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EMPLOYMENT TRIBUNALS

Claimant: **Mrs B Walcott**

Respondent: **The Princess Alexandra Hospital NHS Trust**

Heard at: **East London Hearing Centre** **On: 25-27 April & 2-3 May 2017 (and further in chambers on 24 May and 4 July 2017)**

Before: **Employment Judge C Hyde**

Members: **Mr D Kendall**
Mr M Rowe

Representation

Claimant: In person

Respondent: Mrs E Melville (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

(1) The breach of contract claim was dismissed on withdrawal by the Claimant.

(2) The complaints of direct disability discrimination under section 13 of the Equality Act 2010 were not well-founded and were dismissed (Issues 5(a) and (b)).

(3) The complaints of discrimination arising from disability (Issues 8(a), (b) and (c)) under section 15(1) of the 2010 Act were not well founded and were dismissed.

(4) The indirect disability discrimination complaints (Issues 12 (a) – (c), 13(b)) under section 19 of the Equality Act 2010 were not well founded and were dismissed.

(5) The complaints of failures to make reasonable adjustments (Issues 18 (a) and (b)) under sections 20 and 21 of the 2010 Act were not well founded and were dismissed.

(6) The allegations of disability harassment (Issues 19(a) – (e)) under section 26 of the 2010 Act were not well founded and were dismissed.

(7) The allegations of victimisation (Issues 22(a), (b), (e), (f) (g) and (h)) under section 27 of the 2010 Act were not well founded and were dismissed.

(8) The allegation of direct race discrimination (Issue 23) was not well-founded and was dismissed.

(9) The constructive unfair dismissal complaint was not well founded and was dismissed.

REASONS

1 Reasons are provided in writing for the above judgment as the judgment was reserved.

2 Reasons are set out in writing only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost. Further the reasons are set out only to the extent that it is proportionate in all the circumstances to do so.

3 All findings of fact were reached on the balance of probabilities.

4 By a claim form which was presented on 13 November 2015, the Claimant brought various complaints. She had worked for the Respondent as a midwife (Band 6) from October 2009 until she tendered her resignation on 6 July 2015. The central cause of difficulties was the change of shift patterns adopted in the maternity and other nursing departments in this hospital from three shifts of seven and a half hours each to two shifts of eleven hours each. This new shift pattern went live in April 2014 and the Claimant raised objections about it in due course but between April 2014 and her resignation she in effect remained on the old short shift pattern.

5 By a response which was presented on 10 February 2016, and subsequently amended in the light of clarification of the Claimant's case, the Respondent indicated that it was their intention to resist the complaints.

6 Three closed preliminary hearings were held to clarify the claims. These took place on 13 April, 16 September and 18 November 2016. The list of issues from which the Tribunal worked and which was included in the hearing bundle, evolved during the

course of those preliminary hearings and formed the basis of the Tribunal's deliberations. Further, before the hearing in front of Employment Judge Jones on 13 April 2016, Employment Judge Ferris had ordered the Claimant to provide further particulars of the discrimination claims. This was by an order of 12 February 2016.

7 The first in chambers meeting took place on 24 May 2017. The resumed in chambers meeting did not take place on 31 May as originally intended but on 4 July 2017.

Documents adduced/Witnesses

8 At the commencement of the hearing the parties produced an agreed hearing bundle contained in a lever arch and an A4 file. It numbered approximately 600 pages. During the hearing by agreement further documents were added to the bundle. The hearing bundle was marked [R1].

9 Mrs Walcott's evidence in chief was given by way of a witness statement which was marked [C1]. She was employed by the Respondent as a Midwife from October 2009 until 6 July 2015.

10 On behalf of the Respondent the Tribunal heard evidence from Mrs Konstantina Stavrakelli (referred to as "Matron Dina"); she was one of the managers who directly line managed the Labour Ward Coordinators who in turn directly line managed the team of Midwives. She left the Respondent's employment in June 2015. Her witness statement was marked [R2].

11 The Tribunal next heard from Mrs Jacquelyn Featherstone, who was Associate Director of Nursing and Midwifery, Supervisor of Midwives for Family and Women's Services and more recently Surgery and Critical Care. At the relevant time, she line-managed 10 Matrons who reported directly to her. Her witness statement was marked [R3].

12 The next witness was Mrs Anjanee Neat (also known as Jhurry). Her witness statement was marked [R4]. She worked for the Respondent from February 2012 to January 2017. At that time, she was employed as the Head of Nursing for Children Services. She line managed around 50 members of staff in her department between bands 2 to 7.

13 Finally, on behalf of the Respondent, the Tribunal heard evidence from Mrs Sharon Brennan (previously known as Mrs Ramanaiken). She had been with the Respondent since November 2009 and was employed as Matron for Maternity and Gynaecology. At the times that the Tribunal was concerned with in determining this case, she was responsible among other matters for e-rostering for the Post-Natal Ward, Colposcopy/Hysteroscopy Unit and for ensuring that the correct number of staff were in the Unit as a whole over the 24-hour period. In her role as Matron she undertook managerial responsibilities such as dealing with employee concerns and managing sickness absence and she was responsible for line managing the Midwives and for the day-to-day running of the ward. Part of her job also was to address and manage flexible working requests. She reported to Mrs Featherstone. Her witness statement was marked [R5].

Closing submissions

14 The Tribunal heard closing submissions from both parties. The Respondent's Counsel relied on written submissions which were marked [R6]. Each side was then given the opportunity to supplement the written submissions orally. The Claimant initially presented her submissions orally, but concluded by giving the document from which she had been working to the Tribunal. This was marked [C2].

The issues

15 The Claimant confirmed what appeared to have been dealt with also at an earlier preliminary hearing, namely that she was not bringing a freestanding breach of contract claim.

16 The list of issues was agreed in the last preliminary hearing before Employment Judge Brown on 18 November 2016, subject to some minor amendment. The numbers allocated to the Issues in the List are used in these reasons also. It is recorded however that the Claimant provided a disability impact statement and other clarification about her claim after the third closed preliminary hearing in a letter dated 16 December 2016 (pp156 – 158). The Respondent's position in relation to the disability issues was set out in response in a letter dated 28 March 2017 (pp158B – C).

17 In summary, the live claims for the Tribunal to determine were: -

17.1 a complaint of constructive unfair dismissal following the Claimant's resignation on 6 July 2015, expressed to be "with immediate effect";

17.2 whether the Claimant had been discriminated against on racial grounds in respect of one detriment under section 13 of the Equality Act 2010 in one respect (issue 24);

17.3 a number of allegations of disability discrimination detriments set out below; and

17.4 finally, the Claimant also alleged victimisation detriments under the Equality Act 2010.

18 The alleged constructive dismissal was not complained of as an act of discrimination.

19 The Tribunal also had to determine whether the Claimant had brought her discrimination claims within the relevant primary time limit pursuant to section 123(1)(a) of the 2010 Act having regard to section 140B of the same Act. If not, the Tribunal had to determine whether the conduct was part of a course of conduct extending over a period, such as to bring it within the primary time limit pursuant to section 123(3) of the 2010 Act.

20 Alternatively, the Tribunal had to decide if it was just and equitable to extend the time limit pursuant to section 123(1)(b) of the 2010 Act.

21 Although the List of Issues included a reference to remedy, it was agreed in relation to the constructive unfair dismissal complaint, that the Tribunal would determine the substantive issue of liability in this hearing and to the extent that it was necessary or relevant to do so, would also determine whether the Claimant had caused or contributed to her dismissal and whether she would have been dismissed in any event had a fair procedure been followed (*Polkey*), and in any event whether the Claimant would have remained in the Respondent's employment and if so, for how long. The remedy issues have therefore been omitted from the List of Issues below.

22 The question of whether the Claimant was a disabled person within the meaning of the Equality Act 2010 at the relevant times was disputed. As was the issue of whether the Respondent had the requisite knowledge, even if the Claimant was a disabled person. In addition to the statutory provisions, the Tribunal had regard to the 'Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability'. A large print photocopy of this was helpfully handed up to the Tribunal by the Claimant. It had been determined in paragraph 14(1) of the Order of EJ Tobin of 16 September 2016 that the relevant period in terms of disability in this case was from 1 January 2015 to 23 June 2015, the latter being the date on which the final act of discrimination relied upon was said to have occurred.

LIST OF ISSUES

Breach of Contract free standing claim dismissed on withdrawal by C

Disability

1) Was the Claimant ('C') a disabled person for the purposes of **s.6 and Part 1, Schedule 1 of the Equality Act 2010** ('**EqA**') at the material time, ie. between 1st January and her resignation with immediate effect on 6th July 2015[1], by reason of:

   a) Asthma
   b) Anaemia
   c) Arthritis
   d) Low mood and depression
   e) Diabetes?

2) The Respondent ('R') admitted at the PH on 16th September 2016 that C was disabled by reason of depression by August 2015 but not before (thus will argue that she was not disabled for the purposes of the **EqA** prior to her resignation).

3) R does not concede that any of the other conditions amounted to a disability for the purposes of the **EqA**, either alone or taken together.

Knowledge of disability

4) It is admitted that R was aware from 23rd July 2014 that C was suffering from anaemia and from 5th September 2014 that she was suffering from depression. It is denied that R knew or ought to have known at any time prior to her resignation that C was a disabled person for the purposes of the **EqA** and/or that they knew or ought to have known of the other conditions said by C to constitute a disability.

[1] See EJ Tobin's Order of 26th September 2016 at paragraph 14.1

Direct disability discrimination: s.13 EqA

5) Did R treat C less favourably because of her disability (depression and/or anaemia only[2]) by:

a) Failing to consider her request to remain on her current contract on 24th March 2015 (email to 'Matron Dina');

b) Suggesting that she apply for the roles which she suggested should be reasonable adjustments.

6) C relies upon the following comparators:

a) Nicky Constantinou, in respect of issue at 5(b);
b) Gill Seers, in respect of issue at 5(b);
c) An hypothetical comparator, generally.

7) Was there any material difference between the circumstances relating to C and her comparators?

Discrimination arising from disability: s.15(1) EqA

8) Did R treat C unfavourably because of her sickness absence, which she says arose largely as a consequence of her depression, by:-

a) Subjecting her to a meeting on 5th February 2015 with Matron Dina and Marianne Green [pp282, 286] cf RTW meeting held with Claimant on 30 January 2015 with Marianne Green;

b) Declining to give her a proper 'back to work' meeting on 5th February 2015;

c) Telling C at the meeting on 5th February 2015 that there would be no discussion of her sickness.

9) If so, did R know, or could they reasonably have been expected to know, that C had the disability (or disabilities) relied on at this time?

10) If so, can R show that their treatment of C was a proportionate means of achieving a legitimate aim?

Indirect disability discrimination: s.19 EqA

11) C relies on the following as 'PCP's:

a) R's requirement that midwives work long 12-hour shifts;

b) R's policy that employees attend a Managing Attendance Stage 1 meeting after a long term absence.

12) In respect of the requirement that midwives work long 12-hour shifts:

a) Did the PCP apply to persons who did not share C's particular disabilities?

b) If so, did it put, or would it have put, persons with whom C did share those disabilities at a particular disadvantage when compared with persons who do not share those disabilities? C alleges that the PCP put her and others with her disability at a disadvantage because the longer hours would impact negatively on their health;

c) Did it put, or would it have put, C at that disadvantage? C says she had poor sleep patterns as a result of difficulty adjusting to the shift work, evidenced by low mood, loss of concentration and potentially poor performance;

d) If so, can R show that the PCP was a proportionate means of achieving a legitimate aim?

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[2] See paragraphs 54 and 55 of C's 'Amended Further and Better Grounds of Complaint'

13) In respect of a requirement that employees attend a Managing Attendance Stage 1 meeting after a long-term absence:

a) Did the PCP apply to persons who did not share C's particular disabilities?

b) If so, did it put, or would it have put, persons with whom C did share those disabilities at a particular disadvantage when compared with persons who do not share those disabilities? C alleges that the PCP put her and others with her disability at a disadvantage because they were more likely to have disability related absences;

c) Did it put, or would it have put, C at that disadvantage? C says she was more likely to have disability related absences than those not suffering from the same impairments as her and therefore more likely to be subjected to Managing Attendance meetings which could culminate in a sanction, and that she suffered additional work-related stress;

d) If so, can R show that the PCP was a proportionate means of achieving a legitimate aim?

14) It was clarified at the PH on 18th November 2016 that C cannot rely on any disadvantage arising prior to 31st December 2014.

Failure to make reasonable adjustments: s.20/21 EqA

15) C relies on the requirement for midwives to work 12 hours shifts (for the period from 31st December 2014 to her resignation) as her PCP.

16) Did the PCP put her at a substantial disadvantage in comparison with persons who are not disabled?

17) Did R know, or could they reasonably have been expected to know, at the time at which C alleges R should have made reasonable adjustments, that she was disabled and was likely to be placed at a disadvantage in comparison with persons who were not disabled?

18) If so, did R fail to make reasonable adjustments by:-

a) Changing C's shifts from the short 3-shift system to 12 hours shifts on 4th June 2015 instead of allowing her to remain on short shifts;

b) Requiring C to apply for alternative roles through the normal routes as communicated on 23rd June 2015 instead of allocating her to a role in the maternity helpline, Maternal Foetal Assessment Unit, maternity diabetes clinic or to continue doing caesarean sections?

Disability Harassment: s.26 EqA

19) Did R subject C to harassment by engaging in unwanted conduct related to her disability which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment by:

a) Matron Dina insisting on having an unscheduled meeting with C on 11th March 2015 to discuss her request to remain on a short shift pattern;

b) Matron Dina refusing C's request to allow a colleague to attend the meeting on 12th March 2015 as support;

c) Matron Dina physically pushing C on 12th March 2015 when C when she tried to leave her office;

d) On 4th June 2015, Matron Brennan (Ramanaiken) requiring C to commence 12 hour shifts with less than 24 hours' notice and contrary to Occupational Health advice that she should be allowed a gradual adjustment to 12 hour shifts;

e) Matron Brennan cancelling C's 7 ½ hour shift scheduled for Sunday 7th June, stating that the ward was overstaffed when that was not the case.

f) If so, did this conduct relate to C's disability?

Victimisation: s.27 EqA

20) C relies on the following as constituting protected acts within the meaning of **s.27(2) EqA**:

a) Her objection (in email dated 19 December 2013 to Matron Dina, and subsequently) to the 12 hour shift on the grounds of her disability; it is presumed that C relies on **s.27(2)((d)** in this regard.

b) Her grievance [p209] in relation to Matron Dina's treatment of her, dated 12th March 2015.

21) It is not admitted that C did acts which were protected pursuant to **s.27(2)**.

22) Did R subject C to a detriment because she had done the protected act(s)? C relies on the following alleged detriments:

a) Matron Dina failing properly to consider C's request to remain on short shifts and harassing and bullying her in 2015;

b) R failing to uphold her grievance against Matron Dina (26th May 2015);

c) R (Matron Dina, Matron Brennan and Jackie Featherstone) failing to grant her request not to do long shifts in 2015;

d) R failing to make a proper assessment of whether or not she had disabilities for the purposes of the Equality Act 2010 by failing to ask for a second Occupational Health opinion in June/July 2015, contrary to a recommendation by the OH doctor in October 2014;

e) R (Matron Dina) seeking to influence the OH doctor (Dr Miah) to change his opinion regarding C's condition of anaemia;

f) R (Matron Brennan) moving her to work the 12 hour shift with less than 24 hours' notice (4th June 2015) (p368);

g) R insisting that she make a request for flexible working instead of making 'reasonable adjustments' (26th May 2015);

h) R (Matron Brennan and Mrs Featherstone) declining her request for flexible working (4th June 2015 and 23rd June 2015).

Direct race discrimination

23) Did R (Mrs Featherstone) treat C less favourably because of her race (black Jamaican) than it treated white comparators, by requiring her to apply for alternative roles (26th May 2015)?

24) R relies on Nicky Constantinou and Gill Seers as comparators. She says they were allowed to take up a role with the Helpline without having to apply for the position.

25) Was there a material difference between C and her comparators?

Time limits

26) Did C bring her discrimination claims within the relevant primary time limit pursuant to **s.123(1)(a) EqA**, and having regard to **s.140B EqA**.

27) If not, was the conduct part of a course of conduct extending over a period, such as to bring it within the primary time limit pursuant to **s.123(3) EqA**?

28) Alternatively, is it just and equitable to extend the time limit pursuant to **s.123(1)(b) EqA**?

Constructive unfair dismissal

29) C relies on the implied contractual term of mutual trust and confidence (Amended Grounds of Claim paragraph 69).

30) Did R breach the implied term by:

a) Unilaterally seeking to change C's hours;

b) Not permitting her to opt out of the new shift pattern;

c) Changing her roster without adequate notice;

d) Consistently failing to consider her request for a reasonable adjustment;

e) Failing to uphold her grievances;

f) Cancelling her shift with less than 24 hours' notice;

g) Ignoring information which it had in its control (R is not clear what this allegation relates to);

h) Deliberately misinterpreting information in the OH and GP letters;

i) Failing to take steps to verify the extent of her disabilities for the purposes of the **EqA 2010**;

j) Suggesting that as she was not registered disabled she did not have a disability for the purposes of **s.6(1) EqA 2010**;

k) Failing to make reasonable adjustments;

l) Imposing a PCP which it was difficult for her to meet and which put her at a disadvantage;

m) Requiring her to make a flexible working request to avoid the 12 hour shift pattern and declining the same.

31) C relied on R's change to her shift on 1 July 2015 (p384) as the 'last straw'. (C deleted "R's failure to uphold her appeal on 23 June 2015 during the hearing)

32) Did C resign in response to the breach(es)?

33) Did she delay unduly before resigning?

34) Did she affirm the breach(es) or any of them?

35) If C was constructively dismissed, was there a potentially fair reason for the dismissal (R will rely on a capability and/or conduct reason and/or SOSR)?

36) Did R act reasonably or unreasonably in treating the reason as sufficient reason for dismissing C?

37) If C was unfairly constructively dismissed:

a) Did she cause or contribute to her dismissal by her own conduct?

b) Would she have been dismissed in any event had a fair procedure been followed (Polkey)?

c) In any event, would C have remained in R's employment and, if so, for how long?

Relevant Law

23 The Tribunal acknowledged the helpful statement of the relevant law set out in the closing submissions of Ms Melville. These were largely adopted by the Tribunal

although the Tribunal also refers below to further parts of the Guidance.

24 Disability within the meaning of the Equality Act 2010 ("the 2010 Act") is defined at section 6(1). There are four elements to this, namely: -

24.1 A *physical or mental impairment*;

24.2 Adverse effects of the impairment which are '*substantial*';

24.3 The substantial adverse effects are '*long-term*'; and

24.4 The long-term substantial adverse effects are effects on the Claimant's ability to carry out '*normal day-to-day activities*'

25 The five impairments that the Claimant relied upon are set out above in paragraphs 1(a)-(e) of the agreed List of Issues. She argued in the alternative that she was a disabled person by reason of each of the impairments and/or that:

> '*The effect of any, or of the combination of any of these conditions, is that I became tired easily resulting in difficulty adjusting to shift and night work, loss of concentration on prolonged work days, difficulty waking up in the mornings, as well as difficulty coping under prolonged pressure and stress. This affects my ability to concentrate and to react timeously when under pressure, and results in further low mood affecting interaction with patients*'. [Witness statement para 3]

26 In assessing the question of whether a combination of conditions/impairments could bring the Claimant within the definition of disability the Tribunal had regard to B6 of the Guidance.

27 The word '*substantial*' means '*more than minor or trivial*': s. 212(1) of the 2010 Act. Section B1 of the Guidance states that this requirement reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. In deciding whether the adverse effects for the impairment are substantial the Tribunal can have regard to the time taken to carry out an activity, the way in which an activity is carried out, and the cumulative effects of an impairment.

28 Paragraph B6 provides that:

> '*a person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial overall effect on the person's ability to carry out normal day-to-day activities.*
>
> *Further, for the purposes of determining disability, the effect of an impairment must be treated as having the effect that it would have, were it not for treatment: Guidance Paragraphs B12-17. Treatment in this context includes therapy such as counselling as well as medication. However B16 provides that this does not apply where the treatment has effectively cured the impairment such that no*

adverse effects remain."

29 The Tribunal also had regard however to the definition below of disability which includes past disability. The third element of consideration of whether a person is disabled within the meaning of the 2010 Act is a determination whether the impairment is long-term. Schedule 1 Part 1 of the 2010 Act provides at paragraph 2(1) that this is the case if:

"*(a) it has lasted for at least 12 months,*

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected."

30 Further, Paragraph 2(2) provides that the adverse effect on a person's ability to carry out normal day-to-day activities, is to be treated as continuing to have that effect if it is likely to recur.

31 Finally, in this context the Guidance states at Paragraph C3 that 'likely' means 'it could well happen'.

32 These were particularly relevant in consideration of the Claimant's anaemia and depression/low mood.

33 The fourth limb of the definition of disability is that the impairment has the substantial adverse effect referred to above on the Claimant's ability to carry out normal day-to-day activities. The Guidance provides a non-exhaustive list of day-to-day activities: Section D. The general approach was said to be that day-to-day activities are things people do on a regular or daily basis such as shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Further, normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

34 We further had regard to the Guidance at D8 which stated that highly specialised activities or levels of attainment would not be regarded as normal day-to-day activities for most people. On the other hand, Paragraph D10 provided that many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment.

35 The Guidance in these latter paragraphs was illustrated by the example of a watch repairer who would not be considered to be carrying out normal day-to-day activities when conducting or performing delicate work with highly specialised tools but who if also required as part of his job to, for example, prepare invoices and count and record daily takings, would be so regarded. The watch repairer in this example seemed to have tenosynovitis. This guidance was supported by the decision in the case of *Paterson v Commissioner of Police for the Metropolis* [2007] ICR 1322 at

paragraphs 66-67.

36 In the case of *Chief Constable of Dumfries Galloway Constabulary v Adams* [2009] IRLR 612, the EAT held that very ordinary physical activities carried out on a night shift, such as walking and stair climbing, constituted normal day-to-day activities for the purposes of the 2010 Act. In that case the Claimant was a police officer suffering from ME whose condition meant he had extreme difficulty carrying out normal activities between 2 to 4am although he was able to work during the day. However, it was also commented that where he was exercising a special skill required only of a policeman, he may well not satisfy the test of carrying out normal day-to-day activities.

Outline factual background

37 The Respondent is a District General NHS Trust providing a wide range of clinical services from the Princess Alexandra Hospital in Harlow. The Claimant was employed by the Respondent as a Midwife from October 2009 until her employment terminated by reason of her resignation on 6 July 2015. The Claimant was contracted to work 30 hours per week.

38 With effect from 2011 the Respondent began to move towards a standard 12-hour shift pattern in order to lower costs by reducing overlap periods between shifts and to improve quality of care by increasing continuity throughout the day. The Respondent consulted on this change with staff representative bodies and individuals. The Claimant did not attend a consultation meeting arranged for her. With effect from 28 April 2014 shift patterns in the Respondent's maternity department were restructured so that all Midwives were required to work 12 hour shifts in line with the Respondent's overall approach within specific areas of delivery.

39 The Claimant was unhappy about the requirement to work 12 hour shifts and also the Respondent's requirement for her to work night shifts and in June 2014 she suggested that there was a health issue that prevented this. The Respondent therefore permitted the Claimant to work short shifts on a temporary basis.

40 With effect from 18 August 2014 the Claimant commenced an unbroken period of sickness absence which lasted until November 2014. As a result of the Claimant's absence she attended meetings under the Respondent's applicable Attendance Management policy in September and October 2014. The Claimant was referred to the Respondent's Staff Health and Wellbeing Service for occupational health advice in October 2014 and the Respondent was advised that although the Claimant perceived that working 12 hour shifts was having a negative impact on her well being, there was no medical reason why the Claimant could not work 12 hour shifts or nightshifts.

41 In November 2014, the Claimant returned to work and, despite the medical advice received by the Respondent, was permitted to work short shifts and no night shifts based on conflicting advice from the Claimant's GP. Following the Claimant's return to work she was absent for 4 days in January 2015 due to ill health.

42 The Respondent sought a further opinion from its Staff Health and Wellbeing Service in January 2015 which advised that there was no medical reason why the Claimant could not work 12 hour shifts or night shifts.

43 On 5 February 2015, the Respondent met with the Claimant under the Respondent's Attendance Management policy to discuss her working arrangements. The Respondent required the Claimant to work in line with the shifts worked by others. The Respondent's case was that if staff did not work consistent shifts and night shifts this would lead to additional costs and/or work for other staff in a clinical context where the work flow was unending and could never be delayed. The Claimant was advised that she could continue to work short shifts until the end of March 2015 but that with effect from April 2015 and because of the Respondent's service needs, she would be required to work 12-hour day shifts thereafter. The Claimant was advised that she would also be allocated 2 night shifts in March 2015, and only 3 night shifts per month from April 2015 onwards for a period of 6 months with a 48-hour gap between shifts.

44 The Claimant was unhappy with this and remained of the view that there was a health reason why she should not work in the way suggested and so the Respondent obtained a further opinion from its Staff Health and Wellbeing Service in January 2015 which again advised that there was no medical reason why the Claimant could not work 12 hour shifts or nightshifts.

45 On 12 March 2015, the Claimant raised a grievance and complained of unfair treatment and harassment by her line manager, Matron Constantina Stavrakelli, in relation to the proposed changes to her shift pattern. On 30 April 2015, the Respondent met with the Claimant to discuss her complaints and an investigation was conducted. On 26 May 2015, the Respondent wrote to the Claimant to inform her that her grievance was not being upheld.

46 Additionally, the Respondent signposted the Claimant to make a request under its flexible working policy as a mechanism to reconsider her working hours in more detail. On 1 June 2015 Matron Sharon Ramanaiken met with the Claimant to discuss her flexible working request and the Claimant raised again the impact on her health of the need to work long shifts and night shifts. On 2 June, the Respondent sought further advice from its Staff Health and Wellbeing Service but was advised that a further referral was not required and the advice was unchanged. On 4 June 2015, the Respondent wrote to the Claimant declining her flexible working request and citing its need to allocate shifts fairly amongst staff to avoid an undue burden on others, and the absence of a medical reason for a change in hours and shift pattern.

47 On 10 June 2015, in response to the refusal to allow her flexible working request, the Claimant raised a second grievance, this time against Matron Sharon Ramanaiken alleging disability discrimination, unfair treatment and victimisation.

48 The Claimant also appealed against the decision in relation to her flexible working request and on 22 June 2015 she attended an appeal meeting. On 23 June 2015, the Respondent's Associate Director of Nursing and Midwifery wrote to the Claimant rejecting her appeal.

49 On 25 June 2015, the Respondent invited the Claimant to a grievance meeting in relation to her complaints against Matron Sharon Ramanaiken and scheduled this to take place on 7 July 2015.

50 The Claimant resigned with immediate effect on 6 July 2015.

51 The Claimant attended the grievance meeting on 7 July 2015 despite her resignation and on 10 September 2015 the Respondent wrote to the Claimant rejecting her complaints.

52 Around one week after her resignation in July 2015 the Claimant started work at London Northwest Healthcare NHS Trust working as a Midwife on its staff bank. In November 2015, the Claimant commenced substantive employment at the Whittington Hospital NHS Trust as a Midwife. In January 2016, the Claimant commenced a course of study and supervised practice to return to practice as a nurse.

Specific findings of fact and conclusions

Was the Claimant a disabled person?

53 The Tribunal addressed the individual conditions in turn to determine whether taken individually or cumulatively the Claimant was a disabled person. The Tribunal took into account the concessions in relation to disability made by the Respondent above.

54 The conditions are addressed in order set out in the agreed list of issues.

55 The first condition was ***asthma***. The first reference to this condition in the Claimant's GP notes was on 16 October 2014 (p.466). The Claimant was prescribed an inhaler in December 2015 (p.465) following a request for one by her.

56 The medical records show that the inhaler was effective in that subsequent asthma reviews stated that wheezing severity was mild, there was no breathlessness, sleep was not disturbed and daytime activities were not limited (pp.464 and 463). There was then no further reference to asthma in the GP records between 3 February 2015 and the Claimant's resignation in July 2015.

57 The letter from the Claimant's GP to Dr Miah, the Respondent's occupational health doctor dated 3 December 2014 (pp.422-3) did not include asthma under the heading of 'currently active conditions', although it noted that the Claimant was on regular medication. Further the summary of the GP notes (pp.454-6) printed on 11 May 2016 did not include asthma under 'problems active' or 'significant past' conditions. There was one reference under 'minor past' (p.455, 13 November 2014).

58 There were also only very limited references by the Claimant herself to asthma in discussions with her employer. Thus, in January 2015, the Claimant had five days off work with a chest infection. During her return to work interview with Ms Green, her supervisor (pp.277-8), the Claimant referred to asthma as an underlying condition but it was noted that there was no requirement for a referral to occupational health or for any reasonable adjustments in relation to the condition.

59 The Claimant did not raise asthma as a relevant condition during the discussion about 12 hour shifts on 5 February 2015, five days after the return to work meeting (pp.280-2). Asthma was mentioned at the Attendance Management meeting on 23

February 2015 (p.295) and then not again until a grievance meeting on 7 July 2015 after the Claimant's resignation (p.389 at 391).

60 Finally, the Claimant never suggested in her discussions with the Respondent that her asthma affected her ability to work longer shifts and she did not explain how it was said to adversely affect her ability to carry out normal day-to-day activities.

61 In summary, there was sketchy evidence of the condition and the Tribunal would have needed to speculate about the effect on the Claimant of her asthma without medication. At worst, it appeared to have been mild.

62 In addition, at the material time, namely January to 6 July 2015, the Claimant's asthma had not lasted 12 months. As the GP records above indicate, its presence in the Claimant's medical records was short lived and the last summary in May 2016 did not shed any further light on this.

63 The Claimant's disability impact statement did not give any evidence as to how her asthma was said to have adversely affected her ability to carry out normal day-to-day activities (p.158 para 5).

64 Even if the Tribunal concluded that the Claimant was disabled by reason of her asthma, the Tribunal was satisfied that this condition was fully controlled by medication. It is unlikely to have been relevant therefore in relation to consideration of what reasonable adjustments, if any, were required. Indeed, as referred to above (cf p.277), the Claimant had not sought any reasonable adjustments and therefore it is unlikely that this condition gave rise to a duty on the Respondent's part to make reasonable adjustments.

65 The second condition relied upon by the Claimant was ***anaemia***. The Claimant's case was that the Respondent was aware of her anaemia from 24 November 2009. The Respondent denied this. That date was relevant to a reference in the occupational health notes to 'low iron' on that date (p.410) after a self referral to occupational heath. There was no reference to anaemia. The concern seems to have been a cyst that the Claimant subsequently had removed.

66 The first reference to anaemia in the GP records was on 21 April 2013 (p.473). It was characterised as 'mild anaemia'.

67 In June 2014, there was also a reference to the Claimant reporting that she was 'getting very anaemic' with the condition of fibroids. The Claimant underwent treatment for the fibroids by way of the insertion of a coil in early October 2014 (p.467). Her blood was monitored thereafter and by 21 November 2014 it was noted that 'recent bloods are pretty good for her' (p.465). The Claimant appears to have been prescribed iron again on 16 February 2015 (pp.462-3) but subsequent blood tests on 29 May/1 June 2015 (p.462) appeared to be normal.

68 This picture was consistent with the contents of the Claimant's GP's letter to the Respondent's occupational health doctor of 3 December 2014 (pp.422-3) in which her GP referred to anaemia as 'resolved', although somewhat contradictorily the GP also listed that condition under 'currently active conditions'. Finally, the summary of GP

notes printed on 11 May 2016 referred to above did not refer to anaemia under ‘active problems’ or ‘significant past’ or indeed under ‘minor past’ conditions.

69 There were references in the occupational health reports in 2014 to anaemia. The Claimant raised this with the occupational health nurse in July 2014. The nurse’s amended report stated that anaemia ‘can lead to excessive tiredness if the anaemia is severe enough’ (pp.230-231). The Claimant initially refused permission to occupational health to approach her GP for further information.

70 The Tribunal concluded from the evidence that the occupational health nurse was not saying that the Claimant’s anaemia was severe.

71 Further, on or around 30 October 2014, Dr Miah wrote: ‘The anaemia is long-term and can have an impact on her activities of daily living and thus is likely to come under the coverage of the Act’. He went on to say however that he did not think there was any medical evidence to support the Claimant’s request not to do long days or nights. He said he would obtain further medical evidence from the GP which then resulted in a letter of 3 December 2014 (p.422) which confirmed that the anaemia was resolved.

72 Further, the Claimant did not refer to anaemia as a reason why she could not do the 12 hour shifts when she had discussions with her managers at any stage. Finally, there was no other evidence to corroborate the Claimant’s statement in paragraph 2 of her disability impact statement (p.157) that by reason of the anaemia the Claimant tired easily at the end of the day even after 7½ hour shifts. There was no medical or occupational health evidence which corroborated this effect.

73 On the basis of the evidence above the Tribunal concluded that: -

> 73.1 The Claimant’s anaemia lasted longer than a year and thus fulfilled the test of being ‘long-term’.
>
> 73.2 There was no evidence that the anaemia had a substantial adverse effect on the Claimant’s ability to carry out normal day-to-day activities.
>
> 73.3 Even if it did, the condition had resolved prior to the commencement of the relevant period for the purposes of these proceedings (January to July 2015).

74 In all the circumstances therefore, the Tribunal concluded that the Claimant was not a disabled person by reason of anaemia.

75 The third condition relied on by the Claimant was ***arthritis***. The first reference to knee pain appeared to be on 18 April 2013 in her GP records (p.474). The Claimant was referred by her GP to a consultant orthopaedic service. The problem was described as knee pain (new) and the history recorded was that the Claimant still suffered a loss of pain from her knee, that it was keeping her awake at night and there was ‘a effusion on scan plus some OA – possible loose body in knee.’

76 There was a further entry on 9 May 2013 in relation to joint degeneration of the

left knee. The notes stated: ‘left knee early disease medial and patellofemoral compartments with possible medial meniscal tear’.

77 The condition was first mentioned in the GP records on 29 July 2014 (p.468). It was noted in relation to the Claimant’s knee. It was then not mentioned again until 29 July 2015 (p.460). In the summary of the GP notes (pp.454-6) ‘patellofemoral osteoarthritis’ was listed under ‘problems active’ only from 29 July 2015. ‘Osteoarthritis nos (not otherwise specified) of knee’ was listed under ‘minor past’ with a date of 17 July 2014.

78 The GP’s letter to Dr Miah of 3 December 2014 referred to ‘osteoarthritis of the knee and chondral lesion’ under ‘currently active conditions’ and stated that the Claimant had ‘osteoarthritis of the knee that makes standing for longer periods of time very difficult for her although her symptoms seem to be variable’.

79 The Claimant did not produce any evidence to the effect that her duties as a midwife involved prolonged periods of standing nor did she question the Respondent’s witnesses about that. In the absence of any actual evidence about this the Tribunal was unable to draw inferences one way or the other. Indeed, Dr Miah did not think that the Claimant was prevented from doing longer shifts despite being aware of this condition based on its inclusion referred to above in the GP’s letter.

80 As was the case above with the other conditions, the Claimant never made a complaint to the Respondent or reported that she was prevented from or hindered in doing the 12 hour shifts due to problems with standing. The only reference to arthritis by the Claimant was at her grievance hearing on 7 July 2015 (p.389 at p.391), the day after her resignation. Even then, the reference appeared to have been made in passing.

81 There was a more generalised reference by the Claimant to ‘joint pains’ (p.371 at para 6) on 4 June 2015 during the Claimant’s flexible working appeal. This was part of a long list of generalised symptoms which were largely unrelated to the alleged disabilities.

82 The Claimant made reference to various symptoms at paragraph 6 of her disability impact statement (p.158). These were largely unsupported by any corroborating evidence and were not expressed by the Claimant at the material time.

83 Against that background of evidence, the Tribunal similarly concluded in relation to the condition of osteoarthritis that it had probably been in existence for over a year by the material time; but there was inadequate evidence that it had a substantial adverse affect on the Claimant’s ability to carry out day-to-day activities. It was not clear whether the reference to pain keeping the Claimant awake at night was due to osteoarthritis or for some other reason. Further, even if the Claimant were a disabled person by reason of osteoarthritis, there was insufficient evidence about the effects of that osteoarthritis on her to establish relevance for the purposes of this case.

84 The next condition was ***low mood and depression***. The Respondent accepted that the Claimant was disabled by reason of this condition by August 2015 only; and that they had knowledge that she was suffering from depression only from 5

September 2014.

85 The Claimant's medical records contained numerous references to low mood and depression. There were entries in the occupational health records on 20 May 2010 and 1 July 2010 showing that the Claimant had had six weeks off work with 'stress and depression' up to 3 July 2010. The Respondent submitted that this was precipitated by some difficult personal circumstances as well as a distressing death of a baby at work. The Tribunal did not consider that the cause of the stress and depression mattered for current purposes if the effect was that the Claimant became depressed over that period of time, although the cause could point to the condition being episodic rather than of longer duration.

86 The Claimant was not prescribed any medication at that time although she had four to six sessions of counselling which the Tribunal noticed in accordance with the Guidance must be disregarded in terms of assessing the effects on the Claimant. There is reference to these in the GP notes (p.481).

87 Earlier in June 2010 (p.481) the Claimant reported to her GP that she felt tired, low mood and lethargic and that she got SAD. She had previously reported feeling very tired on 23 April 2010.

88 There was no relevant evidence before the Tribunal linking the earlier episode in 2010 with any later depression or low mood.

89 On 28 March 2014, on a visit to the GP the Claimant admitted to SAD (Seasonal Adjustment Disorder), of having been offered antidepressant medication in the past and that she took a herbal remedy St John's Wort although it had no great benefit for her. She indicated that she would like to try psychological strategies and her doctor referred her to the mental health team (p.470).

90 Around this time that the Claimant was making numerous visits to her GP with various medical conditions.

91 On 19 August 2014, she was diagnosed as suffering from depression and was prescribed antidepressant medication. She gave a history of low mood for a long time. Among other things, her state was described as 'anhedonia'.

92 There was an entry of 7 August 2014 (p.468) indicating that the Claimant was under the local community mental health team. This suggests that she was receiving counselling in relation to the depression.

93 Once again, the Tribunal did not have sufficiently clear evidence about the effects of depression/low mood on the Claimant during the earlier periods but it appeared on the evidence to be a persistent and recurring condition. Certainly, when it occurred in 2014 it appeared to have had a sufficiently severe effect on the Claimant that she was unable to attend work and took a period of sick leave.

94 Further, the Tribunal had regard to the report of the Claimant's GP dated 3 December 2014 (p.423) which was sent to the Respondent's Occupational Health department which stated that the Claimant's: "depression is currently improving but she

is still complaining of low mood/mood swings, tiredness, difficulty in concentrating at work, especially during her long shifts". At this point the Claimant had been prescribed relevant medication for depression.

95 Further towards the end of the material period, she was still being treated with medication for depression. The Tribunal considered therefore that as this constituted a 10-month period from August 2014 to June 2015, it was likely that she would continue to suffer from depression for 12 months. It was likely therefore on the balance of probabilities that this was either a recurrence of an earlier condition and/or the incidence of an impairment which was likely to last 12 months.

96 There was no relevant evidence about the likely severity of the effects of the depression without treatment. The Tribunal considered that the fact of treatment by prescribed medication for ten months carried with it an implication of an impact which met the threshold of more than minor or trivial.

97 This was consistent with the report prepared after the termination of the Claimant's employment. The Tribunal had no proper basis for a finding that the Claimant was a disabled person at any specific point in time before the point conceded by the Respondent, which fell outside the material dates.

98 The fifth matter which the Claimant raised was her diagnosis of ***diabetes***. The Claimant was not diagnosed with type 2 diabetes until shortly before her resignation, on 10 June 2015 (p.461). She was then commenced on a course of medication. The Claimant stated in her disability impact statement (p.157, para 4) that she suffered symptoms of diabetes prior to this but there was no medical evidence of this nor was there any evidence as to the start date or duration of any such symptoms. There was no information as to how she came to be diagnosed with diabetes.

99 There was also very limited evidence as to the adverse effects on the Claimant's health which were due to the diabetes. Further, there was no evidence on which the Tribunal could rely as to the effects of the diabetes on the Claimant in the absence of medical treatment. There was a note which arose from the Claimant's visit to the occupational health doctor on 22 July 2015 in respect of a symptom of diabetes namely that the Claimant was 'feeling more tired'. The Tribunal could not properly on the evidence before us link this symptom to the diabetes given that this was a symptom which the Claimant had been suffering from for at least 5 years. The reference in the meeting of 22 July 2015 to the Claimant feeling more tired as a result of the diabetes was the Claimant's report rather than the doctor's opinion.

100 The Tribunal concluded therefore that yet again we had insufficient evidence to conclude that the threshold for disability had been met in the relevant timeframe by reason of this condition.

101 We further found that the Claimant did not raise the issue of diabetes or diabetes related symptoms with the Respondent at any time during her employment. The first reference to it was in the occupational health report of 22 July 2015 (pp.398-9) which occurred after the Claimant's resignation and termination of her employment.

102 The case in relation to disability was put in the alternative on the basis of the

cumulative effects of the Claimant's conditions. The Respondent did not dispute that the Guidance specifically provides for the possibility that the Tribunal could find disability as a result of the cumulative effect of a number of conditions. When considering the cumulative effects, the Tribunal disregarded diabetes because it had not been diagnosed until June 2015 and there was no evidence of the effects on the Claimant when the diabetes was not treated. The Tribunal noted that the Claimant had complained of tiredness for some five years and that during that period of time she had had episodes of anaemia and had been treated medically and psychologically for depression. There was insufficient evidence to link the references to osteoarthritis to any symptoms of tiredness.

103 Mrs Melville strongly submitted that the Claimant suffered tiredness due to her difficulties in sleeping during the day as opposed to any inherent consequence of her conditions.

104 It was certainly the case that the Claimant's evidence about her symptoms of tiredness were somewhat wide-ranging and she attributed various causes to this other than depression. Thus, for example she described having suffered from low moods, low energy and tiredness 'since 2000'. In contrast in the grievance meeting on 30 April 2015 (p.326) she stated: 'I can't do more hours and I don't feel as fit at my age of 50, my body can't tolerate it anymore'.

105 Against that the Tribunal had the evidence of the occupational health experts instructed by the Respondent. Their evidence did not substantiate a finding of disability during the material period. Although the occupational health advisers did not have as much information as the Tribunal did, it is correct to say that when the Claimant gave consent and further information was obtained by the occupational health doctor from the Claimant's GP in December 2014, the occupational health doctor was then in a position to review the position. The Tribunal cannot properly contradict the views of the occupational health doctor in those circumstances.

106 The next question, even if the Claimant was disabled, was whether there was sufficient evidence of knowledge of this by the Respondent. This is relevant both to the claims under section 15 (discrimination arising from disability and the section 20 claim (failure to make reasonable adjustments).

107 The Tribunal found that the Respondent took all reasonable steps to apprise themselves of the Claimant's condition including seeking occupational health advice as well as information from the Claimant's GP. They also met with the Claimant on numerous occasions to discuss her objection to working longer shifts and thus to give her an opportunity to explain what conditions she was suffering from and how they affected her. The Tribunal considered that it was relevant in this context that the Claimant herself is a nurse and could be expected to describe such issues with sufficient clarity to the Respondent's managers. In the event however the Claimant failed to do this and instead made unspecific and generalised statements about why she could not fulfil the duty in relation to working the longer shifts. The Tribunal considered that it was particularly important for the Claimant to have been able to give a clear statement of her reasons, given that she was aware that the Respondent's managers had occupational health advice, based on information from her GP, which did not support making an exception for her.

108 Thus, in all the circumstances, whilst the relevant Respondent's managers were aware of some of the Claimant's health conditions during the relevant period, they did not know nor could they reasonably have been expected to know that the Claimant had a disability or disabilities and that she was or was likely to be placed at a substantial disadvantage in relation to the longer shifts by reason of them.

109 The Tribunal concluded therefore either that the Claimant was not a disabled person or if she was a disabled person the Respondent did not have knowledge that it amounted to disability during the relevant period.

110 The Tribunal then went on to set out its findings of fact in relation to the disability allegations because these also overlapped with the constructive dismissal complaint. The allegations are dealt with in chronological order.

111 The first allegation was 8 in the list of issues, namely did the Respondent treat the Claimant unfavourably because of her sickness absence, which she says arose largely as a consequence of depression, by: -

111.1 Subjecting her to a meeting on 5 February 2015 with Matron Dina;

111.2 Declining to give her a proper 'back to work' meeting on 5 February 2015; and

111.3 Telling the Claimant at the meeting on 5 February 2015 that there would be no discussion of her sickness.

112 This was a reference to a sickness absence meeting to which the Claimant was called. She had previously been called to a return to work meeting held with Ms Green a Mupervisor of Midwives on 30 January 2015 (record at pp.277-279). The Claimant had been absent by reason of a chest infection. She was due to return to work on 11 January then had taken a week's annual leave thus her return to work or her first shift back at work was on 19 January 2015.

113 The Claimant had taken five days off work from 7 to 11 January 2015 because of the chest infection. She had by now had 12 days off sick in a rolling three month period and 47 days off in a rolling 12 months. It was recorded that there was no pattern to the absence. She had had 43½ days off sick in a rolling six month period.

114 The form completed by the manager and signed by the Claimant was headed "Sickness Absence Reporting/Return to Work Form". Effectively it was signed after some of the issues to be discussed on the template were discussed (pp.277 - 279). In answer to the question on the template whether there was a need for an informal meeting in relation to attendance standards it was noted that the Claimant had a formal meeting arranged for 5 February 2015. The action to be taken therefore was that the Claimant would attend that meeting. It appeared to the Tribunal therefore to be quite clear that the Claimant's requirement to attend an Attendance Management meeting on 5 February 2015 was triggered by the most recent period of absence in January 2015. There had also been an earlier Attendance Management meeting in October 2014 following the Claimant's 10 week absence for depression following which the Claimant

was placed on the first formal stage of the attendance management procedure (pp.255-6).

115 The Tribunal did not consider that the Claimant had established that she had been treated unfavourably by being required to attend this meeting. Unfavourable treatment is a concept which is different from detriment or less favourable treatment: Trustees of *Swansea University Pension and Assurance Scheme v Williams* [2015] IRLR 885. In that case it was held that in order to assess whether something was 'unfavourable' there must be a measurement against an objective sense of that which is adverse as compared to that which is beneficial. It was further held in the case of *Paisner v NHS England* [2016] IRLR 170, EAT that determination of the reason for the unfavourable treatment requires an assessment of the Respondent's conscious or subconscious thought processes, whereas determination of the issue of whether the reason arises in consequence of the Claimant's disability is an objective test.

116 Matron Dina was the manager who held the meeting with the Claimant on 5 February 2015 and she was assisted by a representative from Human Resources, Kemi Bandoh.

117 At the return to work meeting on 30 January 2015 [p.277] it had been agreed that there was no requirement for a referral to occupational health or for any reasonable adjustments. The Claimant had therefore already been supported in her return to work.

118 Further, the letter which was written to the Claimant inviting her to the meeting on 5 February 2015, dated 29 January 2015 [p.275] expressed the purpose of the meeting as in part, to 'discuss the report from the Shaw [Occupational Health] referral and the impact on your shift hours'. Given that there remained an issue between the Claimant and the Respondent as to the Claimant's ability to work the longer shifts and night duty, the Tribunal did not consider that the Claimant had established that she had been treated unfavourably.

119 The complaint that the Respondent had declined to give the Claimant a "proper back to work meeting on 5 February 2015" was also misconceived. The Claimant had already had a return to work meeting on 30 January 2015 as referred to above. The Respondent had therefore already supported the Claimant in her return to work.

120 Finally, in relation to issue 8(c), the Claimant suggested in cross-examination that the Respondent was being unsupportive with regard to her sickness absence when they said that there would be no discussion of her sickness. The Tribunal did not accept that. The Claimant had already had the meeting on 30 January as well as having been referred to occupational health on a number of occasions. The meeting on 5 February was discussed at the meeting on 30 January and then after the meeting on 5 February, Matron Dina wrote to the Claimant (pp.283-4) in a letter dated 6 February 2015 to inform the Claimant that a separate Attendance Management meeting would be arranged to review her attendance under the policy.

121 The focus of the discussions on 5 February was on the shifts issue. The Tribunal took into account that by February 2015 the new system of working had been instituted across the board since the preceding April. It was therefore reasonable and

proportionate and to be expected for the Respondent to use the meeting on 5 February to seek to resolve the problems that the Claimant faced in complying with the new shift pattern. This was particularly the case given that a further meeting was scheduled to discuss the sickness issues with the Claimant.

122 The Claimant also accepted in evidence that the Respondent was entitled under the policy to call her to these meetings.

123 In relation to the allegation about saying there would be no discussion of her sickness at the meeting of 5 February, the Tribunal did not find that a bald statement to the effect was made.

124 The next set of allegations was issues 19(a) to (c), namely harassment by reason of disability under section 26 of the Equality Act 2010. The first of the allegations related to events on 11 March 2015. It was said that Matron Dina insisted on having an unscheduled meeting with the Claimant on 11 March 2015 to discuss the Claimant's request to remain on a short shift pattern. In the agreed list of issues this date was stated to be 12 March but it was apparent, and both parties agreed by reference to the documents, that the correct date in this allegation should have been 11 March (p. 301).

125 The amendment from 12 March to 11 March 2015 applied in relation to all three allegations under issue 19 (a) to (c). It also was convenient to deal with those three matters together as they were all allegations against Matron Dina in a similar context.

126 Matron Dina had been made aware that the Claimant had not attended for work on 2 March 2015.

127 By a statement of fitness for work dated 16 February 2015 the Claimant had submitted a medical statement authorising adjustments, namely remaining on altered hours on the basis that the Claimant should only be doing day shifts no longer than eight hours and no night shifts. She was diagnosed as suffering from fatigue/malaise. This was said to be the case for two months. Matron Dina was taking advice from her Human Resources department at the end of February 2015 as to how to respond to a fit note which apparently contradicted the input of the occupational health physician.

128 A relevant email was sent by Tina Griffin, HR adviser, to Matron Dina and other managers on 25 February 2015 (p.301). Having discussed the circumstances of the referral the HR advice to Matron Dina was that the occupational health recommendation in the circumstances overrode the GP fit note. Matron Dina was told by Ms Griffin of Human Resources on 3 March 2015 that the Claimant had failed to turn up for a night shift on 2 March (p.302).

129 In a further email also dated 3 March 2015, Matron Dina informed her colleagues that following Dr Miah's report (occupational health) at the end of January 2015, she had made local adjustments of short shifts for two months and only two nights in two months. She recorded that her understanding was that the Claimant's argument about not working nights was not the length of the shift but because night duty 'messed up with her sleep'. She reported that she understood that the Claimant also opposed long days due to the length of the shifts which made her tired. She said

in relation to the expressed concern from the Claimant that when she worked longer hours she lost concentration and became abrupt to her clients that Dr Miah had found no reason why she should lose concentration following his review of the Claimant's GP reports.

130 Finally, Matron Dina expressed a concern that if they accepted i.e. acted upon the GP fitness note, the Claimant would be providing the Respondent with a repeat fit note in similar terms every two months. She believed that the Respondent had to appear to be fair to the rest of the staff who had been flexible in working shifts.

131 An email followed later in the afternoon on 3 March from Ms Griffin raising various issues going forward in relation to managing the situation concerning the Claimant. That was the immediate background against which the meeting on 11 March took place.

132 The Claimant had not attended work on 2 March, but whether or not she had, it was still important that Matron Dina met with the Claimant to resolve the position about the shifts. Thus the Tribunal was satisfied that the reason why Matron Dina held a meeting with the Claimant was yet another attempt to try to resolve the issue and to clarify what the position was in relation to what the Claimant could and could not do. Aside from the discrepancy between the GP fit note and occupational health advice, the Human Resources email to Matron Dina referred to above on 3 March 2015 had also highlighted some confusion in the sense that it appeared that the Claimant herself had said that she was able to fully complete all of her job objectives. Further, occupational health had advised Matron Dina, among other things, that before moving forward with formal action under the disciplinary policy for conduct, she should endeavour to get the Claimant to 'buy in' to work to a shorter nightshift given that the Claimant already worked to short days.

133 It appeared to the Tribunal abundantly clear that the reason for the meeting was certainly not to harass the Claimant. Indeed, the HR Adviser highlighted in the email to Matron Dina on 3 March 2015 that they did not want the Claimant to go off on long-term sickness due to stress.

134 The next allegation under issue 19(b) was that Matron Dina had refused the Claimant's request to allow a colleague to attend the meeting on 11 March 2015 as support. This was a reference to the Claimant's colleague Vicki Evans. The Claimant did not point to any policy or practice whereby a colleague was entitled usually to be invited to an informal management meeting such as this. The Tribunal accepted the Respondent's contention that this was not a formal meeting like a disciplinary meeting and that it was the usual practice for an employee not to be accompanied. The Tribunal was therefore further satisfied that the reason that the Claimant was not allowed to have a colleague accompanying her was not to harass her, but because that was not in accord with the usual practice. Indeed the Claimant insisted that she should be accompanied and became quite animated and distressed so Matron Dina allowed Ms Evans who had accompanied her to be in the vicinity of the meeting.

135 This set the scene for the third allegation under issue 19, namely that Matron Dina physically pushed the Claimant when the Claimant tried to leave Matron Dina's office. The Tribunal heard and read a fair amount of evidence on this issue including

photographic evidence of the layout of the room in which the meeting took place (pp.502A and B). It was highly material that the Respondent had conducted investigations into this allegation closer to the time and had been met with contradictory accounts from each of the three people present. The Tribunal did not consider that further examination of this issue with fewer witnesses during the course of this hearing could reach a different result from that which was reached closer to the time after hearing the three relevant witnesses.

136 The Tribunal could not find on the balance of probabilities that the matters alleged against Matron Dina, namely an assault on the Claimant, had taken place.

137 Chronologically the next issue to determine was whether the Claimant had done the two protected acts which she describes in issue 20 of the list of issues. The first was said by the Claimant to be her objection to the 12 hour shifts on the grounds of her disability. It was not clear by the commencement of the hearing what date or dates the Claimant was said to be relying on. During her oral evidence she clarified that she relied on an email sent to Matron Dina on 19 December 2013 (p.212). In fact, the email of 19 December 2013 was sent to Ms Featherstone as the main recipient and because there was an error in the spelling of her email address, the Tribunal accepted that it was likely that it had not arrived at that time. Then further to a conversation between the Claimant and Matron Dina the Claimant forwarded the message to Matron Dina on 29 May 2014. In the original email the Claimant stated:

> I'm writing to say that I'm not able to do 12 hour shift working patterns and would prefer to keep my current working pattern for safety of patients and myself (health)."

138 The Tribunal considered that this was not an allegation of disability discrimination. The reference to the Claimant's health was made at a time when the Respondent had agreed not to require the Claimant to work the new shifts. There was no evidence that the email when it was eventually received was treated by the Respondent as a protected act. In those circumstances the Tribunal concluded that this email did not amount to a protected act.

139 The second matter which was said to constitute a protected act under the Equality Act was the grievance that the Claimant raised in relation to her treatment by Matron Dina referred to above. This was set out in an email dated 12 March 2015 (p.309).

140 The Claimant was scheduled to work a night shift and she did not because she believed that she was covered by the fit note (p. 310, penultimate paragraph).

141 It did not appear to the Tribunal that the Claimant was doing a protected act under the Equality Act in relation to disability by this letter. She raised various allegations including the allegation of assault on her and she set out something of the history of the dispute about whether she should work the night shifts. Indeed towards the end of the grievance she stated:

> "I also stated (as I have before) that I have been unwell on night duties and patients have complained that I appear tired, when I have worked on 12 hour

shift. I have also stated that I will gather any evidence I can find to show that night duties and 12 hours make me sick. Dina stated that she agrees that I need to present this evidence."

142 The Tribunal considered that the Claimant's difficulties in this case are summarised by that extract. Even by the date of the hearing she had not produced evidence to this effect. She also stated in her grievance that she really felt harassed and stressed by what she characterised as the ongoing pressure to work in a pattern that had made her unwell.

143 In her closing submissions Ms Melville assumed that the Claimant would argue that the grievance fell within section 27(2)(d) of the 2010 Act, namely making an allegation (whether or not expressed) that A or another person has contravened the Equality Act.

144 The Claimant had failed to particularise the reason for contending that this grievance amounted to a protected act. However, fundamentally also the Claimant's case was bound to fail because there was no difference in her treatment before and after this grievance was sent. The Respondent for some months had sought to address the issue of the shifts with her and this continued after the date of this grievance. There was not even therefore the beginnings of a prima facia case showing a causal link between the treatment complained of and any protected act.

145 The Claimant did not put the victimisation case to the relevant witnesses, Ms Neat and Sharon Brennan. When questioned about any causation the Claimant could only say that Matron Dina and Ms Brennan sat together "looking like twins and wearing purple". The Tribunal did not consider that there was any basis for drawing an inference of adverse treatment by reason of having made the grievance on the basis of the evidence of this issue.

146 As can be seen from the list of issues above at issue 22 all the detriments complained of arose out of the discussions between the Claimant and the Respondent about her working the same shifts as everyone else.

147 In the alternative, the Tribunal considered the case even if the grievance had been held to amount to a protected act. Our findings are therefore set out below in relation to each of the detriments in chronological order.

148 The next set of detriments which arose were those brought under issue 5. This was an allegation of direct disability discrimination under section 13 of the 2010 Act alleging less favourable treatment because of her disability (depression and/or anaemia only) by failing to consider the Claimant's request to remain on her current contract on 24 March 2015 (p.316 emailed to Matron Dina); and suggesting that the Claimant applied for the roles which she suggested should be reasonable adjustments.

149 In relation to issue 5(a) above, the Claimant received a letter dated 24 March 2015 inviting her to attend a meeting with Matron Dina and Ms Idrees, Human Resources Manager, on 1 April 2015 at Matron Dina's office. The letter explained that the purpose of the meeting was to discuss further issues relating to the Claimant's working hours. She was told that she could be accompanied by a representative and

was urged to attend (p.315).

150 The email which the Claimant was referring to was one that she sent to Matron Dina (pp.316-317) dated 24 March 2015. It was headed:

> "Appeal against decision about my shift pattern i.e. that I may safely undertake 12 shifts and night duties and to commence longer shifts in April. And evidence of negative effects of night duty on my health and wellbeing and safety."

151 This email was written following two Attendance Management meetings on 5 and 23 February 2015, following which it was confirmed that the Claimant would be moving on to long days and night duty from April 2015, albeit with some adjustments (pp.311-312). In addition to that there was the invitation to the further meeting already referred to at page 315.

152 The matters raised by the Claimant in her email of 24 March 2015 (p.316) were investigated by Ms Neat as part of her investigation into the Claimant's grievance which also concerned the meeting between the Claimant and Matron Dina on 11 March 2015. Ms Neat wrote to the Claimant to inform her of this by letter dated 15 April 2015 (p.322).

153 An investigation meeting with the Claimant eventually took place on 19 May 2015 and Ms Neat wrote to the Claimant informing her of the outcome by letter dated 26 May 2015 (pp.352-353). Ms Neat did not uphold the Claimant's grievance and she outlined the reasons for the decision. In the letter Ms Neat referred to the discussion during the meeting to the fact that the Claimant had met with the Head of HR Ms Idrees and Matron Dina on 15 May 2015 to discuss 12 hour shift patterns and that the Claimant was advised of the appropriate way to take this forward. There was no dispute that this was a reference to the Claimant having been advised that the appropriate way to take this forward was to put in a flexible working application.

154 The Claimant had acted on the suggestion that she put in the flexible working application and this was then dealt with by Ms Brennan in the first instance and then by Jackie Featherstone on appeal.

155 The Claimant's allegation in this respect was not clear. It was unclear whose actions or omissions she was complaining about. Further, she did not make it clear or specify which disability or disabilities she says were the reason for the less favourable treatment. The Claimant relied on two actual comparators and a hypothetical comparator generally. However, she was unclear about the circumstances relating to them. The Tribunal accepted the Respondent's case that one comparator, Nicky Constantinou, had been on restricted medical duties on her return from maternity leave in 2015 and had been assigned to restricted duties for that reason. This was evidence given by Ms Featherstone who was well placed to know the circumstances. The other comparator, Gill Seers, had set up the maternity helpline several years earlier and attained the age of 65. She worked in that role in the period approaching her retirement.

156 The circumstances of each of these comparators therefore was materially different to the Claimant's situation.

157 Primarily however the Tribunal rejected these allegations on the basis that it was clear that the Respondent had sought to inform themselves as fully as possible about the Claimant's circumstances and about any medical or other justification for amending her duties going forward. There was no basis for inferring that a hypothetical comparator would have been treated any differently to the Claimant. Indeed the Claimant accepted as set out in the text referred to above that she needed to provide evidence about the justification for not going on to the long shifts. That would have been required of anyone. Further, the Tribunal refers to our finding above that the Respondent was not aware of the Claimant's disability. The occupational health advice informed by the Claimant's GP undermined such a finding.

158 Issue 5(b) alleging direct disability discrimination was a similar allegation on its facts to issue 18(b) which was said to be a failure to make reasonable adjustments by requiring the Claimant to apply for alternative roles. The explanation for the Claimant being told that she needed to put in formal applications for alternative roles was set out in the letter informing the Claimant of the outcome of her flexible working appeal dated 23 June 2015 and sent by Ms Featherstone, the Associate Director of Nursing and Midwifery in the Family and Women's Health Care Group. (p.376). She stated:

> "There are number of roles which you could apply for with women's health that are short 7.5 hour shifts, however as explained to you in the meeting you will be required to follow the normal recruitment process, applying for the post and having an interview. You cannot be slotted into these roles as other staff members within the department may also be interested and you do not have a slotting in right."

159 The Claimant produced no evidence whatsoever to undermine the positions outlined in the explanation. There was no reference to any process or policy within the Respondent which would have permitted her to be slotted in in the circumstances. The Tribunal was satisfied therefore that the suggestion to the Claimant that she should apply for the alternative roles and the failure to slot her in did not constitute direct disability discrimination and were not failures to make reasonable adjustments for the Claimant.

160 In respect of the failure to make reasonable adjustments and the alternative roles, the PDM/diabetes roles were specialised roles which the Claimant would have needed to apply for. In any event however there were no vacancies at the relevant time. Similarly the maternity helpline role was being fulfilled by Gill Seers and Nicky Constantinou at the material time. The other duties relied on by the Claimant were rotated amongst the midwives and were not discrete roles to which the Claimant could be allocated. Although the Tribunal considered the failure to make reasonable adjustments on an alternative basis it was material to bear in mind that the evidence available to the Respondent at the time was that neither the GP nor the occupational health section had advised that the Claimant's health condition was long-term or more particularly that there were restrictions on her working long shifts because of her health (p.376).

161 The next detriment chronologically (after 24 March 2015) was in relation to 26 May 2015. This was set out in issue 22(b) and was an allegation of disability

victimisation. The Claimant complained that the Respondent failed to uphold her grievance against Matron Dina. Following the submission of the grievance by the Claimant various meetings were held during which Ms Neat investigated the matters raised. The grievance is the second alleged protected act relied upon by the Claimant above.

162 As already referred to above by a letter dated 26 May 2015 Ms Neat informed the Claimant that the grievance had not been upheld. Ms Neat at the time was Neonatal Community Team Manager in the Neonatal Unit (pp.352-353). In order to assess whether the Claimant may have been treated unfavourably as a result of having done the alleged second protected act, it was instructive to look at the substance of the Respondent's reasons for rejecting the grievance as set out in the letter. If the reasons were not credible or the process of assessing the grievance raised questions then this might be the basis for inferring that the reason for the grievance not being upheld was because of an earlier protected act.

163 In relation to the Respondent's finding about the alleged assault which was part of the grievance, the Tribunal took into account that the Respondent had three divergent and contradictory accounts from the three witnesses, namely Matron Dina, the Claimant and Ms Evans. As this Tribunal has found earlier it was not possible on the balance of probabilities to reach a view about what had happened. Indeed in the original grievance, when describing this incident, the Claimant's account was of Matron Dina physically putting her hands on her to stop the Claimant leaving. The Claimant continued:

> "At this point she [Matron Dina] invited Vicki Evans into the office to minute the meeting. This behaviour, I find really offensive and unacceptable and would like to register my grievance. I spoke to midwife Vicki Evans who was present, about Dina pushing me and she said she don't know what happened."

164 Thus even on the Claimant's own account Ms Evans was unable to corroborate her allegation.

165 There was no criticism raised of the process by which these matters were investigated.

166 The second element of the grievance was about the consultation and the 12 hour shifts. The Respondent had consulted appropriately about the introduction of the shifts. Further, in relation to the introduction of the 12 hour shifts, the Tribunal considered that following the consultation the Respondent was entitled to implement the shifts. Further the justification for wanting to implement the new shift patterns, which was related to continuity of care was valid. Further the Respondent's undisputed evidence was that the new longer shifts were overwhelmingly popular with the staff consulted. Finally, as has been set out above, the Respondent attempted to assess the health and other objections raised by the Claimant to complying with the shift pattern and their investigations did not lead them to believe that there was any good reason not to implement the shift patterns with the Claimant. It was also clear that some considerable time had been spent in discussing this matter with the Claimant so that over a year after the shift patterns were implemented for everyone else they had still not been imposed on the Claimant.

167 Regrettably during the hearing the Claimant failed to put victimisation to Ms Neat and Ms Featherstone or Ms Brennan.

168 In the circumstances the Tribunal concluded that the allegation in issue 22(b) was not well-founded and was dismissed.

169 The next allegation in issue 23 was in relation to matters which took place on 26 May 2015. The Claimant alleged as acts of direct race discrimination that she was treated less favourably because of her race (black Jamaican) when the Respondent required her to apply for alternative roles on 26 May 2015.

170 The date was subject to some debate but there was no dispute about the essence of the allegation which has been referred to above in the context of the correspondence from Ms Neat which referred to an earlier suggestion.

171 The Tribunal refers to its reasoning above in relation to issues 18(b) and 5(b). The findings in relation to the comparators and the circumstances in which this suggestion was made are relevant to this allegation also.

172 Further, when the Claimant was cross-examined about her race discrimination complaint she appeared unclear about who she was alleging had discriminated against her for this reason. She eventually appeared to settle on Ms Featherstone but did not give any explanation of why she believed that she had been discriminated against on racial grounds nor did she put to this Ms Featherstone in cross-examination.

173 In all the circumstances, the Tribunal did not find that the allegation of direct race discrimination was well-founded. That complaint was therefore dismissed.

174 Closely related factually to the above allegation was the allegation at 22(g) that it was an act of victimisation that the Respondent insisted that the Claimant made a request for flexible working instead of making ‘reasonable adjustment’. This also related to the letter at page 352 from Ms Neat. That letter set out the outcome of the grievance investigation. The last sentence was a reference to the Claimant being told at the meeting on 15 May 2015 that the appropriate way forward was to put in a flexible working application. In an email dated 21 May 2015 sent to Ms Featherstone, (p.349) the Claimant indicated that she had attached an addendum with information which she wished to be considered at the review of her application for flexible working. She then added two further points under the section which related to the impact of a new working pattern. The first was that she was very flexible and worked well in all acute areas of the maternity department and so MAFU, the maternity helpline (regular staff about to retire), and elective caesarean section lists that were done on a short shift basis were all areas she had worked in in the past. She continued that this was a positive benefit for the Trust and her colleagues as she could cover sickness absences and annual leave for dedicated staff in MAFU and either timeshare with another member of staff on the helpline or do the majority of those shifts.

175 She continued that she had informed the Practice Development Lead Midwife that she was happy to assist with study days (another area needing extra staffing due to a recent retirement). Further the antenatal manager and the diabetes specialist

midwife had also been informed, she said, of her availability to assist with a diabetes clinic and also provide study days on this high risk area that she had studied at postgraduate level.

176 The Claimant made no reference whatsoever to the Respondent's policies or procedures for considering flexible working applications, or to any other documents which would establish that referring her to the flexible working process was wrong or detrimental.

177 In considering this allegation we also took into account our findings as to reasonable adjustments. In particular it was relevant that occupational health and the medical advice to the Respondent did not suggest that these adjustments should be made.

178 In all the circumstances therefore we concluded that the reason why the Claimant was directed to making a request for flexible working was because the Respondent considered that was the appropriate way for her request in relation to work to be progressed. There was no evidential basis for concluding that the Respondent followed this path because the Claimant had put in a grievance in relation to Matron Dina's treatment of her. The victimisation complaint therefore was not well-founded and dismissed.

179 The Tribunal next considered issues 22(d), (e) and (c). These were all allegations of victimisation. The Tribunal considered them against the context of the second alleged protected act, namely the grievance.

180 Allegation 22(e) did not have a date attached to it in the list of issues but it appeared from the Claimant's evidence that she was referring to events in February 2015 (p.287). In the list of issues, she complained that the Respondent (Matron Dina) had sought to influence the occupational health doctor to change his opinion regarding the Claimant's condition of anaemia.

181 By an email sent on 10 February 2015 by the Claimant to Matron Dina, she objected to being in her words "forced to do night duties" despite repeatedly being quite unwell after doing nights and long 12 hour day shifts. She believed that the Health and Safety at Work Act was not being taken into account as her health was being prejudiced and she stated she would be seeking a second opinion on her medical records review as she was surprised by the suggestion from Dr Miah that 12 hour duties could safely be undertaken by her.

182 She then made reference to research about the detrimental effects of working long hours and/or shift work on health generally.

183 Matron Dina forwarded the email of 10 February 2015 from the Claimant to occupational health and HR. It was addressed to the occupational health manager, Jirina Boyd. She commented: "We need to be taking some serious decisions regarding BW attitude towards working the normal shift patterns". Ms Boyd then forwarded this email to Dr Miah by email dated 11 February 2015.

184 The Claimant's allegation was about Matron Dina's email comment above and

the fact that this eventually found its way to Dr Miah. There was no evidence before the Tribunal that Dr Miah took any action in response to the comment. He was invited to comment on the Claimant's correspondence and he was also told it had been sent to him for his information by Ms Boyd.

185 It was not in dispute that by email dated 29 January 2015 (p.290) Dr Miah had reviewed the GP's report and had expressed his view as an occupational health physician. He stated in terms:

> "Following on from the GP report I see no medical reason to exclude BW from either nights or long days. You may wish to make this a gradual change to allow her to get used to them."

He was thereby confirming advice which had already been passed on to others earlier (p.291). To that extent therefore there was no reason for Matron Dina to have sought to influence Dr Miah's view. He had already expressed an opinion which there was no reason to seek to dissuade him from, from a management point of view.

186 It was thus clear on the evidence that Dr Miah's view was not influenced by Matron Dina; the referral of the Claimant's email and of Matron Dina's comment to Dr Miah was not done, on the evidence before the Tribunal, at Matron Dina's instigation; and in any event Dr Miah had reached a concluded view about the occupational health issue and had already expressed it in writing some several days before the correspondence complained about. It was also apparent that Dr Miah's view in relation to the Claimant's anaemia was based on the Claimant's GP report (pp.422-423) dated 3 December 2014 in which the GP said that the anaemia was resolved.

187 The next allegation dealt with was issue 22(c) in which the Claimant complained that the Respondent (Matron Dina, Matron Ramanaiken/Brennan and Jackie Featherstone) failed to grant the Claimant's request not to do long shifts in 2015.

188 This was a generalised complaint of victimisation. The Tribunal refers to the facts which have been established and set out above. The issue was whether the Respondent took the action they did because of the Claimant having made the grievance. The Tribunal refers to the explanations provided by the Respondent and to the Tribunal's findings about these explanations being justified and valid. In any event the Respondent's position did not change before and after the making of the grievance. They were consistent in their approach to the issue of the hours that the Claimant worked, namely to assess whether there was any medical reason not to apply the new shifts to the Claimant also.

189 The Tribunal therefore considered that the issue 22(c) allegation was not well-founded and was dismissed.

190 The Claimant further alleged as an act of victimisation detriment at issue 22(d) that the Respondent failed to make a proper assessment of whether or not she had disabilities for the purposes of the Equality Act 2010 by failing to ask for a second occupational health opinion in June/July 2015, contrary to a recommendation by the occupational health doctor in October 2014.

191 The Respondent obtained an occupational health report from the occupational health physician in October 2014 (p.266). The relevant parts of the report were as follows:-

191.1 In answer to the question whether the medical condition met the criteria as defined by the Equality Act 2010 Dr Miah stated that the anaemia was long-term and could have an impact on the Claimant's activities of daily living and thus was likely to come under the coverage of the Act. The depression however he stated had been an issue for a shorter period and at present may not come under the Act.

191.2 In answer to the question whether adjustments were required to facilitate an early return etc he indicated that the main issue was: "a perception/ complaint that the long days and nights have a negative impact on her wellbeing thus if you are able to allow her to work short shifts then this would resolve the issue." He continued that he did not feel that there was currently enough medical evidence to suggest that this was needed but he would be writing to the Claimant's GP for a full report to give him a better understanding of the Claimant's medical issues.

191.3 He was then asked what was the likelihood of a recurrence of the condition and whether the employee would be able to give reliable and consistent attendance in the future. He answered that the Claimant felt that her underlying medical problems were the reason why she was not able to work the longer shifts and clearly if this perception remained then it might affect future attendance.

191.4 He summarised by stating that he did not believe that there was any medical evidence presently to support he Claimant's request not to do long days and night shifts but that he would obtain further medical evidence from the Claimant's GP. Until then he advised that the Claimant should continue, on her return to work, to do short shifts and long nights.

192 This letter was sent to the Claimant and to HR as well as to Matron Dina. There was a delay in obtaining the information from the Claimant's GP until 3 December 2014 (pp.422-423) when the Claimant's GP Dr Burtan of the Church Street Surgery wrote to the Respondent. That report was then reviewed sometime in January by Dr Miah and he confirmed the position to Matron Dina and HR in late January 2015 and early February 2015. In essence there was nothing in the GP report which altered his preliminary view.

193 Thus the implication in the allegation that Dr Miah had asked for a second occupational health opinion in his report in October 2014 was wrong. He had sought further information from the GP.

194 Further, in the context of other allegations above, the Tribunal has referred to evidence that the Claimant herself understood that she would need to find further evidence because by then the matter had been considered appropriately by

occupational health and their view had been expressed. The Tribunal did not consider that the Respondent needed on the basis of the enquiries that they had made and the responses from occupational health, to refer the matter back to occupational health in June/July 2015. They had followed Dr Miah's advice up to that point, and there was no new evidence.

195 The fragility of the Claimant's case on this issue was exposed by the fact that her case changed in her witness statement on this issue. In paragraph 15 the Claimant stated that the Respondent had failed to get a further legal opinion. This argument was said to be based on the comment which was part of the pro forma question put to Dr Miah after questioning whether the medical condition met the criteria as defined in the 2010 Act: "As you are aware, the final arbiter as to whether the Act applies is a legal opinion". The Tribunal saw no merit in that argument, especially against a background that all proper enquiries had been made by the Respondent.

196 Further, in relation to issue 22(d) the Tribunal noted that in the Claimant's submission to Jackie Featherstone in the context of her appeal against the decision to reject her request for flexible working (pp.370-371) sent on 4 June 2015, at paragraph 11 the Claimant indicated as point 11 of 12 in support of this appeal:

> "I'm requesting a second opinion from the occupational health specialist as two senior GPs advised me against long days and I have also suffered due to my request and concerns being ignored. Dr Miah only looked at my GP medical records and does not have all the evidence and I would like to submit additional evidence, (as requested by Matron Dina in order to better understand my problems with working long shifts) not just from colleagues as I stated before. Please look at this evidence before deciding if it is acceptable or not."

197 In the event, as stated above, the Claimant did not submit any further relevant medical evidence. But this quotation confirms that at the time the Claimant was saying that the Respondent should seek a further occupational health report, not a legal opinion. The Tribunal considered that the Respondent acted completely properly and reasonably by not doing so as there were no grounds for reverting to occupational health. Further, the Claimant did not produce evidence of the two senior GPs who had advised her against working long days either to the Respondent or indeed to the Tribunal.

198 In relation to issue 22(d) the Claimant had not established the facts alleged and further there was no basis whatsoever on the evidence for concluding that the failure to obtain a further occupational health report (as originally pleaded) or a legal opinion in June/July 2015 could have been caused by the fact that the Claimant had put in a grievance against Matron Dina's actions. That victimisation complaint was therefore not well-founded and was dismissed.

199 The next two allegations of victimisation detriment were issues 22(f) and (h). The first complained about the Respondent moving the Claimant to work the 12 hour shift on less than 24 hours' notice (4 June 2015); and the second complained about the Respondent declining the Claimant's request for flexible working (4 June and 23 June 2015). This latter allegation (h) was directed at Ms Brennan and Ms Featherstone and referred to the outcomes of the flexible working request (pp.365-367) and the appeal

against that outcome (pp.376-377).

200 Although the Tribunal did not have the original flexible work request form it was quoted from by Ms Brennan in her outcome letter at p.366. Thus the three points made in support of the flexible work application initially were as follows: -

200.1 The 7.5 hour shifts were more easily adjustable to fit in with the needs of the Claimant's department when they most needed her.

200.2 This shift pattern would help improve attendance.

200.3 Long shifts had a negative impact as the Claimant became stressed towards the end of each shift.

201 The Tribunal has already set out the two additional points in relation to the flexible working appeal which the Claimant added.

202 The outcome letter from Sharon Brennan to the Claimant was dated 4 June 2015 and was hand delivered to the Claimant on that day. The Claimant received it while on duty on the ward.

203 Allegation 22(f) was highly contentious. When the Claimant received the letter of 4 June on the ward on 4 June, she went off sick. She had been due to carry out an early shift on 5 June for 7½ hours and then on Sunday 7 June to work the late shift also for 7½ hours. The effect of the outcome of the flexible working request on 4 June was that the Claimant was informed that her shifts would be altered: "to commence long shifts from immediate effect". Ms Brennan then continued that some adjustments would be made to provide adequate rest periods between shifts in order to make the transition easier for her. These were spelt out in the letter and covered a two week period.

204 The net effect therefore which was spelt out in the letter was that instead of working a 7½ hour early shift on 5 June the Claimant was due to work a long day on 5 June and then another long day on 10 June 2015. She was not then required to work the previously rostered late shift of 7½ hours on Sunday 7 June.

205 It was stated that she would then have 6, 7 and 9 June off before being required to work the second long day in that timeframe. The Respondent's position was that this way they were providing adequate rest periods between shifts for the Claimant. The issue once again was whether the Respondent was taking this action because the Claimant had brought the complaint against Matron Dina or whether as they contended it was because they wanted to implement the new shift system.

206 The Tribunal considered as before that it was clear on the evidence that the reason that this action was taken was because the Respondent wished to implement the new shift system, no good reason having been presented as to why they should not. Indeed the comment in the email which the Claimant complained about as Matron Dina seeking to influence the occupational health doctor's opinion confirms this finding. Before complaint was made about Matron Dina she was asking for some resolution of this issue in February 2015 (p.287). The Respondent's desire to take "some serious

decisions" regarding the Claimant's position was justified from a management administrative point of view and there was no alteration to this position before and after the grievance against Matron Dina. In those circumstances therefore the Tribunal found that this allegation under section issue 22(f) was not well-founded and was dismissed.

207 In relation to the flexible working request as no new evidence or grounds had been forthcoming and the Respondent had been advised by their relevant expert occupational health there was no reason why the Claimant could not do the long shifts, once again the Tribunal considered that it was on the balance of probabilities the reason for their declining the flexible working requests. In addition the Respondent took into account the impact on other staff members if the Claimant was not integrated into the long shift working.

208 The complaint under issue 22(h) was therefore not well-founded and was dismissed.

209 The next issue was issue 19(d), a harassment allegation whereby the Claimant alleged that on 4 June 2015, Matron Ramanaiken/Brennan required the Claimant to commence 12 hour shifts with less than 24 hours notice and contrary to occupational health advice that she should be allowed a gradual adjustment to 12 hour shifts.

210 This allegation is very closely related to issue 22(f) on its facts. The factual findings are carried over to consideration of this allegation. As the Tribunal found that the reason that the Claimant was put on to the shift was because they wanted to implement the shift system and they believed that the Claimant had had long notice of it and they had made adjustments for her over a period of time. There was no evidence to support a finding that they took this action because they believed the Claimant was a disabled person given the occupational health advice that they had received and given their state of knowledge, given the Tribunal's findings about this.

211 The flexible working outcome letter records an inconsistent response from the Claimant about the adverse effects on her health of working long hours (p.365 last paragraph). The Claimant was reported as having told Matron Brennan that after having worked long shifts while on the bank at Princess Alexandra Hospital she suffered "chest pains and headaches". The Tribunal noted that those symptoms did not appear to be related to either depression or osteoarthritis or indeed anaemia. Matron Brennan recorded that occupational health had advised that the Claimant should explore these symptoms with her GP.

212 The Tribunal was satisfied that in the two letters the Respondent put forward a full explanation of the reasons for rejecting the flexible work request and also addressed the various other points raised by the Claimant.

213 The schedule of work that the Claimant was asked to perform in terms of her times off duty was amended by a further letter of 4 June which was also hand delivered to her (p.368). The duty on 5 June was again altered from a 7½ hour previously rostered shift to a long day and 8 June was inserted as a long day which had not been included in the previous letter; 9 June would then remain a day off and the next long day would be 10 June. This would then be followed by a day off on 11 June and a

short shift of 7½ hours on 12 June 2015. The Claimant would then have two days off on 13 and 14 June 2015 and a night duty on 15 June 2015. On 16 and 17 June 2015 she was to have days off and then a long day on 18 June 2015 followed by a day off on 19 June 2015. The Tribunal considered that this amended roster was also consistent with the Respondent's stated intention of granting the Claimant sufficient time off between long shifts to address her expressed concerns about fatigue.

214 Once again the Tribunal had no basis for properly finding that the Respondent's actions were harassment (disability). This allegation was therefore not well-founded and was dismissed.

215 Next chronologically was issue 18 which was an allegation of failure to make reasonable adjustments in the following respects:-

> 215.1 Changing the Claimant's shifts from the short 3-shift system to 12 hour shifts on 4 June 2015 instead of allowing her to remain on short shifts (issue 18a);
>
> 215.2 Requiring the Claimant to apply for alternative roles through the normal routes as communicated on 23 June 2015 instead of allocating her to a role in the maternity helpline, Maternal Foetal Assessment Unit ("MFAU"), maternity diabetes clinic or to continue doing caesarean sections (issue 18b)?

216 In relation to issue 18(a) it was admitted by the Respondent that the requirement to work a 12 hour shift was a provision, criterion or practice ("PCP").

217 The next issue for the Tribunal to decide was whether the PCP placed the Claimant at a substantial disadvantage in comparison with persons who were not disabled. The code of practice on employment (2011) at paragraph 6.16 provides that:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion [or] practice … disadvantages the disabled person in question."

218 At risk of repeating itself the Tribunal refers back to its findings about the occupational health advice which did not indicate that the Claimant could not do the long nights or was adversely impacted by reason of her condition when she did long nights. The Tribunal did not consider it necessary to make express findings about the submissions for the Respondent about other reasons why the Claimant might not have wished to do long nights but it was certainly recorded that the Claimant was adamantly opposed to doing nights or long days (p.351) and her various appeals and requests not to do them. Alongside this was a failure of the Claimant to put forward evidence which would have permitted the Respondent to consider removing her from that shift. The Tribunal only needed for the purposes of this case to find that the evidence did not support a case that the Claimant was unable or disadvantage in doing long shifts by reason of her health/any disability.

219 Further in relation to the Respondent's knowledge as this allegation also repeats earlier contentions that the Tribunal adopts its findings in relation to those also.

Ms Brennan had sought advice from occupational health and human resources as appropriate and had been informed in terms by occupational health that a further referral was not necessary. She did not know nor could she reasonably had been expected to know in the circumstances that the Claimant was a disabled person at the relevant time and that she was likely to be placed at a disadvantage in comparison with persons who were not disabled.

220 Allegation 18(b) was very closely related to earlier allegations about the way in which the Claimant was asked to apply for alternative roles (p.376). As already canvassed above, there were no vacancies at the relevant time. The maternity helpline role was being fulfilled by Gill Seers and Nicky Constantinou at the material time. The other duties relied on by the Claimant were rotated amongst the midwives and were not discrete roles to which the Claimant could be allocated. The Claimant accepted in her evidence that the performance of these duties was also important for the professional development of the other midwives.

221 In all the circumstances therefore the Tribunal concluded that even if the Claimant had been disabled the Respondent was not under a duty to make reasonable adjustments and that in any event the evidence had not established that the Claimant was likely to be placed at a disadvantage in comparison with persons who were not disabled by reason of any health conditions. In all the circumstances issues 18(a) and (b) were not well-founded and were dismissed.

222 Indeed in relation to the complaint about the shift change on 5 June as notified by the letter on 4 June, it was worth noting that the Claimant was due to be working anyway on that date; the difference was that she would have had to work a longer shift – 12 hours instead of 7½ hours. There was no evidence whatsoever that her health would have been adversely affected by that increase in hours. The Tribunal could readily acknowledge that the late change to her shifts may well have caused some personal inconvenience but such matters were unrelated to her health or disability. There was no evidence that they would not similarly have caused inconvenience to a person who was not disabled.

223 The next allegation was an allegation of disability harassment under issue 19(e) to the effect that Matron Ramanaiken/Brennan cancelled the Claimant's 7½ hour shift scheduled for Sunday 7 June 2015, stating that the ward was overstaffed when that was not the case.

224 The Claimant registered a grievance in relation to this on 10 June 2015 (p.372). The Respondent through Matron Brennan continued to assert that this was indeed the position. The Claimant based her perception that this was erroneous on the NHPS advertisement. Matron Brennan explained that they continued to advertise even in situations when they are overstaffed in case help is needed at short notice.

225 The Tribunal accepted the Respondent's submission that the conduct complained of was not related to the Claimant's disability for the purposes of the 2010 Act. The real reason was the continued divergence of views as between the Respondent and the Claimant about whether she was required to turn up for night duties and/or to undertake longer day shifts.

226 Indeed under this issue the Claimant complains that she was not required to work a late shift for 7½ hours on Sunday 7 June which had previously been rostered when she was notified of the outcome of her flexible working request by letter dated 4 June 2015 i.e. at short notice she was not required to work a shift. The Respondent explained in both the original outcome letter and in the amendment what they were seeking to achieve in terms of the allocation of shifts to her and this was to provide adequate rest periods between shifts for the Claimant.

227 In relation to the complaint that the Claimant was falsely told that the ward was overstaffed, the Claimant relied on the fact that she had seen evidence that Matron Brennan had posted vacancies for that shift on the NHS website seeking agency staff. This was dealt with in Matron Brennan's witness statement at paragraph 34. She stated that she had not cancelled the agency staff as she wanted to ensure cover was available if anyone else went off sick. She further stated that anyone, including the Claimant, could have logged on to their portal and applied to work the shifts available on NHPS (the website referred to).

228 There was thus agreement about the information on the website. The Tribunal accepted the Respondent's case as to the way in which they managed staffing levels to cover potential last-minute absence. There was no basis for rejecting Matron Brennan's account, and managing this process was her responsibility.

229 This harassment allegation was not well-founded and was dismissed.

230 The Claimant next alleged indirect disability discrimination in issue 12. In relation to the PCP of a requirement that midwives worked long 12 hour shifts, it was said that the PCP put her and others with her disability at a disadvantage because the longer hours would impact negatively on their health. She further alleged that she was put at that disadvantage or would have been put to that disadvantage because she had poor sleep patterns as a result of difficulty adjusting to the shift work, evidenced by low mood, loss of concentration and potentially poor performance.

231 The difficulty for the Claimant in putting forward this case was that she did not in fact work the long shift pattern other than a passing reference to having done a bank shift. There was therefore a dearth of evidence linking the poor sleep patterns, and the low mood and loss of concentration etc to working the long shifts. Against that as stated above, there was the occupational health advice based on apparently full information from the Claimant's GP.

232 In the circumstances therefore the Tribunal found that the Claimant was not put at a disadvantage by the requirement to work long 12 hour shifts. Even if that were established, the Tribunal considered that it was likely that the Respondent would have succeeded in establishing that the PCP was a proportionate means of achieving a legitimate aim, given the absence of proper grounds for exempting the Claimant from working those shifts after extended and reasonable enquiries on their part, and the good patient care reasons for the longer shifts.

233 The allegation of indirect discrimination under issue 12 was therefore not well-founded and was dismissed.

234 The Claimant then alleged indirect disability discrimination in issue 13, namely in relation to the PCP of requiring employees to attend a managing attendance stage 1 meeting after long-term absence.

235 The Claimant attended the managing attendance stage 1 meeting prior to 31 December 2014 (p249). It had been clarified at the preliminary hearing on 18 November 2016 that the Claimant could not rely on any disadvantage arising prior to that date i.e. 31 December 2014.

236 The Tribunal also had regard to the case of *Essop v Home Office (UK Border Agency*) and *Naeem v Secretary of State for Justice* [2017] UK SC 27 in relation to the indirect disability discrimination complaints. The Tribunal considered that there was overlap between the indirect disability discrimination complaint and the failure to make reasonable adjustments which had been dealt with already. Nothing new was added by the indirect discrimination complaints.

237 Further, the Tribunal was not provided with any statistics relevant to the impact on different groups and had insufficient evidence on which to make any findings under this head.

238 In all the circumstances therefore the indirect discrimination allegations under both issues 12 and 13 were not well-founded and were dismissed.

Time Limits

239 The Tribunal did not consider the time limits because it was unnecessary to do so as none of the discrimination complaints was made out.

Constructive unfair dismissal

240 The Tribunal had regard to the statement of law as set out by Ms Melville in paragraphs 112 to 117 of her closing submissions. It did not appear to the Tribunal that the constructive dismissal claim in this case raised any controversial legal issues and therefore on grounds of proportionality the relevant law in this context is not repeated in these reasons.

241 The Claimant made no submissions as to the applicable law.

242 To the extent that the alleged breaches of the implied term of mutual trust and confidence repeat the discrimination allegations the Tribunal will not address them further in terms of the findings of fact as those facts are set out above. Where they raise different or additional elements, these are considered in this context. None of the discrimination allegations had been made out.

243 During the hearing the Claimant varied her position in relation to the last straw to amend it to reliance on the change of shifts as the last straw on 1 July 2015 (p.384). Her email setting out her resignation was sent on 6 July 2015. Having stated that she wished to resign with immediate effect, the Claimant immediately referred to her duties having been changed the previous week (1 July shift) without the Respondent having informed her. This was her first shift back at work after returning from a period of

sickness due to workplace stress for three weeks. Two shifts on 1 and 2 July had been cancelled and she had been rostered for 12 hour shifts instead on 3 July, 4 July and Monday 6 July. She objected to being rostered to do the longer shifts on grounds which have already been canvassed above. She complained that no-one had apologised for this upsetting situation and that she was instructed to hand over the care of her patient and to go home.

244 In fact the roster which was produced which was printed out on 13 June 2016 showed that the Claimant had been rostered to work 7½ hour shifts on 1 July (early – helpline); day off on 2 July; then a 12 hour shift on 3 July 2015 from 7.30am to 8.30pm in two locations and then a previously rostered duty on Monday 6 July was cancelled because emergency annual leave had apparently been granted to the Claimant by Alison Steel. This was the position as set out in the roster printed out on 13 June 2016.

245 There was therefore an issue about whether the Claimant had accurately recorded what the changes were to her shifts.

246 The next point was that in her resignation letter she complained that these changes had been made: "despite the recommendation by the [occupational health] doctor for me to have a tapered increase in my hours if I was made to do longer shifts." The Tribunal did not consider that this raised any new points that had not already been considered above. The printout of the roster of 13 June certainly suggested that the Claimant was given good notice about this change. It may be that because of her sickness she did not become aware of it until the night of the actual shift. However she failed to adduce any evidence to the effect that the Respondent had failed to bring it to her attention or that the roster was inaccurate. Further the roster printed out on 13 June 2016 (p.404A) was a personal roster list for the Claimant and covered the period from 1 March to 31 July 2015.

247 Issue 30(h) raised an additional matter of complaint in the constructive unfair dismissal case. Thus the Claimant alleged that the Respondent had deliberately misinterpreted information in the occupational health and GP letters. These were references to documents already referred to above at (p.266) and (p.422). As the Tribunal has found above the contents were clear and the Respondent did not misinterpret any such information.

248 A further complaint was raised in issue 30(j) that the Respondent suggested that as the Claimant was not registered disabled she did not have a disability for the purposes of section 6(1) of the 2010 Act. The facts being asserted were not established.

249 In relation to the Claimant's duty on 1 July (p.391) this was a matter which was discussed by the Claimant at the grievance meeting that took place on 7 July 2015, the day after she had resigned. Once again there appeared to be some inconsistency in the Claimant's case as to what occurred on that occasion. The notes record that she stated that when she turned up on 1 July and was told to go home, she did not leave immediately and that Matron Brennan took her to one side and asked if she would man the maternity helpline as they were short staffed. The notes record that in the grievance meeting the Claimant was upset by this because she had asked during

consideration of her flexible working application if she could do this duty but she was told it was a specialist area and therefore not possible; and yet she was asked to carry out this duty on 1 July.

250 In her resignation email (p.385) when describing what had happened on 1 July she said: “No one apologised for this upsetting situation where I was told to hand over the care of my patient and go home. Even when I was asked if I am happy to do the helpline no one acknowledged that I had this unfair disruption to my life.” The Claimant had been given an explanation previously about why she could not be allocated to these duties on a permanent or full-time basis and her own account of events on 1 July suggest that she was asked to do some work which would be of use to the Respondent as she had turned up on a day when she was not rostered to work. The Tribunal considered that was inconsistent with the contention that the Respondent wished to terminate her employment or did not value her services.

251 In relation to the contention that the Respondent failed to make reasonable adjustments and that this constituted a breach of the implied term of mutual trust and confidence (issue 30(k)), the Tribunal made findings above that the Respondent postponed their requirement that the Claimant comply with the new shift system after its introduction in April 2014 for well over a year in the event and that they went through various processes to address the issues raised by the Claimant. In the Tribunal hearing the Claimant did not seek to refer to any of the Respondent’s procedures and to seek to substantiate any breaches of those procedures. There was no basis therefore for suggesting that the Respondent had failed to make reasonable adjustments in a general sense to the work.

252 A similar position pertained in relation to the complaint about the Claimant being required to make a flexible working request if the Claimant wished to avoid the 12 hour shift pattern and the Respondent’s refusal of that application (issue 30m). The Tribunal noted that this had been referred to variously by the Claimant as a suggestion and a requirement. In any event it was not in dispute that the Claimant did submit such an application and as set out above it was taken through the appropriate procedures. This included the consideration of an appeal. No failing in the process followed was alleged and the Tribunal found none. Further, the Tribunal considered that the outcome was justified. In those circumstances therefore the matter set out at allegation 30(m) did not constitute a breach of her contract.

253 The matters set out at issues 30(a) and (c) relate to events which happened in early June 2015 and the roster change which followed the notification of the consideration of the flexible working application by Matron Brennan. Issue 30(f) was a reference to the cancellation of the 1 July 2015 shift (p.391).

254 In relation to 1 July (the ‘last straw’), the evidence from both parties was somewhat unclear.

255 The Claimant’s case was that she had telephoned the Respondent on 30 June and said she would be in the next day (p.390), but no-one told her that by then the Respondent had allocated the shift elsewhere.

256 The Claimant’s sickness ran from 7 June 2015 and the roster referred to above

on pages 404 and 404A show that she produced a sick certificate dated 8 June 2015 covering the period up to 30 June 2015.

257 The Respondent produced copies of the advance rosters prepared some six months earlier which indicated what the planned duties were for the period up to and including 1 July and compared this with the roster already referred to (at p404A) which they contended was a record of the picture closer to the date. The rosters appeared to show (p.409) that her planned duty for 1 July was not cancelled. The Claimant's case was that she came into work on 1 July despite having been told when she phoned up on 30 June that her duty was cancelled.

258 In paragraph 57 of the Claimant's witness statement she contended that she had returned to work on 1 July and was told that she was not rostered and sent home as her shift had been changed without notice during her sickness absence. She went on to say that Matron Brennan denied changing her shifts. That reported denial is consistent with the roster documents which were produced which tended to show that the Claimant had indeed been rostered to work on 1 July on the helpline.

259 However, in the outcome to the grievance meeting which took place on 7 July 2015, Ms Arbuthnott, Head of Adult Critical Care Services (pp.400-401) referred to this issue of the late change to the rostered day of work and the Claimant not being informed of this and stated: "I have spoken to Sharon [Brennan] in relation to this and she has confirmed that [your duty] was changed and apologised for the error".

260 Sharon Brennan did not deal with the issue of the cancellation of the shift on 1 July in her witness statement.

261 In her closing submissions Ms Melville noted that the Claimant had not cross-examined Ms Brennan about the alleged change to the shifts on 1 July.

262 The most contemporaneous record of a discussion of the 1 July shift was in the notes of the grievance meeting which took place on 7 July 2015. At pages 390 and 391 the Claimant's complaint about what happened is set out. At page 390 she described the difficulty with the shifts at the beginning of June and that she had been off sick from 7 June and was due to return to work on 1 July. She then said that she phoned on 30 June to say she was fit for duty and would come into work on 1 July 2015 and was told that her duty had changed and she was not down to work. She told Ms Arbuthnott that this duty had not been changed before she went off sick and confirmed the audit trail showed it was changed 10 days before she returned to work by a member of staff called Ms Sylvester. The Claimant said that Ms Sylvester would not have done this without authority from the manager but that no-one had told her about this. The discussion then apparently covered other matters and returned to the issue of the duty on 1 July at p.391. This is where there was a note about the Claimant turning up for work and being told to go home as set out above.

263 The Tribunal did not understand and the Claimant did not adequately explain why she had then turned up for work on 1 July if she had been informed on 30 June that she was not down to work.

264 Further, as set out above, the documents that we were shown about the shifts

tended to show that the Claimant had been down to do that shift. In any event, as the Tribunal has set out above, the fact that Matron Brennan asked the Claimant to work on the helpline contradicted an intention to terminate her employment.

265 Given that the Claimant was aware that the issue in relation to her doing long shifts was still live and that there may well have been adjustments to her shifts to take into account the most recent outcome of the consideration of her request not to do the long shifts, if there had been an error or recent change to the Claimant's shift, the Tribunal did not consider that it was reasonable for the Claimant to treat this as a matter which constituted a breach of the implied term of mutual trust and confidence either on its own or as a final straw.

266 In all the circumstances, the Tribunal did not consider that a breach of the implied term of mutual trust and confidence had been established either taking the matters complained of individually or together. In those circumstances therefore the Claimant's employment was terminated by way of resignation and she was not constructively dismissed.

Employment Judge Hyde

1 December 2017