EMPLOYMENT TRIBUNALS

Claimant: **Ms Paula Annetta Mitchener**

Respondent: **South London & Maudsley NHS Foundation Trust**

Heard at: **London South**

On: **31 October 2016 to 3 November 2016. In chambers on 22 June 2017 and 14-15 August 2017**

Before: **Employment Judge Martin**
Ms B Brown
Ms T Bryant

Representation
Claimant: **Mr Allsop - Counsel**
Respondent: **Ms Stanley - Counsel**

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal is dismissed
2. The Claimant's claim of disability discrimination succeeds
3. The Respondent shall pay the Claimant £18,000 injury to feelings

REASONS

1. By a claim form presented to the Tribunal on 15 February 2016 the Claimant claimed she had been discriminated on the protected characteristic of disability and unfairly dismissed. The Respondent in its response presented on 17 March 2016 defended the claims.

The issues

2. The issues between the parties are as set out in the appendix to this judgment.

The law

Disability discrimination - The Equality Act 2010

3. Section 13. The statutory provision is as follows insofar as is material:

> 13 Direct discrimination
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
> (2) . . . .
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
> (4) – (8) . . . .

4. Section 15. The statutory provision is as follows:

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

5. The Claimant must therefore identify the 'something arising' and the unfavourable treatment suffered in consequence.

6. Section 20 claim. This is the principal provision relating to reasonable adjustments, supplemented by section 21 and Schedule 8 to the Act. Section 20 is as follows insofar as relevant:

7. 20 Duty to make adjustments

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) – (13) . . . .

8. The Claimant must therefore identify each of (1) the provision, criterion or practice, (2) the substantial disadvantage in question, and (3) the steps which it is alleged the Respondent should have taken to avoid that disadvantage.

9. Section 26. This section relates to harassment.

26 Harassment
(1) A person (A) harasses another (B) if—

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

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

(i) violating B's dignity, or

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

(2) – (3) . . . .

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

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—
. . . ;
disability;
. . . . .

10. The Claimant must therefore identify the conduct in issue and also set out the effect which it is alleged that that conduct had on the Claimant.

<u>Unfair dismissal – Employment Rights Act 1996</u>

11. The Respondent admitted that the Claimant had been dismissed and gave the reason as being capability. The Tribunal must therefore decide on the evidence before it whether the dismissal was fair or unfair in accordance with the provisions of section 98(4) Employment Rights Act 1996:

Section 98(4)

12. Where the employer has fulfilled the requirements of subsection (1), [i.e. shown the reason for the dismissal and that it was a potentially fair reason] the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)–

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

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

15. An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity to improve his performance.

16. The function of the Tribunal is not to substitute its own judgment for that of the employer.

The facts as found by the Tribunal

17. The Respondent is a NHS trust, which has on its site a nursery. The Claimant was employed as a Nursery Nurse from 28 September 2009. The Claimant was dismissed on 28 September 2015. She was employed at the Cedar House Day Nursery at the Maudsley Hospital, Denmark Hill, Camberwell which cares for about 65 children ranging in age between three months and five years and employs approximately 15 members of staff. The nursery is run principally for the benefit of hospital staff and shares resources (for example human resources) with the hospital. The Claimant's manager at the relevant times was Ms Ferguson-Boyce.

18. The Respondent has a sickness policy which provides amongst other things for management to conduct regular sickness review meetings with employees on long term sick leave. It sets the purpose of the meetings to support and return the staff member to work at the earliest opportunity and that warnings can be given if appropriate. The meetings are stated to establish if possible, the reason for absence and its likely duration. It provides that the Respondent should consider termination of employment contract on the grounds of incapacity if employee is unable/unlikely to return to work.

19. There were no issues with the Claimant's work, performance or attendance prior to August 2013 when she had to take time off work for an investigatory operation. In late 2013 and early 2014 the Claimant was undergoing further

investigations and was referred to Croydon University Hospital for medical scans. On 22 April 2014, when the Claimant was attending a meeting with Ms Ferguson-Boyce and Ms Vince she was taken ill with severe abdominal pains, left work and went straight to King's College Hospital, which was across the road from the nursery. The Claimant was then signed off work by her GP from 23 April 2014 until 7 May 2014. The statement of fitness for work recorded "*abdominal pain, waiting test hospital*".

20. The Claimant had a CT scan on 22 May 2014 and the Claimant submitted further continuous statements of fitness to work dated 23 May 2014 and 4 June 2014, which recorded the reasons for her absence has *"gynaecological illness, under hospital investigation*" or similar. On 6 June 2014, she went for an appointment at Croydon University Hospital and was told that she had a large abdominal tumour. She is then referred to the Royal Marsden Hospital which confirmed the diagnosis. She updated Ms Ferguson Boyce about this on 9 June 2014.

21. On 10 June 2014 Ms Ferguson-Boyce sent an email to Brenda Dawson on the Claimant's medical condition where she says, *"She called me yesterday to inform that she had her results back from hospital and they have identified a malignant tumour/complex mass in her pelvis area. They have now referred her to the Royal Marsden where they will identify a plan of action in relation to positive identification of the mass and treatments needed*". The Royal Marsden Hospital is a well renowned specialist cancer hospital.

22. The Claimant had been due to attend meetings with Ms Ferguson-Boyce and Ms Vince. There was correspondence between Ms Vince, Ms Dawson (Senior Employee Relations Adviser) and Ms Dibben (Head of Employee Relations). In one of these meetings on 24 June 2014 Ms Dawson said "*Paula failed to turn up to meetings and was claiming to be too unwell to do so.*". It is clear from the Respondent's evidence that Ms Dawson and Ms Dibben were involved in discussions about the Claimant's absence and the reasons for it some weeks before this.

23. The Claimant had an operation which was originally scheduled for 13 August 2014, but was then brought forward to 25 July 2014. The Claimant left hospital on 30 July 2014 and on the same date received a letter from the Respondent informing her that her sick pay entitlement would reduce to half pay from the end of August. This upset the Claimant. The Claimant asked if they could adjust their sick policy to maintain her full pay. However, the Respondent refused this on 3 September 2014, saying it "*cannot extend your sickness for pay as the allowances are specified by government*". Within this letter, the Respondent said "*we must have a sickness review meeting soon in line with trust policy and I was wondering if once you have seen Occupational Health we could either meet at the nursery or I can find an alternative room to discuss what Occupational Health has advised and if appropriate your phased return to work. I know the staff would like to see you, so hopefully you will choose the nursery"*. The Claimant says she felt under pressure to return to work because of this letter.

24. The Claimant then had further consultations with a specialist on 4 September 2014 and had scans on 11 and 23 September 2014. It was in September 2014 that she started to have symptoms which were later diagnosed as sarcoidosis. The Claimant remained off work and provided a statement of fitness to work to cover the period 29 August to November 2014. She told Ms Ferguson-Boyce that she would be undergoing further tests.

25. On 24 September, the Claimant attended Occupational Health for the first time at the Respondent's request. Occupational Health did not ask to speak to her treating specialists then or at any subsequent time. The Occupational Health report dated 24 September 2014 states "*in relation to your specific questions, following assessment in my opinion she is unfit to return to work at present. It is difficult to predict the likely return to work date at this time, I will review her in 6 weeks time when I shall obtain a clearer picture then management would be advised further".*

26. On 1 October 2014. Ms Ferguson Boyce and Ms Vince sent an email to the Claimant, suggesting a meeting the following Friday (3 October) to review "*how we may be able to support you within your present role as nursery nurse within the under twos room and if and how you would like to use your accrued annual leave, have a phased return back to work when your medical certificate ceases on 3 November 2014"*. The Respondent did not wait for a further review by Occupational Health as set out in the Occupational Health report of 24 September. The Claimant's position is that the Respondent's focus was not to properly understand her medical conditions to assist her, but to tick boxes to progress its agenda, which the Claimant says was the termination of her employment. The Claimant's medical condition was such that she moved to live with her sister in October 2014 so that she could get more support.

27. The Claimant was unable to attend that meeting and a meeting was eventually held on 29 October 2014. It was also the date when the Occupational Health consultation had been booked. The Claimant attended the Occupational Health consultation at 10:30 a.m. and the meeting with Ms Vince and Ms Ferguson-Boyce at 3:30 p.m. In this meeting, the Claimant updated at the Respondent on her health conditions, discussing her operation to remove the tumour, that she was unable to lift anything heavier than a kettle and was awaiting details of further treatment. She also described her symptoms of the sarcoidosis, which at that stage had not been formally diagnosed. She told them that she had further meetings with her specialists in December 2014.

28. When the Claimant attended the meeting with Ms Vince and Ms Ferguson-Boyce they had not received any communication from Occupational Health following her consultation that morning. The Occupational Health report dated 30 October 2014 again referred to a further review in six weeks' time and raised the issue of ill-health retirement. The Respondent accepts that the meeting on 29 October 2014 was inappropriate as they did not have the Occupational Health report. The Occupational Health report says that the Claimant refused to allow the diagnosis to be communicated to the

Respondent. The Claimant, in her disability impact statement refutes this, saying she never said this and that at that time she was still very upset by the cancer diagnosis and whenever she had to use the word became tearful and upset.

29. This meeting was followed up with a letter of 12 November 2014, which sets out what was discussed at that meeting. By this time the Respondent had the Occupational Health report of 30 October 2014 which said that they had consent from the Claimant to write her specialist and that a review appointment would be arranged with the Occupational Health physician once it was received. Up to this point it was an Occupational Health Advisor who was seeing her. Occupational Health hoped the specialist report wold be available within six weeks. They expressed the hope that following the next Occupational Health review they would be able to give further advice on the future management of the Claimant's absence.

30. The Claimant complains that the letter of 12 November put unwelcome pressure on her to return to work at a time when she was very unwell. She refers to the Respondent saying "*we have since been advised by employee relations that in the absence of advice from occupational health it would be both inappropriate and unsafe for us to guess at what adjustments need to be made in order to facilitate a return to work… The amount non-attendance work… cannot be sustained".*

31. The Claimant remained off work supplying statements of fitness to work and on 18 November 2014, the Claimant wrote to the Respondent confirming that she would be seeing her specialist in December and once she had done so she would be a better position to discuss suitable adjustments and a return to work. The Respondent agreed that there would be a further review on 9 January 2015 at 9:30 a.m. However, the Claimant then received a letter inviting her to attend a further formal sickness absence review meeting on 15 December 2014, which took the Claimant by surprise as it had been agreed that the next meeting would be on 9 January 2015 after she had seen her specialist. The Claimant saw this as further pressure being exerted on her. The Claimant rearranged her medical appointment so it would happen before the review meeting and attended her consultation with her specialist on 14 December 2014. She was told that she would need to have a further exploratory operation.

32. The Claimant updated Ms Ferguson Boyce and Ms Dawson in their meeting on 15 December 2014 as far as she could, saying that there were further investigations and she needed a further exploratory operation and biopsy which was due to take place in January. The Respondent informed the Claimant that her absences had become "*unsustainable on an ongoing basis"* and that her absence needed to improve substantially. The Claimant felt she was being coerced into having to agree to try to return to work even when she was not fit to do so and her treating practitioners also said she was not fit.

33. The Respondent says it issued the Claimant with an attendance improvement notice (AIN) on 15 December 2014. The Claimant denies having seen that

document until September 2015 when it formed part of the management case against her at the time she was dismissed. The Tribunal accepts the Claimant's evidence that she did not receive this document in December 2015.

34. On 16 December 2014, the Claimant had an occupational health appointment with Dr Haq an Occupational Health Consultant. Dr Haq informed the Respondent that the Claimant was undergoing further tests to determine if she required chemotherapy and if she did not she may be able to return to work at the end of January.

35. The Claimant had a further appointment with Dr Haq on 20 January 2015 when he recorded that the Claimant's other symptoms were unlikely to be cancer related and stated that the Claimant felt well and was keen to return to work as soon as possible. Dr Haq set out a phased return to work plan for weeks, with the proviso that she should not lift the first two weeks and gradually phase in lifting in the following two weeks. He also said that she should avoid working in the baby room for two months and that she would continue to have appointments and may require further treatment which may require time off work. He arranged to review her on 21 April 2015.On 27 February 2015 the Claimant had further investigatory surgery.

36. The Claimant had a 15-minute return to work interview with Ms Ferguson-Boyce on her return to work on 11 April 201and the Claimant's evidence was that this meeting lacked any warmth and was purely procedural in nature. The agreed hours were explained and it was explained that she was going to be moved to the toddler room to reduce the requirement for lifting which was in accordance with the advice from Occupational Health.

37. On 16 April 2015 the Claimant was diagnosed with sarcoidosis and reported this to Ms Ferguson-Boyce the next day. The Claimant had a further Occupational Health review with Dr Haq on 7 May 2015 who reported that she had successfully completed her phased return to work and apart from feeling a bit tired from time to time had been fine.

38. On 11 May 2015, five weeks after the Claimant had returned to work she was called in to a supervision meeting with Ms Ferguson-Boyce and Ms Vince where she was told that she was not using her initiative and that they did not know how to support her. They also told her that had she not gone on sick leave, poor performance was going to be acted on for low standard of work. The Claimant felt that no allowances were being made for her being absent for a disability related reason, and that she was still suffering from the effects of her disabilities. The Respondent used a draft supervision form which had the date 11 May 2015 at the top. This form is critical of the Claimant's performance and gave a performance rating of '*unacceptable*'. The form reports amongst other matters that an accident book was completed incorrectly saying "*specific information regarding the child's injury was not specific*."

39. The form also refers to an incident when a child was left unattended in the room. This incident happened the following day, on 12 May 2015. Presumably the form was incorrectly dated or added to later - this was not clear from the evidence. Ms Ferguson-Boyce asked the Claimant and other members of staff who were also present at that time to make statements. The Claimant's colleague, Ms De Cordova blamed the Claimant, and the Claimant blamed Ms De Cordova. No investigation or disciplinary action was initiated at that time. Shortly after this, the Claimant was moved back to the baby room where she used to work, and was told that this was to avoid any animosity with Ms De Cordova who stayed in the toddler room. The Claimant says that she believes that this was a difference in treatment and an indication of the Respondent's attitude towards her. The Claimant complained about being moved to the baby room and told the Tribunal that because of her treatment she was now unable to have children and therefore found working with babies upsetting. She was told that she had to remain in the baby room. The Respondent's evidence was that she had developed animosity towards Ms De Cordova and that she had previously worked in the baby room so it was considered appropriate that she be moved there.

40. The Claimant had an interview with Ms Fergusson-Boyce on 15 June 2015, which again was critical about her performance and she was again told her performance was unsatisfactory.

41. On 18 June 2015, the Claimant was called to be interviewed about what had happened on 12 May 2015. Ms De Cordova was also interviewed. The Claimant points to differences in the interviews between herself and Ms De Cordova in that she was questioned directly about procedures and best practice, what she had and had not done whereas Ms Cordova was questioned to a much lesser degree. The Claimant was distressed about this interview and went on sick leave again from 19 June 2015, which she blames on circumstances created by the Respondent which resulted in the deterioration of her sarcoidosis condition, anxiety and distress. She describes feeling very hurt and that every time she spoke or thought about the situation she would start to cry. She started counselling at this point. A further statement of fitness to work dated 26 June 2015 was submitted citing stress at work being the cause of absence.

42. On 7 July 2015, after two weeks of absence, the Claimant was invited to attend an Occupational Health consultation. She also received a letter dated 30 June 2015, asking her to attend a sickness absence review meeting with Ms Ferguson-Boyce on 6 July, the day before the Occupational Health appointment. The Claimant was too unwell to attend the meeting, which was rescheduled for 13 July 2015 but she did attend the Occupational Health appointment.

43. Dr Haq reported that the Claimant was not fit to return to work and the reasons for absence fell within the scope of the Equality Act 2010. The report says: *"I would like to emphasise that Ms Mitchener has been suffering from a serious medical condition. Ms Michener feels she is being subject to*

additional undue stress and should she continue to perceive this, then this may cause prolonged sickness absence. I would therefore recommend that she supported by the workplace to address issues positively and support her so that the workplace helps her to work on any performance issues if identified. I suggested to Ms Michener, that we will review her in 2 months' time to monitor her progress". He expected her to be able to return to work in about a month and suggested a meeting with her in 2 or 3 weeks' time.

44. The Respondent's response was to ask Dr Haq if the Claimant was fit to attend an investigatory meeting as part of the trust's formal process. Dr Haq replied that the Claimant was not fit to attend a formal meeting then but that she may be within several weeks if she had adequate notice.

45. On 20 August 2015 Ms De Cordova was placed on a performance improvement plan and her pay increment was withheld. The Respondent initially said this was in relation to the missing child incident but the record of this indicates the reasons were for the year ending March 2015 which was before the incident with the missing child. From this the Tribunal infers that it related to something else. No other sanction was applied to her.

46. On 27 August 2016 Ms Ferguson-Boyce and Ms Dawson presented a management investigation report which proposed that formal disciplinary action be taken against the Claimant. No such report was undertaken for Ms De Cordova. The Claimant's belief is that if there was a genuine and honest reason for progressing the matter it would have been done promptly after 12 May 2015 rather than being left for so long. The Claimant criticises the report as being insubstantial and that this is evidence of a lack of formal and proper investigation. She criticises that the report did not mention Ms De Cordova and that no proper assessment was made of Ms De Cordova about her part in the incident. She feels that she was singled out for disciplinary action without good cause because of her disability related absences.

47. The Claimant presented a further statement of fitness for work dated 28 August 2015 until 11 September 2015 certifying her absence for sarcoidosis. On 2 September 2015, Ms Dawson wrote to the Claimant inviting her to attend a disciplinary hearing on 14 September 2015 and a separate letter of the same date, inviting her to a formal sickness review meeting on the same date. This was despite Dr Haq's advice about her ability to attend meetings. On 8 September, the Claimant attended Occupational Health and in summary the report said that the Claimant was too unwell to attend work and that she was going to see her specialist. He asked the Claimant to make an appointment for six weeks' time on the assumption that she had then by then been seen by her specialist and that if she had not, then she should postpone the Occupational Health appointment until such time that she has been seen by a specialist.

48. The meeting on 14 September 2015 was chaired by Ms Dibben the Head of Employee Relations. She dealt with both the disciplinary and the sickness review aspects of the meeting. The Claimant did not feel that Ms Dibben was

an independent person as she had previously been involved in matters relating to the Claimant. The meeting was postponed until 25 September 2015 at the Claimant's request.

49. The letter inviting the Claimant to a disciplinary hearing did not set out the precise nature of the allegation against the her simply referring to the management statement. Claimant was warned that, if upheld, she might be dismissed for gross misconduct.

50. The invitation for the sickness review stated that it was likely that the Respondent would consider terminating the Claimant's employment on the grounds of ill-health capability. This meeting was held without the updated specialist report which Dr Haq was waiting for.

51. The Claimant was unwell and not able to attend the meeting on 25 September and the meeting went ahead in her absence. The Claimant was dismissed on the grounds of capability and this was communicated to the Claimant by letter dated 25 September 2015 sent under cover of email dated 28 September 2015. The dismissal letter referred to the Claimant's absence due to ill-health being substantial over the past 18 months, whilst accepting that she had a serious underlying medical condition. The reason for dismissal given was that there was no foreseeable date for the Claimant to return to work and that the Claimant's recent emails confirmed that she was too ill to attend meetings. The Respondent did not pursue the disciplinary action against the Claimant. Ms Dibben told the Tribunal that the Claimant would not have been dismissed for the missing child incident in any event.

52. The Claimant appealed against the dismissal and the hearing was set for 7 December 2015. The Claimant was unable to attend as she was too unwell. The Claimant's appeal went ahead in her absence and was dismissed.

The Tribunal's conclusions

53. Having found the factual matrix as set out above the Tribunal came to the following conclusions on the balance of probabilities.

54. In summary, the Tribunal finds the steps taken by the Respondent following the incident with the missing child, namely subjecting the Claimant to the threat of disciplinary proceedings and potentially dismissal for gross misconduct and not progressing that procedure once it was started for some time was discriminatory conduct. The Claimant was treated very differently from Ms De Cordova and the Respondent has not provided a satisfactory explanation as to why this occurred. The inference is therefore that this was because of the Claimant's absences from work which were all related to her disabilities.

Unfair dismissal

55. The Tribunal finds that the Claimant was fairly dismissed. On any account, the Claimant had had extensive periods of absence and there was no indication of a date to return to work or any indication of a likely date in the near future. She had taken 412 days' absence in an 18-month period. The Respondent's policy on long term sickness states that termination can be considered if there is not prospect or likelihood of the Claimant being able to return to work in a reasonable period.

56. The Claimant says she was too ill to attend meetings and her last Occupational Health report says that she continued to have multiple symptoms from underlying medical condition. The Tribunal notes that even though the Claimant says she was too unwell to attend meetings, she was able to write a long letter of complaint on 9 September 2015, yet did not attend meetings or send in any written representations to explain when she would be able to come back to work even though she knew what the issues were and that dismissal was a possibility. The Claimant was given the option of sending in written representations in the email from Ms Dibben to her dated 23 September 2015 but chose not to do so.

57. The Claimant was still unwell and not able to return to work or give an indication of when she was likely to return at the appeal which she did not attend. The Tribunal finds that the Respondent was entitled to say enough was enough even though the Tribunal considers that the process could have been managed better and with more thought. For example, the Claimant's impression of meetings was that they were unfriendly and the Tribunal finds that there should have been more thought as to the timing of meetings specifically in relation to Occupational Health appointments.

58. The Tribunal's conclusion is that these deficiencies are not sufficient to render the dismissal unfair after 18 months of very high absences. The Respondent explained to the Tribunal that using agency staff to cover the Claimant's absences presented problems both in terms of cost and continuity of care. Continuity was required for the children who found frequent change of staff caring for them disruptive. At the point of dismissal, there was substantial absence with no indication of when the Claimant may be able to return to work and this was the same when the appeal took place.

Disability Discrimination

59. The Respondent conceded that the Claimant is a disabled person because of her medical conditions, namely, cancer, sarcoidosis and stress. There is a dispute about when the Respondent became aware of these conditions. The Respondent says they knew that the Claimant had a disability (cancer) on 15 December 2014. The Claimant's position is that the Respondent knew of her disability in relation to cancer in June or August 2014. The Tribunal started by considering when the Respondent knew of the Claimant's disabilities.

60. The Tribunal finds that the Respondent knew of the Claimant's cancer on 10 June 2014. The reason for this is the email from Ms Ferguson-Boyce updating Brenda Dawson on the Claimant's medical condition which is set out above. The Tribunal find it is reasonable to conclude that the Respondent, having received this information was on notice that the Claimant was a disabled person. It was common ground that the Respondent knew of the sarcoidosis diagnosis on 17 April 2015.

61. The Tribunal then considered the agreed issues in turn.

62. ***Was the Claimant subjected to the following treatment. If so, was this less favourable treatment on the grounds of the Claimant's disability?***

On 29 October 2014, the Respondent arranged a meeting with the Claimant to review her sickness absence. The Claimant claims the following constituted instances of discriminatory treatment:

(i) The fact of the meeting;

(ii) This meeting was scheduled in advance of an Occupational Health consultation; and

(iii) At the meeting, itself the Respondent put pressure on the Claimant to return to work.

63. The Tribunal finds that it was inappropriate for the Respondent to hold a sickness meeting in advance of an Occupational Health consultation. The Tribunal does not criticise the Respondent for wanting to have a meeting and setting one up as this is part of its policy and procedures when dealing with long term ill health. It was reasonable for the Respondent to want to explore how and when the Claimant could return to work. By that time the Claimant had been on sick leave for seven months. The purpose of meeting was to explore how to support and return the Claimant to work at the earliest opportunity. The Tribunal accepts that the Claimant may have perceived it as pressure, but her letter of 18 November 2014 in reply, is cordial and did not complain about being pressurised. To the contrary it thanks the Respondent for continued support and understanding. Although the Tribunal considers this could have been dealt with better the Tribunal does not find that there was discrimination. The purpose of the meeting is to give encouragement to return to work which is ultimately what the procedure is for.

On 12 November 2014, the Respondent wrote to the Claimant to invite her to attend a sickness meeting on 15 December 2014 notwithstanding the fact that the Claimant had a meeting with her specialist in December 2014 and was due to have an Occupational Health appointment on 16 December 2014. It had been agreed the meeting would take place on 9 January 2015.

64. The Tribunal finds that it is strange that the Respondent arranged this interview when one had already been set for January 2015 there was not real explanation given. The Occupational Health report of 30 October 2014 refers to the Claimant having a consultant appointment and clearly a meeting after that, would have been preferable. The Tribunal takes on board the Respondent's submissions that having meetings is in accordance with its

sickness policy which provides for 'regular' sickness review meetings. Whilst it may have been preferable not to have had a meeting in December, the Tribunal does not find this was because of the Claimant's disability but was more of an administrative defect and is not directly discriminatory.

The Respondent held a meeting with the Claimant on 15 December 2014. The Claimant claims the following constituted discriminatory treatment:

(i) The fact of the meeting;

(ii) The manner of the meeting; and

(iii)The Respondent issued an AIN –

65. This meeting occurred in accordance with the Respondent's policy. The Tribunal has found that the Respondent did not send the Claimant the AIN in December 2014. It is not known how this came about as there was no satisfactory explanation from the Respondent about this. Ms Ferguson-Boyce says it not issued by her even though it had her electronic signature. The Respondent says that it did not know about the cancer at this time, however the Tribunal has found that they did know of it. On balance, the Tribunal find that the Respondent did prepare an AIN but the Tribunal is unable to determine what happened to it; the Tribunal accepts the Claimant's evidence that she did not receive it at the time. The Tribunal does not find this to be direct discrimination.

The Respondent had a return to work interview with the Claimant on 2 March 2015. The Claimant claims the following constituted instances of discriminatory treatment:

(i) The Respondent's attitude towards the Claimant was very negative and unwelcoming at this meeting;

(ii) The Respondent failed to discuss or consider any other reasonable adjustments except (i) the phased return to work and (ii) working in the baby room.

66. The documentation surrounding this interview comprises a new staff induction questionnaire completed by the Claimant which is cheerful in tone. There is nothing in any other document which casts light on the nature of this meeting. The Claimant submitted that the fact that there is a block signature covering many matters on the return to work form is indicative of the negative attitude towards her and the cursory nature of the meeting. The Tribunal does not consider this is the case and fids that the block signatures do not denote anything save that the matters were discussed which was not disputed. The Claimant also signed this form and made no complaint at the time.

67. The Tribunal has considered the GP fit note which makes no recommendations about adjustments. There were recommendations from Occupational Health which were for a phased return to work, no lifting for the first two weeks and that the Claimant should not work in the baby room for two months. The Respondent did put in a phased return to work plan, did

arrange for no lifting as recommended and moved the Claimant to the toddler room as also recommended. No other adjustments were suggested by the Claimant or by Occupational Health or by the Claimant.

68. The Tribunal does not find that there was unfavourable treatment on the grounds of the Claimant's disability.

On 11 May 2015, the Respondent held a supervision meeting with the Claimant at which the Claimant was criticised.

69. The Claimant had come back to work on 2 March with a phased return which ended on 27 March. The Claimant had some time off in this period however on 7 May 2015 Occupational Health reported that the Claimant had successfully managed the phased return to work and was given the all clear to resume normal duties. No review appointment made. The Claimant was criticised in this meeting and Ms Fergusson Boyce agrees that it may have come across as harsh. In cross examination, the Respondent's witnesses came across as being quite regretful. The review considered the Claimant's performance prior to her going sick leave and Ms Dibben in cross examination agreed it was negative, with no positives being mentioned at all. On all accounts, the review was critical of the Claimant and the Tribunal can understand why the Claimant may have been upset. However, the Tribunal whilst finding there was a detriment does not consider that the reason for the less favourable treatment was the Claimant's disability.

On 12 May 2015, the Respondent moved the Claimant to the baby room and refused her request to move out of the baby room.

70. The reason that the Clamant was moved to the baby room was because of the issue relating to the missing child as set out in the facts above. The Respondent's evidence is that this was because of their perception of animosity with Ms De Cordova and because the Claimant had previously worked in the baby room it was appropriate for her to be moved there. This was after the time Occupational Health said the Claimant should not work in the baby room. The Claimant says did not want to work in the baby room as became upset as could not now have children. The Claimant said she told the Respondent she did not want to work in the baby room and why. The Respondent's evidence is that the Claimant did not say this to them. On balance, the Tribunal accepts the Respondent's evidence. There was nothing from the Claimant to the Respondent in writing setting this out and the Tribunal does not find this to be less favourable treatment on the grounds of her disability.

On 15 June 2015, the Respondent held an appraisal meeting with the Claimant. At this meeting, the Claimant's performance was criticised and the Respondent apportioned blame for the incident on 12 May 2015.

71. The fact of the appraisal meeting is not challenged. The meeting took place and the Claimant was criticised over her performance and was blamed for the incident with child. The form has one section where the question is "What behaviours has positively contributed to the employee's achievements over the last year?" The answers whilst acknowledging the Claimant was kind and

caring to the children and was punctual, negated this positivity with negative comments and criticism. The Tribunal finds that this was a negative appraisal and can understand why the Claimant may have felt dispirited. However, the Tribunal does not find that the reason for this was the Claimant's disability.

On 18 June 2015, the Respondent took the decision to investigate the incident on 12 May 2015. The Respondent (a) failed to properly investigate Ms De Cordova's part in the incident (b) conducted a prejudicial investigation to the detriment of the Claimant (c) prejudged the outcome (d) the Claimant was informed by Brenda Dawson that the buck stopped with her.

72. The Tribunal find it surprising that it took from 12 May 2015 until 18 June 2015 for an investigation to begin into the missing child incident. Both Ms De Cordova and the Claimant were initially investigated. Having considered the investigations, the Tribunal agrees that there were differences in treatment between the Claimant and Ms De Cordova. The Respondent says that both employees acted inappropriately in relation to the missing child. The Tribunal agrees that Ms De Cordova was not probed in same detail as the Claimant and had more time to prepare her statements when the incident occurred. Ms De Cordova was issued with a '*formal conversation letter'* and was not subject to a full investigation and gross misconduct allegations. If this was gross misconduct the Tribunal considers that both the Claimant and Ms De Cordova should have been suspended and the disciplinary procedure invoked quickly. Ms Dibben said in evidence that the charges would not have resulted in dismissal and therefore the question is why the Claimant had the threat of dismissal for gross misconduct hanging over her for a long period when there was never any likelihood that she would have been dismissed or that the actions against her would be classified as gross misconduct. This is in stark contrast to the outcome of the investigation which said '*we believe she was negligent and not safe to work in this area'*. Ms Vince said the Claimant and Ms De Cordova were jointly responsible but they were treated differently. No reasonable explanation has been given by the Respondent to explain the difference in treatment although this was probed in cross examination.

73. The Tribunal has considered s136 Equality Act 2010 as set out above in light of the recent EAT decision in Efobi v Royal Mail Group Ltd UKEAT/0203/16/DA. The Tribunal has considered all the evidence, from all sources, and concludes that there are facts from which it can infer discrimination. In the absence of any reasonable explanation for the differential in treatment from the Respondent, the Tribunal finds that the Claimant's claim of direct disability discrimination in relation to this issue is successful.

On 7 July 2015 the Respondent required the Claimant to undertake a further Occupational Health consultation.

74. This was not pursued by the Claimant and not considered by the Tribunal.

The Respondent took no positive action in respect of the Occupational Health report dated 7 July 2015.

75. The Occupational Health report stated that the Respondent should resolve the workplace issues otherwise the Claimant's absence may be prolonged. The Respondent did not do this proceeding to commission a management investigation stating the Claimant was not fit to work with children and to set a date for a disciplinary hearing. Ms De Cordova was not treated in this way with no satisfactory explanation being given for the differential treatment. Despite the Occupational Health report confirming that the Claimant was stressed and had significant medical issues, the Respondent did nothing to alleviate the work situation but instead initiated the disciplinary investigation and action. The Tribunal has considered why the Respondent did this for the Claimant and not for Ms De Cordova. The Tribunals finding is that the only reasonable explanation was because of the Claimant's disability in that she had taken substantial periods of time away from work because of this.

On 27 August 2015, the Respondent produced a management investigation report proposing disciplinary action against the Claimant;

76. As set out above, the Tribunal finds that there was no sufficient explanation as to why a management investigation report was not done for Ms De Cordova. The Respondent says there was remorse expressed by Ms De Cordova buy not by the Claimant. At the initial meeting which was held close to when the event happened, the Respondent said they had joint responsibility. The Tribunal finds the two appraisal documents for the Claimant and Ms De Cordova interesting in comparison. The Claimant's appraisal says she left a child unattended whereas Ms De Cordova's says that she and another member of staff left a child unattended. The Tribunal finds that both the Claimant and Ms De Cordova failed to fill their job requirement and the Tribunal infers that difference in treatment is because of the Claimant's disability and discriminatory. The Tribunal does not find the expression of remorse or lack of such expression to be a sufficient reason for such a disparity of treatment.

The Respondent accelerated the sickness absence management process.

77. While the Claimant was absent from work in 2014 the Respondent arranged for meetings and occupational health referrals as part of its sickness absence management procedures. The Tribunal finds that after the Claimant returned to work, the sickness absence management procedure continued as the Claimant had more time off work after she had returned. She went off work due to sickness quite soon after she returned. The Tribunal find it reasonable for the Respondent to put the periods of absence together as they were sufficiently proximate. The Tribunal does not find the procedure was accelerated as alleged and this part of the Claimant's claim is not made out.

The Respondent dismissed the Claimant

78. The Tribunal finds that the reason for dismissal was the Claimant's levels of absence together with the lack of any indication that she would be able to return to work in the foreseeable future and not the fact of her disabilities. The Tribunal does not find that the Claimant was directly discriminated against in relation to this issue.

The Respondent delayed in holding an appeal hearing for almost 2 months

79. The Respondent's evidence was that this was not a delay to its normal procedure which is that appeals are heard once a month with a non-executive director being made available. The Tribunal accepts this and does not find that the Claimant was directly discriminated on this basis.

Discrimination Arising

Was the Claimant treated in the following respects. If so was this unfavourable treatment? If so was this treatment because of something arising in consequence of the Claimant's disability? The "something" is the Claimant's absences including the perception of future absence. If so, was this a proportionate means of pursuing a legitimate aim?

On 3 September 2014, the Respondent put pressure on the Claimant to return to work.

80. The Tribunal has found that there was no pressure put on the Claimant to return to work on 3 September 2014. The Claimant may have felt pressurised but purpose of meeting is to see how to get her back to work and what adjustments needed. There was no unfavourable treatment.

The Respondent sought to progress an Occupational Health referral and a sickness meeting before the Claimant's meeting with her consultant specialist on 11 September 2014;

81. This was not pursued by Claimant so not considered by the Tribunal

Following Occupational Health management referral reports on ~~24 September 2014, 30 October 2014,~~ [1] 20 January 2015, 7 May 2015, 7 July 2015, 14 July 2015 and 8 September 2015 the Respondent took no steps to:

(i) Engage or consult with the Claimant about the reports;

(ii) Seek any further information from the Claimant herself or her treating specialists.

82. The evidence is that the Respondent tried to engage with the Claimant by setting up meetings which the Claimant did not attend. Had she attended the contents would have been discussed with her. There was the opportunity at the 14 September meeting to discuss the reports, however the Claimant did not attend. The Claimant wrote a 5-page letter regarding the disciplinary matter just before the disciplinary hearing and in this refers to her ill health but makes no reference to a specialist report. The Claimant asked for an adjournment of the meeting on 14 September to get representation and it was moved first to 16 September and then to 25 September 2015. The updated reports were included in the sickness review meeting held on 25 September 2015. The Tribunal finds that the Respondent tried to have meetings and accommodated the Claimant's requests for postponements but the Claimant was unable to attend them. This part of the Claimant's claim is not made out.

[1] The dates struck through were not pursued by the Claimant

(b) On 29 October 2014 the Respondent arranged a meeting with the Claimant to review her sickness absence. The Claimant claims the following constituted instances of discriminatory treatment:

(i) The fact of the meeting;

(ii) This meeting was scheduled in advance of an Occupational Health consultation.

(iii) At the meeting itself the Respondent put pressure on the Claimant to return to work;

83. The Tribunal does finds that the fact of the meeting is something arising from her disparity as the reason for the absence is related to her disability which gave rise to the utilisation of the sickness policy. However, the Tribunal finds it to be a proportionate means of achieving a legitimate aim, that aim being to have employees at work. This part of the Claimant's claim is not made out.

On 12 November 2014, the Respondent wrote to the Claimant to invite her to attend a sickness meeting on 15 December 2014 notwithstanding the fact that the Claimant had a meeting with her specialist in December 2014 and was due to have an Occupational Health appointment on 16 December 2014. It had been agreed the meeting would take place on 9 January 2015;

The Respondent held a meeting with the Claimant on 15 December 2014. Claimant claims the following constituted discriminatory treatment:

(i) The fact of the meeting;

(ii) The manner of the meeting; and

(iii) The Respondent issued an AIN (although the Claimant's case is that it was not received until September 2015). The Claimant says that the issuing of the AIN and / or the wording of the AIN constituted discriminatory treatment.

84. The Tribunal finds that this meeting was set up in accordance with the sickness policy. The fact of the meeting was related to the Claimant's absence for a disability related reason however, the Tribunal finds it to be a proportionate means of achieving a legitimate aim, that aim is to have employees at work. The Tribunal does not find that the manner of the meeting was discrimination arising. However, the Tribunal does have concerns about the AIN. It has found that it was created at this time but not given to the Claimant until September 2015 when the Respondent was considering the termination of her employment. Had the AIN been given to the Claimant in December 2014 then the Tribunal would have considered it a proportionate means of achieving a legitimate aim given the extent of the absences from work. However, the Tribunal finds that this does not apply in September 2015 when the Respondent's procedure was moving towards

termination of employment rather than to get the Claimant back to work. The Tribunal finds this to be discrimination arising from diability.

(c) The Respondent had a return to work interview with the Claimant on 2 March 2015. The Claimant claims the following constituted instances of discriminatory treatment:

(i) The Respondent's attitude towards the Claimant was very negative and unwelcoming at this meeting;

(ii) The Respondent failed to discuss or consider any other reasonable adjustments except (i) the phased return to work and (ii) working in the baby room.

85. On 11 May 2015 the Respondent held a supervision meeting with the Claimant at which the Claimant was criticised. This has been referred to above. The Tribunal does not find that the attitude was negative or unwelcoming although the Claimant may have perceived it that way. The Tribunal find that the adjustments suggested by Occupational Health were discussed and the Claimant did not suggest any other adjustments. This part of the Claimant's claim is not made out.

On 12 May the Respondent moved the Claimant to the baby room and refused her request to move out of the baby room.

86. The Tribunal's finding in relation to this issue have been set out above. The Claimant was moved after the incident with the missing child as the Respondent considered there was animosity between her and Ms De Cordova. The Tribunal finds that the Claimant did not explain why she wanted to move from the baby room and does not find this to be discrimination arising out of a disability.

On 15 June 2015, the Respondent held an appraisal meeting with the Claimant. At this meeting, the Claimant's performance was criticised and the Respondent apportioned blame for the incident on 12 May 2015.

87. In this meeting, the Respondent considered the Claimant's performance going back to before she had gone on sick leave. This related to a time leading to the Claimant being unwell and off work for a considerable time as well as more recent matters. The Tribunal finds that the criticisms relating to the Claimant's work prior to her period of sick leave to be unfavourable treatment arising from her disability. The Tribunal does not find unfavourable treatment arising from disability in relation to the apportionment of blame for the incident in May 2015 or for any performance matters after she returned to work.

On 18 June 2015 the Respondent took the decision to investigate the incident on 12 May 2015. The Respondent (a) failed to properly investigate Ms De Cordova's part in the incident (b) conducted a prejudicial investigation to the detriment of the Claimant (c) prejudged the outcome (d) the Claimant was informed by Brenda Dawson that the buck stopped with her.

88. The Tribunal finds that the decision by the Respondent only to investigate the Claimant was because of the tie the Claimant had absent from work due to her disabilities. There was no reasonable explanation as to why Ms De Cordova was not treated in a similar way and therefore the inference is that it was because of something arising from the Claimant's disability, that 'something' being her long periods of absence.

On 7 July 2015, the Respondent required the Claimant to undertake a further Occupational Health consultation.

89. This was not pursued by Claimant so was not considered by the Tribunal

The Respondent accelerated the sickness absence management process.

90. Clearly the sickness absence management process was utilised for a reason arising from the Claimant's disabilities. However, the Tribunal find that the Respondent was following its own policies and that it was a proportionate means of achieving a legitimate aim, namely to have staff at work.

On 27 August 2015 the Respondent produced a management investigation report proposing disciplinary action against the Claimant;

91. The Tribunal finds that the whole matter relating to the disciplinary action was related to the Claimant's absence from work for disability related reasons as found in issues above. The Respondent categorised the disciplinary offence as one of gross misconduct and had the process hanging over the Claimant for some time. There was no such process for Ms De Cordova. Ms Dibben told the Tribunal that the Claimant would never have been dismissed for such a matter. The Respondent however categorised the offence as gross misconduct which put pressure on the Claimant and the Tribunal finds the reason for this is the amount of absence the Claimant had.

The Respondent dismissed the Claimant;

92. The Tribunal finds that the Claimant was dismissed for the level of sickness absence over an 18-month period. It is common ground that this absence arose from her disabilities. The Tribunal accepts the Respondent's evidence that at this time the reasons for the Claimant's absence was for her sarcoidosis and stress and not for her cancer diagnosis however a substantial part of her absence was for treatment for cancer.

93. The Tribunal finds that this is treatment arising from the Claimant's disabilities. However, the Tribunal accepts that the Respondent had a legitimate aim in running an effective service, maintaining continuity particularly for the children and economic efficiency. The dismissal letter cites all these matters and the impact of the Claimant's absence. The Tribunal finds that given the level of absence (412 days) and the lack of any indication about when the Claimant might be able to return to work that dismissal was a proportionate means of achieving these legitimate aims.

94. **The Respondent delayed in holding an appeal hearing for almost 2 months.**

This was not pursued by the Claimant and not considered by the Tribunal

Harassment

Was the Claimant subjected to the following treatment? Was this unwanted conduct? Was this conduct related to a protected characteristic? Did this conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

(a) The Respondent sought to progress an Occupational Health referral and a sickness meeting before the Claimant's meeting with her consultant specialist on 11 September 2014.

This was not pursued by the Claimant and not considered by the Tribunal.

(b) On 29 October 2014, the Respondent arranged a meeting with the Claimant to review her sickness absence. The Claimant claims the following constituted instances of discriminatory treatment:

a. The fact of the meeting;

b. This meeting was scheduled in advance of an Occupational Health consultation; and

c. At the meeting itself the Respondent put pressure on the Claimant to return to work.

The Tribunal does not find this to be harassment. The Respondent was obliged to hold meetings to discuss the Claimant's absence from work in accordance with its policies. The Tribunal find that the organisation of the meetings was rather haphazard and that it would clearly have been preferable to have scheduled the meeting for a time after the occupational health report had been received. Inevitably at a meeting of this sort, which is held to ascertain when the Claimant could return to work and what could be done to facilitate a return to work the Claimant may perceive a pressure to return to work. However, the Tribunal does not find that this fits with the statutory definition of harassment. It may have been annoying to have a meeting in these circumstances however it is not harassment.

(c) On 12 November 2014 the Respondent wrote to the Claimant to invite her to attend a sickness meeting on 15 December 2014 notwithstanding the fact that the Claimant had a meeting with her specialist in December 2014 and was due to have an Occupational Health appointment on 16 December 2014. It had been agreed the meeting would take place on 9 January 2015.

The Tribunal does not find this to be harassment for the same reasons as set out in (b) above.

(d) The Respondent held a meeting with the Claimant on 15 December 2014. Claimant claims the following constituted discriminatory treatment:

(iv) The fact of the meeting;

(v) The manner of the meeting; and

(vi) The Respondent issued an AIN (although the Claimant's case is that it was not received until September 2015). The Claimant says that the issuing of the AIN and / or the wording of the AIN constituted discriminatory treatment.

The Tribunal finds that the Attendance Improvement notice was not sent to the Claimant in December 2014 but was sent for the first time in September 2015. This was at a time when the Respondent was contemplating terminating the Claimant's employment. The notice relates to the Claimant's disability and the Tribunal finds that the timing of sending it to the Claimant to be harassment. The Tribunal finds that the fact and the manner of meeting not harassment as set out in (b) above.

(e) The Respondent had a return to work interview with the Claimant on 2 March 2015. The Claimant claims the following constituted instances of discriminatory treatment:

(i) The Respondent's attitude towards the Claimant was very negative and unwelcoming at this meeting;

(ii) The Respondent failed to discuss or consider any other reasonable adjustments except (i) the phased return to work and (ii) working in the baby room.

The Tribunal does not find this to be harassment as alleged. A return to work meeting is a normal process and there was no evidence to corroborate the Claimant's perception that the Respondent was unwelcoming and negative. The adjustments discussed were those recommended by Occupational Health. The Claimant did not suggest any other adjustment may be appropriate. For the reasons set out above, the Tribunal does not find this to be harassment.

(f) On 11 May 2015 the Respondent held a supervision meeting with the Claimant at which the Claimant was criticised.

The Tribunal does not find this to be harassment as alleged. The nature of a supervision meeting is that good and bad matters are discussed. There was no evidence to suggest that the manner of this meeting was such to constitute harassment on the grounds of the Claimant's disability.

(g) On 12 May the Respondent moved the Claimant to the baby room and refused her request to move her out of the baby room.

The Tribunal has found that the Claimant did not tell Ms Ferguson Boyce about not wanting to work in the baby room and the reasons for this. The Tribunal considered the Claimant's cross examination and Ms Ferguson-Boyce's. The Claimant first said she told the Respondent she did not want to go into the baby room but also said that she had a croaky voice at that time

and maybe people did not notice what she said. Importantly however, the Claimant accepted the reason she was moved there was because of the incident with the missing child. Ms Ferguson-Boyce said that she considered it appropriate to move the Claimant to the baby room after the missing child incident to separate her and Ms De Cordova and also because Susan who is a friend of the Claimant's worked there and she thought it was a supportive environment and the work fitted in with the Occupational Health report which recommended less lifting. On balance the Tribunal accepts the Respondent's evidence and finds that the reason for the move to the baby room was reasonable given the incident with the missing child, that it was not related to the Claimant's disability and that the Claimant did not articulate any desire to be moved from the baby room or the reasons why she wanted this.

(h) On 15 June 2015 the Respondent held an appraisal meeting with the Claimant. At this meeting the Claimant's performance was criticised and the Respondent apportioned blame for the incident on 12 May 2015.

The Tribunal finds this to be harassment for the reasons set out above in relation to blame being apportioned for the incident on 12 May 2015. The Tribunal accepts that this created an offensive, and hostile environment for the Claimant and that the reason blame was put on her and not on Ms De Cordova before any investigation had been carried out was because of the Claimant's absences due to her disabilities.

95. **On 18 June 2015 the Respondent took the decision to investigate the incident on 12 May 2015. The Respondent (a) failed to properly investigate Ms De Cordova's part in the incident (b) conducted a prejudicial investigation to the detriment of the Claimant (c) prejudged the outcome (d) the Claimant was informed by Brenda Dawson that the buck stopped with her.**

The Tribunal finds his to be harassment for the reasons set out above.

96. **On 7 July 2015 the Respondent required the Claimant to undertake a further Occupational Health consultation.**

This was not pursued by the Claimant and not considered by the Tribunal.

97. **The Respondent accelerated the sickness absence management process.**

For the reasons set out above the Tribunal does not find this to be harassment

98. **On 27 August 2015 the Respondent produced a management investigation report proposing disciplinary action against the Claimant.**

For the reasons set out above the Tribunal finds this to be harassment on the grounds of the Claimant's disability.

FAILURE TO MAKE REASONABLE ADJUSTMENTS

Sickness Absence

99. **Did the Respondent apply the PCP of requiring an employee to maintain a certain level of attendance at work in order to avoid receiving warnings and ultimately, dismissal?**

The Tribunal finds that the Respondent did apply this PCP.

100. **Was the Claimant put at the substantial disadvantage of being given warnings and/or dismissed.**

The Tribunal finds that dismissal is a disadvantage as is being given warnings.

101. **If so, would it have been reasonable to make the following adjustments:**

(a) Not giving the Claimant warnings;

(b) Extending her trigger points;

(c) Deferring the decision to dismiss;

(d) Not dismissing her.

In these circumstances the Tribunal finds that it would not have been reasonable not to give warnings, to extend the trigger points, to defer the decision to dismiss or not dismissing the Claimant in light of the extent of the Claimant's absences and the indications that she would not be fit to return in the foreseeable future. At some point the employer must be able to say that enough was enough and be able to progress the sickness absence policy.

Proceeding with the final sickness review meeting in the Claimant's absence

102. **Did the Respondent apply the PCP of making a decision about an employee's future in the absence of an employee?**

103. **If so, did this put the Claimant at a substantial disadvantage as the Claimant was more likely to be absent due to her disability than those not suffering from her disability. The Claimant was not afforded the opportunity to make oral representations about her illness/the future of her illness/the medical advice the Respondent could seek etc (as per page 84a of the bundle).**

The Tribunal does not find this to be a PCP. There was no evidence of this being a practice applied to other staff and a one-off decision in the absence of an employee does not constitute a PCP.

104. **Would it have been reasonable to make the following adjustments:**

(a) Waiting to hold the meeting until the Claimant was able to attend;

And/or make alternative arrangements to allow the Claimant to attend including holding the meeting near or at the Claimant's home.

Had this been a PCP, then the adjustments listed here would have been reasonable.

Locations of meetings

105. **Did the Respondent apply a PCP in holding meetings at the Employee Relations Department in Maudsley Hospital?**

The Respondent did apply a PCP as set out above.

106. **If so, did this put the Claimant at a substantial disadvantage in that she was unable to/found it difficult to travel from her home to meetings as she was suffering from the physical and mental effects/barriers of her illness.**

There was no evidence that this PCP put the Claimant at a substantial disadvantage when compared to persons without her disabilities. The Claimant did not raise any concerns about the location of the meetings save for one time (the final sickness absence meeting on 25 September 2015) there was no information in the. The Respondent was not therefore under a duty to make reasonable adjustments.

107. **Would it have been reasonable to make the following adjustments:**

(a) Wait until the Claimant was able to attend the meeting;

If the Respondent had been under a duty to make reasonable adjustments it would not have been reasonable to wait until the Claimant was well enough to attend. There was no indication of when that would be and the Respondent had already made adjustments by rescheduling the meeting twice at the Claimant's request. It is reasonable for the Respondent to hold the meeting in the Claimant's absence particularly as they gave her the option of making written representations and clearly the Claimant was able to write detailed emails, as demonstrated by the correspondence in the bundle.

(b) And/or making alternative arrangements to enable her to attend including holding meetings near the Claimant's home/at the Claimant's home.

If the Respondent had been under a duty to make reasonable adjustments, then the making alternative arrangement for attendance at the meeting would have been reasonable. The Respondent said in evidence that alternative arrangements could have been made had they been notified of difficulties and the reason for those difficulties.

Lifting Duties

108. **Did the Respondent apply the PCP of requiring or allowing employees to lift babies or children?**

109. **If so, did this put the Claimant at a substantial disadvantage as she was suffering from the physical effects/barriers of her illness including severely aching joints. She suffered increased pain and discomfort in her joints (including her shoulders) due to the requirement to lift babies/children. This caused/contributed to her absence.**

110. **Would it have been reasonable to make the following adjustments:**

(a) Giving the Claimant jobs that did not involve lifting babies/children.

The Claimant is not pursuing this issue and it was not considered by the Tribunal

Working Outside

111. **Did the Respondent apply the PCP of requiring/allowing employees to work outside?**

112. **If so did this put the Claimant at a substantial disadvantage in that she was suffering from the physical effects/barriers of her illness including severely aching joints. She suffered increased pain and discomfort in her joints and chest together with breathlessness, constant coughing and loss of voice due to the effects of cold/damp weather upon her. This caused/contributed to her absence.**

113. **Would it have been reasonable to make the following reasonable adjustments:**

(a) Restricted the Claimant's work to indoor work.

The Claimant is not pursuing this issue and it was not considered by the Tribunal

Drawing conclusions

114. **Did the Respondent apply the PCP of drawing conclusions and/or going on to the next stage of the sickness absence procedure before medical evidence was available/considering medical evidence or consulting with the employee.**

The Tribunal finds that there is no practice provision or criterion as set out in this issue. There was no evidence that this was something that was applied to all staff and which put the Claimant at a particular disadvantage. If the Respondent did draw conclusions this was particular to the situation with the Claimant and not a general policy applicable to all.

115. **Did this put the Claimant at a substantial disadvantage in that it caused the Claimant (who suffered from the physical and mental effects/barriers of her illnesses) increased stress and anxiety causing/contributing to her absence/continuing absence. The Claimant had adjustments that could have facilitated the faster return to work**.

As there is no PCP so there is no substantial disadvantage arising from the implementation of a PCP.

116. **Would it have been reasonable to make the following adjustments:**

(a) Waiting until an OH report/the treating physician commented on the Claimant's condition and/or consulting directly with a Claimant before making an assessment.

As there was no PCP so there was no requirement to make reasonable adjustments. In any event the Claimant had not seen her specialist by the time she made her appeal in October, and there was no mention of having seen specialist in the appeal meeting in December. Even if there had been a PCP requiring adjustments, the Respondent would have been justified in not waiting longer given the levels of absence from work.

Knowledge of Substantial disadvantage

117. **If the Claimant was put at a substantial disadvantage by all or any of these PCPs, did the Respondent have knowledge of this substantial disadvantage at the relevant time or times?**

Where the Tribunal has found there to be a PCP, the Tribunal finds that the Respondent did have knowledge of the substantial disadvantage at the relevant times.

COMPARATORS

118. The Claimant's comparators are Madge De Cordova and a hypothetical comparator.

Remedy

119. Having made the findings as set out above the Tribunal considered remedy for the disability discrimination found. The Tribunal considered the relevant Vento bands as amended and finds that the appropriate band is the middle band. Considering the evidence heard from the Claimant about the distress and upset she felt because of the disciplinary matters against her the

Tribunal find that it is just and equitable to award £18,000 injury to feelings. Quite clearly these allegations being so serious and the threat of dismissal for gross misconduct because of them had a big impact on the Claimant. Considering Ms Dibben's evidence that the Claimant would not have been dismissed in any event for a situation such as she was being disciplined for means that the stress and pressure put on the Claimant, who was in a very vulnerable position at that time, was unnecessary.

_____

Employment Judge Martin

Date: 19 October 2017

Appendix

AGREED SCHEDULE OF
DISCRIMINATION ALLEGATIONS

DIRECT DISCRIMINATION

1. Was the Claimant subjected to the following treatment:

(a) On 29 October 2014 the Respondent arranged a meeting with the Claimant to review her sickness absence. The Claimant claims the following constituted instances of discriminatory treatment:

(iii) The fact of the meeting;

(iv) This meeting was scheduled in advance of an Occupational Health consultation; and

(v) At the meeting itself the Respondent put pressure on the Claimant to return to work.

(b) On 12 November 2014 the Respondent wrote to the Claimant to invite her to attend a sickness meeting on 15 December 2014 notwithstanding the fact that the Claimant had a meeting with her specialist in December 2014 and was due to have an Occupational Health appointment on 16 December 2014. It had been agreed the meeting would take place on 9 January 2015.

(c) The Respondent held a meeting with the Claimant on 15 December 2014. Claimant claims the following constituted discriminatory treatment:

(vii) The fact of the meeting;

(viii) The manner of the meeting; and

(ix) The Respondent issued an AIN.

(d) The Respondent had a return to work interview with the Claimant on 2 March 2015. The Claimant claims the following constituted instances of discriminatory treatment:

(i) The Respondent's attitude towards the Claimant was very negative and unwelcoming at this meeting;

(ii) The Respondent failed to discuss or consider any other reasonable adjustments except (i) the phased return to work and (ii) working in the baby room.

(e) On 11 May 2015 the Respondent held a supervision meeting with the Claimant at which the Claimant was criticised.

(f) On 12 May the Respondent moved the Claimant to the baby room and refused her request to move out of the baby room.

(g) On 15 June 2015 the Respondent held an appraisal meeting with the Claimant. At this meeting the Claimant's performance was criticised and the Respondent apportioned blame for the incident on 12 May 2015.

(h) On 18 June 2015 the Respondent took the decision to investigate the incident on 12 May 2015. The Respondent (a) failed to properly investigate Ms de Cordova's part in the incident (b) conducted a prejudicial investigation to the detriment of the Claimant (c) prejudged the outcome (d) the Claimant was informed by Brenda Dawson that the buck stopped with her.

(i) On 7 July 2015 the Respondent required the Claimant to undertake a further Occupational Health consultation.

(j) The Respondent took no positive action in respect of the Occupational Health report dated 7 July 2015.

(k) On 27 August 2015 the Respondent produced an management investigation report proposing disciplinary action against the Claimant;

(l) The Respondent accelerated the sickness absence management process.

(m) The Respondent dismissed the Claimant

(n) The Respondent delayed in holding an appeal hearing for almost 2 months.

2. If so, was this less favourable treatment on the grounds of the Claimant's disability?

DISCRIMINATION ARISING FROM A DISABILITY

3. Was the Claimant treated in the following respects:

(a) On 3 September 2014 the Respondent put pressure on the Claimant to return to work.

(d) The Respondent sought to progress an Occupational Health referral and a sickness meeting before the Claimant's meeting with her consultant specialist on 11 September 2014;

(e) Following Occupational Health management referral reports on 24 September 2014, 30 October 2014, 20 January 2015, 7 May 2015, 7 July 2015, 14 July 2015 and 8 September 2015 the Respondent took no steps to:

(i) Engage or consult with the Claimant about the reports;

(ii) Seek any further information from the Claimant herself or her treating specialists.

(f) On 29 October 2014 the Respondent arranged a meeting with the Claimant to review her sickness absence. The Claimant claims the following constituted instances of discriminatory treatment:

(i) The fact of the meeting;

(ii) This meeting was scheduled in advance of an Occupational Health consultation.

(iii) At the meeting itself the Respondent put pressure on the Claimant to return to work;

(g) On 12 November 2014 the Respondent wrote to the Claimant to invite her to attend a sickness meeting on 15 December 2014 notwithstanding the fact that the Claimant had a meeting with her specialist in December 2014 and was due to have an Occupational Health appointment on 16 December 2014. It had been agreed the meeting would take place on 9 January 2015;

(o) The Respondent held a meeting with the Claimant on 15 December 2014. Claimant claims the following constituted discriminatory treatment:

(x) The fact of the meeting;

(xi) The manner of the meeting; and

(xii) The Respondent issued an AIN (although the Claimant's case is that it was not received until September 2015). The Claimant says that the issuing of the AIN and / or the wording of the AIN constituted discriminatory treatment.

(h) The Respondent had a return to work interview with the Claimant on 2 March 2015. The Claimant claims the following constituted instances of discriminatory treatment:

(i) The Respondent's attitude towards the Claimant was very negative and unwelcoming at this meeting;

(ii) The Respondent failed to discuss or consider any other reasonable adjustments except (i) the phased return to work and (ii) working in the baby room.

(i) On 11 May 2015 the Respondent held a supervision meeting with the Claimant at which the Claimant was criticised.

(j) On 12 May the Respondent moved the Claimant to the baby room and refused her request to move out of the baby room.

(k) On 15 June 2015 the Respondent held an appraisal meeting with the Claimant. At this meeting the Claimant's performance was criticised and the Respondent apportioned blame for the incident on 12 May 2015.

(l) On 18 June 2015 the Respondent took the decision to investigate the incident on 12 May 2015. The Respondent (a) failed to properly investigate Ms de Cordova's part in the incident (b) conducted a prejudicial investigation to the detriment of the Claimant (c) prejudged the outcome (d) the Claimant was informed by Brenda Dawson that the buck stopped with her.

(m) On 7 July 2015 the Respondent required the Claimant to undertake a further Occupational Health consultation.

(n) The Respondent accelerated the sickness absence management process.

(o) On 27 August 2015 the Respondent produced an management investigation report proposing disciplinary action against the Claimant;

(p) The Respondent dismissed the Claimant;

(q) The Respondent delayed in holding an appeal hearing for almost 2 months.

4. If so was this unfavourable treatment?

5. If so was this treatment because of something arising in consequence of the Claimant's disability?

   The "something" is the Claimant's absences including the perception of future absence.

6. If so, was this a proportionate means of pursuing a legitimate aim?

HARASSMENT

7. Was the Claimant subjected to the following treatment?

120. The Respondent sought to progress an Occupational Health referral and a sickness meeting before the Claimant's meeting with her consultant specialist on 11 September 2014.

121. On 29 October 2014 the Respondent arranged a meeting with the Claimant to review her sickness absence. The Claimant claims the following constituted instances of discriminatory treatment:

(i) The fact of the meeting;

(ii) This meeting was scheduled in advance of an Occupational Health consultation; and

(iii) At the meeting itself the Respondent put pressure on the Claimant to return to work.

122. On 12 November 2014 the Respondent wrote to the Claimant to invite her to attend a sickness meeting on 15 December 2014 notwithstanding the fact that the Claimant had a meeting with her specialist in December 2014 and was due to have an Occupational Health appointment on 16 December 2014. It had been agreed the meeting would take place on 9 January 2015.

123. The Respondent held a meeting with the Claimant on 15 December 2014. Claimant claims the following constituted discriminatory treatment:

(xiii) The fact of the meeting;

(xiv) The manner of the meeting; and

(xv) The Respondent issued an AIN (although the Claimant's case is that it was not received until September 2015). The Claimant says that the issuing of the AIN and / or the wording of the AIN constituted discriminatory treatment.

124. The Respondent had a return to work interview with the Claimant on 2 March 2015. The Claimant claims the following constituted instances of discriminatory treatment:

a. The Respondent's attitude towards the Claimant was very negative and unwelcoming at this meeting;

b. The Respondent failed to discuss or consider any other reasonable adjustments except (i) the phased return to work and (ii) working in the baby room.

125. On 11 May 2015 the Respondent held a supervision meeting with the Claimant at which the Claimant was criticised.

126. On 12 May the Respondent moved the Claimant to the baby room and refused her request to move her out of the baby room.

127. On 15 June 2015 the Respondent held an appraisal meeting with the Claimant. At this meeting the Claimant's performance was criticised and the Respondent apportioned blame for the incident on 12 May 2015.

(r) On 18 June 2015 the Respondent took the decision to investigate the incident on 12 May 2015. The Respondent (a) failed to properly investigate Ms de Cordova's part in the incident (b) conducted a prejudicial investigation to the detriment of the Claimant (c) prejudged the outcome (d) the Claimant was informed by Brenda Dawson that the buck stopped with her.

128. On 7 July 2015 the Respondent required the Claimant to undertake a further Occupational Health consultation.

129. The Respondent accelerated the sickness absence management process.

130. On 27 August 2015 the Respondent produced a management investigation report proposing disciplinary action against the Claimant.

8. Was this unwanted conduct?

9. Was this conduct related to a protected characteristic?

10. Did this conduct have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

FAILURE TO MAKE REASONABLE ADJUSTMENTS

Sickness Absence

11. Did the Respondent apply the PCP of requiring an employee to maintain a certain level of attendance at work in order to avoid receiving warnings and ultimately, dismissal.

12. Was the Claimant put at the substantial disadvantage of being given warnings and/or dismissed.

13. If so, would it have been reasonable to make the following adjustments:

    (e) Not giving the Claimant warnings;

    (f) Extending her trigger points;

    (g) Deferring the decision to dismiss;

    (h) Not dismissing her.

Proceeding with the final sickness review meeting in the Claimant's absence

14. Did the Respondent apply the PCP of making a decision about an employee's future in the absence of an employee?

15. If so, did this put the Claimant at a substantial disadvantage as the Claimant was more likely to be absent due to her disability than those not suffering from her disability. The Claimant was not afforded the opportunity to make oral

representations about her illness/the future of her illness/the medical advice the Respondent could seek etc (as per page 84a of the bundle).

16. Would it have been reasonable to make the following adjustments:

    (b) Waiting to hold the meeting until the Claimant was able to attend;

    (c) And/or make alternative arrangements to allow the Claimant to attend including holding the meeting near or at the Claimant's home.

Locations of meetings

17. Did the Respondent apply a PCP in holding meetings at the Employee Relations Department in Maudsley Hospital?

18. If so, did this put the Claimant at a substantial disadvantage in that she was unable to/found it difficult to travel from her home to meetings as she was suffering from the physical and mental effects/barriers of her illness.

19. Would it have been reasonable to make the following adjustments:

    (c) Wait until the Claimant was able to attend the meeting;

    (d) And/or making alternative arrangements to enable her to attend including holding meetings near the Claimant's home/at the Claimant's home.

Lifting Duties

20. Did the Respondent apply the PCP of requiring or allowing employees to lift babies or children?

21. If so, did this put the Claimant at a substantial disadvantage as she was suffering from the physical effects/barriers of her illness including severely aching joints. She suffered increased pain and discomfort in her joints (including her shoulders) due to the requirement to lift babies/children. This caused/contributed to her absence.

22. Would it have been reasonable to make the following adjustments:

    (b) Giving the Claimant jobs that did not involve lifting babies/children.

Working Outside

23. Did the Respondent apply the PCP of requiring/allowing employees to work outside?

24. If so did this put the Claimant at a substantial disadvantage in that she was suffering from the physical effects/barriers of her illness including severely aching joints. She suffered increased pain and discomfort in her joints and chest together with breathlessness, constant coughing and loss of voice due to the effects of cold/damp weather upon her. This caused/contributed to her absence.

25. Would it have been reasonable to make the following reasonable adjustments:

    (b) Restricted the Claimant's work to indoor work.

Drawing conclusions

26. Did the Respondent apply the PCP of drawing conclusions and/or going on to the next stage of the sickness absence procedure before medical evidence was available/considering medical evidence or consulting with the employee.

27. Did this put the Claimant at a substantial disadvantage in that it caused the Claimant (who suffered from the physical and mental effects/barriers of her

illnesses) increased stress and anxiety causing/contributing to her absence/continuing absence. The Claimant had adjustments that could have facilitated the faster return to work.

28. Would it have been reasonable to make the following adjustments:

    (b) Waiting until an OH report/the treating physician commented on the Claimant's condition and/or consulting directly with a Claimant before making an assessment.

Knowledge of Substantial disadvantage

29. If the Claimant was put at a substantial disadvantage by all or any of these PCPs, did the Respondent have knowledge of this substantial disadvantage at the relevant time or times?

COMPARATORS

30. The Claimant's comparators are Madge De Cordova and a hypothetical comparator.