevant submissions but that where she has not, a suitable adjustment that would have removed the disadvantage is easily identified and could easily have been made.

Allegation 34

117) C submits that it is clear from all the facts of this case that the cumulative effect of all of R's acts of discrimination against C over many years, the increased discrimination she suffered from mid-2012 onwards and the discrimination throughout 2013 was sufficient to destroy C's confidence in R. C further submits that by deciding in November 2013 that they were not going to make the adjustments necessary to remove

or reduce the disadvantages caused to her by the PCP requiring her to work fixed hours/days (after falsely representing that they would do so), by attempting to justify that decision by invoking alleged policy provisions and unfounded and unsupportable alleged concerns about C's health, and by isolating and ignoring C and failing repeatedly to sort out her serious pay-related issues whilst at the same time representing that they were being dealt with, R caused C to resign from a job that she enjoyed and which she could have continued for many more years.

118) C submits that it was the confirmation to her, upon receipt of a copy of R's OH referral of 4 November on 14 November 2013, that R had decided to unlawfully omit to make an adjustment that was wholly reasonable in all the circumstances of the case that made C's constructive dismissal an act of disability discrimination because that was the point at which she knew for sure that R would not make the adjustments she needed. However, C submits that R's continued failure after that to maintain supportive contact with her and to remedy the numerous ERA breaches or even to acknowledge or apologise for them were also acts of discrimination, as previously described, which contributed to the final act of disability discrimination that was C's constructive dismissal.

119) C submits that the constructive dismissal was direct discrimination because it was on the grounds of her disability, and/or was indirect discrimination because the new PCPs imposed on C which effectively denied her the flexibility necessary to be able to make up shifts caused her substantial disadvantages compared to non-disabled people or those with disabilities having different effects to C's, and/or it was discrimination arising from disability because a large causative factor in the constructive dismissal was the negativity towards C's because of her continuing absence from work and continuing queries and complaints about pay-related matters when R considered C to be a troublesome, difficult employee, unfit for her job and just a drain on R's resources and on the relevant managers' time.

120) C further submits that the constructive dismissal was also victimisation because a causative factor in C's resignation was the conscious or unconscious negativity towards her which led to both C personally and her pay and pay-related issues being ignored and which was in part because C had made allegations of discrimination which the relevant managers had plenty of opportunity to learn about whenever they 'reviewed' C's personnel file. C submits that the detriment caused to her by this act of victimisation is obvious. C also submits that the constructive dismissal was an act of harassment because the acts that caused it were unwanted conduct relating to C's disability which humiliated and offended C and violated her dignity as a disabled person because of the way she was viewed and treated.

Allegation 35

121) C submits that the failure to inform C in December 2013 that she had been awarded a long service award and the failure to provide it to her was just yet another example of the way in which she was being unfavourably treated as a result of the negativity towards her because of her continuing absence from work and continuing queries and complaints about pay-related matters when R considered C to be a troublesome, difficult employee, unfit for her job and just a drain on R's resources and on the relevant managers' time. C submits that R asserted in their response to this allegation in the Scott Schedule that the reason C did not receive this award was because it was 'inadvertently put in a drawer' and 'was only discovered' when C started these proceedings but this is totally different from what Greer Husbands asserted in her oral evidence, which was that it was not sent to C because it required a signature and that she intended to give it to C when she next saw her.

122) Further, as shown by the evidence, Trish Bridson had spoken to Greer Husbands about the fact that it was in Trish's drawer on the same afternoon she replied to an email from C (pgs 967/9) and so she could have mentioned it in her reply. It was certainly not

misplaced as has been suggested and it could have been sent by recorded delivery if R was concerned about the gift voucher going astray. C submits that again there is no plausible reason why this was not even mentioned to C, let alone provided to her, other than because R just couldn't be bothered because of the attitude towards C.

123) C submits that this was also an act of victimisation caused by conscious or unconscious negativity towards C because of these circumstances and because of the allegations of discrimination C had previously made, which those managers had plenty of opportunity to learn about as they 'reviewed' C's personnel file. C submits that the detriment caused to C is obvious.

124) C submits that R has given contradictory explanations for many of their unlawful acts and C requests that the Tribunal take note of the various times that their explanations or versions of the facts differ between their initial response to the claims, their further responses given in the Scott Schedule, the witness statements and the oral evidence of their witnesses.

125) Finally, in respect of the allegation adjustments cited by R in the document they produced as part of their final submissions to the Tribunal, C submits that R appears to confuse adjustments that are good practice and/or which are offered to most employees to assist with a return to work after illness and reasonable adjustments under the EQA which are to address specific disadvantages caused by specific PCPs.

Further, making adjustments in respect of one PCP/disadvantage/disability does not mean that R does not have a duty to make adjustments for different PCPs/disadvantages/disabilities. Of the adjustments R identifies in that document, C submits as follows by reference to the dates in the document:

- 01.10.07 - the 1st does amount to a reasonable adjustment but it was short-term and so did not address the PCP in Allegations 1 - 3. The 2nd was not a reasonable adjustment as the days of work were what suited R. The 3rd was a reasonable adjustment but was designed to address symptoms C sometimes experienced at work. It did not address the PCPs in allegations 1 - 3.

- 10.01.08 – The 1st was to address a detriment caused to C by R's decision to have her working weekdays, a decision which was itself detrimental to C. The 2nd was an adjustment but it did not address the issue of C's role on Saturdays which had been changed without her knowledge/without consultation and it was not better for C because she had to work all of her weekly hours on one day which was more difficult in relation to her ME symptoms.
It also did not address the PCP in allegations 1 - 3

- 25.06.08 – Adding C to the rota to work early shifts on a Saturday was not a reasonable adjustment because it was the new PCP requiring a 7.30am start for the Saturday shift that caused C the disadvantage. It did not address allegations 1 – 3.

- 18.11.08 – As established during Emma Knowles oral evidence, C was improperly put back on weekday working for 'support' because of 2 non-disability related absences. This was therefore not a reasonable adjustment under the EQA and caused disability-related and financial detriment to C.

- 10.03.09 – This was a compromise package of reasonable adjustments that reduced the disadvantage caused to C by the new PCP applied to Saturday shifts. This should have been offered in October 2007. This did not address the PCPs in allegations 1 – 3.

- 30.07.09 – This was a reasonable adjustment that reduced difficulties caused by the work environment. It did not address the PCPs in allegations 1 – 3.

- 29.06.10 – this was an extra step taken in relation to the adjustment made on 01.10.07 because 1 break was not sufficient.

- 28.09.11 – This was a temporary measure whilst waiting for the reasonable adjustment to be made. The chair was not adequate for C's needs.

- 10.08.12 (in place 15/8) This was a reasonable adjustment to remove the disadvantage caused by the lack of a suitable chair. It was effective but took 2 years to make. It did not address the PCPs in allegations 1 – 3.

- 16.01.13 – the 1st and 2nd were suggestions but were not adjustments made. The 3rd was a suggested quiet space for Sunday shifts but was not implemented at this time. The 4th was a reasonable adjustment to remove the disadvantage caused by R's delay in agreeing appropriate reasonable adjustments in relation to the PCP in allegation 1 – it did not address that PCP itself. R had also represented that they would make the same adjustment for the identical period between May – August 2012 but did not.

- 24.01.13 – The 1st and 2nd were suggestions and were not implemented. The 3rd was the same 'quiet space' previously suggested for Sundays but was not properly implemented because the Day Case Office was inaccessible at weekends. A separate quiet space in the administrative centre was also required but not made at this time.

- 07.02.13 – The 1st was not a new reasonable adjustment – it was C's normal shift pattern and an existing adjustment. The remainder was a set of reasonable adjustments purportedly agreed to by R but which were not properly implemented or not implemented at all. If they had been they would have removed or reduced the substantial disadvantage caused by the PCP in allegation 1.

Pamela Whitburn (Claimant) 12/02/17

Annex 4 - Respondent's response to the Claimant's submissions

IN THE EXETER EMPLOYMENT TRIBUNAL
Case No: 1400422/14
BETWEEN:

MRS P WHITBURN
Claimant
-and-

ROYAL DEVON AND EXETER NHS FOUNDATION TRUST
Respondent

RESPONDENT'S COMMENTS ON THE CLAIMANT'S SUBMISSIONS

References to paragraph numbers below are those appearing in the Claimant's submissions.

1. The Respondent does, of course, take issue with the essence of the Claimant's submissions. The purpose of this document is not to repeat the Respondent's submissions or re-iterate areas of dispute. As such, on behalf of the Respondent there is little to comment upon in relation to the submissions made by the Claimant (save to say they are not accepted). The following are minor points of observation that are made simply to assist the tribunal as far as possible in relation to its findings of fact and applying the law to the facts established.

2. Paragraph 27: Need it be said, in evidence it was apparent that managers would consider the Claimant's file and not rely simply on the record of absences.

3. Paragraph 28: Tracey Raymond did not state that the Claimant was a "drain" on the Respondent or use any similar expression. Notably, the Claimant makes no such allegation in her witness statement (paragraphs 58 to 65 of the Claimant's witness statement).

4. Paragraph 31: The assertion here is not consistent with the evidence and is not sustainable. In his letter to the Claimant dated 13 January 2011 (see p527) Mr Pithers states that "sickness related to disability would be counted and I explained that they would be, although clearly this is a factor of which we are mindful and due consideration needs to be given". Likewise, in his letter of 10 February 2011 (see p544-6) to the Claimant's TU representative, Jeff Skinner, who also raised the matter on behalf of the Claimant, Mr Pithers stated that "each period of sickness absence is reviewed independently and careful consideration is given to absence which relates to an employee's disability. This does not necessarily mean that these absences should be excluded from the sickness record, but clearly any reasonable adjustments should be considered and implemented if practical". Additionally, (bottom of p545) Mr Pithers refers to Stacey Dyer's email of 17 January 2011 (p531) where the same point is made to which he adds "sickness episodes which are disability-related should be taken into account when managing her sickness absence but we need to be mindful of the reasons and give appropriate consideration to any adjustments which need to be made as a result". He also explained (p544) that triggering the management of sickness absence was not an automatic process. In any event, the material point is that the Claimant suffered no detriment or disadvantage because of the way her absence was recorded. All managers identified in the evidence as responsible for decisions about the Claimant's employment were aware of her disabilities and the consequent limitations.

5. Paragraph 39: The Claimant was paid at weekend enhanced rates despite working weekday shifts and, as the evidence demonstrated, this was back dated in 2008 to cover the start of the arrangement in October 2007. Likewise, the non-numbered paragraph below paragraph 49 refers to "associated losses of pay that occurred". Save for the incorrect pay arising in mid-2013 that continued to termination of her employment, the Claimant did not identify in her claim or evidence any specific loss of pay due to a failure to make reasonable adjustments. Given that the Claimant always received enhanced weekend rates for shifts that she worked in the week, the Respondent denies that the Claimant suffered any such allegation in any event.

6. Paragraphs 87: The Claimant has, throughout her claim, referred to these matters as PCPs or new PCPs. In so far as it is material, it is submitted that they cannot be correctly termed PCPs. They were adjustments made to the Claimant's working arrangements to overcome any substantial disadvantage that previously existing PCPs applicable to the function of the role of ward clerk might have caused. Accordingly, the significance of how they applied or whether or not they were varied or changed needs to be viewed in terms of the reasonableness of such adjustment.

7. Paragraph 116: Notably, the Claimant seems to be inviting the tribunal to "easily" identify suitable adjustments that could "easily" have been made where she has failed to do so. It stands to reason that, if the Claimant has been unable to easily identify possible suitable reasonable adjustments (despite the lengthy pleadings, Scott Schedule and her 20,000 word witness statement), then for the tribunal to embark upon such an exercise at this stage in the proceedings would be speculative at best.

8. Two further general points need to be made in respect of the Claimant's submissions.

9. Firstly, whilst it is denied that the Respondent failed to or inappropriately delayed making reasonable adjustments, if there was any such failure to make reasonable adjustments (or any delay in doing so), the tribunal will need to address the question of whether the Respondent had knowledge or constructive knowledge that any adjustment it should have made (or made more quickly) would have alleviated any substantial disadvantage. For example, notwithstanding knowledge of the Claimant's back problem, it is submitted that the Respondent did not and could not have known that the provision made in respect of the Claimant's chair throughout the material period (up to the point that a specific chair was sourced and provided in August 2012) was insufficient to overcome any substantial disadvantage arising from that condition.

10. Secondly, the tribunal will recall that in response to a question asked by the Employment Judge the Claimant accepted in her own evidence that as at February 2013, all reasonable adjustments had been made. Accordingly, this has significant implications regarding whether any earlier complaints are in time and whether the tribunal has jurisdiction to consider them.

STEPHEN WYETH
22 February 2017